

WAIVER OF DOCTOR-PATIENT PRIVILEGE BY WIDOW OF PATIENT

Ernest Warnke, an employee of the McDonough Motors, Inc., was alleged to have sustained internal injuries while engaged in moving a large safe pursuant to his employment on February 14, 1931, resulting in his death August 9, 1932. The Industrial Commission of Ohio denied the widow compensation under the Workmen's Compensation Act. She then instituted this action at the trial of which she introduced the testimony of the attending physician concerning the physical condition of the decedent both before and after the accident. The Industrial Commission objected to the admission of such testimony on the ground that the information received by the physician was in the nature of a privileged communication and not admissible under Section 11494 Gen. Code. The evidence was admitted and the widow obtained judgment. On appeal it was held that the widow could waive the statutory privilege and the judgment was affirmed. *Industrial Commission v. Warnke*, 131 Ohio St. 140, 2 N.E. (2d) 248, 5 Ohio Op. 505 (1936).

As a general rule "all facts having rational probative value are admissible unless some specific rule forbids."¹ One of these specific rules that cut down on admissibility of relevant evidence is that of privilege. Wigmore states that to constitute a privilege four things are necessary. (1) The communication must originate in confidence. (2) Confidence must be essential to the relation. (3) The relation must be one to be fostered. (4) The benefit obtained by the secrecy must be greater than the harm done by the exclusion of relevant testimony.² In the physician-patient privilege the second requirement is clearly not met and there is good reason to believe the same about the fourth.³

There is no physician-patient privilege at common law⁴ but nearly three-fourths of the states provide for such a privilege by statute.⁵ The privilege is that of the patient and the physician must testify if the patient is willing for him to do so.⁶ In fact the use of the term "privi-

¹ Wigmore on Evidence, Second Ed. sec. 10.

² Wigmore on Evidence, *supra*, sec. 2285.

³ Wigmore on Evidence, *supra*, sec. 2380

⁴ *Bozicevich v. Kenilworth Mercantile Co.*, 58 Utah 458, 199 Pac. 406 (1921); *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904); Wigmore on Evidence, *supra*, sec. 2380; 31 A.L.R. 168.

⁵ Wigmore cites the statutes of thirty-one states, District of Columbia, Hawaii, Porto Rico, Alaska, and the Philippine Islands. Wigmore on Evidence, *supra*, note to sec. 2380.

⁶ *Hirschberg v. Southern Pacific Co.*, 183 Pac. 141 (1919); *Trieber v. New York and Queen County Railway Co.*, 149 App. D. 804, 134 N.Y.S. 267 (1912); *Parker v. Parker*, 78 Nebr. 535, 111 N.W. 119 (1907).

lege" carries with it the power to elect whether to permit the testimony or not.⁷ If the law made the doctor incompetent it would be a disqualification and not a privilege.

It is consistently held that the patient may waive the privilege.⁸ Some state statutes expressly permit the patient to waive it⁹ but even where the statute is mandatory in terms, making no express provision for waiver, the patient is permitted to waive the privilege.¹⁰ There is no such unanimity as to whether or not those who stand in his place may waive it. The different wording of the various statutes explains in part the difference of opinion in the several jurisdictions. For example, the Missouri statute provides that a physician shall be incompetent to testify;¹¹ the California statute, before amendment, provided that a physician cannot without the consent of his patient testify in a civil action as to information received, etc.;¹² the early New York statute provided that a physician should not testify unless there was an express waiver by the patient.¹³ Most statutes are variations of the above.

Courts differ as to the interpretation of statutes which are substantially the same. The absolute type of statute providing that a physician shall not testify or is incompetent to testify, and making no provision for waiver, was passed in Indiana,¹⁴ Missouri,¹⁵ Michigan¹⁶ and Wis-

⁷ *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552 (1889).

⁸ *Olson v. Court of Honor*, 100 Minn. 117, 117 Am. St. Rep. 676, 110 N.W. 374 (1907); *National Annuity Ass'n. v. McCall*, 103 Ark. 201, 146 S.W. 125 (1912); *Harrison v. Sutter St. Railway Co.*, 116 Cal. 156, 47 Pac. 1019 (1897); *Auld v. Cathro*, 20 N.D. 461, 128 N.W. 1025 (1910).

⁹ *Olson v. Court of Honor*, *supra*; *Harrison v. Sutter St. Railway Co.*, *supra*; *Denning v. Butcher*, 91 Ia. 425, 59 N.W. 69 (1894).

¹⁰ *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358 (1884); *Fraser v. Jennison*, 42 Mich. 206, 3 N.W. 882 (1879); *Penn Mutual Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769 (1884); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889). In *Thompson v. Ish*, *supra*, it was said, "Notwithstanding, our statute provides for no exception, still it deals with a privilege, and it must be taken as established law that the privilege may be waived by the patient; and we have held that it may be waived by the representative."

¹¹ Mo. Rev. St. 1879, sec. 4017 interpreted in *Groll v. Tower*, *supra*, note 10 and *Thompson v. Ish*, *supra*, note 7.

¹² California C.C.P. 1872, sec. 1881 interpreted in *Harrison v. Sutter Street Railway Co.*, *supra*, note 8.

¹³ New York Code Civil Procedure sec 834 interpreted in *Westover v. Aetna Life Ins. Co.*, 99 N.Y. 56, 52 Am. Rep. 1, 1 N.E. 104 (1885).

¹⁴ Indiana Rev. St. 1881, sec. 497 interpreted in *Penn Mutual Life Ins. Co. v. Wiler*, *supra*, note 10.

¹⁵ Mo. Rev. St., *supra*, note 11.

¹⁶ Mich. Comp. Laws 5943 interpreted in *Fraser v. Jennison*, *supra*, note 10.

consin.¹⁷ Indiana and Missouri have steadily held that although no waiver is mentioned, the patient and his personal representative may waive the privilege as a privilege of necessity denotes the power to waive.¹⁸ Michigan early adopted the same view¹⁹ but in a later case the court asserted that the privilege was personal to the patient.²⁰ Such an assertion was unnecessary for the decision as the question was merely whether the physician could waive the privilege.²¹ Later an amendment to the statute provided that in a probate issue the heirs at law shall be deemed personal representatives of the patient for purposes of waiving the statute.²² Wisconsin early adopted the opposite view and held the privilege to be personal to the patient.²³ A statutory change later permitted waiver by the personal representative of the patient.²⁴ The Arkansas statute reads as though the privilege belongs to the physician but the court has interpreted the statute to mean that the privilege is that of the patient and waiver is possible by the patient or if he is dead by his personal representative.²⁵

The most common type of statute provides that the physician cannot testify without the consent of the patient. Nearly all states having such statutes permit waiver of the privilege by the representative of the patient.²⁶ A very few of these states have held the privilege to be personal to the patient. North Dakota has steadily so held.²⁷ California

¹⁷ Wisconsin St. 1898 sec. 4075 interpreted in *In Re Will of Hunt*, 122 Wis. 460, 100 N.W. 874.

¹⁸ *Groll v. Tower*, *supra*, note 10; *Thompson v. Ish*, *supra*, note 7; *The Masonic Mutual Benefit Ass'n. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295 (1881); *Penn Mutual Life Ins. Co. v. Wiler*, *supra*, note 10; *Morris v. Morris*, *supra*, note 10.

¹⁹ *Fraser v. Jennison*, 42 Mich. 206, 3 N.W. 882 (1879).

²⁰ *Storrs v. Scougale*, 48 Mich. 387, 12 N.W. 502 (1882).

²¹ 31 A.L.R. 168.

²² Mich. 5 How. Stat. (2d) sec. 12826. See *In Re Oldenberg*, 177 Mich. 150, 142 N.W. 1076 (1913).

²³ *In Re Will of Hunt*, 122 Wis. 460, 100 N.W. 874 (1904); *Casson v. Schoenfeld*, 166 Wis. 401, 166 N.W. 23 (1918); *Maine v. Maryland Casualty Co.*, 172 Wis. 350, 178 N.W. 749 (1920).

²⁴ *Estate of Gallun*, 215 Wis. 314 (1934).

²⁵ *National Annuity Ass'n. v. McGall*, 103 Ark. 201, 146 S.W. 125 (1912).

²⁶ *Denning v. Butcher*, 91 Ia. 425, 59 N.W. 69 (1894); *Winters v. Winters*, 102 Ia. 53, 71 N.W. 184 (1897); *Olson v. Court of Honor* (Minn.), *supra* note 8; *Schornick v. Schornick*, 220 Pac. 397, Ariz. (1923); *Fish v. Poorman*, 85 Kan. 237, 116 Pac. 898 (1911); *Flack v. Brewster*, 107 Kan. 63, 190 Pac. 616 (1920); *Parker v. Parker*, 78 Nebr. 535, 111 N.W. 119 (1907); *Grieve v. Howard*, 54 Utah 225, 180 Pac. 423 (1919).

²⁷ *Auld v. Cathro*, 20 N.D. 461, 128 N.W. 1025 (1910).

early adopted this view because of the belief that its statute was similar to the New York statute when in reality the two were different.²⁸ Later a statute was passed changing the rule in California and bringing it in line with the majority.²⁹ The Mississippi statute provides that a physician shall not testify except at the instance of his patient.³⁰ Under this statute Mississippi holds that the privilege is personal with the patient.³¹

Formerly the New York statute provided that the physician could not testify unless there was an express waiver by the patient. Under this statute it is more difficult to permit the representative to waive the privilege and New York early came to the conclusion that the privilege was personal.³² This was changed in 1893 by statutory modification expressly permitting waiver by the representative of the patient.³³

A fourth type of statute is in force in Ohio and Wyoming.³⁴ The Ohio statute provides, "The following persons shall not testify in certain respects: — a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient. But the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject."³⁵ It was held in *Sweetland v. Miles* that the privilege is personal to the patient and that it can not be waived by the personal representative or heir because when certain exceptions to a statute are named they are exclusive and others may not be read in by the court.³⁶ The majority of the court in the principal case holds that the statute in listing the two exceptions implied that the patient would be alive and is silent as to the result if he were dead. This reasoning seems open to question. A comparison of the Ohio statute with other statutes shows that while some of them do not mention waiver and others expressly provide for waiver by the patient, the

²⁸ *Harrison v. Sutter Street Railway Co.*, 116 Cal. 156, 47 Pac. 1019 (1897).

²⁹ Cal. St. 1933 c. 536.

³⁰ Miss. Code 1906, sec. 3695.

³¹ *McCaw v. Turner*, 126 Miss. 260, 88 So. 705 (1921).

³² *Westover v. Aetna Life Ins. Co.*, 99 N.Y. 56, 52 Am. Rep. 1, 1 N.E. 104 (1885); *Renihan v. Dennin*, 103 N.Y. 573, 57 Am. Rep. 770, 9 N.E. 320 (1886).

³³ Code of Civil Procedure, Sec. 834; *Pringle v. Burroughs*, 70 App. Div. 12, 74 N.Y. Supp. 1055 (1902); Appeal, 100 App. Div. 366, 91 N.Y. Supp. 750 (1905); Affirmed, 185 N.Y. 375, 78 N.E. 150 (1906).

³⁴ Ohio Gen. Code 11494; Wyoming Rev. Stats. 1931, sec. 89-1703-C St. 1920 sec. 5806.

³⁵ Ohio Gen. Code, sec. 11494.

³⁶ *Sweetland v. Miles*, 101 Ohio St. 501, 130 N.E. 22 (1920).

Ohio statute expressly names two instances in which the patient may waive the privilege. It is difficult to reconcile the holding that the widow could waive the privilege with the peculiar terms of the Ohio statute. If other exceptions were intended it would seem that they would have been specifically stated. The majority opinion in the principal case reaches a desirable result from a social standpoint, but the reasoning seems strained.

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LEASES

REAL PROPERTY—LEASES—ACKNOWLEDGMENT OF LEASE— ATTACHMENT OF CERTIFICATE OF ACKNOWLEDGMENT

A lease agreement was typewritten upon ten separate pages and firmly bound and fastened together by brass rivets. It was contended that the lease agreement was ineffective to convey the leasehold estate recited in the agreement because the acknowledgment was upon a separate page, contrary to the requirements of Section 8510, Gen. Code. This section provides that a qualified officer "shall certify the acknowledgment *on the same sheet* on which the instrument is written or printed, and subscribe his name thereto." In this lease, the beginning of the certificate of acknowledgment appeared on the ninth page of the instrument following part of a sentence of the lease and the signatures of the parties and witnesses. The remaining portion of the certificate of acknowledgment with the notary's signature appeared on the tenth and last sheet. *Held*, that the instrument in question constituted a valid lease. *Rollman & Sons Co. v. The Alaska Realty Co.*, 52 Ohio App. 166, 4 Ohio Op. 386 (1936).

It was the opinion of the court that the object of Section 8510 is to prevent mistake and fraud, and to give greater certainty to titles within the state. The court placed considerable emphasis upon the fashion in which the ten sheets comprising the instrument were bound together by brass rivets, so constructed that when once drawn through the paper and compressed they presented a fastening which must be destroyed if removed and which could not be detached without leaving evidence of mutilation. The court also emphasized the fact that a page could not be inserted in the collection without first removing the rivets and referred to these sheets as forming "one instrument of ten pages."

One of the earliest cases in point is *Winkler v. Higgins*, 9 Ohio St. 599 (1859). In that case the court held that a certificate of acknowl-