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be protected and the court would not have to require a permanent attachment under Article 467 before holding that the movable became immobilized. These other forms of protection will be available whether the movable was attached permanently or not, whereas it is surmised that if the attachment were permanent the vendor would lose his right under the current interpretation of Article 467.

The policy considerations which prompted the amendment to Article 467 are not questioned by the writer. However, the method used to effectuate this policy is disturbing in certain particulars. The "unity of ownership" concept was peculiar to immovables by destination prior to the 1912 amendment. The Louisiana Civil Code was written and enacted as a unified body of law. This coherence has been disrupted by the amendment to Article 467 by requiring "unity of ownership" in the classification of things as immovable by their nature. It is suggested that the policy objectives which prompted the amendment could as easily have been accomplished through an addition to the Revised Statutes without disrupting the unity of the Civil Code.

Gordon A. Pugh

The Doctor-Patient Privilege in Civil Cases in Louisiana

Generally all evidence relevant to the issues at trial is admissible, although of course there are many exceptions. The physician-patient privilege is designed as an exception to this rule in that it works an exclusion of otherwise admissible evidence. It is designed to encourage the free exchange of information between physicians and their patients. The desirability of the privilege is essentially tested by the balancing of a revelation of truth on the one hand and the encouragement of disclosure to physicians on the other. Although the physician-patient privilege did not exist at common law,[1] various states have adopted it by statute.[2] Louisiana has provided for the privilege

1. 8 WIGMORE, EVIDENCE § 2380 (3d ed. 1940) and authorities cited therein; 3 JONES, EVIDENCE § 838 (5th ed. 1958); MCCORMICK, EVIDENCE § 101 (1954). England still does not recognize the privilege.

2. See note 1 *supra*. For a detailed compilation of the statutes adopted, see 8 WIGMORE, EVIDENCE § 2380 (3d ed. 1940).

in criminal proceedings by a provision in the Code of Criminal Procedure.[3] There is no specific legislation dealing with the privilege in civil cases. It is the purpose of this Comment to investigate whether the physician-patient privilege exists in Louisiana civil cases.

Statutory Law

Since there is no express legislation on the existence of the privilege in civil litigation, a determination of the existence of such a privilege necessitates investigation of other possible sources. In this connection, a brief look at the sources of Louisiana rules of evidence may prove helpful. In 1805, the Crimes Act[4] was adopted, providing for the application of common law rules of evidence in administration of cases falling under its provisions. Then, in *Durnford v. Clark*,[5] a civil case, the Louisiana court considered a rule of common law evidence in reaching its decision. Later, in *Planters' Bank v. George*,[6] it was held that the common law rules of evidence were in force in Louisiana civil cases. Since the privilege does not exist at common law, it would appear that an application of common law rules of evidence provides no basis for the existence of the privilege in Louisiana civil cases.

All Louisiana Constitutions since 1879 have contained provisions for the physician-patient privilege.[7] However, since

3. LA. R.S. 15:476 (1950): "No physician is permitted, whether during or after the termination of his employment as such, unless with his patient's express consent, to disclose any communication made to him as such physician by or on behalf of his patient, or the result of any investigation made into the patient's physical or mental condition, or any opinion based upon such investigation, or any information that he may have gotten by reason of his being such physician; provided, that the provisions of this article shall not apply to any physician, who, under the appointment of the court, and not by a selection of the patient, has made investigation into the patient's physical or mental condition; provided, further, that any physician may be cross-examined upon the correctness of any certificate issued by him." For the waiver provision, see *id.* 15:478.

4. La. Acts 1804, c. 50, p. 416, adopted May 4, 1805. See specifically *id.* § 33, at 440, providing for application of common law rules of evidence in administration of cases under the act. In the same year, the Practice Act was adopted. While that act did provide for some evidentiary rules, there was no provision for the general rules of evidence in cases under the act. La. Acts 1804, c. 26, p. 210, adopted April 10, 1805.

5. Durnford v. Clark, 1 Mart.(O.S.) 202 (La. 1811) (applied common law rule allowing witness to be cross-examined only on points which were adduced on direct examination).

6. 6 Mart.(O.S.) 670 (La. 1819).

7. LA. CONST. art. 178 (1879); LA. CONST. art. 297 (1898); LA. CONST. art. 297 (1913); LA. CONST. art. VI, § 12 (1921). The present Constitution provides: "The Legislature shall provide for the interest of State Medicine in all its departments . . . for protecting confidential communications made to practitioners

the provision of the present Constitution has been said not to be self-operative,[8] no privilege may be drawn from that source alone. As mentioned above, the Code of Criminal Procedure provides for the physician-patient privilege in criminal cases.[9] The problem of whether or not the privilege conferred by the Code of Criminal Procedure is applicable in civil cases was discussed by the Court of Appeals, Fifth Circuit, in *Rhodes v. Metropolitan Life Insurance Co.*[10] In that case the beneficiary under a life insurance policy sought recovery for the death of the insured. In answer to the defendant's contention that the insured had made misleading statements to the doctor as to his physical condition without which statements he could not have purchased insurance, the plaintiff claimed the statements were privileged. In an alternative holding the court said that "the privilege in question is restricted to criminal proceedings."[11] After apparently resolving that point, the court went on to hold that even if this position was not sound, the privilege was personal to the patient and could not be claimed by the beneficiary of the insured's insurance policy. This latter statement appears to have weakened the former. No case has been found in which a Louisiana appellate court directly resolved the issue of the applicability of the privilege provisions in the Code of Criminal Procedure in civil litigation. The position has been taken that those provisions are legislative mandates on the proper rules of evidence for Louisiana courts, and that as they are fairly complete they should be followed in civil cases in preference to the common law.[12] On the other hand, it is said that the legislature enacted the Code of Criminal Procedure when those interested were aware that the common law rules of evidence were being applied in civil cases, and that if a change was desired legisla-

of medicine and dentistry and druggist by their patients and clients while under professional treatment and for the purpose of such treatment."

8. State v. Genna, 163 La. 701, 112 So. 655 (1927) (not self-operative in connection with public and private doctors; case calls for legislative implementation if privilege desired).

9. For criminal cases dealing with doctor-patient communications prior to the adoption of the Code of Criminal Procedure (La. Acts 1928, No. 2) see State v. Lyons, 113 La. 959, 37 So. 890 (1904) (visit upon which statements were made was not visit for treatment and a doctor-patient relationship held not to come into existence); State v. McCoy, 109 La. 682, 33 So. 730 (1903) (evidence admitted, not on basis of lack of privilege but on a technicality). The court in each case based its decision on technicalities rather than a flat holding of no privilege.

10. 172 F.2d 183 (5th Cir. 1949).

11. *Id.* at 184.

12. See generally Comment, 14 LOUISIANA LAW REVIEW 568, 577 (1944).

tion could have been provided.[13] There is no definite indication of whether or not the Louisiana courts will follow the *Rhodes* decision and thereby declare that no privilege exists in civil cases.

There are other statutory provisions which may have some pertinence to the problem. The Louisiana legislature has enacted statutes aimed at securing the availability of charity hospital records as evidence.[14] In *Shepard v. Whitney National Bank*[15] a statement was made to an interne in Charity Hospital in New Orleans and signed by the patient. The interne incorporated the statement into the patient's record. When plaintiff tried to exclude the record on the basis of the physician-patient privilege, the court overruled his objection saying: "There does not appear to be any reason why the records . . . should not be offered in evidence."[16] It appears to the writer that there was no intention on the part of the legislature to effect any change in the law relative to the physician-patient privilege by enacting the Hospital Records Statutes. The statutes appear to have been meant to remove only the hearsay objection to the introduction of these records. It is submitted that the statutes should have no bearing on the physician-patient privilege in civil cases.

Under the provisions of Revised Statutes 40:978, communications made to a physician for the purpose of unlawfully obtaining drugs or narcotics or the administration thereof are not privileged.[17] There have been no reported cases under its provisions. Several questions are presented by the statute. If the statute was intended solely as an exception to the privilege in criminal cases, with no bearing on civil matters, it would seem that it would have been enacted as an amendment to the Code of Criminal Procedure. There would of course be no necessity for such a provision regarding civil cases, if there is in fact no such privilege there. But it must be remembered that there is generally no privilege in the absence of a statute conferring one. There appears to be little basis for contending by negative implication that R.S. 40:978 has brought a physician-patient privilege into our civil rules of evidence.

13. *Ibid.*

14. LA. R.S. 13:3714, as amended, La. Acts 1952, No. 519, § 1 (Supp. 1958) (charity hospitals and veteran hospitals); *id.* 13:3715 (charity hospitals).

15. 177 So. 825 (La. App. 1938).

16. *Id.* at 826.

17. LA. R.S. 40:978(B) (1950) (information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawful to procure the administration of any such drug, shall not be deemed a privileged communication).

On the basis of the foregoing discussion, it would appear that the physician-patient privilege is not a part of the civil rules of evidence by virtue of any legislation on the subject.

Case Law

In *Morgan v. American Bitumuls Co.*[18] the plaintiff, seeking workmen's compensation, claimed a physician-patient privilege when four doctors who had examined him were called by the defendant. The trial court sustained plaintiff's claim of privilege. The Court of Appeal, First Circuit, reversed this holding saying: "There is no basis for sustaining of this objection in a compensation case."[19] Under the Workmen's Compensation Act, rules of evidence are to be liberally construed.[20] In workmen's compensation cases the plaintiff is putting his physical condition at issue, and it would seem that he should not be allowed to deny the court an opportunity to hear all possible testimony as regards that physical condition. It might be contended that the narrow language of the court restricting its holding to a "compensation case" should be construed as a negative implication that the privilege exists in other civil cases. It is the opinion of the writer that this contention is without any substantial basis.

Under the doctrine of the adverse presumption, as developed by the jurisprudence, the failure of one of the parties to call on all of the doctors who have made examinations for him relative to the issue at trial gives rise to a presumption that the medical testimony of those doctors not called would have been adverse to this contention. This doctrine is applicable in workmen's compensation[21] and personal injury cases.[22] The fact that doc-

18. 39 So.2d 139 (La. App. 1949).

19. Morgan v. American Bitumuls Co., 39 So.2d 139, 144 (La. App. 1949).

20. Louisiana Workmen's Compensation Act. LA. R.S. 23:1317 (1950): ". . . The court shall not be bound by technical rules of evidence, . . . but all findings of fact must be based on competent evidence."

21. Keener v. Fidelity & Casualty Co., 96 So.2d 509 (La. App. 1957); Chance v. American Mut. Liability Ins. Co., 92 So.2d 493 (La. App. 1957); Walker v. Monroe, 62 So.2d 676 (La. App. 1953); Rider v. R. P. Farnsworth Co., 61 So.2d 204 (La. App. 1952); Morgan v. American Bitumuls Co., 39 So.2d 139 (La. App. 1949); Law v. K. C. Bridge Co., 199 So. 155 (La. App. 1940); Johnson v. Damange-Godman Lbr. Co., 141 So. 779 (La. App. 1932); McPherson v. Hillyer Deutsch-Edwards, Inc., 143 So. 89 (La. App. 1932).

22. Moore v. Natchitoches Coca Cola Bottling Co., 32 So.2d 347 (La. App. 1947) (alleged contaminated coke, did not call doctors to show illness); Gunter v. Alexandria Coca Cola Bottling Co., 197 So. 159 (La. App. 1940) (called one doctor who testified adversely to plaintiff; failed to call second doctor); Hines v. Heinkamp, 194 So. 731 (La. App. 1940) (had neighbors testify, but failed to call doctor); Comforto v. Cloverland Dairy Products Co., 194 So. 43 (La. App. 1940) (called no doctor to corroborate claims).

tors who examined the party were not called to testify may be brought to the attention of the trier of fact and commented upon by counsel in argument. Thus, it may be seen that often the detrimental effect of the presumption on a plaintiff's claim may outweigh any disadvantage that would result from putting the doctor on the stand. The net effect of the presumption is to allow the court to draw inferences from a visit made to a physician which might not have been possible if a privilege were present.

In the materials covered so far there would appear to be little authority for the proposition that the physician-patient privilege exists in civil cases. It was pointed out that Louisiana derived no civil privilege by reason of its adoption of the common law rules of evidence. The Louisiana Constitution has provided the basis for such a privilege, but none has ever been expressly enacted. Although there exists basis for argument, it is doubtful that the Code of Criminal Procedure privilege is applicable in civil cases. There is no privilege in workmen's compensation cases, and it is likely that none exists in personal injury cases. However, a recent decision of the Louisiana Supreme Court seems to throw the entire matter into uncertainty. In *Savin v. Savin*,[23] a husband sought a divorce from his wife on the grounds of adultery. In an effort to show that she was pregnant, he attempted to call her doctor to testify as to a medical examination the doctor had made. Defendant objected, saying that the results of the examination were part of a privileged communication between herself and the doctor. The objection was sustained by the district court and this position was affirmed by the Louisiana Supreme Court. The Supreme Court quoted with approval from the opinion of the trial judge:

> "Plaintiff's next charge against the defendant is that she is pregnant. This, of course, would show that she is guilty of committing adultery, for she has lived continuously apart from her husband for a period of over three and one-half years.
>
> "For the purpose of establishing this fact, plaintiff attempted to produce the evidence of a physician, Dr. Lopez, and also questioned one or two of his lady witnesses regarding their visual observations of defendant's physical appearance.

23. 218 La. 754, 51 So.2d 41 (1951).

> "Dr. Lopez was not permitted to testify. Defendant apparently consulted him for medical advice or treatment, and her husband found out about it. But on trial of the case, when the doctor was presented as a witness by the plaintiff, defendant *refused to waive her legal right not to have the doctor disclose the nature of her visit and the result of his examination, if he made one.*" (Emphasis added.)[24]

Thus, the Supreme Court seems to have recognized the physician-patient privilege for the first time in a civil case in Louisiana. The exact basis for such recognition does not appear in the case, and no authority has been found for such a decision in the existing legislation and jurisprudence. It appears from this decision that the court will not require any legislative basis for the privilege. If so, the court will perhaps turn to the provisions of the Code of Criminal Procedure as a possible guide in the application of the physician-patient privilege in civil cases.

Policy Considerations

The considerations involved in determining whether or not the privilege should be a part of the law of evidence is largely a balancing process. The suppression of relevant evidence is to be balanced against the unhindered disclosure of information between doctors and their patients. In the opinion of the writer utilization of the privilege in the *Savin* case clearly points up an injustice in any application of the privilege. If the wife was not pregnant, she had nothing to fear in allowing her doctor to testify. If she was pregnant, and therefore perhaps an adulteress, then this fact was kept from the court and consequently an injustice resulted, as the divorce was denied.

Until subsequent cases or legislation appear, there is marked uncertainty as regards the physician-patient privilege in Louisiana civil cases. In favor of the privilege is the desirability of protecting the relationship between the physician and his patients. There is also the Hippocratic Oath, which says: "Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even part therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets." On the other hand, exercise of the privilege might often lead to the suppression of very relevant evidence, as in the *Savin* case. It is submitted that non-

24. Savin v. Savin, 218 La. 754, 762, 51 So.2d 41, 44 (1951).

existence of the privilege is not likely to cause any person in need of medical aid to forego such treatment because of possible disclosure in a court of law at a future date. In the opinion of the writer, the physician-patient privilege is unwarranted in Louisiana civil cases, and its presence would pose a threat to the administration of justice.

Leslie J. Schiff