IV

MEDICO-LEGAL PROBLEMS IN RELATION TO VENEREAL DISEASE

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Based upon an Address delivered before the Medical Society for the Study of Venereal Diseases on November 27th, 1925.

LAWYERS, when they have to deal with a question of this kind, naturally consider it from the aspect of what was called by the medical profession "professional privilege." That had led to some heart-burning, perhaps to some conflict, between the two professions. In a recent discussion with an eminent member of the medical profession with regard to this matter, that gentleman claimed that the privilege was on the ground of general public good, but he added, "We cannot help thinking that there is a conspiracy between the Bar and the Bench to deprive us of this privilege." He (the writer) thought there was some misunderstanding as to what this question of privilege really involved. He divided up the problems arising from professional communications, or information obtained by members of the medical profession, into two categories: (1) The case of a medical witness being compelled to give evidence, perhaps against his will; (2) the problem which would arise regarding professional communications if legislation were promoted to deal with venereal diseases from this point of view.

It had been laid down that every witness who was called in a court of law was bound to give evidence, but there were one or two exceptions to that. On the ground of public policy, no person, husband or wife, was compelled to make a statement which was the result of communication by the other spouse. And no person was compelled to give evidence in a court of law when such evidence would incriminate himself. A third exception was the privilege which a member of the legal profession enjoyed in regard to communications made to him in the course of his professional activities. Though an anomaly,

BRITISH JOURNAL OF VENEREAL DISEASES

this last was necessary because the administration of justice without that privilege could not be carried on. It could readily be seen why there was a distinction between the medical and the legal professions. Not a thousandth part of the information obtained by the medical profession in the course of practice would ever be the subject of litigation, but every communication made to a lawyer had the potentiality of litigation, and in most cases the lawyer was consulted either to prosecute litigation or to avoid it. It was not the privilege of a particular profession, but of a particular class of communication. Lord Brougham said it was in the interests of justice that this privilege was given, for justice could not be upholden if the privilege did not exist.

Dr. Crookshank * has mentioned the law of other countries, but did not touch on French law. It was part of the French penal code that any communication made by a doctor in breach of his professional oath was a criminal offence, but there was an exception to that in cases in which he was compelled to give evidence in a court of law. Of course, all these medico-legal problems must be solved in the light of a proposition that the basis of consideration was the good of the public at large ; only on that ground was the exception he had mentioned tolerated. The question of medical privilege had been discussed in the courts on many occasions, and one of the earlier and more important decisions was in 1776, the Duchess of Kingston case. The medical attendant of the Duchess was called before the House of Lords, sitting as a judicial body, and was asked what he knew of the marital relations of the Duchess, who was charged with bigamy. At first the doctor refused to give evidence, but Lord Mansfield stated that no privilege was granted to a medical adviser, but that if the surgeon were to voluntarily reveal secrets he would be guilty of a breach of honour and of a great indiscretion, but to give that evidence in a court of justice would not be imputed to him for dishonour. If the medical profession wished for legislation on the matter it was for them to educate public opinion, without which such legislation would be impossible. Taking one of the difficulties, to come to another matter, whether it should be a penal offence for a person to communicate venereal disease to an innocent person, that, as Dr.

* See the previous article.

MEDICO-LEGAL PROBLEMS

Crookshank has said, would depend on the state of knowledge of the person charged. It was for the medical profession to say whether in any circumstances a person could be allowed the plea that he did not know he had that complaint. There were analogous cases in the criminal law in which a state of knowledge had to be imputed to the person charged. The law had had to surmount that difficulty as best it could, and if such an offence as had been discussed were to be placed on the statute book, no doubt the difficulty of proving knowledge of a particular condition could and would be surmounted.

To go to a further question which Dr. Crookshank has raised, an example of which was the familiar triangle, that in which Dr. A. was aware that Mr. B., who was infected with the disease, was determined to marry Miss C., what would be the possible results of the doctor's communication to the lady or her parents of the state of health of the prospective bridegroom? If the doctor was sure of his facts, he had nothing to fear; the only form of action would be one for slander, and then a complete defence would be what lawyers called justification. But there would be a further defence, on the ground of what is called qualified privilege, which arises in cases where there was any moral or legal duty to make a communication. Failing proof of malice, there would be a complete defence.

Lawyers were often placed in a difficulty by the contradictory evidence tendered by different doctors. A medical friend of his who appeared in workmen's compensation cases seemed to make it appear that all workmen who got into his hands were complete cripples, that is when he was acting for the claimant. But later, when that same gentleman took service with an insurance company, the workmen seemed to be better after the accident than they had been before!

Generally speaking, however, there was no class of evidence given in a court of law which was more acceptable than that of the medical profession. Dr. Crookshank has touched upon the Swedish legislation. If anything of the kind were permitted in this country, it was obvious that some kind of legislation dealing with the notification of the disease would be necessary, but that was rather a problem for the medical than for the legal profession.

BRITISH JOURNAL OF VENEREAL DISEASES

Dr. Crookshank has well said that without public justice there would be no mental or moral public health. The legal difficulties in the path of the medical profession would yield at once to an educated public opinion, which opinion it was for the medical profession itself to form. Dr. Crookshank has remarked that it was a slander to say "He hath the pox"; but it was also a slander to say of a person that he had any contagious disease, and there was nothing, in the matter of slander, about venereal disease which did not apply to other contagious diseases.