

April 1963

Evidence--Federal Shop-Book Rule--Admissibility of Hospital Records

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Recommended Citation

Eugene T. Hague Jr., *Evidence--Federal Shop-Book Rule--Admissibility of Hospital Records*, 65 W. Va. L. Rev. (1963).
Available at: <https://researchrepository.wvu.edu/wvlr/vol65/iss3/8>

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in its judgment, such harm has been done to the accused as to require a new trial. *State v. Chisnell*, 36 W. Va. 659, 15 S.E. 412 (1892).

In West Virginia, as in the federal courts, the specific question of whether or not a co-defendant's attorney may comment on defendant's failure to testify has not been decided. However, the court has strongly implied that it will construe the provisions of the statute very strictly, and will permit no comment whatsoever on a defendant's failure to testify. In *State v. Taylor*, 57 W. Va. 228, 234, 50 S.E. 247, 249 (1905) which involved comment on an accused's failure to call his wife to corroborate his testimony, the court said that the statutory terms are very broad and that ". . . all persons are forbidden to make any reference to his failure [to testify]."

Thus, the dilemma presented by *De Luna v. United States, supra*, seems not to arise in West Virginia. The co-defendant's absolute right to be separately tried, coupled with the statutory prohibition against any comment concerning an accused's failure to take the stand, furnishes as perfect a solution to the problem as could reasonably be expected. Perhaps the problem could be best resolved in the federal courts by providing for separate trial of jointly indicted defendants where it is shown that one expects to take the stand to testify and the other expects to remain silent.

Robert Edward Haden

Evidence—Federal Shop-Book Rule—Admissibility of Hospital Records

P brought an action for injuries sustained when struck by *D*'s automobile. The trial court refused to admit in evidence the results of a test for intoxication conducted on *P* at the Navy hospital where he was treated. The district court rendered a judgment for *P* and *D* appealed. *Held*, reversed and remanded for a new trial. The court of appeals held that prejudicial error was committed in excluding from evidence the hospital records showing results of the intoxication test, such being properly admissible in evidence under the federal shop-book rule. *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962).

The immediate problem involved admission of hospital records as evidence under the federal shop-book rule, one of the recognized exceptions to the hearsay evidence rule. Hearsay evidence is generally inadmissible. *Rohrbaugh v. Rohrbaugh*, 136 W. Va. 708, 68 S.E.2d 361 (1951). The shop-book rule, rigidly applied under the early common law, is being applied more liberally by the courts today. McCORMICK, EVIDENCE § 283 (1954). The statutory federal shop-book rule provides that records kept in the ordinary course of business should be admissible in evidence. Business is broadly defined to include business, professions, occupations and callings of every kind. 62 Stat. 945 (1948), 28 U.S.C. § 1732 (1958).

Some courts, even today, have been reluctant to include hospital records under the regular entries concept of the shop-book rule, but Professor McCormick points out that the safeguards of trustworthiness of the records of a modern hospital are at least as substantial as the guarantees of reliability of the records of business establishments. McCORMICK, EVIDENCE § 290 (1954). In order to qualify as a business entry, the record must show that the document is actually a record of an act, condition or event. The record must be relevant and the custodian of the record or another qualified witness must testify to its identity and the mode of its preparation. It must be shown that it was made in the regular course of business and was entered at or near the time of the act, condition or event. *Cascade Lumber Terminal v. Cvitanovich*, 215 Ore. 111, 332 P.2d 1061 (1958).

In the principal case the question presented was whether a hospital record containing an entry showing the result of a test for intoxication was admissible as a business record. The court was divided on this issue, but the majority decided that the records should be admitted, following the holding in a previous case that hospital records, including an entry showing the results of a test for intoxication, were admissible where the test was recorded according to the regular routine of the hospital and was performed in the regular course of the hospital's business. *Kissinger v. Frankhouser*, 308 F.2d 348 (4th Cir. 1962). In an earlier decision by this same court it was held that a certificate showing the alcoholic content of a sample of blood determined by chemical analysis was properly received in evidence under the federal shop-book rule. *Kay v. United States*, 255 F.2d 476 (4th Cir. 1958).

The same judges dissented in the principal case and the *Kissinger* case. The dissent in the *Kissinger* case expressed the view

that the court had expanded the application of the federal shop-book rule far beyond its intendment, contending that the entry in issue amounted to an impression and should not be admitted. While courts hold that the business record statute should be liberally construed, the mere fact that a record would be generally admissible does not mean that any and everything contained in the record is necessarily admissible. When the statute is applied to hospital records, the entry must be pertinent to the care or treatment of the patient in order to be admissible. *Maggi v. Mendillo*, 147 Conn. 663, 165 A.2d 603 (1960).

Texas has determined that facts involving medical opinions are not admissible. The determination whether hospital records consisted of factual statements by doctors or were based on opinions or conclusions should be left largely to the sound discretion of the trial court. *Martinez v. Williams*, 312 S.E.2d 742 (Tex. Civ. App. 1958). Also, the Fifth Circuit Court seems to favor limiting the scope of hospital entries which can properly be admitted, and will admit hospital records in evidence only to show what treatment the patient received, the cost of services and related facts. *Missouri Pac. R.R. v. Soileau*, 265 F.2d 90 (5th Cir. 1959).

In dealing with this area of the admissibility of business records as evidence, several states have adopted the Uniform Business Records as Evidence Act. In discussing the admissibility of hospital records under the Act, the Ohio court has held that those portions of hospital records made in the regular course of business and pertaining to the business of hospitalization and recording observable acts, transactions, occurrences or events incident to the treatment of a patient were admissible. Further the court has held that the purpose of this act was to liberalize and broaden the shop-book rule and to permit the admission of records regularly kept in the course of the business, and, as applied to hospital records, to avoid the necessity and expense, inconvenience and sometimes the impossibility of calling the witnesses who have collaborated to make the record. *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

The West Virginia Legislature has not adopted the Uniform Act. The Supreme Court of Appeals seems inclined to the position that it is unnecessary to determine to what extent and in what circumstances a hospital record may be introduced in evidence. The court held that if the records had been properly identified and were shown to have been made in the regular course of treatment they

may be admissible, within proper limits, by analogy to rules governing the keeping of books and records generally. *Cline v. Evans*, 127 W. Va. 113, 31 S.E.2d. 681 (1944). In the later case of *Keller v. Wonn*, 140 W. Va. 860, 87 S.E.2d. 453 (1955), the court, without spelling out a rule applicable to all entries in hospital records, was of the opinion that routine entries and perhaps ordinary diagnostic findings, based upon objective data and not presenting a question of obvious difficult interpretation, should be admitted. For a comparison of the existing West Virginia law and the provisions of the Uniform Act, see 60 W. VA. L. REV. 321, 328 (1958).

The conclusions of the majority of the court in principal case seem to be in accord with the present day liberal construction of the shop-book rule. The West Virginia Supreme Court has taken steps in this direction but it would appear that the adoption of the Uniform Business Records as Evidence Act would greatly clarify this area of admissibility of evidence.

Eugene Triplett Hague, Jr.

**Federal Courts—Diversity Jurisdiction by Assignment—
Improper or Collusive.**

P was sole stockholder of an insolvent corporation. The corporation assigned to *P* all claims which the corporation had or might have against *D*. In consideration thereof, *P* had paid, or orally agreed to pay, a substantial part of the corporation's indebtedness. The corporation and *D* were of like citizenship while *P* was a citizen of another state. The assignment was made for the purpose of gaining admission to the federal court on diversity. The trial court held that it did have jurisdiction, but certified the question to the circuit court as one where there was "substantial grounds for difference of opinion". *Held*, affirmed. The assignment was not "improper or collusive" within the meaning of 62 Stat. 935 (1948), 28 U.S.C. § 1359 (1958), because *P* had paid, or agreed to pay, the debts of an insolvent corporation as consideration for the assignment. Until the time of the challenged assignment *P* was not the sole owner of the claim against *D* and was not the real party in interest. *Bradbury v. Dennis*, 310 F.2d 73 (10th Cir. 1962).

As the instant case is another example of an assignment that is not "collusive or improper", even though it was made for the