the case should be limited to its facts, and that any expansion of its principle to the contract field generally would be unwarranted.[32] But the familiar tendency of a principle to expand itself to the limit of its logic cannot be ignored. The possibility of such an expansion makes *Bruce's Juices, Inc. v. American Can Co.* a case of considerable significance to both lawyers[33] and legislators.[34]

EVIDENCE

PHYSICIAN-PATIENT PRIVILEGE— WAIVER IN DEED AND WILL CONTESTS

The heirs of a deceased grantor sued the grantees to set aside a deed on the grounds of fraud, undue influence, and unsoundness of mind. The heirs called two physicians to testify to the physical and mental condition of the grantor. The grantees objected to this testimony on the grounds that a physician is incompetent to testify as to any information acquired in his professional capacity while attending or treating a patient. The trial court admitted the testimony of the physicians over this objection. On appeal, the Indiana Appellate Court reversed, holding that the deceased grantor's privilege of objecting to the admission of testimony of physicians who attended him cannot be waived over the objections of the grantees who seek to sustain the deed. *Stayner v. Nye*, 76 N.E.2d 855 (Ind. App. 1948).

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32. Lockhart, "Violation of Anti-Trust Laws as a Defense in Civil Actions," 31 Minn. L. Rev. 507, 548 n.215 (1947).

33. At time of writing there has been at least one reported attempt (unsuccessful) to use the doctrine of the instant case to overcome a defense of illegality in a contract action. A seller who charged more than the OPA ceiling price brought suit to recover damages for buyer's failure to pay for goods sold. Defendant pleaded illegality ,and plaintiff urged the Bruce's Juices case on the Court. In refusing recovery, the Court said: " . . . the fact, if it be a fact, that the Supreme Court of the United States has held that a seller's violation of another statute—the Robinson-Patman Price Discrimination Act—does not render unenforceable notes given for the purchase price of goods . . . does not give a N.Y. court leave to ignore or disregard the specific decision of [the New York] Court of Appeals with reference to the effect of violation of the identical statute here involved." Government of French Republic v. Cabot, 16 U.S.L.Week 2240 (N.Y. Sup. Ct. Nov. 25, 1947).

34. The refusal of courts to enforce contracts involving violation of a statute is often one of the most effective of the available sanctions. If those who draft statutes wish to avail themselves of this sanction, it appears, as a result of the principal case, even more clearly than before, that they must expressly provide for it. Not even addition of criminal sanction will assure the result.

In the earlier case of *Towles v. McCurdy*[1] where the controversy was among heirs and devisees in a will contest, the Court had held that for "obvious reasons" neither set may waive the patient's privilege over the objections of the other set who seek to sustain the will. In the instant case, the Court found that there was no reason why the rule announced in the *Towles* case was not equally applicable to deed contests. The problem presented by these two cases is to determine what those "obvious reasons" are that prevent heirs from waiving their deceased ancestor's privilege in will and deed contests.

At common law, a physician was a competent witness to testify as to facts concerning the mental and physical condition of a patient. Furthermore, a patient had no privilege of objecting to a full disclosure of such facts when his physician was called upon to testify in court.[2] The medical profession first succeeded in persuading the New York legislature[3] that the same rule of public policy by means of which the common law protected professional confidences existing between a client and his attorney should be extended to the relation between a patient and his physician.[4] Modern authorities agree that the reasons for the privilege are unsound and that there is little or no excuse for its existence.[5]

1. 163 Ind. 12, 71 N.E. 129 (1904).
2. Myers v. State, 192 Ind. 592, 599, 137 N.E. 547, 549 (1922); William Laurie Co. v. McCullough, 174 Ind. 477, 488, 90 N.E. 1014, 1018 (1910); Towles v. McCurdy, 163 Ind. 12, 14, 71 N.E. 129, 130 (1904). 8 Wigmore, "Evidence" §2380 (3d ed. 1940).
3. The patient's privilege was first created by statute in New York in 1828. After numerous amendments, the statute now provides in substance that a person duly authorized to practice medicine or dentistry, or a nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. N.Y. Civ. Proc. Act §352. In a later section, provisions are made for waiver. However, a personal representative may waive except as to confidential communications and facts which might tend to disgrace the memory of the patient, or unless the personal representative has interests adverse to the patient's estate. If the validity of the patient's last will is in question, however, the executor named in the will, the surviving spouse, any heir at law, next of kin, or any other party in interest may waive. N.Y. Civ. Prac. Act §354.
4. Masonic Mutual Benefit Assoc. v. Beck, 77 Ind. 203, 210 (1881). For a summary of the purpose and policies behind the privilege, see Studebaker v. Faylor, 52 Ind. App. 171, 172, 98 N.E. 318, 319 (1912); Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. O'Conner, 171 Ind. 686, 85 N.E. 969 (1908); Penn. Mutual Life Insurance Co. v. Wiler, 100 Ind. 92, 100 (1885); 8 Wigmore, "Evidence" §2380a (3d ed. 1940).
5. See 8 Wigmore, "Evidence" §2380a (3d ed. 1940) and commentaries cited in n.3 therein.

However, Indiana was among those states which adopted the privilege by statute, following the lead of New York. Like those of a few other jurisdictions, the Indiana statute is written in terms of competency,[6] not in terms of privilege, and perhaps much of the difficulty in applying it arises from this unfortunate terminology. However, the Indiana courts have declared, in spite of its wording, that the statute creates no

6. Ind. Stat. Ann. (Burns, 1933) §2-1714 provides in part: "The following persons shall not be competent witnesses: . . . Third. Attorneys as to confidential communications made to them in the course of their professional business, and as to advice given in such cases. Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases. . . . " Courts have, in most instances, liberally construed the fourth clause of this statute in that all information acquired by the physician in the course of his professional business falls within the privilege. Thus facts concerning the patient's mental condition are equally protected, even though the physician may have been called to remedy physical ailments. Towles v. McCurdy, supra n.2; Heuston v. Simpson, 115 Ind. 62, 63, 17 N.E. 261, 262 (1889); Masonic Mutual Benefit Assoc. v. Beck, supra n.4. At other times, however, the courts have declared that the the statute under discussion is in derogation of the common law and should not be enlarged by construction. Myers v. State, 192 Ind. 592, 599, 137 N.E. 547, 550 (1922); Bower v. Bower, 142 Ind. 194, 202, 41 N.E. 523, 525 (1895). And see William Laurie Co. v. McCullough, 174 Ind. 477, 483, 488, 90 N.E. 1014, 1016, 1018 (1910) where the physician-patient privilege was both liberally and strictly construed for different purposes.

For purposes of comparison, the California statute which is representative of those in several other jurisdictions, provides in part: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases . . . 4. *Physician and patient.* A licensed physician or surgeon cannot, without the consent of patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; . . " Cal. Code Civ. Proc. (Deering, 1941) §1881. The States which have statutes similar to that of California have not, however, adopted the proviso clause. Those States and their statutes are: Idaho Code (1932) §16-203; Mont. Rev. Codes (Anderson & McFarland, 1935) §10536; Nev. Comp. Laws (Hillyer, 1929) §31-0106; Ore. Comp. Laws Ann. (1940) §3-104; S.D. Code (1939) §36.0101; Utah Code Ann. (1943) §104-49-3; Wash. Rev. Stat. Ann. (Remington, 1932) §1214. The statutes similar to that of Indiana making physicians "incompetent" te testify are: Kan. Gen. Stat. (Cormick, 1935) §60-2805; Mo. Rev. Stat. (1939) §1895; Okla, Stat. (1941) tit. 12, §385. Nevertheless, both Kansas and Missouri Courts allow waiver by heirs. See n.23 infra.

absolute incompetency; that it confers a privilege upon patients for whose benefit it was enacted either to claim or waive it; and that if the patient does not claim the privilege the physician cannot refuse to testify.[7]

A review of the decisions involving an application of this statute discloses that the foregoing interpretation is always applied when the patient is living and a party to the suit.[8] By analogy with other privileges, the patient's privilege does not die with the patient, but survives him to be claimed or waived by those persons who are regarded as standing in his place.[9] Thus in life insurance cases it has been held that the widow or the daughter, as beneficiary under the policy, stands in the place of the deceased patient for the purpose of claiming or waiving his privilege.[10] Also in will contests it has been consistently held that the executor or administrator can claim or waive the patient's privilege in order to protect the interests of the patient's estate.[11] It can be said, therefore, that

7. Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. O'Conner, 171 Ind. 686, 689, 85 N.E. 969, 970 (1908); Penn. Mutual Life Insurance Co. v. Wiler, 100 Ind. 92, 100 (1885).

8. In actions to recover damages for personal injuries, for example, the courts have consistently regarded the statute as creating a privilege and not a rule of absolute disqualification. Thus the person for whose benefit the statute was enacted must claim its protection. Waiver, on the other hand, may be express or implied. See Pittsburgh R. Co. v. O'Connor, supra n.4 (waiver by failing to claim at a prior trial); Northern Indiana Public Service Co. v. McClure, 108 Ind. App. 253, 24 N.E.2d 78 (1940) (waiver by opening up the issue in calling one of several physicians to testify as to the fact in controversy); cf. Schlarb v. Henderson, 211 Ind. 1, 4 N.E.2d 205 (1936). And in suits against the physician for malpractice, it seems that the privilege is waived as to all matters connected with the treatment of the ailment in which defendant physician participated. Lane v. Boicourt, 128 Ind. 420, 27 N.E. 1111 (1890); Becknell v. Hosier, 10 Ind. App. 5, 37 N.E. 580 (1893). In the latter case, the court applied by analogy the rule of those cases where a client sues his attorney for malpractice, citing the early case of Nave v. Baird, 12 Ind. 318 (1859).

9. Pence v. Myers, 180 Ind. 282, 101 N.E. 716, (1913); Penn. Mutual Life Insurance Co. v. Wiler, 100 Ind. 92, 101 (1885); Masonic Mutual Benefit Assoc. v. Beck, 77 Ind. 203, 210 (1881). See also 8 Wigmore, "Evidence" §2387 (3d ed. 1940).

10. Penn. Mutual Life Insurance Co. v. Wiler, supra n.4; Masonic Mutual Benefit Assoc. v. Beck, supra n.4 (widow allowed to claim the deceased patient's privilege in both cases); Excelsior Mutual Aid Assoc. v. Riddle, 91 Ind. 84 (1883) (daughter entitled to claim).

11. Sager v. Moltz, 80 Ind. App. 122, 139 N.E. 687 (1923) (will contest; executor allowed to waive the privilege in order to show mental capacity of the decedent over the objections of the only heir at law who desired to claim it); Studebaker v. Faylor, 52 Ind. App. 171, 98 N.E. 318 (1912) (deed contest; administrator was present in court but was not a party to the suit, and he expressly waived

for most purposes the statute creates a true privilege which must be claimed in order to secure its protection.[12] Unlike rules of absolute disqualification, the privilege, which is a rule of conditional exclusion, may be exercised only by the person for whose benefit it exists or by a person whom courts regard as standing in his place. If no such person is party to the suit or present in the court, there is no one available to exercise the privilege.[13]

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the privilege. Heirs who sought to have the deed set aside due to grantor's mental incapacity also expressly waived the privilege. Grantees, however, had failed to object to the testimony of the physicians at a prior trial. It was held that all persons in whom there could be a right to insist on the privilege had either expressly waived it, or had impliedly done so by standing by and allowing testimony to be given). Morris v. Morris, 119 Ind. 341, 21 N.E. 918 (1889) (will contest; administrator with will annexed allowed to waive the decedent's privilege over the objections of the widow who sought to claim it). See also Brackney v. Fogle, 156 Ind. 535, 60 N.E. 303 (1901) (administrator successfully claimed the privilege when heirs sought to waive it in a will contest); cf. Heaston v. Krieg, 167 Ind. 101, 77 N.E. 805 (1906) (suit to revoke the probate of a will and to substitute a second will. The executor of the first will was not allowed to waive the privilege in order to show the mental capacity of the testatrix with regard to the second will. It appeared that the executor's wife was a beneficiary under the first will). And see Scott v. Smith, 171 Ind. 453, 85 N.E. 774 (1908) (administrator not allowed to waive the privilege for the sole purpose of resisting an application to remove him).

The Court in the instant case cited the latter two cases in support of the proposition that the personal representative may waive in order to protect the interests of the patient's estate only. See instant case at 855. Quaere, while the deed or will may be prima facie the patient's valid act, Heaston v. Krieg, supra, it would seem to be equally within the patient's interests and hence the interests of his estate to find out whether or not the instrument was in fact valid. If in fact the patient lacked the necessary mental capacity to execute a valid deed or will, it is manifest that the persons who were not intended by the patient to take are allowed to prevail over the natural objects of his bounty. See Winters v. Winters, 102 Iowa 55, 71 N.W. 184 (1897).

12. See 8 Wigmore, "Evidence" §2175 (3d ed. 1940), where the author groups rules of exclusion into two categories: absolute and conditional. "The former class of prohibitions are enforced by the Court like other rules of Evidence; the latter are applied only on demand of the person who is supposed to be affected in his interests by the extrinsic policy in question and to be protected by the rule from an injury to that interest." Privileges are members of the latter class.

13. See 8 Wigmore, "Evidence" §§2175, 2327, 2388 (3d ed. 1940). In discussing the attorney-client privilege, in §2327 the author points out: "There is no analogy between a rule of conditional exclusion in the nature of a privilege and an absolute rule of disqualification. Yet the common juxtaposition of the two classes of rules in statutory enactments—due in part to the indiscriminate use of the term "competent," long ago denounced by Bentham—has from time to time made it necessary for the Bench to correct this elementary misunderstanding on the part of the Bar." In discussing

It is doubtful, however, that the decisions in the instant case and the *Towles* case can be explained in terms of "privilege." If it is a privilege with which we are dealing, it would seem that the right to claim necessarily carries with it an equal right to waive.[14] But in the instant case and in the *Towles* case heirs were denied the right to waive; this would indicate that they likewise could not claim the privilege as such had they desired to do so. It hardly can be supposed that devisees or grantees are entitled to *claim* when the heirs cannot.[15] Nevertheless, devisees in the *Towles* case and grantees in the instant case were successful in excluding the testimony of physicians who attended the deceased patient. It seems, therefore, that these decisions adopt a construction of the statute which renders physicians absolutely incompetent to testify as to the mental and physical condition of their patients; and that by analogy with other rules of absolute dis-

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the physician-patient privilege with regard to the problem of waiver by conduct, in §2388 the author indicates that the same observation applies. That the distinctions between the claim of a privilege and an objection to incompetent testimony is of importance not only as the subject of academic debate, but also as a practical consideration in law suits, is illustrated by the decisions in the instant case and in the *Towles* case. While the Court in both cases talks in terms of privilege, it seems difficult to explain the results in such terms. See also 8 Wigmore, "Evidence" §§2386, 2321, 2196 (3d ed. 1940). The patient's privilege belongs to him as a patient and not as a party to the suit, and if he is present in court he may claim the privilege.

14. It is discretionary with the patient as to whether he will claim or waive. There seems to be no reason why the person who stands in the place of a deceased patient should not have the same discretion. But the courts have held that a personal representative may claim or waive in order to protect the interests of the patient's estate only, n.11 supra; and some courts have even enunciated the proposition that only the person who seeks to uphold the instrument may exercise that patient's privilege to claim or waive. Heaston v. Krieg, 167 Ind. 101, 118, 77 N.E. 805, 810 (1906); Sager v. Moltz, 80 Ind. App. 122, 129, 139 N.E. 687, 690 (1923). It would appear that the courts are assuming conclusively that if the patient were alive he would exercise his right to claim or waive in order to protect the prima facie validity of the instrument contested. But quaere, in the case of a personal representative does it necessarily follow that protecting the validity of the contested instrument benefits the estate. Cf. comment in n.11 supra. See also Platz, "The Competency of Attorneys and Physicians to Disclose Privileged Communications in Testamentary Cases," 1939 Wis. L. Rev. 335, 356.

15. This would be true whether or not the devisees or grantees were also heirs or were strangers. In Studebaker v. Faylor, 52 Ind. App. 171, 173, 174, 98 N.E. 318, 319 (1912) it was indicated in dicta that grantees (and no doubt devisees) are not entitled to claim the patient's privilege because such persons cannot be regarded as personal representatives of the patient.

qualification, any party to the suit may successfully object. The objection to the evidence in the instant case may be considered therefore as an objection to incompetent evidence and not as claiming a privilege. If this is one of the several possible explanations of those otherwise inarticulate "obvious reasons," it appears that the Court has departed from precedent without bothering to overrule or distinguish previous decisions supporting a contrary interpretation of the statute, and hence a contrary result.[16]

But while some decisions support a different result, the rule of the instant case and the *Towles* case, which is applicable only to deed and will contests, is also supported by precedent.[17] Perhaps, then, there is something distinctive about deed and will contests which justifies different treatment. No doubt it is extremely unpleasant to hear persons, all of whom are claiming under the deceased patient, arguing in public about his mental capacity. But since the courts permit heirs, devisees, and grantees to voice their personal opinions as to the deceased patient's sanity,[18] it is doubtful that this foregoing consideration has induced the courts to exclude testimony of physicians. So while the court and jury must listen to this often undependable testimony of lay witnesses, the decedent's physician who might be able to qualify as an expert must sit idly by and be a witness only to the suppression of truth rather than to its ascertainment.

Perhaps the remnants of feudal laws of property arise to plague us here. Real property, under Indiana law, passes directly to the heirs,[19] while personal property passes to the

16. A contrary interpretation, and hence a contrary result, is supported by those cases which not only explain the conclusion in terms of privilege, but also apply the rationale of privilege in the process. See n.8 and n.11. A waiver by heirs is supported by the life insurance cases, n.10 supra. That in such cases the privilege should not exist at all is supported by analogy with the cases involving similar controversies where the attorney-client privilege is invoked but held not to apply. See n.26 infra.

17. Pence v. Myers, 180 Ind. 282, 101 N.E. 716 (1913); Gurley v. Park, 135 Ind. 440, 35 N.E. 279 (1893). See also Heuston v. Simpson, 115 Ind. 62, 17 N.E. 261 (1888).

18. Hoppes v. Steed, 86 Ind. App. 201, 156 N.E. 574 (1927); Davis v. Babb, 190 Ind. 173, 125 N.E. 403 (1920); Burkhart v. Gladish, 123 Ind. 337, 24 N.E. 118 (1889); Staser v. Hogan, 120 Ind. 207, 21 N.E. 911 (1889); Lamb v. Lamb, 105 Ind. 456, 5 N.E. 171 (1885).

19. Ind. Stat. Ann. (Burns, 1933) §6-2301; Gavit, "Indiana Law, Future Interests, Wills, Descent" §137 (1934).

executor or administrator of the decedent's estate.[20] So, in actions by heirs against legatees, no doubt the executor or administrator has a duty to claim or waive the privilege as the situation may require in order to protect the interests of the patient's estate. But on the other hand if the suit involves real property and the controversy is among heirs and devisees or among heirs and grantees, it would seem that the heirs would have a sufficient standing to claim or waive the privilege. Under the rule of the instant case and the *Towles* case, if the testator or grantor actually lacked the mental capacity necessary to execute a valid deed or will, persons who may not be the natural objects of his bounty are allowed to take under an invalid instrument. Furthermore, even if an instrument is valid, the law favors a construction which vests the property in the natural objects of the decedent's bounty.[21] How then can these decisions be justified when one possible result is to assist a grantee or devisee, (who may not be a heir), to sustain an instrument the validity of which is in controversy?

It has been seen that heir-beneficiaries are regarded as standing in the place of the patient for purpose of claiming or waiving his privilege in life insurance cases.[22] It seems to follow that heirs should be entitled to claim or waive the privilege in deed and will contests. Presumptively, at least, an heir has more interest in protecting the patient's reputation than does a devisee or grantee, and in many jurisdictions where the privilege exists heirs are entitled to waive.[23] But

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20. Ind. Stat. Ann. (Burns, 1933) §6-701 (executor or administrator responsible for personal property but not for real property); Gavit, op. cit. supra, n.19.

21. Ames v. Conry, 87 Ind. App. 149, 156, 165 N.E. 435, 438 (1927); Oliphant v. Humphrey, 193 Ind. 656, 660, 141 N.E. 517, 518 (1923); Aspy v. Lewis, 152 Ind. 493, 495, 52 N.E. 756, 757 (1899); Crew v. Dixon, 129 Ind. 85, 90, 27 N.E. 728, 730 (1891).

22. See life insurance cases cited n.10 supra, where widows were allowed to claim the privilege being regarded as standing in the place of the deceased patient for that purpose. There is no doubt that a surviving spouse is a statutory heir in Indiana. Ind. Stat. Ann. (Burns, 1933) §§6-2312 (every rule of descent and distribution prescribed in the Act is subject to the provisions made for a surviving husband or wife), 6-2313, 6-2321, 6-2324. See Davis v. Kelley, 179 Ind. 13, 16, 97 N.E. 336, 337 (1912).

23. While the devisees or grantees may also be heirs in fact, for purposes of the suit they are present in the capacity as devisees or grantees and not as heirs. See Bruington v. Wagner, 100 Kan. 10, 164 Pac. 1057 (1917). That in many jurisdictions where the privilege exists, heirs are entitled to waive, see: Schornick v. Schornick, 25 Ariz. 563, 220 Pac. 397 (1923); In re Shapter's Estate, 35 Colo.

if the court does not allow the persons designated as devisees and grantees to claim the privilege, there may be a practical difficulty when both parties to a will or deed contest are heirs of the patient. There would seem to be little or nothing to justify a court in prefering one set of heirs by allowing them to waive the privilege over the objections of the other set who seek to claim it.

Perhaps the best solution to the problem is to apply the rationale of privilege to the statutory provision under discussion and to refuse to permit either party to claim the privilege in deed and will contests or to hold that in such cases the privilege does not apply. At one time there was adequate support for the foregoing solution. The physician-patient privilege has always been regarded as being essentially the same as the attorney-client privilege, and the Indiana courts have frequently drawn analogies from one privilege to the other.[24] In *Kern v. Kern*[25] it was held that where the controversy is among heirs and devisees in a will contest, the attorney-client privilege does not apply. The Court declared that "In such cases it is said that the very foundation upon which the rule proceeds seems to be wanting."[26] By analogy, the patient's privilege should not apply to will contests or deed contests.[27]

578, 85 Pac. 688 (1905); Sprouse v. Magee, 46 Idaho 622, 269 Pac. 993 (1928); Boyles v. Cora, 232 Iowa 822, 6 N.W.2d 412 (1942); Winters v. Winters, 102 Iowa 55, 71 N.W. 184 (1892); Gorman v. Hickey, 145 Kan. 54, 64 P.2d 587 (1937); Thompson v. Ish, 99 Mo. 160, 12 S.W. 510 (1889); In re Gray, 88 Neb. 835, 130 N.W. 746 (1911); Grieve v. Howard, 54 Utah 225, 180 Pac. 423 (1919); In re Thomas Estate, 165 Wash. 42, 4 P.2d 837 (1931).

24. Myers v. State, 192 Ind. 592, 601, 137 N.E. 547, 550 (1922); Springer v. Byrum, 137 Ind. 15, 36 N.E. 361 (1894); Penn. Mutual Life Insurance Co. v. Wiler, 100 Ind. 92, 101 (1885); Masonic Mutual Benefit Association v. Beck, 77 Ind. 203 (1881).

25. 154 Ind. 29, 55 N.E. 1004 (1900).

26. Id. at 154 Ind. 29, 33, 55 N.E. 1004, 1006 (1900). The reasons given by the Court in Russell v. Jackson, 9 Hare 387, 68 Eng. Rep. 558 (1851) (cited by the Indiana Court in the Kern case, supra n.25) is that where the question is which of two parties, both claiming under the client, should get the property, it would be arbitrary to hold that the property and the client's privilege belong to one party and not the other.

27. However, the same Court in Brackney v. Fogle, 156 Ind. 535, 60 N.E. 303 (1901) held that the analogy is improper and that the rule announced in the *Kern* case, supra n.25, had no application to will contests among heirs and devisees where the physician-patient privilege is invoked, even when both parties claim under the patient. Counsel submitted the *Kern* case to the Court in Towles v. McCurdy, supra n.1, but the *Brackney* case was followed and the rule was adopted that in will contests where the controversy is among heirs and devisees, for "obvious reasons" neither set may waive the privilege over the objections of the other set who seek to sustain the will.

It is submitted that the rule announced in *Towles v. McCurdy* and adopted by the Court in the instant case should not be applied in the future to either will or deed contests where the controversy is among heirs and devisees or grantees. The rule certainly is not necessary to protect the reputation of the patient for whose benefit the statute was enacted, for proof that the patient lacked the mental capacity to execute a valid deed or will is not proof of insanity.[28] There seems to be nothing to prevent a court from requiring a person who claims the privilege to show that if the physician's testimony is given, the patient's reputation might be harmed. As in other rules of exclusion, the admissibility of the physician's testimony would then depend on the sound discretion of the court.[29] Thus protection to the patient afforded by the statute would be preserved, and at the same time the court and jury would have a better chance to learn the truth about the fact in controversy. But if rational symmetry of the law relating to privileged communications is desirable, then it is preferable for courts to apply the rule of *Kern v. Kern* and hold by analogy with the attorney-client privilege that in deed or will contests among heirs and grantees or devisees, the patient's privilege cannot be claimed by either party.[30]

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28. Blough v. Parry, 144 Ind. 463, 489, 40 N.E. 70, 43 N.E. 560, 563 (1895); and see Harrison v. Bishop, 131 Ind. 161, 30 N.E. 1069 (1891) (while the adjudication of mental unsoundness in a proceeding for the appointment of a guardian conclusively establishes the fact of his inability to manage his estate, it does not necessarily establish the existence of such unsoundness as would incapacitate him from making a valid will).

29. Tyrrel v. State, 177 Ind. 14, 97 N.E. 14 (1912) (within Court's discretion to determine whether or not a child of eight was capable of testifying); Eckman v. Funderberg, 183 Ind. 208, 108 N.E. 577 (1915) (within Court's discretion to determine whether or not a physician had qualified as an expert). And see 1 Wigmore, "Evidence" §16 (3d ed. 1940) and 2 id. §561 as to discretion of the Court generally. North Carolina has adopted the privilege under discussion in essentially the same form as the New York statute, n.3 supra, but added a proviso which reads: "Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary for a proper administration of justice." N.C. Gen. Stat. (Michie, 1943) §8-53. Writers have recommended that this provision be adopted in all jurisdictions where the privilege exists. See 8 Wigmore, "Evidence" §2380a (3d ed. 1940).

30. To reinstate the rule of the *Kern* case, supra n.25, it would probably be necessary to overrule the *Brackney* case, supra n.27 and perhaps also the cases which have followed it—Towles v. McCurdy, supra n.1, Pence v. Myers, supra n.17, and the instant case. It is submitted that these cases are wrong on principle, and that the Courts can properly take such action. Appropriate legislation is also recommended.