LEGISLATION

PRESENT STATUS OF THE MEDICAL PRIVILEGE—In the burst of legislative activity which led to many reforms in the adjective law of the states during the nineteenth century, a privilege analogous to the common law one existent between attorney and client [1] was created between physician and patient.[2] New York, in 1828, was the first to declare that

> "No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such person as a physician, or to do any act for him as a surgeon." [3]

Statutes similar in practically every important respect were subsequently passed by more than half of the states and territories.[4]

The purpose of the statute, as expressed by the commissioners who drafted it,[5] was to encourage the patient to make all disclosures to his doctor necessary to effectuate proper treatment, without the fear of later disclosure before a public tribunal, and consequent embarrassment or disgrace.[6] With the removal of bars to confidence, a swifter and more general cure of diseases, and increased public health, were envisioned.[7] Although the initiators of the privilege must have been aware that in particular cases the right conferred would have detrimental effects in withholding material truth at trial, they undoubtedly thought, and at least for their own times possibly correctly, that a greater public policy was served by conferring rather than withholding the privilege. The desire to please the medical profession, which had long expressed an aversion to the communication at any time of their patients' secrets, was, of course, an added consideration.

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[1] 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2290 *et seq.*

[2] At common law, there was no medical privilege. See Note (1927) 71 SOL. J. 626. There are occasional *dicta* favoring the granting of such a privilege. Wilson v. Rastall, 4 T. R. 753, 760 (Eng. 1792); Greenough v. Gaskell, 1 Myl. & K. 98, 103 (Eng. 1833). As to the admissibility of a patient's statements to a physician at common law, see Note (1930) 67 A. L. R. 10.

[3] N. Y. REV. STAT. (1829) vol. II, 406.

[4] ARIZ. CODE (Struckmeyer, 1928) § 4412 (6); ARK. DIG. STAT. (Crawford & Moses, 1921) § 4149; CAL. CODE CIV. PROC. (Deering, 1931) § 1881 (4); COLO. ANN. STAT. (Mills, 1930) § 8072 (4); IDAHO COMP. STAT. (1919) § 7937 (4); IOWA CODE (1931) §§ 11263, 11268 (4), (8), (9); IND. ANN. STAT. (Burns, 1926) § 550 (4); KAN. REV. STAT. ANN. (1923) c. 60, § 2805; KY. STAT. (Carroll, 1930) § 2062a (24); MICH. COMP. LAWS (1929) § 14216; MINN. STAT. (Mason, 1927) § 9814 (4); MISS. CODE ANN. (1930) § 1536; MO. REV. STAT. (1929) § 1731; MONT. REV. CODE (Choate, 1921) § 10536; NEB. COMP. STAT. (1922) § 8840; NEV. COMP. LAWS (Hillyer, 1929) § 8974; N. Y. CIV. PRACT. (Cahill, 1931) CIV. PRACT. ACT, § 352; N. C. CODE ANN. (Michie, 1931) § 1798; OHIO ANN. CODE (Throckmorton, 1930) § 11494; OKLA. STAT. (1931) § 272; ORE. CODE ANN. (1930) c. 9, § 404 (4); PA. STAT. ANN. (Purdon, 1930) tit. 28, § 328; S. D. COMP. LAWS (1929) §§ 2730, 2731; UTAH COMP. LAWS (1917) § 7124; WASH. COMP. STAT. (Remington, 1922) § 1214; W. VA. CODE ANN. (1932) § 4992 (e); WIS. STAT. (1931) § 325.21; WYO. REV. STAT. ANN. (1931) c. 89, § 1703; ALASKA COMP. LAWS (1913) § 1870; D. C. CODE (1929) tit. 9, § 20; HAWAII REV. LAWS (1915) § 2615; PORTO RICO REV. STAT. & ORG. LAWS (1913) § 1405. Although the interpretations of the courts sometimes seem to have little regard for the fact, the statutes *now* contain important differences, because of amendments.

[5] REPORTS OF COMMISSIONERS ON REVISION OF THE STATUTES OF NEW YORK, III., Appendix, 737.

[6] See Eddington v. Mutual Life Ins. Co., 67 N. Y. 185, 194 (1876). *Quaere:* whether the patient would usually be embarrassed or disgraced. 5 WIGMORE, *op. cit. supra* note 1, § 2389.

[7] But people with genuine ailments would hardly hesitate to consult a doctor, especially where life itself was at stake.

To the courts was left the problem of determining when and how the statutes applied. Upon such meagre wording as that of the New York statute, hardly fitted even as the skeletal framework for the abundance of factual situations which have been referred to it, they constructed a substantial body of adjective law. In deciding to what persons the privilege pertained, the legislative will was fairly evident as a guide. It was rightly declared that the privilege was that of the patient, and not the physician.[8] Since the usual statute refers only to communications to "physicians and surgeons",[9] by negative implication, dentists, chiropractors, druggists and the like were excluded.[10] Although some statutes expressly confer the privilege upon a nurse,[11] the holdings in most jurisdictions are that she must be acting in the capacity of assistant to the confidential physician in order to be restrained from testimony.[12] The physician or surgeon must be authorized or licensed.[13] Consequently, physicians of another state do not come within the right conferred.[14] To this point, it may be observed, the decisions of the courts are accountable to a fairly obvious expression of legislative will. In problems dealing with the *character* of the asserted privilege, however, their own discretion governed. Most statutes declare little more than that the "communication" should be "necessary" for "treatment". With so little stated as to the intent of the legislature, the courts resorted to consideration of the spirit of the statute; its purpose; the evils it sought to ameliorate. They could have construed so as virtually to nullify the effect of the statute, by declaring, for example, that although a *physician* could not testify as to his patient's confidences, the *patient* could be compelled to supply the information.[15] To the contrary, most courts held that the statutes should be liberally interpreted in favor of the privilege, the reason being, that, although in derogation of the common law, the statutes were remedial legislation.[16] And although there are

[8] This is well settled. Doty *et al.* v. Crystal Ice & Fuel Co., 118 Kan. 323, 235 Pac. 96 (1925); Markham v. Hipke, 169 Wis. 37, 171 N. W. 300 (1919). But the wording of some of the statutes is such as to suggest that the *physician* has the option either alone or jointly with the patient. So, the Arkansas statute reads, "No person authorized to practice physic or surgery . . . shall be compelled to disclose any information . . . " See also statutes of Mississippi and North Carolina. See Hyatt v. Wroten, 184 Ark. 847, 43 S. W. (2d) 726 (1931). The privilege being that of the patient, he may waive it. See *infra* note 19.

[9] See Note (1930) 68 A. L. R. 176. All people assisting the physician in the performance of his duties to his patient are subject to the privilege. So, a notary who typed the patient's statement to his physician. Hogan v. Bateman Contracting Co., 184 Ark. 842, 43 S. W. (2d) 721 (1931). So, a consulting physician. Provident Life & Acc. Ins. Co. v. Chapman, 152 Miss. 747, 118 So. 437 (1928); see Baker v. Mardis, 221 Mo. App. 1185, 1 S. W. (2d) 223 (1928). See generally: Wills v. National Life & Acc. Ins. Co., 28 Ohio App. 497, 162 N. E. 822 (1928); Howe v. Regensburg *et al.*, 75 Misc. 132, 132 N. Y. Supp. 837 (1911); Beave v. St. Louis Tr. Co., 212 Mo. 331, 111 S. W. 52 (1908). The fact that the patient was treated at a public hospital does not defeat the privilege. See Note (1908) 14 L. R. A. (N. S.) 565.

[10] The statutes of Indiana, Ohio, Wyoming and Hawaii refer merely to "physicians". The statute of Iowa includes "a stenographer or confidential clerk" (of the physician).

[11] Arkansas, New York.

[12] Meyer v. Russell, 55 N. D. 546, 214 N. W. 857 (1927); see Borosich v. Metropolitan Life Ins. Co., 191 Wis. 239, 210 N. W. 829 (1926); Hobbs v. Hullman, 183 App. Div. 743, 171 N. Y. Supp. 390 (1918). See Note (1925) 39 A. L. R. 1416.

[13] The statutes of about half the states expressly make this a requirement. See Laurie Co. v. McCullough, 174 Ind. 477, 90 N. E. 1014 (1910).

[14] Colorado Springs & Interurb. Ry. Co. v. Fogelsong, 42 Colo. 341, 94 Pac. 356 (1908).

[15] Examples of the way in which courts have preserved the substance of the statute by holding that what could not be done directly could not be done indirectly: patient need not testify as to what he told physician, Dambmann v. Metropolitan St. Ry. Co., 55 Misc. 60, 106 N. Y. Supp. 221 (1907); no unfavorable inference can be drawn from patient's refusal to allow his physician to testify, Meyer v. Russell, *supra* note 12; testimony at cross-examination as to nature of physician's services does not waive, Monpleasure v. American Car & Foundry Co., 293 S. W. 84 (Mo. App. 1927).

[16] Pride v. Interstate Business Men's Ass'n, 207 Iowa 167, 216 N. W. 62 (1927). The minority takes the view that since the statutes are in derogation of the common law, they should be strictly construed. Chadwick v. Beneficial Life Ins. Co., 54 Utah 443, 181 Pac. 448

many, in increasing number, who lament such judicial construction [17] because of the resultant latitude given to fraud, and the restraint of truth in court, it was incumbent upon the judiciary so to interpret. The governing indices should be: is this the sort of relationship or communication which it was the purpose of the statutes to encourage; if the privilege were not upheld here, would the law be avoided by indirection? In justification, it must be noted that it was evidently the desire of the legislature to put communications to physicians upon a status equal to those to attorneys, and to adapt the common law decisions under attorneys' privilege. So, in code states, the right of the patient is almost always grouped with the right of the client.[18]

There were some restrictions early set up by the courts. That they recognized flaws in the legislation, is seen by the frequency with which they held, once a situation involving privilege had been recognized as existent, that such privilege had been waived by act of the patient.[19] According to the statutes, it may reasonably be deduced that waiver could never be implied against the patient's interest.[20] But even the courts most favorable to medical privilege have held such waiver to take place upon the occurrence of certain events.[21] So, where the presence of a third party at the consultation [22] or other surrounding circumstances [23] make it evident that the communication was not entirely confidential, waiver is implied, in spite of the fact that at trial the patient expressly objects to the inclusion of such testimony. If he consults his physician with a view to obtaining him as a witness,[24] or if he voluntarily submits to a physical examination not for the purpose of treatment,[25] he is held to have waived. If, at the trial, the patient fails to object to the offered testimony of his physician; [26] if he at a previous trial has waived his right to the exclusion; [27] if he has called as witness another physician,[28] or in fact, anyone else,[29] to testify to the same

(1919). The Pennsylvania court employed such interpretation with the result that in that state the privilege is practically negligible. See *In re* Phillips' Estate, 295 Pa. 349, 145 Atl. 437 (1929), (1929) 3 TEMP. L. Q. 445. Section 2 of the Code of Civil Procedure of Kansas provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code." KAN. REV. STAT. ANN. (1923) c. 60, § 102.

[17] For sharp criticism, see Note (1928) 12 MINN L. REV. 390.

[18] This is, of course, not conclusive. The Iowa statute provides: "No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person."

[19] On the general subject see Note (1931) 6 WASH. L. REV. 71.

[20] The wording of the statutes apparently makes waiver conditional upon the patient's consent. Nevertheless, the courts adopted the common law principles of waiver, as in attorney and client privilege, and added thereto.

[21] Such statutes as that of New York, requiring waiver to be in open court, cut down considerably the opportunities for holding implied waiver.

[22] *In re* Swartz's Will, 79 Okla. 191, 192 Pac. 203 (1920). See Note (1922) 16 A. L. R. 450.

[23] *E. g.*, disclosure to another of the same facts. *In re* Visaxis' Estate, 95 Cal. App. 617, 273 Pac. 165 (1929).

[24] Strafford v. Northern Pac. Ry. Co., 95 Wash. 450, 164 Pac. 71 (1917). But *cf.* Michaels v. Harvey, 179 S. W. 735 (Mo. App. 1915).

[25] See notes 66, 67, *infra.*

[26] See Note (1914) 48 L. R. A. (N. S.) 395, at 399. The burden is upon the one seeking the privilege to prove its existence. State v. Masters, 197 Iowa 1147, 198 N. W. 509 (1924).

[27] State v. Long, 257 Mo. 199, 165 S. W. 748 (1914). *Contra:* Arizona East. R. Co. v. Matthews, 20 Ariz. 282, 180 Pac. 159 (1919). Such failure to object must be conscious. Metropolitan Life Ins. Co. v. Fitzgerald, 137 Ark. 366, 209 S. W. 77 (1919). Once waived, the privilege cannot be revived. Stalker v. Breeze, 186 Ind. 221, 114 N. E. 968 (1917).

[28] Waiver of privilege as to one physician waived as to all in same transaction (majority view). See Note (1929) 62 A. L. R. 680.

[29] Moreno v. New Guadalupe Min. Co., 35 Cal. App. 744, 170 Pac. 1088 (1918); *cf.* Brayman v. Russell & Pugh Lumber Co., 31 Idaho 140, 169 Pac. 932 (1917).

matter; waiver is held. Such rulings are illustrative of the fact that courts, liberal in finding situations which the privilege embraced, were also fairly liberal in finding that in some manner the privilege had been destroyed.

The draftsmen of the acts can hardly be blamed for not being gifted with prophetic powers. At the time of the passage of most of the statutes, the privilege was of comparatively little importance as an instrument for either good or evil. The time came, however, when the privilege came in conflict with powerful interests, and was raised in almost innumerable cases. The development, at the turn of the century, of life insurance, accident insurance, workmen's compensation and the liability of common carriers, rapidly expanded the province of medical privilege, causing many extensions and limitations.

Contributing to the unpopularity of the privilege was the development of dispassionate adverse criticism on the part of authorities in the law of evidence; in particular, Dean Wigmore.[30] Fifty years ago, comment was lukewarm: today, it is severely antipathetic.[31] It is undoubtedly true that present conditions and the experience of trial and error have strengthened the criticism and have furnished abundant illustrations of the fallibility of such legislation. The battle has now been fought in many legal textbooks and journals; the result is certainly, at least for the present, an intellectual defeat for the proponents of medical privilege.

It must be borne in mind that early decisions had established the privilege in all manner of cases, civil, criminal and probate, and that the privilege was enforced against all, in favor of the patient, even after death.[32] In the present century, however, various amendments have been added by most of the important jurisdictions.[33] In California, for instance, an amendment of 1911 [34] provided, in substance, that the personal representatives and heirs of a deceased patient may waive the privilege in any action brought to recover damages on account of death. In 1927 [35] it was further provided that in probate proceedings, an attendant physician may testify as to the mental condition of his deceased patient. Amendments of this kind are now fairly common.

Perhaps a more important qualification of the privilege may be found in the usual clauses in Workmen's Compensation Acts,[36] which virtually reject the doc-

[30] 5 WIGMORE, *op. cit. supra* note 1, § 2380.

[31] *E. g.*, see 5 JONES, COMMENTARIES ON EVIDENCE (2d ed. 1926) §§ 2189, 2171; Purrington, *An Abused Privilege* (1906) 6 COL. L. REV. 388.

[32] See Note (1891) 17 Am. St. Rep. 565.

[33] Generally speaking, proviso clauses in the statutes are amendments. About half of the states have not revised: Arkansas, Idaho, Iowa, Kansas, Mississippi, Missouri, Montana, Nebraka, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Utah, West Virginia, Wyoming. Some of the additions, it must be admitted, are merely codifications. Important among the amendments are those which abolish the privilege in actions for personal injuries, as in California and Pennsylvania. See the amendments to the Iowa statute—grave incursions upon the field of privilege. Among the most recent are those of Wisconsin, passed in 1927. Wis. Laws, 1927, c. 334.

[34] Cal. Stat. 1911, 1135, 1136.

[35] Cal. Stat. 1927, 1154, 1155.

[36] ARIZ. CODE (Struckmeyer, 1928) § 1444; COLO. ANN. STAT. (Mills, 1930) § 8161; IDAHO COMP. STAT. (1919) § 6242; IOWA CODE (1931) § 1387; IND. ANN. STAT. (Burns, 1926) § 9472 (2); KAN. REV. STAT. ANN. (1923) c. 44, § 519; KY. STAT. (Carroll, 1930) §§ 4918, 4941; MICH. COMP. LAWS (1929) § 8435; MINN. STAT. (Mason, 1927) §§ 4283 (2), (5), 4311; MO. REV. STAT. (1929) § 3311 (e); MONT. REV. CODE (Choate, 1921) § 2917; NEB. COMP. STAT. (1922) § 3057; NEV. COMP. LAWS (Hillyer, 1929) § 2713; N. Y. WORKMEN'S COMP. LAW (1922) § 19; OHIO ANN. CODE (Throckmorton, 1930) §§ 1465 (95); S. D. COMP. LAWS (1929) § 9463; Utah Laws 1921 c. 67, § 3152; WIS. STAT. (1931) § 102.13; WYO. REV. STAT. ANN. (1931) c. 124, § 129.

The above sections govern communications of an otherwise privileged nature. Mississippi, Arkansas and North Carolina have been omitted because, as yet, these states do not have Workmen's Compensation Laws. Some of the Compensation Acts contain no mention of physician's testimony. The cited sections are of varying character. Some, like that of

trine entirely in regard to this situation. Some statutes, it must be noted, however, confine the abrogation to cases of physicians in attendance upon the patient subsequent to the accident sued on.[37] A few bear no express limitation of medical privilege.[38]

There is a considerable body of statutes referring to criminal proceedings of various kinds where the legislature has recognized exceptions, obviously because of expediency. These statutes,[39] sporadic in appearance and nondescript in character, are nevertheless noteworthy as illustrative of the change in attitude of the legislature, as the crime problem came to assume major importance in recent years. So, a Missouri statute referring to prosecutions for abortion contains a clause:

> "Provided further, that no conviction shall be based alone upon such declarations unless corroborated as to the fact that an abortion or miscarriage has taken place, and in all such prosecutions aforesaid any physician or medical practitioner who may have attended or prescribed for such woman shall be a competent witness in said cause to testify concerning any facts relevant to the issue therein, and shall not be disqualified or held incompetent by reason of his relation to such woman as an attending physician or surgeon".[40]

Also illustrative of this category of qualification, is a Michigan statute[41] which, referring to criminal proceedings against people suffering from venereal diseases who enter into marriage, provides that any physician who has attended or prescribed for any husband or wife suffering from such disease shall be compelled to testify thereto.

There is a growing group of statutes which, while depriving the witness of the privilege against self-incrimination in certain criminal proceedings, grant him immunity.[42] Statutes for enforcing the liquor laws often contain a proviso that

> "No person shall be excused from testifying on any prosecution for violating any law against the sale or manufacture of intoxicating liquors, but no discovery made by such person shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned for the offense done or participated in by him".[43]

Wisconsin, require that "any physician having attended any employee may be required to testify before the commission when it shall so direct". Most of them make the testimony of the physician in attendance for the injury sued on compulsory before the commission.

[37] See *supra* note 36.

[38] *E. g.*, see OKLA. STAT. (1931) § 13359.

[39] It is realized that the statutes discussed often have only an indirect reference to the law of medical privilege. Criminal Code Statutes generally provide that the rules of civil practice shall be applicable to criminal proceedings, and hence, by statute, in the following states medical privilege has application to criminal as well as civil proceedings: ARIZ. CODE (Struckmeyer, 1928) § 5176; CAL. PEN. CODE (Deering, 1931) § 1321; IDAHO COMP. STAT. (1919) § 9129; IND. ANN. STAT. (Burns, 1926) § 2261; IOWA CODE (1931) § 13897; KAN. REV. STAT. ANN. (1923) c. 62, § 1413; MO. REV. STAT. (1929) § 3680; ORE. CODE ANN. (1930) c. 13, § 1413. Minnesota expressly gives a criminal as well as civil applicability. MINN. STAT. (Mason, 1927) § 9814. Some states (*e. g.*, Ohio and West Virginia), group the civil and criminal rules of evidence together. So Pennsylvania, by implication, excludes the privilege from criminal cases. PA. STAT. ANN. (Purdon, 1930) tit. 19, § 681.

[40] MO. REV. STAT. (1929) § 3690.

[41] MICH. COMP. LAWS (1929) § 12695. Mention must also be made of a Minnesota statute which provides, "In any proceeding under this chapter [Bastardy] a licensed physician or surgeon may testify concerning the fact and probable date of inception of the pregnancy of his patient without her consent, and shall so testify when duly called as a witness". MINN. STAT. (Mason, 1927) § 3272 (c).

[42] UTAH COMP. LAWS (1917) § 8060.

[43] N. C. CODE ANN. (Michie, 1931) § 3406.

Statutes of similar wording in various states relate to prosecutions for rape,[44] incest,[45] and the like.[46] It seems clear that such statutes destroy the physician's privilege, at least indirectly, since the patient can be compelled to testify as to his communications, and in all probability, the physician also, even against the patient's consent.

The testimony of a physician in insanity cases is now largely governed by statute. When a person's sanity is called to question by petition in the proper form before an authorized court, the judge has power to order an examination of the person suspected.[47]

Further possibilities of qualification of a patient's right to secrecy are found in general laws relating to public health, where the interest of the individual is subservient to the public welfare. So, it is provided that state hospitals shall keep public records of the condition and ailments of their patients.[48] And it is commonly provided that any physician having knowledge of a person suffering from a communicable disease is bound immediately to report the fact to the proper health authorities.[49] There seems no reason why such records should not be available in court, in spite of the patient's objection; the reason for the rule of privilege failing, because of previous publication.[50] At least, it should be so held where such records are of a strictly public nature. The same situation applies where statutes provide that upon the death of any patient, the physician in charge at the time shall file with the Bureau of Vital Statistics a statement as to the cause of death, including the primary and secondary causes, and complications, and their duration.[51]

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[44] Utah statute cited *supra* note 42.

[45] MICH. COMP. LAWS (1929) § 16858.

[46] Prohibition statutes, where possibly medical privilege might be involved by summoning the doctor to testify as to defendant's drunkenness, etc.; IDAHO COMP. STAT. (1919) § 2639; KAN. REV. STAT. ANN. (1923) c. 21, § 2121; MICH. COMP. LAWS (1929) § 9144; WYO. COMP. STAT. (Remington, 1922) c. 59, § 128; ORE. CODE ANN. (1930) c. 15, § 155.

[47] ARIZ. CODE (Struckmeyer, 1928) § 1769; CAL. POL. CODE (Deering, 1931) § 2167a; IDAHO COMP. STAT. (1919) § 1181 (2); IOWA CODE (1931) §§ 3549-3551; KY. STAT. (Carroll, 1930) § 216aa77; IND. ANN. STAT. (Burns, 1926) § 4113; MO. REV. STAT. (1929) § 8646; N. Y. INSANITY LAW (1922) § 81; ORE. CODE ANN. (1930) c. 67, § 1606; OHIO ANN. CODE (Throckmorton, 1930) § 1956; S. D. COMP. LAWS (1926) § 10071; UTAH COMP. LAWS (1917) § 5403; WASH. COMP. STAT. (Remington, 1922) § 6930; W. VA. CODE ANN. (1932) §§ 2658, 2663; WYO. REV. STAT. ANN. (1931) c. 56, § 126. It must be noted, of course, that in all criminal proceedings, where the defendant pleads insanity, the court has power to appoint physicians to examine him. *E. g.*, see MICH. COMP. LAWS (1929) § 17241. The court may call physicians to examine a juvenile delinquent. See OHIO ANN. CODE (Throckmorton, 1930) § 1652.

[48] CAL. POL. CODE (Deering, 1931) § 2153a; MICH. COMP. LAWS (1929) § 6882; N. Y. INSANITY LAW (1922) § 5.

[49] IDAHO COMP. STAT. (1919) § 1661; IND. ANN. STAT. (Burns, 1926) § 8172; IOWA CODE (1931) §§ 2281, 2249; OHIO ANN. CODE (Throckmorton, 1930) § 1243 (1); ORE. CODE ANN. (1930) c. 59, § 312; KY. STAT. (Carroll, 1930) § 2055; MICH. COMP. LAWS (1929) § 6518; MINN. STAT. (Mason, 1927) § 5381; MO. REV. STAT. (1929) § 9057; NEV. COMP. LAWS (Hillyer, 1929) § 5251 (b); N. Y. INSANITY LAW (1922) § 25; PA. STAT. ANN. (Purdon, 1930) tit. 35, § 511; *id.* tit. 53, § 9063; MONT. REV. CODE (Choate, 1921) § 2479; S. D. COMP. LAWS (1929) § 9901-A; UTAH COMP. LAWS (1917) §§ 2726, 2746, 2764; WASH. COMP. STAT. (Remington, 1922) §§ 6087, 6096, 6109; W. VA. CODE ANN. (1932) §§ 1278, 1300, 1311; WIS. STAT. (1931) §§ 69.49, 143.04, 143.07; WYO. REV. STAT. ANN. (1931) c. 103 § 334, c. 103; *id.* § 214.

[50] CAL. GEN. LAWS (Deering, 1931) § 16. The testimony of attending physicians at an insane asylum is admissible. See Liske v. Liske, 135 N. Y. Supp. 176, 178 (1912).

[51] CAL. GEN. LAWS (Deering, 1931) § 1098 (6); IDAHO COMP. STAT. (1919) § 1630; IOWA CODE (1931) § 2321; IND. ANN. STAT. (Burns, 1926) § 8161; KY. STAT. (Carroll, 1930) § 2062a7; MICH. COMP. LAWS (1929) § 5605; MINN. STAT. (Mason, 1927) § 5357; MONT. REV. CODE (Choate, 1921) § 2528; MO. REV. STAT. (1929) § 9046; NEV. COMP. LAWS (Hillyer, 1929) § 5248; N. Y. PUB. HEALTH LAW (1922) § 377; N. C. CODE ANN. (Michie, 1931) § 7094; OHIO ANN. CODE (Throckmorton, 1930) § 12702; ORE. CODE ANN. (1930) c. 59, § 1207; PA. STAT. ANN. (Purdon, 1930) tit. 35, § 457; UTAH COMP. LAWS (1917) § 5045; WASH. COMP. STAT. (Remington, 1922) § 6012; W. VA. CODE ANN. (1932) § 1327; WIS. STAT. (1931) §§ 69.20, 69.36; WYO. REV. STAT. ANN. (1931) c. 119, § 106.

Although not directly a qualification of the privilege, it seems important to note that in some jurisdictions much of the strength of the rule is divested by statutes giving the court authority to order a physical examination of the plaintiff in a personal injuries action upon the request of the defendant.[52]

Most of the work of recent restriction upon the physician's privilege has been, of necessity, the work of the legislature. The intendment of the original statutes and the rules of *stare decisis* have been strong influences in making a change in judicial attitude slow. But it may nevertheless be noted that the courts have shown a marked tendency, on the whole, away from their early liberality,[53] and, although they incline to repeat the cant about "liberal interpretation" of the statutes, in effect they now frequently disavow it.[54] It would be an exaggeration to say that the problem of medical privilege is now purely academic. It becomes clear that, although no medical privilege statute has ever been repealed, often its practical significance has been seriously undermined by the combined attacks of the court and the legislature of a new age. By way of illustration, and also as a background upon which to prognosticate future amendatory legislation, the present status of the law may be summarized. Since the strength or weakness of a law is determinable by the ways in which it may be avoided, a demonstration of the present ineffectiveness of the law in many particulars seems appropriate.

By far the most important group of cases where the question of medical privilege arises is that concerned with suits upon life insurance policies. It is in this group of cases that the courts have experienced the greatest difficulty in their attempt to achieve justice and, at the same time, to interpret reasonably the statutes. And it is here, in their devotion to what they found to be the spirit of the statute, that many courts have gone far astray. The usual pertinent situation concerns the rights of parties to whom the privilege does not expressly pertain. The question arises, may the beneficiary step into the insured's shoes so that he may waive the privilege?[55] Upon this problem there is a decided split of authority, but the majority of the courts, perhaps stretching the intendment of the statute to effectuate the obvious justice of the situation, allow him so to do.[56] The converse is frequent: the insurer desires to introduce testimony of the insured's physician to show fraud on the part of the insured in making his application. The general rule is, of course, that it may not so introduce. But the rule may be circumvented quite easily. The common practice of insurance com-

[52] It is usually said that at common law there was no such power. Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000 (1891). See Note (1914) 62 U. OF PA. L. REV. 207; Shastid, *May the Plaintiff in a Personal Injury Suit Be Compelled to Exhibit His Injuries?* (1902) 1 MICH. L. REV. 193. *Contra:* Hess v. R. R., 7 Pa. C. C. 565 (1890). Statutes sometimes grant the power: ARIZ. CODE (Struckmeyer, 1928) § 4468; CAL. GEN. LAWS (Deering, 1931) § 4468; N. Y. CODE CIV. PRACT. (Cahill, 1931) CIV. PRACT. ACT § 306.

[53] *E. g.*, Compare Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281 (1880), with Klein v. Prudential Ins. Co. 221 N. Y. 449, 117 N. E. 942 (1917); Cirrincioni v. Metropolitan Life Ins. Co., 223 App. Div. 461, 228 N. Y. Supp. 354 (1928).

[54] It must be pointed out that "liberal" courts at times construe strictly. Pronouncements of interpretive policy in the cases are, of course, mere *dicta*. Compare the wording of Laurie v. McCullough, *supra* note 13, with Cincinnati &c. R. Co. v. Gross, 186 Ind. 471, 114 N. E. 962 (1917). An interesting example of the method of the courts is found in Jacobs v. City of Cedar Rapids, 181 Iowa 407, 164 N. W. 891 (1917), where the court, after declaring that the factual situation considered fell within medical privilege because of its policy of liberal construction, held that nevertheless waiver by contract had dispensed with the privilege.

[55] The reasons the beneficiary may desire to introduce the testimony of insured's physician are (1) to prove accidental death, and recover double indemnity; (2) to meet allegations as to the bad faith of the insured set up by the insurer.

[56] It appears, however, in many states that the beneficiary must be the insured's executor, administrator or heir. Saad v. New York Life Ins. Co., 201 App. Div. 544, 194 N. Y. Supp. 445 (1922). Some statutes expressly grant the beneficiary a right to waive. *E. g.*, see that of Minnesota, *supra* note 4.

panies today is to insert a provision in the application whereby the insured waives his right to the privilege, for himself and his beneficiary.[57] An insurance company has only itself to blame if it fails to insert such a provision. But even without such provision, it is fairly safe. It must be remembered that for any considerable amount of insurance, the insured must undergo medical examination by the physician of the company, and in consequence, most undesirable risks are thereby eliminated, and the problem of medical privilege does not arise. But granted the unusual; the insurer, to show the insured's bad faith, may introduce the testimony of its own physician;[58] it may introduce the testimony of the physician of the insured's employer.[59] It may call upon the insured's physician himself to testify as to whether or not the insured consulted him before the making of the application, when, and how often;[60] upon a surgeon as to whether he operated upon the insured;[61] it may ask the insured's physician any hypothetical question.[62]

The most grievous burden that obtains as the result of medical privilege is borne by defendants in suits for personal injuries. Some states, by statutory provisions, exclude the right of patients to the privilege in such suits.[63] In other states, the privilege is often not without its qualifications. The right of the defendant to demand physical examination of the plaintiff has been remarked before.[64]

There is a considerable split of authority as to whether the privilege can ever be invoked in criminal proceedings.[65] Some statutes expressly include, others exclude,[66] its application. Certainly, where the patient is the putative victim of the defendant's crime, as in the case of murder, the defendant may not claim the privilege.[67] And where the patient is the defendant in the criminal action, testimony of his physician may often be introduced, on the ground that the purpose of the statute granting privilege was not to encourage illegal and criminal relations.[68] It is perhaps desirable that physicians should not further be compelled to incriminate their own patients.

If, on the basis of analysis of the present situation, prognosis of future changes in the law of medical privilege is possible, such prognosis, of course, should deal separately with the varying and independent situations in the different states which have granted the privilege.[69] Certain generalizations, however, seem possible. The present tendencies toward limitations promise to continue and increase, making uniform the types of amendments and qualifications now obtaining in certain jurisdictions. Future legislation will almost undoubt-

[57] Waiver by contract is generally upheld. Wirthlin v. Mutual Life Ins. Co., 56 F. (2d) 137 (C. C. A. 10th, 1932); Wooten v. Wooten, 176 Ark. 1174, 5 S. W. (2d) 340 (1928). Such waiver is not contrary to public policy. New York Life Ins. Co. v. Snyder, 116 Ohio St. 693, 158 N. E. 176 (1927). *Contra:* Gilchrist v. Mystic W. O. W., 196 Mich. 247, 163 N. W. 10 (1917). Introduction of a death certificate does not waive privilege. Acee v. Metropolitan Life Ins. Co., 219 App. Div. 246, 219 N. Y. Supp. 152 (1927).

[58] McGinty v. Brotherhood, 166 Wis. 83, 164 N. W. 249 (1917); Lynch v. Germania Life Ins. Co., 132 App. Div. 571, 116 N. Y. Supp. 998 (1909)

[59] Moutzoukos v. Mutual Ben. Health & Acc. Assn., 69 Utah 309, 254 Pac. 1005 (1927).

[60] Cirrincioni v. Metropolitan Life Ins. Co., *supra* note 53.

[61] Sparer v. Travelers Ins. Co., 185 App. Div. 861, 173 N. Y. Supp. 673 (1919).

[62] See Whitmore v. Herrick, 205 Iowa 621, 218 N. W. 334 (1928). *Contra:* Bauch v. Schultz, 109 Misc. 548, 180 N. Y. Supp. 188 (1919).

[63] *Supra* note 33.

[64] *Supra* note 52.

[65] See Note (1926) 45 A. L. R. 1357. The problem in probate cases, insanity cases, malpractice cases, and suits for workmen's compensation is now hardly of importance because of governing statutes.

[66] *Supra* note 39.

[67] Davenport v. State, 143 Miss. 121, 108 So. 433 (1926).

[68] Hauk v. State, 148 Ind. 238, 46 N. E. 127 (1897).

[69] In some states the burdens are still great.

edly be directed toward dispensing with the privilege in all suits for personal injuries. Since waiver by contract is now generally upheld by judicial decision, the problem of privilege of life insurance cases becomes minimal. Whether the privilege will be entirely discarded in criminal cases and insanity proceedings seems open to question, since here the reason for the rule is strong. It is possible that in the future these two groups will remain sole survivors after experience has reached its logical conclusion. It is, however, possible that the statutes will be amended to resemble that of Pennsylvania, which only excludes testimony of a physician which has a tendency to blacken character, or that of North Carolina, which gives the court the right to admit the testimony, if it sees fit, in the interests of justice. Meanwhile, as has been pointed out, the erosive influences which have operated against the privilege have done much to relegate it to secondary importance as a problem.

R. H. S.