Evidence: Privileged Communications: Physician and Patient: Medical Assistants and Doctrine of Agency

William Edward Taay

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RECENT DECISIONS

trial that the certificate is not such as falls within the terms of the Act. However, in Casto v. Wrenn, 255 Mass. 72, 150 N.E. 898 (1926), the court refused to apply the Act, because there was no proof offered that the issuing corporation was organized in a state where the Act was in force, although the Act was in effect in Massachusetts, the situs of the certificates at the time of their transfer. Norman v. Bancroft Trust Co., 55 F. (2d) 91 (C.C.A. 1st, 1932), is to the same effect.

It has been uniformly held that title to certificates of stock is governed by the law of the situs of the certificates at the time of their transfer. Direction Der Disconto-Gesellschaft v. United States Steel Corp., 267 U.S. 22, 69 L.ed. 495 (1925). Therefore, if the Act is not in effect at such situs it cannot be applied even though such Act was in effect in the state of the domicile of the issuing corporation. However, a recent text writer proposes that if the Act is in force at the domicile of the issuing corporation, the certificates of the corporation are entitled to the benefits of the Act wherever they are negotiated. Christy, The Transfer of Stock (1929) 118. See also Restatement, Conflict of Laws, § 53 (d). There is, however, nothing in the Act that lends its support to this holding and no case on the point can be found. It is submitted that the Uniform Stock Transfer Act fails to recognize the needs of modern business. It seems that the statute should be such as to apply to all transfers within the state, so that its inhabitants may determine by local law the validity of transfers made within the state without regard to the law of the state of issue. It seems harsh, for instance, to require a broker, who takes part, every day, in many transactions on the stock market involving many corporations of different states, to look to the laws of each state of incorporation to see if a transfer was effected.

Edward J. Setlock.

EVIDENCE—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT—MEDICAL ASSISTANTS AND DOCTRINE OF AGENCY.—The action was brought by the plaintiff insurance company to cancel a life insurance policy issued by it on the life of the deceased insured and payable to the defendant beneficiary. The insured died a month and three days after the policy was issued and approximately fifteen months after his admission to the Milwaukee County Hospital. Under the terms of the policy, it was not to become effective if at the date of issuance the insured was not in sound health. The plaintiff company contended the insured deceased was not in sound health as required and, thus, the policy never became effective. The defendant beneficiary counterclaimed for recovery on the policy. The trial court, over the objection of the defendant beneficiary, admitted in evidence the testimony of a nurse in the employ of the hospital, and a medical case record of the deceased insured kept by the nurse and used by the physician in treating the patient. Over objection, the trial court also admitted the testimony of an X-ray operator in the employ of the hospital, and an X-ray plate made by him at the direction of the physician. The evidence conclusively proved that the deceased insured had been suffering from an incurable heart ailment at the time the policy was issued. Subsequently, however, the trial court rejected the evidence and entered judgment dismissing the complaint and awarding recovery to the defendant on the counterclaim. The trial court held that all the evidence as to the deceased insured's unsound health was given or based upon the testimony of witnesses who were incompetent to testify under a statute disqualifying a physician from disclosing "any information he may have acquired in attend-
ing any patient in a professional character necessary to enable him professionally to serve such patient. . . .” [Wis. Stat. (1937) § 325.21]. On appeal by the plaintiff company, held, evidence admissible and judgment reversed in favor of the plaintiff company. The statute applies only to physicians and surgeons and will not be extended beyond its letter to disqualify directly nurses and technicians, or indirectly by the doctrine of medical agency. Prudential Life Insurance Co. of America v. Kozlowski, (Wis. 1937) 276 N.W. 301.

At common law, communications between physician and patient were not privileged. 5 Wigmore, Evidence (2 ed. 1923) §§ 2380-2383. In 1928, therefore, New York granted the privilege by statutory enactment, and other jurisdictions quickly adopted an identical or a similar statute. In 1839, Wisconsin enacted a privilege statute using the New York law as a model. (Wisconsin Annotations, 1930) Based upon a sound philosophy of public welfare and public policy, the statute was designed and intended to prevent disclosure of diseases or uncleanly or vicious habits which are necessary for the physician to know in order to treat the patient successfully, but which the patient might refrain from disclosing to the physician if the latter could be compelled to disclose them. Boyle v. Northwestern Mutual Reserve Ass'n, 95 Wis. 312, 70 N.W. 351 (1897); Maine v. Maryland Casualty Co., 172 Wis. 350, 359, 178 N.W. 749, 752, 15 A.L.R. 1536 (1920). The judicial and legislative history of the statute discloses, however, that the law which was intended to be a shield became a sword and was used to suppress rather than to reveal truth and to obstruct rather than to promote justice. (See dissenting opinion by Mr. Justice Owen in Maine v. Maryland, supra.) Consequently, the statute has been amended frequently and liberalized to express its true intent and to prevent gross injustice by its letter. Estate of Gallun, 215 Wis. 314, 320, 254 N.W. 542 (1934). Thus, while there have been many adjudications under the Wisconsin statute, the effect of the decisions has been changed or modified by subsequent amendments to the law. Since the statute is in derogation of or limits the common law rule expressed above, it has been strictly construed in its interpretation. Thus, an unlicensed practitioner is not within the privilege granted by the statute, Wiel v. Cowles, (N.Y. 1887) 47 Hun. 307; nor a physician licensed to practice in another state but not in Colorado, Head Camp P. J. W. W. v. Loeher, 17 Col. App. 247, 68 Pac. 136 (1902); nor the following professional groups within the privileges of the statute: an osteopath, Hayden v. State, 81 Miss. 291, 33 So. 653 (1903); a chiropractor, Kress and Co. v. Sharp, 156 Miss. 693, 126 So. 650, 68 A.L.R. 167 (1930); a druggist, Deutschmann v. Third Avenue R. Co., 87 App. Div. 503, 508, 84 N.Y. Supp. 887 (1903); a dentist, People v. DeFrance, 104 Mich. 563, 62 N.W. 709, 28 L.R.A. 139 (1895); Fleckinger v. Fischer, 119 Mo. 244, 24 S.W. 167, 22 L.R.A. 799 (1893); a veterinary surgeon, Hendershot v. Western Union Teleg. Co., 106 Iowa 529, 76 N.W. 828 (1898); an orthopedist, William Laurie Co. v. McCullough, 174 Ind. 477, 90 N.E. 1014, 92 N.E. 337 (1910); Christian Science practitioners, In re Mossman’s Estate, 119 Cal. App. 404, 6 P. (2d) 576 (1931); public health nurses, Wills v. National Life and Accident Ins. Co., 28 Ohio App. 497, 162 N.E. 822 (1928); ambulance attendants, Springer v. Byram, 137 Ind. 15, 36 N.E. 361, 23 L.R.A. 244 (1894); nurses and internes, Southwest Metals Co. v. Gomez, 4 F. (2d) 215, 39 A.L.R. 1416 (C.C.A. 9th, 1925); Hobbs v. Hullman, 188 App. Div. 983, 117 N.Y. Supp. 917 (1919); Cleveland v. Maddox, 152 Ark. 538, 239 S.W. 370 (1922). In Borosich v. Metropolitan Life Ins. Co., 191 Wis. 239, 210 N.W. 829, 830 (1926), it was held that testimony of an intern, a nurse or an attendant was not barred because they are not physicians with the meaning of the statute.
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While it is clear that the statute is strictly constructed, a conflict of authority exists in the jurisdictions as to the competency of nurses, technicians, and other third parties to testify under the statute when the doctrine of agency is applicable to the circumstances of the case. Hence, some courts hold information inadmissible when obtained by third party medical assistants while under the direction of a physician for purposes of diagnosis or treatment of the patient. In Culver v. Union Pacific R. Co., 112 Neb. 441, 199 N.W. 794 (1924), it was held that a professional nurse, assisting a physician to whom confidential communications have been made by a patient, stands in the same relation of confidence to the patient and may not be permitted to testify to such communications unless the privilege has been waived by the patient. This medical assistant agency rule is followed by Meyer v. Russell, 55 N.D. 546, 214 N.W. 857 (1927); Mississippi Power and Light Co. v. Jordan, 164 Miss. 174, 143 So. 483 (1932). In Hogan v. Bateman Contracting Co., 184 Ark. 842, 43 S.W. (2d) 721 (1931), it was held that a notary public who typed the patient’s statement to the physician was incompetent to testify as to the contents thereof for to do so would be an evasion of the statute. A visiting physician called into consultation by the attending physician, but who takes no part in the examination of the patient and does not prescribe is precluded, nevertheless, from disclosing any information without the consent of the patient. Green v. Town of Nebagamin, 113 Wis. 508, 89 N.W. 520 (1902); Aetna Life Insurance Co. v. Deming, 123 Ind. 384, 24 N.E. 86, 375 (1890); Note (1908) 16 L.R.A. (N.s.) 888. The contrary rule rejecting the third party medical agency doctrine is stated in Southwest Metals Co. v. Gomez, 4 F. (2d) 215, 39 A.L.R. 1416 (C.C.A. 9th, 1925), which holds that the statute does not exclude the testimony of a nurse who was present and assisting in the care of the patient under the direction of the physician. In First Trust Co. of St. Paul v. Kansas City Life Ins. Co., 79 F. (2d) 48 (C.C.A. 8th, 1935), an insurance case practically identical with the main case, it was held that a Minnesota statute making communications between physician and patient privileged did not extend to a hospital dietitian or to a nurse as to render inadmissible their testimony as to medical treatment given the deceased insured although given under the directions of the physician. In the main case, the Wisconsin Supreme Court, in the interest of the disclosure of truth and in the furtherance of justice, expressly rejected the doctrine of agency where third party medical assistants are involved and followed the last two cases. While the Wisconsin statute must be complied with as to physicians and surgeons because it expresses a public policy declared by the legislature, the supreme court in the main case clearly and concisely states that “if the disclosures to the physician be such as not to subject the patient to shame or affect his reputation or social standing, there is no reason why the physician should not disclose them, and there is sound reason why in the interest of truth and justice he should be compelled to disclose them. The physician’s exemption from disclosure should in reason be limited to such disclosures as would injure the patient’s feelings or reputation.” In view of the many changes in the statute since its adoption, it will be interesting to note whether or not the Wisconsin legislature in its wisdom will amend the statute to conform with the opinion of the supreme court in the recent decision.

WILLIAM EDWARD TAAY.