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Book Reviews

PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.

By Professor Clinton DeWitt, School of Law of Western Reserve University. Charles C. Thomas, Publisher. 1958. \$11.50. Pages 528.

Admittedly, medical confidences are everywhere regarded as sacred and precious. It is the duty of the physician to keep secret and inviolate the intimate knowledge of his patient's malady or physical imperfection, especially that which he learned in the course of his professional employment. Professor DeWitt points out, however, that his book does not deal with the question of medical ethics or professional etiquette of the physician *outside* the courtroom; on the contrary, it concerns only a testimonial privilege, created by legislative enactment, which prohibits a disclosure by the physician when called to testify in a lawful proceeding, of confidential communications made to, or information acquired by him in the course of his professional attendance upon the patient.

It appears that the policy of testimonial compulsion was established in England in 1562; that, in due time, the courts became persuaded that the duty of testifying, so onerous at times, should be subject to mitigation in exceptional circumstances. Accordingly, throughout the course of its history, the Common Law, both in British and American jurisdictions, has conferred ever-increasing privileges of non-disclosure in favor of particular persons who have been lawfully summoned to testify in the courts of justice — privileges which enable them to decline to answer questions which elicit the disclosure of confidential communications and information inimical to the interest of the witness, or of the state, or of society in general.

From these, Professor DeWitt has chosen the highly controversial physician-patient privilege as the subject of his textbook. No author has hitherto undertaken the cumbersome task of treating this testimonial privilege which has, unquestionably, plagued many courts and lawyers. Even a cursory reading of the book reveals the fact that the statutes creating the privilege have frequently been misconstrued and misapplied with the lamentable result that countless miscarriages of justice have occurred.

Professor DeWitt, for many years a successful practicing lawyer in both trial and appellate courts, has also taught law at the Law School of Western Reserve University for forty-six years — the last twelve as a resident teacher — and is the author of four other law books as well as numerous articles published in legal and medical periodicals. His practical experience and profound scholarship mark him as a man well-

equipped for such an undertaking, one which has taken him eleven years to complete.

This is a thoroughgoing, practical and authoritative treatise, one which has long been needed. The importance of the subject cannot be overestimated. The author points out that the privilege is one which is much abused. He estimates that ninety per cent of the litigation in which the privilege is invoked fall within four classes of cases: actions on policies of life, accident, or health insurance; actions for damages for personal injury, malpractice, or for wrongful death; workmens' compensation cases; and testamentary actions where the mental competency of the testator is the principal issue. Professor DeWitt states that in nearly all of these cases, the testimony of the physician who attended the patient — and sometimes the hospital record — is generally the best and most reliable evidence. Nevertheless, the patient, or the holder of the privilege, may, under certain circumstances, close the door to the receipt of such evidence no matter how much light it may throw upon the controversy and no matter how much logical connection it may have with the issue of fact to be proved or disproved. Unquestionably, the legislatures which adopted the privilege deemed it a wise one and have justified its existence on the ground of public policy. The author notes, however, that "the fact that England, Scotland, and most of the other jurisdictions of the British Commonwealth of Nations, as well as seventeen American jurisdictions, have never adopted the privilege, clearly indicates that its wisdom has not universally been apparent." Professor DeWitt has ably evaluated the policy considerations upon which the privilege allegedly is based, and his criticism of the privilege in general is well worth reading.

The organization and planning of the subject matter is notably well done. It is difficult indeed to select particular chapters that deserve special comment, but this reviewer ventures the opinion that the chapters which discuss the relationship inherent between physician and patient, what communications and information are so confidential as to merit privilege, the matter of trial techniques, and waiver by conduct, are all especially valuable.

The chapter on trial practice is most interesting and instructive. It is readily observable that many lawyers do not know the distinction between privileged and non-privileged matters, or how or when to make objection to their introduction; nor do they know much about the right to comment upon a party's failure to produce the attending physician as a witness, or whether a party is entitled to comment upon his adversary's exercise of his right to claim the protection of the privilege. The chapters dealing with waiver of the privilege are likewise significant. Basing his opinion upon the countless judicial decisions he has examined, the

author believes that the important doctrine of waiver has all too often been improperly applied, or overlooked entirely. It plainly appears that lawyers who are not familiar with the doctrine have lost many cases because they failed to take advantage of the patient's waiver of his privilege.

It is common knowledge that the usefulness of a work of this kind seldom rises above the level of its index. If this be a proper measure of quality, Professor DeWitt's treatise must be rated with the best. With painstaking care, the author has listed a large number of subjects under several different titles, recognizing, no doubt, that not every reader will classify a given problem under the same heading.

Professor DeWitt has thoughtfully included an appendix wherein all of the existing statutes creating or pertaining to the privilege are set forth. Reference to these should enable the reader to acquire a better understanding of the cases which are discussed in the text and in the notes. Likewise, the format of the book deserves great praise. The quality of the paper is superior to that ordinarily used by publishers of law books. Also the type and spacing is quite distinctive. The publisher produces many of the finest books in the fields of medicine, science, and law and surely this book is an excellent example of his skill and artistry.

In his scholarly and readable style, Professor DeWitt has written a book which, unquestionably, will be the authoritative text in the field which it covers. It will be of immeasurable value to judges, trial lawyers and medical men everywhere. All of them and every law or medical library in the country should have this splendid textbook and working tool.

A. WALTER STEWART