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[S.C. IN BANCO, AUCKLAND.—(COOPER, J.)—20TH MARCH, 1913.]

In re THE ST. HELENS HOSPITAL.

Evidence—Commission of Inquiry re Maternity Hospital—Demand for Production of Case-books—Claim of Privilege—Communications made to Medical Men by Patients—Subsequent Communication of such Statements by Medical Men in the Course of their Duty to other Persons—Privileged—The Evidence Act, 1908, Section 8, Subsection 2—Power of Commission to order Production and Inspection of Documents—The Commissions of Inquiry Act, 1908, Sections 3 to 11—The Magistrates' Courts Act, 1908, Section 83.

The privilege afforded by subsection 2 of section 8 of the Evidence Act, 1908, to communications made by patients to their medical men in their professional capacity is not destroyed by the subsequent communication by such medical advisers in the course of their duty to other persons, and such latter communications cannot therefore be divulged without the consent of the patients.

Such privilege extends to an inquiry under the Commissions of Inquiry Act, 1908.

Where the Commissioner appointed to hold an inquiry under the Commissions of Inquiry Act, 1908, is a Magistrate, he has the same power to order the production and inspection of documents as a Magistrates' Court under section 83 of the Magistrates' Court Act, 1908.

SPECIAL case stated for the opinion of the Supreme Court under section 100 of the Commissions of Inquiry Act, 1908.

An inquiry was set up at the request of and in consequence of certain allegations made by the Auckland Timber-workers' Industrial Union of Workers and Mrs. Emily Nichol, and Charles Cargill Kettle, Esq., and was appointed a "Commission" under section 2 of the Commissions of Inquiry Act, 1908. He was directed to inquire into and report as to—1, the circumstances surrounding the death at the St. Helens Hospital, Auckland, of Laura Elizabeth Chamberlain; and, 2, generally as to the administration of the said hospital—and the commission issued to him authorized and empowered him to call before him and examine on oath or otherwise as allowed by law all witnesses or other persons whom he might think capable of affording him any information on the subject of the Commission, and also to have before him and to examine all books, papers, documents, and writings as he should deem necessary.

Section 4 of the Commissions of Inquiry Act is as follows: "Every such Commission shall for the purpose of the inquiry have the power and status of a Magistrate in respect of citing parties in the inquiry, summoning witnesses, administering oaths, hearing evidence, and maintaining order at the inquiry." Section 9 of the Act renders every person liable to a fine who, "after being duly summoned to attend before the Commission, or to produce thereto any books, papers, writings, or documents," fails to attend or to produce any such books, papers, writings, or documents.

The St. Helens Hospital is a State maternity hospital established under the Midwives Act, 1904.

During the course of the inquiry the Hospital Department brought into Court, at the request of the complainants and by direction of the Commissioner, three "case-books" and a number of temperature-charts relating to the cases and treatment of patients in the Hospital in respect of whom complaints were filed. These case-books covered a period from the 24th of April, 1910, to the 26th of December, 1912, and contained the names and addresses, and in some cases the medical and family history, of all the patients treated in the Hospital between the above dates, and also in some cases the particulars of the treatment given in the Hospital. Some of the facts set out in the case-books were communications made by such patients to the Matron and nurses of the Hospital. The case-books were written up almost entirely from the original notes kept separately by the nurses and the Matron for each individual case, and each case in the case-book was so written up in some cases some weeks after the discharge of the patient. All the original notes up to the 22nd of October, 1912, had been destroyed by the Matron. The temperature-charts covered a period from the 1st of April, 1912, to February, 1913, and were a record of the temperature, pulse, and respiration movements of the various patients treated during that time. In some cases these charts showed the special medical treatment of the patient.

The Medical Officer of the Hospital was a duly qualified medical practitioner, and the regulations directed that he should attend those cases of labour which were abnormal or which required the administration of an anæsthetic. The

Matron was a nurse registered under the Nurses Registration Act, 1908, and a midwife registered under the Midwives Act. Without medical assistance or supervision she attended and was responsible for the treatment of all cases of labour other than those which the regulations required to be attended by the Medical Officer. The cases of six specific patients came under the review of the Commissioner, and these patients were represented at the inquiry and did not object to the records of their cases being examined, but the pages containing the medical history of these six patients were bound up with numerous other cases in the three case-books referred to. During the course of the inquiry only those pages and charts which related exclusively to these six patients were examined by the Commissioner, the complainants, and counsel for the Department.

There was no evidence, at the time this case was stated, before the Commissioner that any of the facts in the case-book other than those relating to the six patients represented at the inquiry were or were not communications from any of the patients to the Medical Officer.

The complainants claimed—1, that, without the consent of the patients, they have the absolute right to examine all the entries in all the case-books and charts, and to use such of the information obtained thereby as they may think fit for the purposes of the inquiry; and, 2, that if they have not this absolute right, then the Commissioner, without the consent of the patients, has power at his discretion to order that the whole of these books and charts be produced for inspection, and that the complainants be at liberty to inspect them. Counsel for the Department objected to each such claim, and the Commissioner decided to state a case for the decision of the Supreme Court thereon under section 10 of the Commissions of Inquiry Act.

The questions stated for the [decisions of the Supreme Court were:—

"1. Whether, if any of the entries in the said case-books are communications made by patients to the Medical Officer, they should be discovered or admitted in evidence?"

"2. Are the complainants entitled as of right to inspect the said books and charts?"

"3. Has the Commission power under the Commissions of Inquiry Act, 1908, or under the Magistrates' Courts Act, 1908, to order the inspection of the said books and charts before or during the inquiry?"

"4. If the Commission has power to order such inspection, should such inspection be limited to any particular case or matter?"

"5. Whether, when the books have been produced before the Commission by a witness on a summons *duces tecum* issued by the Commission, the Commission has power to order that a party to the inquiry be allowed to inspect the books when produced and take notes or extracts therefrom?"

A. E. Skelton, for complainants:—

The Commission cannot fulfil its duty properly without going through all the case-books. Counsel before a Commission has the same rights as in any Court of law, and has the privilege of looking at any documents seen by the President of the Court.

[Cooper, J.—You have only the right of free speech and immunity from actions for slander. Although any Court has the right to look at any documents, whether directly bearing upon the case before it or not, counsel do not possess that right.]

The matter now in dispute refers to records which are absolutely the life and soul of the inquiry, and that inquiry cannot properly attain its object unless those records are produced. If the Medical Officer has communicated to the Matron the communications made by patients to him, and if she has reduced such communications to writing in the case-books, the privilege attached to such communications between medical men and their patients is lost, and the provisions of subsection 2 of section 8 of the Evidence Act, 1908, do not apply.

[Cooper, J.—It seems to me that most of the questions raised here are rather questions for the Commissioner to answer in his discretion, and he can make such order as he may deem just. In dealing with them he has all the powers of a Magistrate.]

The case-books, papers, and charts are admissible in evidence, for the Commissioner is instructed to inquire generally into the administration of the institution. The position is that there is a complaint against the officials that they have treated some cases improperly, and the production of these records is necessary to determine this issue.

[Cooper, J.—The Legislature's intention was, clearly, that the statements made by patients to their medical advisers should be protected, and the fact that a medical man in the course of his duty repeats that communication to a nurse does not destroy the privilege. Moreover, what you are asking should be admitted is hearsay evidence.]

Only small parts, if any, of the statements in the case-books come within that category. There is no bond of