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EVIDENCE — ADMISSIBILITY OF HOSPITAL RECORDS AS BUSINESS ENTRIES

— As a defense to a suit on an insurance policy, the defendant insurer claimed that the plaintiff was intoxicated at the time of the fatal accident. Defendant offered in evidence a portion of the case record of the hospital to which plaintiff was taken after the accident, the record stating that he was “apparently well under influence of alcohol.” Although it was duly authenticated under the federal statute permitting business entries to be used as evidence,¹ this evidence was

¹ “In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its

excluded by the trial court as being an observation rather than a diagnosis. *Held*, reversed. There was no basis for this distinction, the evidence was admissible as "a memorandum of any act, transaction, occurrence, or event" as defined in the federal statute.² *Reed v. Order of United Commercial Travelers*, (C. C. A. 2d, 1941) 123 F. (2d) 252.

Despite the generally accepted common-law rule making "business entries" an exception to the hearsay rule,³ the courts have continued to exclude much valuable and reliable evidence on various technical grounds.⁴ Hospital records have been subject to this technical treatment,⁵ and yet the basic prerequisites of all exceptions to the hearsay rule—necessity⁶ and a substantial probability of trustworthiness⁷—are seldom more clearly satisfied.⁸ The authorities are in hopeless confusion as to their admissibility and the prerequisites thereto, and the reasons given for the decisions are not consistent.⁹ However, the tendency of the recent decisions is to liberalize the rules as to the admissibility of business records,¹⁰ and it is significant that a substantial number of legislatures have enacted one of two suggested statutory provisions.¹¹ This legislation, however, has not been

admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind." 49 Stat. L. 1561 (1936), 28 U. S. C. (1940), § 695.

² *Id.*

³ 20 AM. JUR. 881-886 (1939) (Evidence, §§ 1043-1045); 5 WIGMORE, EVIDENCE, 3d ed., § 1521 (1940).

⁴ See note 3, *supra*; annotations, 75 A. L. R. 378 (1931); 120 A. L. R. 1124 (1939).

⁵ 6 WIGMORE, EVIDENCE, 3d ed., § 1707 (1940); annotations, 75 A. L. R. 378 (1931); 120 A. L. R. 1124 (1939). See also comment in 38 MICH. L. REV. 219 (1939).

⁶ 5 WIGMORE, EVIDENCE, 3d ed., § 1421 (1940).

⁷ 5 WIGMORE, EVIDENCE, 3d ed., § 1422 (1940); 6 *id.*, § 1707; Jennings v. United States, (C. C. A. 5th, 1934) 73 F. (2d) 470; 38 MICH. L. REV. 219 (1938); Hale, "Hospital Records as Evidence," 14 So. CAL. L. REV. 99 (1941).

⁸ 6 WIGMORE, EVIDENCE, 3d ed., § 1707 (1940).

⁹ Annotations, 75 A. L. R. 378 (1931); 120 A. L. R. 1124 (1939). The problem of privileged communications is beyond the scope of this note. On that point, see the A. L. R. annotations just cited and 79 A. L. R. 1131 (1932).

¹⁰ 5 WIGMORE, EVIDENCE, 3d ed., §§ 1521, 1530 (1940); 6 *id.*, § 1707 (1940); even in absence of statute, *Grossman v. Delaware Electric Power Co.*, 34 Del. 521, 155 A. 806 (1929); *Murgatroyd v. Dudley*, 184 Wash. 222, 50 P. (2d) 1025 (1935); *Schmidt v. Riesenschneider*, 196 Minn. 612, 265 N. W. 816 (1936); and many more cases in annotations, 75 A. L. R. 378 (1931); 120 A. L. R. 1124 (1939). Recent federal case under the statute, *Ulm v. Moore-McCormack Lines*, (C. C. A. 2d, 1940) 115 F. (2d) 492, rehearing 117 F. (2d) 222, cert. denied 313 U. S. 567, 61 S. Ct. 941 (1941).

¹¹ The first suggestion, commonly called the "Model Act," was proposed by a committee of the Commonwealth Fund of New York in 1927. For the text of this act, see the federal enactment (except the first phrase) in note 1, *supra*. The Model Act, or a variation thereof, is in force in seven other jurisdictions: Ala. Code (1940), tit. 7, § 415; Conn. Gen. Stat. (Supp. 1935), § 1675c (variation); Md. Code Ann. (Flack, 1939), art. 35, § 68 (variation); Mass. Ann. Laws (Michie, 1933), c. 233, § 78 (variation); Mich. Stat. Ann. (1938), § 27.902 (variation); N. Y. Civ. Prac. Act (Cahill, 1937), § 374a; R. I. Gen. Laws (1938), c. 538, § 1 (variation). See also

a complete solution,¹² especially in jurisdictions where the courts are hesitant to depart from the rules already established.¹³ The federal courts, when not bound by the rules of the states in which they were sitting,¹⁴ had begun to admit business entries more freely,¹⁵ even before the legislation enacted by Congress.¹⁶ The

Rules of Municipal Court of Chicago, Rule 166 (1933). Some of the modifications of the Model Act made by the legislatures are regarded by Professor Wigmore as unsuccessful and unfortunate. 5 WIGMORE, EVIDENCE, 3d ed., § 1520 (1940).

The second suggestion is the Uniform Business Records as Evidence Act, the pertinent provisions of which are as follows:

"Section 1. (Definition.) The term 'business' shall include every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

"Sec. 2. (Business Records.) A record of an act, condition, or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." 9 UNIFORM LAWS ANNOTATED (1942).

The Uniform Act has been adopted, with very little modification, in twelve states: Cal. Code Civ. Proc. (Deering, 1941), §§ 1953e-1953h; Hawaii Laws (1941), §§ 3836A-3836D; Idaho Code Ann. (Supp. 1940), § 16-401A; Minn. Stat. (Mason, Supp. 1940), §§ 9870-1 to 9870-5; Mont. Rev. Code (Supp. 1939), §§ 10598.1-10598.5; N. D. Laws (1937), c. 194; Ohio Gen. Code (Page, Supp. 1941), §§ 12102-22 to 12102-25; Ore. Laws (1941), c. 414; Pa. Stat. Ann. (Purdon, Supp. 1941), tit. 28, §§ 91a-91d; S. D. Code (1939), § 36.1001; Vt. Laws (1939), No. 48; Wyo. Sess. Laws (1941), c. 82.

Of the many other statutes dealing with business records as evidence, only one appears to be broad enough to include hospital records: Wis. Stat. (1941), § 327.25. Several other statutes provide for the admissibility of the records of some or all hospitals in all or certain kinds of cases: La. Gen. Stat. (Dart, 1939), § 1067.1; Mass. Ann. Laws (Michie, 1933), c. 233, § 79. Mo. Stat. Ann. (1932), tit. 28, § 3311(f).

It will be noted that the provisions of the two common statutes are divergent, especially in respect of the prerequisites of admissibility. A critical analysis of both is made in 32 ILL. L. REV. 334 at 348-352 (1937), in which a new proposal is made, for adoption in Illinois. This proposal apparently has not been adopted in Illinois or any other state. Professor Wigmore, conceding that the Illinois proposal has much to be said for it, expresses the hope that the Uniform Act will be adopted, for the sake of uniformity. 5 WIGMORE, EVIDENCE, 3d ed., § 1520, p. 363 (1940). That this is the trend is evidenced by the fact that most of the recent enactments are of the Uniform Act, and that at least two jurisdictions (Hawaii and Oregon) repealed the Model Act in order to adopt the Uniform Act.

¹² See the weaknesses in the legislation pointed out in 32 ILL. L. REV. 334 at 348-352 (1937).

¹³ 5 WIGMORE, EVIDENCE, 3d ed., § 1530a (1940). An interesting comparison of the cases in New York, which maintains the strict views even after the statute is in force, with the federal cases, is made in 11 BROOK. L. REV. 78 (1941).

¹⁴ *Brown v. Maryland Casualty Co.*, (C. C. A. 8th, 1932) 55 F. (2d) 159; 32 ILL. L. REV. 334 (1937).

¹⁵ *Adler v. New York Life Ins. Co.*, (C. C. A. 8th, 1929) 33 F. (2d) 827; *Jennings v. United States*, (C. C. A. 5th, 1934) 73 F. (2d) 470; 11 BROOK. L. REV. 78 (1941).

¹⁶ See note 1, supra.

court in the principal case assumes that under the statute a diagnosis is admissible.¹⁷ However, it has been suggested that the qualifications of the diagnostician should be considered,¹⁸ as has been done by the Pennsylvania courts,¹⁹ and that the courts likewise should distinguish between the types of ailments diagnosed, or else reject the record as evidence of diagnosis altogether.²⁰ But diagnosis so simple as to be tantamount to fact should be admitted as fact, and more complicated diagnosis as expert testimony. In the latter case, whether or not the diagnostician is called to testify, he should be qualified as an expert. It is to be noted that the statute does not deal with the admissibility of opinions, but probably it was not intended to change the common-law rule requiring that an expert be qualified; yet some courts tacitly assume such an intent by admitting the record to show the diagnosis.²¹ However, since the purpose of the statute is to avoid the necessity of procuring the testimony of the doctor, he should not be required to appear and submit to a cross-examination,²² if his expert qualifications have been established. It must be remembered also that a hospital record usually contains a summary of the symptoms upon which the diagnosis is founded. Certainly the influence of alcohol is a sufficiently simple conclusion to be tantamount to fact, so that the qualifications of the observer are not significant, and it is easy to conceive the frequency of the cases in which the only reliable and impartial evidence of intoxication is the hospital record. Courts reaching a result contrary to the principal case have done so for special reasons, inapplicable where this statute is in force.²³ Since the language of the statute²⁴ is broad enough to

¹⁷ “. . . The surgeon’s statement that the patient is ‘apparently well under influence of alcohol,’ seems to be as much a diagnosis of his existing condition as would a statement that the patient appears to have a fractured skull.” Principal case, 123 F. (2d) 252 at 253.

¹⁸ 38 MICH. L. REV. 219 at 226-227 (1939).

¹⁹ *Paxos v. Jarka Corp.*, 314 Pa. 148, 171 A. 468 (1934); *Loder v. Metropolitan Life Ins. Co.*, 128 Pa. Super. 155, 193 A. 403 (1937); *Leed v. State Workmen’s Ins. Fund*, 128 Pa. Super. 572, 194 A. 689 (1937). These cases all preceded Pennsylvania’s adoption of the Uniform Act. See also *Harkness v. Borough of Swissvale*, 238 Pa. 544, 86 A. 478 (1913); *Baum v. Metropolitan Life Ins. Co.*, 144 Pa. Super. 37, 19 A. (2d) 486 (1941).

²⁰ 38 MICH. L. REV. 219 at 226-227 (1939).

²¹ *Wickman v. Bohle*, 173 Md. 694, 196 A. 326 (1937); *Sadjak v. Parker-Wolverine Co.*, 281 Mich. 84, 274 N. W. 719 (1937); *Conlon v. John Hancock Mutual Life Ins. Co.*, 56 R. I. 88, 183 A. 850 (1936); other cases in annotations, 75 A. L. R. 378 (1931); 120 A. L. R. 1124 (1939).

²² 5 WIGMORE, EVIDENCE, 3d ed., 1533 (1940).

²³ Evidence of intoxication in hospital records excluded: because requirements of statute not complied with, *Weller v. Fish Transport Co.*, 123 Conn. 49, 192 A. 417 (1937); because requirements of common-law exception to hearsay rule not complied with, *Job v. Grand Trunk Western Ry.*, 245 Mich. 353, 222 N. W. 723 (1929); *Lusardi v. Prukop*, 116 Cal. App. 506, 2 P. (2d) 870 (1931); because record itself was made from hearsay, *Geroeami v. Fancy Fruit & Produce Corp.*, 249 App. Div. 221, 291 N. Y. S. 837 (1936); no reason given, *Roberto v. Nielsen*, 262 App. Div. 334, 30 N. Y. S. (2d) 334 (1941). Evidence of intoxication in hospital records was admitted as medical history and diagnosis in *Leonard v. Boston Elevated Ry.*, 234 Mass. 480, 125 N. E. 593 (1920); *Bilodeau v. Fitchburg & L. St. Ry.*, 236 Mass. 526, 128 N. E. 872 (1920); *Clark v. Beacon Oil Co.*, 271 Mass. 27, 170 N. E. 836 (1930).

²⁴ See note 1, supra.

cover almost any medical or quasi-medical matter in the record, it is suggested that the court in the principal case reached the proper result.

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