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Evidence -- Hearsay -- Admissibility of Medical Records

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solution of which may change the entire course of government and industry. If the N.I.R.A. or the A.A.A. is to be interpreted by any court, that is, if any court ever has jurisdiction, it will be a federal court. No one can be a more interested party than one whom the statutes and codes in express terms purport to affect. It is frequently said that an interest in security, the preservation of social equilibrium, and an avoidance of unnecessary disputes underlie the declaratory judgment acts. Therefore, when jurisdiction hinges on the question as to who may sue under a given statute, it would seem more in keeping with the appropriate social policy to hold a private suit sufficient for a declaratory judgment.

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Evidence—Hearsay—Admissibility of Medical Records.

Plaintiff brought an action under a war risk policy to recover for alleged total disability. The defense introduced evidence of a position of employment formerly held by the plaintiff, and also a notation, made by a physician, since deceased, upon the plaintiff's application for such employment reading as follows, "Showing no disease with heart and lungs o.k. application accepted". This latter was objected to as hearsay. *Held,* that the evidence was properly admitted as part of the *res gestae* of plaintiff's applying for employment.[1]

The most common situation in which the admissibility of medical records has been litigated is that involving medical history charts and other records of hospitals. Such records, when containing communications made by a patient to his physician for the purpose of treatment, are protected by the statutory physician-patient privilege,[2] even though the records be kept pursuant to some legal requirement.[3] However, once

[1] Jennings v. United States, 73 F. (2d) 470 (C. C. A. 5th, 1934).

[2] Massachusetts Mut. Life Ins. Co. v. Board of Trustees of Mich. Asylum for the Insane, 178 Mich. 193, 144 N. W. 538 (1913) (writ of mandamus to permit examination of the records of insane asylum denied); Price v. Standard Life & Acc. Ins. Co., 90 Minn. 264, 95 N. W. 1118 (1903) (hospital records denied admission as evidence); Metropolitan Life Ins. Co. v. Swain, 149 Miss. 455, 115 So. 555, 557 (1928) ("The records consisted of statements of the physician who treated [insured] while a patient in the hospital. The relation of physician and patient exists between the physician who has cause to make an examination and diagnosis of him in a hospital, as well as outside of a hospital, or whether a pay patient or charity patient, and such physician may not deliver his testimony so acquired in open court or have it written down in so-called reports for consideration as evidence in contravention of our privileged communication statute."); Toole v. Franklin Inv. Co., 158 Wash. 696, 291 Pac. 1101 (1930) commented upon (1930) 5 TEMP. L. Q. 300.

It should be noted that the privilege granted by the North Carolina statute is not absolute. N. C. CODE ANN. (Michie, 1931) §1798 contains this proviso: "That the presiding judge of a superior court may compel such a disclosure, if in his opinion it is necessary to a proper administration of justice."

[3] Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709 (1907).

this privilege has been waived, or found to be inapplicable to the case in hand, there are various theories under which hearsay objections to these records may be obviated. Clearly they are permissible for the purpose of refreshing the memory of a witness then in court,[4] or, when failing to thus induce present recollection, may be admitted as past recorded recollection, provided the witness can testify that the record embodies his past perception and was correct when made.[5] Likewise, when the recorder is dead, out of the jurisdiction, or otherwise unavailable, they are usually[6] held to be within the exception to the hearsay rule for entries in the regular course of business.[7] Furthermore, if, as is

[4] Generally see 2 WIGMORE, EVIDENCE (2nd ed. 1923) §§758-765. *Cf.* Levy v. Mott Iron Works, 143 App. Div. 7, 127 N. Y. S. 506 (1911) (physician's testimony based upon hospital records inadmissible where he could not swear that they were correct, and they did not refresh his memory).

[5] *In re* Hock's Will, 74 Misc. Rep. 15, 129 N. Y. S. 196 (1911); *cf.* Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915) (admitted in malpractice action to show factors considered by defendant in prescribing treatment); Buck v. Brady, 110 Md. 568, 73 Atl. 277 (1909) (admitted in connection with expert opinions). The ordinary rules governing the admissibility of past recorded recollection would, of course, be applicable. These principles are discussed in 2 WIGMORE, EVIDENCE (2nd ed. 1923) §734 *et seq.*

[6] Due, perhaps, to the fact that hospital records were less complete and methodical formerly than now, some of the earlier cases indicate that their use should be limited to that of refreshing the recollection of a witness then in court. Baird v. Reilly, 92 Fed. 884, C. C. A. 2nd, 1899); McMahon v. Bangs, 5 Penn. 178, 62 Atl. 1098 (Del. Super. 1904); National Life & Acc. Ins. Co. v. Cox, 174 Ky. 683, 192 S. W. 636 (1917); Griebel v. Brooklyn Heights R. Co., 95 App. Div. 214, 88 N. Y. S. 767 (1904); Harkness v. Borough of Swissvale, 238 Pa. 544, 86 Atl. 478 (1913); *cf.* Wright v. Upson, 203 Ill. 120, 135 N. E. 209 (1922); Kimber v. Kimber, 317 Ill. 561, 148 N. E. 293 (1925).

[7] Boss v. Illinois Cent. R. R. Co., 221 Ill. App. 504 (1921); Ribas v. Revere Rubber Co., 37 R. I. 189, 91 Atl. 58 (1914); *cf.* Chernov. v. Blakeslee, 95 Conn. 617, 111 Atl. 908 (1921) ("The hospital record, except as to the dates of admission and discharge . . . was not admissible as independent proof of the statements of fact contained therein."); Richmond v. City of Norwich, 96 Conn. 582, 115 Atl. 11 (1921) (hospital bill admitted); Firemen's Ins. Co. v. Seaboard Air Line Ry., 138 N. C. 42, 50 S. E. 452 (1905) (train dispatcher's sheets admitted); Jones v. Atlantic Coast Line R. Co., 148 N. C. 42, 62 S. E. 521 (1908) (freight conductor's report rejected). The persons who made the entries must be unavailable as a witness. Cashin v. New York, N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930 (1904); Delaney v. Framingham Gas Fuel & Power Co., 202 Mass. 359, 88 N. E. 773 (1909); Osborne v. Grand Trunk Ry. Co., 87 Vt. 104, 88 Atl. 512 (1913). The records must be properly authenticated, etc. Jordan v. Apter, 93 Conn. 302, 105 Atl. 620 (1919); State v. Trimble, 104 Md. 317, 64 Atl. 1026 (1906); Metropolitan Life Ins. Co. v. Dabudka, 232 Mich. 36, 204 N. W. 771 (1925). But, in this connection, it seems that the "ancient documents" rule is applicable. Inhabitants of Townsend v. Inhabitants of Pepperell, 99 Mass. 40 (1868); see *In re* Barney's Will, 185 App. Div. 782, 174 N. Y. S. 242, 254 (1919). The fact that the records are kept upon loose-leaf sheets or filing cards rather than in a bound volume should not affect their admissibility. Matson Navigation Co. v. United Engineering Works, 213 Fed. 293 (C. C. A. 9th, 1914) (workmen's time and material cards admitted); Graham & Corry v. Work, 162 Iowa 383, 141 N. W. 428 (1913) (accounts kept by a system of sales tickets); Armstrong Clothing Co. v. Boggs, 90 Neb. 499, 133 N. W. 1122 (1912) (loose-leaf ledger). But *cf.* Hamilton v. Fusco Const. Co., 87 N. J. L. 62, 94 Atl. 50 (1915). It has been held that opinions contained in such records will be excluded unless they are those of persons who could qualify as expert witnesses. Paxos v. Jarka Corp.,

increasingly the case, the records are kept in accordance with the requirements of a statute[8] or municipal ordinance, under the majority rule they may be admitted as "public documents".[9]

But hospital records are usually composed of entries made by numerous doctors, nurses and interns during the course of the patient's illness. All of these entrants may be available to testify at the trial, and if there is no statute entitling the records to admission under the "public documents" exception, a party may be deprived of valuable evidence unless he sees fit to summon a large portion of the hospital staff as witnesses. The eminent reliability of these records, coupled with the fact that such a course would not only involve increased costs of litigation, but seriously interfere with the hospital's daily routine as well, appears to have formed the basis for a new exception to the hearsay rule in a few jurisdictions. Legislative intervention has solved the problem in some,[10] but in a few others the courts seem to have sponsored the exception. Occasionally this departure has been indicated by direct language in judicial decisions,[11] more often by an obviously liberal attitude on the part of the court.[12]

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314 Pa. 148, 171 Atl. 468 (1934) commented upon (1934) 19 ST. LOUIS L. REV. 255.

[8] For example, Mo. REV. ST. (1929) §9056. Compare N. C. CODE ANN. (Michie, 1931) §7104.

[9] Galli v. Wells, 209 Mo. App. 460, 239 S. W. 894 (1922) (municipal ordinance); Shaw v. American Ins. Union, 33 S. W. (2d) 1052 (Mo. App. 1931) (statute); Dallas Coffee & Tea Co. v. Williams, 45 S. W. (2d) 724 (Tex. Civ. App. 1932) ("bedside notes" in state hospital, statute required records to be kept) commented upon (1932) 10 TEX. L. REV. 510; Hempton v. State, 111 Wis. 127, 86 N. W. 596 (1901); *cf.* Fondi v. Boston Mut. Life Ins. Co., 224 Mass. 6, 112 N. E. 612 (1916) (record of state board of health inadmissible as it was not required by statute); State v. Tarwater, 293 Mo. 273, 239 S. W. 480 (1922); Laird v. Boston & M. R. R., 80 N. H. 58, 114 Atl. 275 (1921) (findings of board of draft examiners inadmissible); Casey v. Kennedy, 52 D. L. R. 326 (New Brunswick, 1920) (medical history sheet made out by medical board which examined plaintiff for military service is admissible). So long as the records are kept pursuant to a legal requirement, it should not be necessary that they be open to public inspection. Casey v. Kennedy, *supra.*

[10] For example, MASS. LAWS ANN. (Michie, 1933) vol. 8, c. 233, §79 provides that certain hospital records shall be admissible in evidence "so far as such records relate to the treatment and medical history of such cases; but nothing therein contained shall be admissible as evidence which has reference to the question of liability." This statute has been before the court in several cases. Raymond v. Flint, 225 Mass. 521, 114 N. E. 811 (1917); Whipple v. Grandchamp, 261 Mass. 40, 158 N. E. 270 (1927); *cf.* Inangelo v. Petterson, 236 Mass. 439, 128 N. E. 713 (1920); Kelley v. Jordan Marsh Co., 278 Mass. 101, 179 N. E. 299 (1932). But *cf.* Commonwealth v. Sacco, 255 Mass. 369, 151 N. E. 839 (1926).

[11] Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 Atl. 43 (1927); Mack v. Western & Southern Life Ins. Co., 53 S. W. (2d) 1108 (Mo. App. 1932); St. Louis v. Boston & M. R. R., 83 N. H. 538, 145 Atl. 263 (1929). But *cf.* Kirkpatrick v. American Creosoting Co., 225 Mo. App. 438, 37 S. W. (2d) 996 (1931). Professor Wigmore is a staunch advocate of such an exception. See vol. 3 of his work on EVIDENCE (2nd. ed. 1923) §1707.

[12] Lund v. Olson, 182 Minn. 204, 234 N. W. 310 (1931); Smith v. Missouri Ins.

It is to be noted, however, that such an exception, if there be one, should be strictly limited to hospital records. The necessity in that case, *i.e.* the multiplicity of entrants, is not present in the case of the usual physician's office records, notations of physicians examining applicants for employment and the like. Nevertheless, in such cases the other principles mentioned above are applicable,[13] and the evidence in the present case would seem to be admissible as an entry in the regular course of business.[14]

JOEL B. ADAMS.

Federal Procedure—Jurisdiction of Federal Courts—Appointment of Ancillary Receivers.

There is a firmly established rule that a federal court has jurisdiction of an ancillary proceeding, regardless of the citizenship of the parties, the amount in controversy, or any other factor that ordinarily would determine jurisdiction, provided the court had jurisdiction of the principal suit.[1] In the case of *Mitchell v. Maurer*,[2] the Supreme Court of the United States raised two questions regarding the application of the rule, which, it stated, did not appear to have been decided by that Court, and which it declined to decide, as unnecessary to the disposition of the problem presented. First—may the rule ever be applied to a proceeding brought in the federal court of another district? Secondly—if so, is a

Co., 60 S. W. (2d) 730 (Mo. App. 1933); Pickering v. Peskind, 43 Ohio App. 401, 183 N. E. 301 (1930).

[13] Douler v. Prudential Ins. Co. of America, 143 App. Div. 537, 128 N. Y. S. 396 (1911) (records of doctors and nurses admitted as past recorded recollection); Adler v. New York Life Ins. Co., 33 F. (2d) 827 (C. C. A. 8th, 1929) (office record of deceased physician admitted as regular entry); New York Life Ins. Co. v. Bullock, 59 F. (2d) 747 (S. D. Fla. 1932) (physician's medical history card admitted as regular entry); Royal Indemnity Co. v. Industrial Commission, 88 Colo. 113, 293 Pac. 342 (1930) (examining physician's report made in connection with laborer's application for employment admitted as regular entry); Leburn v. Boston & M. R. R., 83 N. H. 293, 142 Atl. 128 (1928) (report of employer's physician who examined plaintiff after former injury admissible as regular entry); *cf.* Simmons v. Means, 8 Smedes & M. 397 (Miss. 1847) (physician's account book admitted); Clark v. Smith, 46 Barb. 30 (N. Y. 1866) (physician's books admissible to show number of calls made by him). A collection of cases bearing on the admissibility of physician's records to show birth, death, etc. will be found in Note L. R. A. 1915 F. 803. There seems to be a split of authority over the admissibility of physicians' death certificates. Cases on this point are collected in Note (1922) 17 A. L. R. 359.

[14] It is not clear, however, upon what principle the evidence was admitted. The following is quoted from the opinion: "The doctor's notations on the card were admissible as a part of the *res gestae* of the plaintiff's application for work. They were shown to have been made under circumstances making it reasonably apparent that they truly represented the facts they purported to set down. They are in effect declarations by the plaintiff himself that he was fit and able to work." 73 F. (2d) at 473.

[1] 2 HUGHES, FEDERAL PROCEDURE (1931) §1192.

[2] 55 Sup. Ct. 162 (1934).