REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1909-10.

[HIGH COURT OF AUSTRALIA.]

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. . . . } APPELLANTS;
DEFENDANTS,

AND

GODRICH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *Feb.* 22, 23, 24; *March* 21.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Evidence — Admissibility — Privilege — Medical man and patient — "Information acquired"—Evidence Act 1890 (*Vict.*) (*No.* 1088), *sec.* 55.

Sec. 55 of the *Evidence Act* 1890 (Vict.) provides that :—"No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding (unless the sanity of the patient be the matter in dispute) any information which he may have acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient."

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Held, that the prohibition in that section extends to anything which comes to the knowledge of the physician or surgeon with regard to the health or physical condition of the patient, as well as anything said by the patient to him, while the relationship of medical adviser and patient continues, provided that it was reasonably necessary for the purpose stated.

Warnecke v. *Equitable Life Assurance Society of the United States*, (1906) V.L.R., 482 ; 27 A.L.T., 236, approved.

Held, further (by *Barton*, *O'Connor*, *Isaacs* and *Higgins* JJ.), that the prohibition does not cease upon a prescription being given or an operation being undertaken, but extends at least to all information acquired until the professional attendance on the patient is at an end, provided the information is material to proper treatment.

Held, by *Griffith* C.J., that it does not extend to mere physical facts ascertainable by observation only, irrespective of confidential communications, ascertained by such observations after the necessity for treatment is at an end.

The section is applicable in every case where the evidence is offered in Victoria notwithstanding that the events or facts sought to be proved occurred elsewhere.

The operation of the section is not limited to the lifetime of the patient.

Quære, whether the executor of a deceased patient can consent to the information being divulged.

Quære, *per Higgins* J., whether the section makes it incumbent on the Court to ignore the evidence if, through inadvertence or otherwise, it has been given in fact.

Decision of the Supreme Court of Victoria affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought by Edward Winton Godrich, executor of the estate of Annie Cairncross Godrich, who died on 3rd September 1908, against the National Mutual Life Association of Australasia Ltd., seeking to recover £600, being the amount of a policy of life assurance on the life of Mrs. Godrich effected on 28th April 1908 by herself with the defendants. The defendants, by their defence, alleged a breach of a warranty contained in the personal statement made by Mrs. Godrich which accompanied her proposal, and which was expressly made the basis of the contract of assurance. In order to establish this breach of warranty the defendants proposed to show that before and at the time of making the proposal Mrs. Godrich had suffered from chronic salpingitis.

The trial took place before *Hodges* J. and a jury, and in refer-

ence to this particular matter the following statement appeared in the notes of evidence taken by the learned Judge :—" Mr. *Starke* (counsel for the defendants) alleges that Dr. Thring attended deceased on 29th August 1908. Deceased was then an ordinary patient. He advised her to go into the Royal Prince Alfred Hospital, Sydney, which is an ordinary charitable institution. She went in there and was operated on by Dr. Thring. This is admitted by Mr. *Fink* (plaintiff's counsel).

" Mr. *Starke* is to be taken to have tendered Dr. Thring to prove what statements Mrs. Godrich made to him before going into the hospital and what observations he personally made, and the like allegations after she went into the hospital. This took place in Sydney, New South Wales.

" Objected to—Objection allowed."

Other facts appear in the judgments hereunder.

The jury found a verdict for the plaintiff, and judgment was accordingly entered for the amount claimed and costs.

On appeal to the Full Court they held that they were bound by the judgment of the Full Court in *Warnecke* v. *Equitable Life Assurance Society of the United States* (1), and therefore they dismissed the appeal with costs.

From this decision the defendants now appealed to the High Court.

Mitchell K.C. and *Starke*, for the appellants. Sec. 55 of the *Evidence Act* 1890 should be confined to confidential communications made by a patient to his medical attendant, and should not be extended to knowledge acquired by the medical attendant by examination of the patient's body. The decision in *Warnecke* v. *Equitable Life Assurance Society of the United States* (1) to the contrary is wrong. This legislation was first introduced into Victoria by sec. 18 of the *Evidence Statute* 1857 (No. 8). The evil intended to be remedied was that by the common law a medical man might be compelled to disclose in the witness box confidential statements as to family history, &c., made to him by a patient, and not that he might be compelled to state what he saw on examination of the patient's body : *Phillipps on Evidence*,

(1) (1906) V.L.R., 482 ; 27 A.L.T., 236.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

(1852), pp. 105-108; *Greenleaf on Evidence*, 7th ed. (1854), p. 326; *Starkie on Evidence*, 4th ed. (1853), p. 40; *Gresley on Evidence*, 2nd ed. (1848), pp. 381, 383; *Taylor on Evidence*, 1st ed. (1848), vol. I., p. 617; *Roscoe's Nisi Prius Evidence*, 8th ed. (1851), p. 135; *Wilson* v. *Rastall* (1); *Duchess of Kingston's Case* (2). The intention was to give the same privilege as was accorded by the common law to solicitors. The privilege of a solicitor does not extend to facts of which he becomes aware through his professional capacity, but of which any other man in his place would have become aware: *Greenough* v. *Gaskell* (3); but is limited to communications: *Wheeler* v. *Le Marchant* (4). The proper inference in regard to the original enactment is that the legislature were aware of the comments in text books on the need for protecting communications made to medical men, and finding there the provision in the Statute of the State of New York, adopted it as a convenient means of remedying the evil which had been pointed out. The interpretation of "information acquired" as extending to the result of observation is a forced one.

[ISAACS J. referred to *Dwyer* v. *Collins* (5); *Lyell* v. *Kennedy* (6); *Southwark and Vauxhall Water Co.* v. *Quick* (7).

HIGGINS J. referred to *Wheatley* v. *Williams* (8).]

If the language is capable of the wider construction, the consequences are so grave that it should not be adopted. The legislature, in adopting the language of the New York Statute, did not intend to adopt the construction placed upon that language by the decisions of the Supreme Court of New York, few of which were given before 1857, and none of which were likely to be known to the legislature: See cases referred to in *American and English Encyclopædia of Law*, vol. XIX., p. 148. The principle that a legislature of one State which adopts an enactment of a legislature of another State adopts also the construction put upon that enactment by the Courts of that other State only applies between States of the British Empire. The information must be necessary to enable the physician or surgeon to prescribe or act. Therefore

(1) 4 T.R., 753, at p. 759.
(2) 20 How. St. Tr., 355, at p. 572.
(3) 1 Myl. & K., 98, at p. 103.
(4) 17 Ch. D., 675, at p. 681.
(5) 7 Ex., 639, at p. 645.
(6) 27 Ch. D., 1; 9 App. Cas., 81.
(7) 3 Q.B.D., 315.
(8) 1 M. & W., 533.

what a surgeon observes during an operation or afterwards is not privileged.

[HIGGINS J. referred to *Campbell* v. *Loader* (1).]

The prohibition in sec. 55 only applies to information acquired in Victoria, and the medical man and the patient must be in Victoria when the communication is made: *Macleod* v. *Attorney-General for N.S.W.* (2). The whole object of the legislation is to give a benefit to persons in Victoria, and the section is not merely a procedure provision. The prohibition is not intended to extend beyond the lifetime of the patient.

Fink, for the respondent. Even if the decision in *Warnecke* v. *Equitable Life Assurance Society of the United States* (3) were wrong the appellants have not shown that any substantial wrong or miscarriage has been occasioned by the rejection of the evidence, and therefore a new trial should not be ordered: *Rules of the Supreme Court* 1906, Order XXXIX., r. 6. The construction put on the language of sec. 55 by the Supreme Court of New York: *Renihan* v. *Dennin* (4); *Nelson* v. *Village of Oneida* (5), is correct and has been adopted by the Supreme Court of the United States: *Connecticut Mutual Life Insurance Co.* v. *Union Trust Co.* (6); *Supreme Lodge, Knights of Pythias* v. *Meyer* (7). The language plainly includes information gained from whatever source and through whatever sense, and the argument of inconvenience does not apply: *Broom's Legal Maxims*, 7th ed., pp. 146, 147; *Taylor on Evidence*, 10th ed., vol. I., p. 646. The privilege extends to all information acquired during the continuance of the relationship of doctor and patient, and is not limited to information necessary for any particular act during that relationship. The privilege is not determined by the death of the patient: *Farwell on Powers*, 2nd ed., p. 140; *Bullivant* v. *Attorney-General for Victoria* (8).

Starke, in reply. As to the decisions of the Supreme Court of the United States, relied upon by the respondent, that Court

(1) 34 L.J., Ex., 50; 3 H. & C., 520.
(2) (1891) A.C., 455.
(3) (1906) V.L.R., 482; 27 A.L.T., 236.
(4) 103 N.Y.L.R., 573.
(5) 156 N.Y. L.R., 219.
(6) 112 U.S., 250.
(7) 198 U.S., 508.
(8) (1901) A.C., 196.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

adopts the construction put upon Statutes of a State by the Supreme Court of that State: *Bauserman* v. *Blunt* (1); *Taylor's Jurisdiction and Procedure of the United States Supreme Court*, pp. 386 *et seq.*

[ISAACS J. referred to *Gelpcke* v. *City of Dubuque* (2); *Burgess* v. *Seligman* (3); *Pana* v. *Bowler* (4).]

[The following authorities and text books also were referred to during argument:—*R.* v. *Gibbons* (5); *Broad* v. *Pitt* (6); *Current Law*, vol. IV., p. 1955; *Johnson* v. *Johnson* (7); *Stack* v. *Stack* (8); *Godfrey* v. *Godfrey* (9); *Edington* v. *Ætna Life Insurance Co.* (10); *Grattan* v. *Metropolitan Life Insurance Co.* (11); *Taylor on Evidence*, 10th ed., vol. I., p. 646; *Best on Evidence*, 9th ed., p. 482.]

Cur. adv. vult.

The following judgments were read:—

March 21.

GRIFFITH C.J. This was an action brought by the executor of Annie Cairncross Godrich, who died on 3rd September 1908, to recover the amount of a life policy effected by her with the appellants in April of that year. The appellants set up by way of defence a breach of a warranty contained in the personal statement made by the assured which accompanied her proposal, and which was expressly made the basis of the contract of assurance. In order to establish this breach they proposed to show that she had before making the proposal suffered from a disease of the uterus or ovaries, namely, salpingitis. It appeared from the extract of the Register of Deaths forwarded by the plaintiff to the defendants, as proof of death, that the cause of death was chronic salpingitis, and the defendants sought to show that the existence of the disease must have been antecedent to the date of the proposal. Upon this point they proposed to call Dr. Thring, a leading surgeon practising in Sydney in New South Wales, but, it being doubtful whether his evidence would be admissible according to the law of Victoria, their counsel, following a usual

(1) 147 U.S., 647, at p. 652.
(2) 1 Wall., 175.
(3) 107 U.S., 20, at p. 33.
(4) 107 U.S., 529, at p. 541.
(5) 1 C. & P., 97.
(6) 3 C. & P., 518.
(7) 4 Paige Ch. N.Y., 459.
(8) 25 N.Z. L.R., 209.
(9) 6 Gaz. L.R. (N.Z.), 289.
(10) 77 N.Y.L.R., 564.
(11) 80 N.Y.L.R., 281.

and convenient practice, instead of calling the witness, stated to the Court that Dr. Thring had attended the assured in Sydney on 29th August (five days before her death) as an ordinary patient, that he had advised her to go into the Royal Prince Alfred Hospital, which is an ordinary charitable institution, that she went into the hospital and was operated upon by Dr. Thring. All this was admitted by the plaintiff's counsel.

The Judge's notes then contain this passage: "Mr. *Starke* is to be taken to have tendered Dr. Thring to prove what statements Mrs. Godrich made to him before going into the hospital and what observations he personally made, and the like allegations (*sic*) after she went into the hospital." It was, of course, assumed that the evidence, if admitted, would tend to show that the assured must have suffered from the disease before April 1908. Mr. *Starke* referred to the case of *Warnecke* v. *Equitable Life Assurance Society of United States* (1), and did not dispute that if that case was well decided the evidence was inadmissible, unless the present case could be distinguished on the ground that the relevant Statute does not apply when death has occurred, or on the ground that the evidence tendered related to events which had taken place out of Victoria. The learned Judge thought that the case cited was not distinguishable, and rejected the evidence. A motion for a new trial was dismissed by the Full Court upon the same grounds.

As I understand the Judge's notes, the case is to be considered as if Dr. Thring had been formally called as a witness and interrogated on two distinct points: (1) What oral communications Mrs. Godrich made to him; and (2) What facts as to the condition of her body did he discover by ocular observation before, during, and after the operation. If his evidence on either point was admissible it is contended that there must be a new trial.

Sec. 55 of the *Evidence Act* 1890 (Vict.) is as follows:—"No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs.

(1) (1906) V.L.R., 482; 27 A.L.T., 236.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Griffith C.J.

"No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding (unless the sanity of the patient be the matter in dispute) any information which he may have acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient."

In the *Evidence Act* this section appears in Part III., which relates to "Witnesses," as one of a group of sections, 53 to 57, headed "Division 2: Privileges Disabilities and Obligations of Witnesses." Sec. 53 relates to the evidence of accused persons in criminal cases, and their wives and husbands, sec. 54 to communications between husband and wife during marriage, sec. 56 to criminating questions, and sec. 57 to the admissibility against themselves of statements made by persons giving evidence before boards or commissions of inquiry. The provisions of sec. 55 were first enacted in Victoria in the year 1857 (21 Vict. No. 8, sec. 18), where they appear between a section relating to the comparison of handwriting and a section as to the admissibility of confessions made under inducement.

In *Warnecke's Case* (1) the Supreme Court held, in effect, that under sec. 55 the lips of a medical adviser are sealed, so far as regards civil proceedings, not only as to anything said by the patient to him, but as to anything which comes to his knowledge with regard to the health or physical condition of the patient while the relationship of medical adviser and patient continues. The prohibition contained in sec. 55 extends to "any information which he (the physician or surgeon) may have acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient." There are thus two express limitations: the information must have been acquired in "attending the patient," and it must have been "necessary to enable the physician or surgeon to prescribe or act for the patient." Some discussion took place as to the words "necessary" and "prescribe or act," but I think it sufficient to say that in my opinion the word "necessary" must be construed in a wide sense, so as to include any information which is, or is likely to be, relevant in determining the proper treatment of the patient, such, for instance, as his personal, and in some cases, but not all, his family,

(1) (1906) V.L.R., 482; 27 A.L.T., 236.

history; and that it is not material whether the information given is actually followed by any treatment or not. The question to be solved depends, in my opinion, upon the construction to be given to the terms "information acquired," "in attending," and "to enable him to prescribe or act." If the words are free from ambiguity *cadit quæstio*, but if they are fairly open to two constructions it is proper to consider the previous state of the common law, the mischief for which the common law did not provide, and the nature and reason of the remedy provided by the Statute: *Heydon's Case* (1).

The appellants, while not disputing that the words "information acquired" are capable of the meaning put on them by the Supreme Court of Victoria as well as by most of the American State Courts in which a similar law is in force, contend that it is not the only nor the most probable meaning. They point out that at common law communications between a patient and his medical adviser were entirely unprivileged, and that this state of the law had been often animadverted upon by learned Judges. It does not appear, however, that in any of the cases referred to the confidence which was necessarily violated in the witness box related to any physical fact discoverable by ocular observation, or even to any statement as to the health of the patient. In the *Duchess of Kingston's Case* (2), for instance, the confidence was as to a marriage having taken place, a fact which was quite irrelevant to the health of the Duchess. The section under consideration does not protect a confidence on such a subject, but it plainly protects "information," whatever that may mean, which is relevant to health. Conceding, therefore, that verbal communications relevant to health are protected by the Statute, the appellants maintain that the mischief of the common law was that communications between physician and patient, and between clergymen and penitent, were not subject to the same protection as communications between solicitor and client, and that it had never been suggested that any greater protection was needed. The object of the Statute, therefore, they say, was to give a protection co-extensive, but not greater, and this they say is a construction fairly open upon its language. They point out,

(1) 3 Rep., 7*b*.

(2) 20 How. St. Tr., 355, at p. 614.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Griffith C.J.

further, that if the larger construction is adopted the result will be the exclusion in many cases not only of the best evidence, but of the only possible evidence, of a fact the ascertainment of which may be necessary for the ends of justice. If, for instance, the patient dies, and so can no longer give consent, a fact relating to his health and essential to be proved in order to establish some right in his executors, but which is only known to his medical adviser, becomes, it is said, incapable of proof. I confess that I cannot believe that the legislature intended such a consequence, but if they have said so it is for them, and not for the Court, to alter what they have said.

Again: It is contended that the word "information" primarily suggests information in the nature of a communication such as might be made by a client to a solicitor. In my opinion a solicitor is not privileged from giving evidence of a physical fact simply because he first became aware of the fact though information given to him in professional confidence: *Brown* v. *Foster* (1). During the argument I put the case of a tree alleged to be an important boundary mark. In an action in which the boundary was in question a solicitor could not be asked whether his client had told him of the existence of the tree, or what he had said to him about it, but in my opinion he could be asked whether he had seen the tree, of what sort it was, and where it was situated. And so was the opinion of Lord *Blackburn* (*Lyell* v. *Kennedy* (2)). But, giving the fullest weight to all these arguments, a further difficulty is raised by the word "acquired" which suggests sources of information not limited to communications, verbal or demonstrative, from the patient. And I am reluctantly compelled to the conclusion that I cannot see any satisfactory ground for so limiting its meaning.

What, then, is the limitation imposed by the words "in attending the patient"? But, first, what is the meaning of the words "the patient"? I do not think that the mere fact that a physician or surgeon prescribes for or operates on a human being necessarily constitutes that human being his patient within the meaning of the section. If that had been the intention of the legislature, it could have been simply expressed by an enactment that "no

(1) 1 H. & N., 736, at p. 739. (2) 9 App. Cas., 81, at p. 87.

physician or surgeon shall divulge any information with regard to the health or condition of any person consulted or treated by him," words which are not in my opinion synonymous with those of sec. 55. In my opinion, the words connote a period co-extensive with the continuance of the relation of personal confidence which may be assumed to exist between the physician and the patient.

Whether that relation ever existed, or, having existed, still continues at any particular moment, is in every case a question of fact. In the case of a person who undergoes an operation at a public hospital, when the necessity and nature of the operation has been already decided upon, I do not think that the person operated upon is, necessarily, within the meaning of the section, the patient of the surgeon who there saw him for the first time. Such a surgeon is, therefore, I think, not necessarily prohibited from divulging what he sees in the course of the operation. Certainly a bystander is not so prohibited.

Whether this principle would be relevant in the present case would depend upon whether, after the assured became an inmate of the hospital, she ceased to be in substance and in fact the patient of Dr. Thring in the sense in which the word is used in the Statute. If she did, the information which he obtained from ocular observation during or as a consequence of the operation was not acquired "in attending the patient." But these observations must not be understood as applying to information given orally by the patient to the operating surgeon and necessary for the purpose of the operation, with respect to which confidence may reasonably be presumed to have been intended.

With regard to the limitation imposed by the words "and which were necessary," &c., it was contended that the prohibition relates only to information acquired before the prescription or operation, and does not extend to the prescription or operation itself, or to any information subsequently acquired. I agree, so far as regards the physical fact of the prescription or operation. If a physician prescribes medical treatment he is not forbidden to say what it was. If a surgeon amputates a limb he may depose to the fact. An accoucheur may give evidence of the fact of birth, of the sex of the child, whether it is born alive or dead, and of the probable period of gestation. None of these

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Griffith C.J.

matters are "information necessary to enable him to prescribe or act." If the subsequent treatment to be followed after the operation depends upon facts to be discovered from the condition of the member removed, it may be that, so far as that condition is only discoverable from the member itself, information derived from inspection or observation may be excluded, but in my opinion the results of the observation of the member removed are *primâ facie* admissible in evidence. It is quite clear that a competent bystander making the same observations could give evidence of them, and I think that the principle laid down in the case of *Brown* v. *Foster* (1) is applicable to such evidence.

I proceed to apply this principle to the present case. If the assured on admission to the hospital substantially ceased to be the patient of Dr. Thring, so that he was afterwards in the same position towards her as any other surgeon called in to operate, I think that any information acquired by him by observation was not acquired "in attending the patient" within the meaning of the Act; *et vice versâ*. I think, further, that any information which he acquired by observation of any parts of the body removed after removal was not within the prohibition, unless it was shown that the information so acquired was necessary for the purpose of further treatment by him, even if he first acquired that information before the removal.

We do not know the facts, but I will suppose that he excised the ovaries and fallopian tubes, and that he, or any other specialist, could from their appearance form an opinion as to the probable duration of the salpingitis. I cannot find anything in the Statute to exclude such evidence.

I think, therefore, that it is very likely that Dr. Thring could have given some evidence which would have been admissible under the Statute. But in order to obtain a new trial on the ground of improper rejection of evidence it is not sufficient to show that the evidence tendered was admissible in the abstract. If the only ground on which the evidence is offered is untenable, another ground not taken at the trial on which it was admissible cannot afterwards be taken.

I have had some difficulty on this part of the case, but on the

(1) 1 H. & N., 736.

whole I do not think that the attention of the learned Judge was drawn to any distinction between facts discovered by observation and not necessary to enable the witness to prescribe or operate, and facts which were necessary for that purpose. Possibly the evidence would still have been rejected even if that distinction had been made, since the objection taken, based upon *Warnecke's Case* (1), was assumed to cover the whole ground. But this is matter of conjecture.

There is a further difficulty in the appellants' way. Under the Victorian Rules of Court a new trial cannot be granted for improper rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage has thereby been occasioned in the trial. The utmost that could have been established by the evidence said to have been improperly rejected was that the facts observed would render it probable that the assured was suffering from salpingitis in April. It is not suggested that the fact of her suffering from that disease at that time would have been established conclusively, or at all, except as matter of probable opinion, or that the appellants' counsel were prepared with any evidence to show that there was a high degree of probability. In view of these facts, and the fact that evidence on the point of probability had already been given on both sides, I find myself unable to say that I think that any substantial wrong or miscarriage was occasioned by reason of the rejection of the evidence.

I think it right to say that, in my opinion, the learned Judges who decided *Warnecke's Case* (1) attributed too much weight to the supposed opinion of American Courts given before 1857 as to the construction of a similar law. The doctrine that, where the legislature re-enacts in identical language a Statute which has been judicially interpreted, or adopts in identical language an English Statute which has been interpreted by English Courts, they are to be taken to have accepted that interpretation, is not, in my opinion, applicable to the case of a Statute enacted in Victoria in 1857 and based (but not in identical language) upon a New York Statute, some of the terms of which had been the subject of judicial decision in the State of New York. I am not oppressed by the weight of these, or of later

(1) (1906) V.L.R., 482; 27 A.L.T., 236.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Griffith C.J.

decisions of the American State Courts, although most of the opinions are adverse to the opinion which I have formed.

With regard to the distinctions sought to be taken by Mr. *Starke* at the trial, and which alone were open to him after *Warnecke's Case* (1), I do not think that they are valid. The law governing admissibility of evidence is part of the *lex fori*, and is applicable in every case where the evidence is offered within the country in which the law is in force, wherever the events or facts sought to be proved may have occurred. Nor am I able to import a limitation of the prohibition to the lifetime of the patient. And even if her executor could give consent—a point on which I reserve my opinion—it was not given in the present case.

I think, therefore, that the appeal must be dismissed.

BARTON J. There can be no doubt that the "personal statement" of the assured was of the basis of the contract and amounted to a warranty, or that the existence of chronic salpingitis at the time of making the contract, would, if undisclosed at that time, have evidenced a breach of the warranty. The material question, therefore, was whether Mrs. Godrich had this disease at the time of her proposal. If she had it then, certainly she did not disclose the fact. The plaintiff had in making his claim furnished the defendants with a certified copy of the registration of the death of the assured in Sydney. This was put in evidence for the defence at the trial, and it stated on the authority of a Dr. Matthews that the causes of death were "Double chronic Salpingitis (general)" and "Septic Peritonitis (post-operative)." A declaration by Dr. Thring, a legally qualified medical practitioner, had also been furnished by the plaintiff to the defendants with his proofs of death, and was put in by the defendants. It stated that Dr. Thring knew the assured, and that he attended her professionally in her last illness from 29th August to 3rd September 1908, when she died, and that the "immediate cause of death" was septic peritonitis. Apparently, then, Dr. Thring attended the assured up to her death. His declaration does not mention any other disease or cause of death.

Now it is manifest that Dr. Thring, having first attended the

(1) (1906) V.L.R., 482; 27 A.L.T., 236.

assured on 29th August, could not possibly say as a fact that chronic salpingitis was in progress on 15th April. To show, however, that from the knowledge he had gained of the assured in attending her, there was reason to infer that the complaint existed in April, the defendants proposed to examine him. The circumstances are thus set forth in the learned Judge's notes :— "Mr. *Starke* alleges that Dr. Thring attended deceased on 29th August 1908. Deceased was then an ordinary patient. He advised her to go into the Royal Prince Alfred Hospital, Sydney, which is an ordinary charitable institution. She went in there and was operated on by Dr. Thring. This is admitted by Mr. *Fink*." (Mr. *Starke* was the defendants' counsel at the trial, and Mr. *Fink* acted for the plaintiff). Before quoting what follows I may point out that it is clear that the assured was Dr. Thring's patient, since she was attended by him professionally from 29th August to 3rd September, the day of her death. (See his declaration). The mere fact of her going into the hospital upon his advice, probably for greater convenience and safety in the intended operation, is by itself not sufficient to disturb the presumption of the continuance during the illness of the relation which had arisen between them, and which Dr. Thring declares to have existed from the one date to the other. The case might have been different if Mrs. Godrich, without having first seen Dr. Thring, had gone into the hospital, and seen him there for the first time as one of the hospital staff. But the fact is otherwise. His Honor's notes proceed thus :—" Mr. *Starke* is to be taken to have tendered Dr. Thring to prove what statements Mrs. Godrich made to him before going into the hospital and what observations he personally made, and the like allegations after she went into the hospital." The evidence thus taken to have been tendered was objected to, the objection was allowed, and judgment having been given for the plaintiff for the sum named in the policy, the Full Court refused the defendants a new trial sought by reason of the rejection of the evidence, and from that refusal the defendants now appeal to us on the same ground, and on that alone.

The word "allegations" in his Honor's note is somewhat obscure, but I take it to refer to statements made by the patient to the doctor, and observations visually made by him, after the

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Barton J.

assured went to the hospital. That was the meaning placed on the expression by the parties. In the absence of any explanation at the trial, all the statements and observations sought to be elicited must be relegated to the subject matter of the relation then existing between the patient and the surgeon, namely, to her physical condition. Thus they would comprise such statements as she made to him, and such visual observation as the confidence between them enabled him to make, as to her then state and as to her history, so far as that was relevant to her state. Further, the questions proposed must have been intended to cover the period of treatment up to the day of the death of Mrs. Godrich. Assuming, then, that the patient made certain statements to the practitioner, and that his examination of her at her instance disclosed certain facts to his visual observation, and that these statements and observed facts tended to show that the patient not only then had chronic salpingitis—as we know—but also that its existence from a period anterior to her proposal for insurance could be inferred, would such statements and facts have been admissible evidence, heard and seen as they were during the existence of the relation of patient and surgeon ?

Before deciding that question I propose to examine the enactments that were so fully discussed at the bar, and to give my view of their meaning.

The *Evidence Act* 1890 lays down in Division 2 certain rules relating to the disclosure of confidences. Sec. 54 prescribes that no husband shall be compelled to reveal "*any communication made to him*" by his wife during the marriage, and gives a similar shield to every wife. Then comes sec. 55, already quoted. Its first part forbids the divulgation by any clergyman, in any proceeding whether civil or criminal, of "*any confession made to him in his professional character*," without the consent of the person who confessed. Lastly, we have the enactment now in question, which forbids any physician or surgeon to divulge, in any civil proceeding, without his patient's consent, "*any information which he may have acquired in attending the patient* and which was necessary to enable him to prescribe or act for the patient."

The first point of contention is found in the words, "informa-

tion which he may have acquired." The defendants, now appellants, argue that these words are equivalent to "communication made to him by the patient." Their first reason is that while at common law certain professional confidences, such as those made by a client to his solicitor, were protected, the privilege related only to communications, and there was nothing to suggest to the legislature that any greater protection was necessary in the case of patient and doctor. Their second reason is that, if a wider meaning be given to the words, or, as I prefer to say, unless the meaning of the words be restricted as they desire, the result will be injury to the administration of justice, and sometimes its entire defeat, inasmuch as much valuable evidence will be entirely suppressed, a consequence which the legislature will not be taken to have intended.

First, let us suppose that the words "information acquired" are, as suggested, narrowed in their meaning so as only to be equivalent to "communications made." Even so, I do not think the limitation would be of much advantage to the defendants in this case, for communications made are not confined in their meaning to mere oral or written statements, or to those with the addition of gestures. For instance, "if . . . a document be exhibited to the attorney in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication" (*per* Lord *Abinger* C.B. in *Wheatley* v. *Williams* (1)). *Alderson* B. said, in the same case (1):—"I think the privilege extends to all knowledge that the attorney obtains, which he would not have obtained but for his being consulted professionally by his client." Of course, the learned Baron was speaking of knowledge not open to others. It was not necessary to say so, because knowledge that is patent to others is not the subject of a confidence. On this subject of the confidential relation between patient and physician, see *Stack* v. *Stack* (2), where the question arose on a section of the *Evidence Further Amendment Act* 1895 of New Zealand, similar in its scope to the enactment now under discussion, but limited to "communications made" by the patient to the physician in his professional capacity. There, on the hearing of a petition for

(1) 1 M. & W., 533, at p. 541. (2) 25 N.Z. L.R., 209.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Barton J.

divorce, the evidence of a medical man was tendered to prove that the respondent had consulted him, that on examination he had observed a certain fact as to his bodily condition, and that he had prescribed accordingly. *Denniston* J. ruled that the tendering by a patient of any part of his body to a physician for examination with a view to medical treatment was a "communication" within the section, and he rejected the evidence. I mention this decision, not as an authority for this Court to follow, but because it expresses a view of the meaning of communications in confidential relations which appears to me to be sound. If on consulting my doctor I am asked to bare my body, and do so, have I not communicated the state of my body to him? Of course, no one will contend that such a thing as a plainly visible wound, *e.g.*, on the face or hand, if shown to a surgeon, is the subject of a confidence as to its existence, and *Denniston* J. is not to be taken as implying this in his use of the term "any part of his body." That is like the case of a tree alleged to be a boundary mark, instanced by the Chief Justice during argument. Things that are obvious cannot, of course, be confidentially communicated. Cases like *Brown* v. *Foster* (1) do not assist the defendants' contention, though reliance appeared to be placed on them. In that case, on a charge of embezzlement before a magistrate, the prosecution produced a book in which it was the duty of the accused to enter a sum of money received by him. The same book was produced again on a second examination, and found to contain an entry of the sum in question, and the charge was dismissed. Then the former defendant became the plaintiff in an action against his accuser for malicious prosecution. On the trial of this action, counsel who had appeared for the now plaintiff when he stood charged before the magistrate, was called to prove that he saw the book at the time of the first production, and that it then contained no entry such as was afterwards found in it. It was held that his evidence had been rightly received, on the simple ground that, the book having been produced by the prosecutor, its condition was not information communicated to counsel by his client, who at that time was the accused. As *Pollock* C.B. said, he had no more means of information than

(1) 1 H. & N., 739.

any other person who examined the book. *Watson* B., quoting Lord *Brougham* C. in *Greenough* v. *Gaskell* (1), described the privilege as protecting merely "matters which come within the ordinary scope of professional employment" (2). As between counsel and client in their confidential relation, the contents of the book were not communicated at all. Similar in the failure to establish any confidence is the case where information such as a map is given by a client to his solicitor "under circumstances that enabled any person who pleased to avail himself of the information": *Doe* v. *Marquess of Hertford* (3). The plain substance of the two cases is that in the one there was no communication by the client and in the other there was no confidence on his part. Such cases do not establish exceptions to the rule, for they stand quite apart from it. But no doubt appears to have been suggested in either of the cases cited, nor so far as I know in any other, that as between a client and his legal adviser a document, a map, or a book may in appropriate circumstances be a part of a confidential communication. And so, I conclude, is any part of the patient's body disclosed to his medical adviser for examination—giving, of course, to the word "disclosed" its due meaning of the revelation of that which is unknown to others. But be this as it may, I apprehend that the position is clear when the subject of protection is not merely a communication made, but "any information acquired." If that form of words has been deliberately chosen by the legislature, the matter passes beyond the region of doubt, if it ever rested there. There is strong internal evidence of such deliberation in the Statute itself. It deals with three classes of confidences: "communications" between husband and wife, "confessions by a penitent to a clergyman," and "information acquired" by a physician or surgeon in attending his patient, when "necessary to enable him to prescribe or act for the patient." It appears to me that the legislature has distinguished the three classes of cases very clearly, and has protected the confidences of a patient to the degree necessary to render the protection real. The mischief for which the common law did not provide was that confidences reposed by sick people in their

(1) 1 Myl. & K., 98. (2) 1 H. & N., 736, at p. 740.
(3) 19 L.J.Q.B., 526, at p. 527.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Barton J.

medical men were not safe. Communications were only part of such confidences. No matter what the confidence was—howsoever intimate, and in whatsoever manner gained—he who held it was compellable to disclose it in the interests of justice. The range of confidence in matters of bodily health is much wider than in the case of the confessional. A penitent makes his confession by narration of his sins. A patient, on the other hand, has not only symptoms to relate, but a body to lay bare as the source of his symptoms. There may be anguish long concealed, now first to be discovered by the doctor, or a drug-taking habit which for worlds he would not let anyone but the doctor trace to its cause; or he may have secreted in his room something which, without word spoken or sign made, will, when the doctor sees it, tell him that which he needs to know. The nature or position of a wound or lesion may be his innermost secret, but he must either exhibit it or remain ill, and perhaps die. The fact that his medical man was bound to disclose to the world in open Court, whenever so directed by the tribunal, every bit of the information he had gained during professional attendance, could not but act as a deterrent, so as to cause patients in many cases to suffer agony, and perhaps death, rather than divulge facts inexorably kept secret. That dread, whether the fear of exposure and humiliation, or the recoil from the infliction of injury or grief on others, was the real "mischief" which the common law did not provide against, if the legislature saw fit to consider it a mischief; and their opinion is easily traced in the width of the terms they adopted in their provision, as well as in the sharpness with which they differentiated between this large class of confidences and others which might be maintained by protecting only communications.

The second reason advanced by the defendants in favour of a restricted meaning of the enactment is that the administration of justice will suffer if this remedial section be taken in its full sense. The argument as to possible consequences is, I think, admissible only in the case of an ambiguity, which I do not find, because, apart from the reasonable plainness of the expression "information acquired," standing by itself, it is made very clear by the immediately preceding and succeeding provisions. But

the argument as to consequences appears to me to lose sight of the standpoint from which a legislature must view a question such as this. It could not protect the confidences of the sick against forensic disclosure without making some sacrifice. The confidences had been sacrificed in the past. They must continue to be sacrificed, unless forensic disclosure were done away with altogether or in part. In considering the range of the subject matter to be protected the legislature had to weigh in the balance the danger to life and health, arising from the rigidity of the common law, against the loss of material testimony which must, often to the defeat of justice, result from its relaxation by Statute. They have done this duty, with the result, be it right or wrong in the main, that they have secured the safety of an immense range of confidences, and by doing so have necessarily impaired and in many cases prohibited the means of proof in a large class of forensic controversies. If by the expressions they have used they appear to some to have endangered the administration of justice, they will appear to others to have done a righteous and beneficent work in safeguarding within very wide bounds the confidence necessary to the frank disclosure of history and condition which alone can give sufferers the complete benefit of the skill of their chosen medical advisers. It is not for us to say which view is the right one. That is for the legislators, because it is a matter of policy, and our exposition of the laws is not to be turned this way or that by our own opinions on such a matter. If in our view—I do not say it would be a correct view —the humane policy of holding confidences sacred has led the lawmakers to make inroads, fraught with possibilities of disaster, upon the administration of justice, it is their law and not ours, and if it is plain, as I think it is, we must declare and enforce it. It is for them to say whether they intended all that their words mean, and whether they ought to retrace their steps, entirely or in some degree.

"The office of the Judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the Court injudicious": Lord *Blackburn*, in *River Wear Commissioners* v. *Adamson* (1). "Whatever I may think,"

(1) 2 App. Cas., 743, at p. 764.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Barton J.

said *Jessel* M.R., "of the extraordinary results which are so caused, it is my duty to interpret Acts of Parliament as I find them. I must read them according to the ordinary rules of construction, that is, literally, unless there is something in the context or in the subject to prevent that reading": *Taylor* v. *Corporation of Oldham* (1).

Whether or not, then, such evidence as was tendered falls, in respect of the observations made by Dr. Thring, within the category of communications made by the patient to the practitioner, it is to my mind obvious that it is "information acquired." As has been seen, it was acquired "in attending the patient." The question remains whether it was "necessary to enable" the doctor "to prescribe or act for the patient." For the appellants it is contended that what was observed during the operation, and upon and after its completion, is admissible. Mr. *Starke* argued that the protection ceases as soon as the "practitioner" has "prescribed," if a physician, or has "acted"—which he takes to mean "operated"—if a surgeon, because information can no longer be necessary to enable the one to prescribe or the other to operate. This is an ingenious argument, but I think it fails to quite reach the point. A practitioner may and often does prescribe before he operates. Does the protection cease when he has prescribed? A surgeon may neither prescribe nor operate; he may only advise, and by mere alteration in diet or other conditions he may avoid an operation. Has he not "acted" for the patient? If the words are construed as Mr. *Starke* suggests, there would *ab initio* be no protection in that case. Is it unnecessary for the surgeon to act for the patient after he has operated? Is there not need for his vigilance, for dressings, for healing applications, and is not all this watchfulness and care "acting" for the patient? What knowledge is more vital to the success of subsequent treatment than the knowledge gained from the operation? The object of an operation is to cure, but unless the surgeon, after operating, acts for the patient with all his faculties, there is small hope of cure in a host of cases. Under all these considerations it is impossible to say that the confidence ceases with the operation, and if it continues, so must the protection. Assuming that health may

(1) 4 Ch. D., 395, at p. 405.

perhaps be recovered or life saved by an operation—that is, assuming an operation to be justified—information gained, up to the use of the knife, material to an accurate diagnosis, is in my opinion "necessary to enable" the surgeon "to act," for operation is one of many kinds of possible action. But the information is also necessary for the surgeon's guidance throughout the operation, and after it, for upon the facts diagnosed both the operation and the subsequent treatment depend for success—sometimes entirely, always largely. I hold, therefore, that the protection does not cease upon the operation being undertaken, but extends at least to all information acquired during the treatment of the patient, that is, until the professional attendance on the case is at an end, provided that the information is material to proper treatment, for in that case it is "necessary" within the meaning of this law. Indeed, it is probable, though in this case it is not necessary to affirm, that in qualifying the enactment by the words "necessary," &c., all that the legislature meant to compass was the avoidance of a construction which would extend the privilege to information not actually relative to the condition or illness of the patient.

Yet another question is raised on this enactment. It is pointed out that the operation may result in the discovery of something, such as the existence of some internal disease, not diagnosed. Does the protection, we are asked, extend to such a discovery by the surgeon? I think it does. It is a discovery made in the course of treatment, and certainly while the patient lives it is a fact necessary to enable the surgeon to prescribe or act—giving action the sense I have attributed to it. There the knowledge could not have been gained had not the confidence been instituted. A disclosure in such circumstances would render the protection of the section a mere pretence. We cannot assume that it means something which would be illusory, a more reasonable construction being open. I should hold the same opinion even if the disease discovered were a necessarily fatal one, since action—that is, treatment—for the prolongation of life is still the duty of the practitioner. An analogous case with regard to the relation of attorney and client is put by Lord *Abinger* C.B. in a

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Barton J.

case already cited, *Wheatley* v. *Williams* (1). In the course of his judgment he says:—"The passage cited . . . . from *Buller's Nisi Prius* must apply to a case where the attorney has his knowledge independently of any communication from the client; it cannot mean that where the attorney, coming to the client for a confidential purpose, obtains some other collateral information which he would not otherwise have possessed, he can be compelled to disclose it. Suppose an attorney, when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he would be bound to disclose it?"

There remain two questions of construction, raised with relation (1) to the question of consent to disclosure, and (2) to the suggested restriction of the words "physician and surgeon" to Victorian practitioners and to confidences taking place within this State. On these I have nothing to add to what has been said by my learned brother the Chief Justice, except that, as to the first of them, I am as at present advised inclined to think that the consent can be exercised only by the patient, and that, if he does not give it, his representatives cannot do so after his death. Here there was no consent by anybody, and the question need not be decided.

I am of opinion, then, that the evidence tendered was inadmissible.

A number of decisions of American State Courts were cited. As to these I would remark that the sections now numbered 54 and 55 in the *Evidence Act* 1890 were first enacted in Victoria in 1857 as secs. 10 and 19 of "An Act to consolidate and amend the Law of Evidence." I think only one or two of the American decisions were reported before that year. There were some differences between the State Acts then in operation in America and the Victorian enactment, and seeing that they were decisions in one, perhaps two, of a multitude of States the tribunals of which are frequently at variance in the construction of Statutes, I do not think it can well be said that, when the legislature of Victoria enacted these provisions, they had acquired in Victoria the meaning contended for by the plaintiff by prior judicial interpretation in

(1) 1 M. & W., 533, at p. 541.

America. There are many American decisions later than 1857, some of them on words identical, or almost so, with portions of sec. 55. But these obviously cannot be called in aid on the principle adverted to, and they are not of authority to us otherwise. Although there is much able reasoning to be found in them, I feel that in this case we are on sounder ground in arriving at our conclusions independently by the light of the ordinary canons of construction.

For the reasons given I am of opinion that the refusal of a new trial by the Supreme Court was correct, and I ought further to say that, in my opinion, the case of *Warnecke* v. *The Equitable Life Assurance Society of United States* (1) was rightly decided as to the question immediately before the Court.

O'CONNOR J. From the pleadings and evidence in this case it is abundantly clear that the bodily condition of Mrs. Godrich in certain respects, at the time when she was attended and operated on in Sydney, was a material fact for the consideration of the jury. Evidence of what Dr. Thring could prove was tendered by the defendants at the trial comprehensively, and without the details which would probably have been given if that gentleman had actually been a witness. That course was apparently followed on the assumption that the learned Judge would reject evidence of all information the doctor had acquired in reference to the lady's bodily condition when once she had become his patient. Whether that form of tendering the evidence has brought before the Court with sufficient definiteness the real point for decision is a matter which I shall consider later. Taking, however, the evidence as it was tendered, it naturally divides itself into two classes according to the source from which the "information"—I use the word in its widest sense—may have been derived. First, that communicated to the doctor by some word or act of the patient. Secondly, that which he acquired solely from his own observation. There can be no doubt that, but for the provisions of sec. 55 of the *Evidence Act* 1890, the doctor's evidence as to both classes of evidence would have been admissible. The words of the section are as follows:—"No physician or surgeon shall

(1) (1906) V.L.R., 482; 27 A.L.T., 236.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

O'Connor J.

without the consent of his patient divulge in any civil suit action or proceeding (unless the sanity of the patient be the matter in dispute) any information which he may have acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient." Before entering upon an examination of the Statute I shall refer briefly to two contentions of the defendants' counsel which may be briefly dealt with. It is, in my opinion, immaterial whether the doctor whose evidence it is sought to exclude attended the patient in or out of Victoria. The section deals only with procedure in Victorian Courts. It is within the competency of the Victorian legislature to bind in matters of procedure all persons who come before Victorian Courts even though the result may be, as in this case, to shut out evidence of a transaction which took place outside their territorial jurisdiction. Privilege from disclosure in Court is certainly a matter of procedure only. That being so, there is no reason why the general words used by the legislature, which on the face of them include attendance on a patient in any part of the world, should be restricted in their operation to attendance in Victoria. In the next place it is, I think, quite plain that the protection of the section does not cease on the death of the patient. There is nothing in the language used to indicate an intention on the part of the legislature to so limit the privilege, and the analogy of other communications made in the course of confidential relations which the law privileges from disclosure do not support the appellants' view. The death of the husband or the wife does not enable the other to give in evidence communications made during marriage, nor does the solicitor become entitled on his client's death to divulge in Court communications made to him as professional adviser by the client in his lifetime. Whether or not there may be circumstances in which the personal representatives of a patient who has died could consent in the interests of the patient's estate to release the medical attendant from his obligation of secrecy it is not necessary here to determine. Upon the facts as they are before us, I am of opinion that whatever prohibition existed in the patient's lifetime against her doctor divulging in Court information as to his patient's condition is still in existence notwithstanding her death.

Turning now to the section itself, and applying the well known rules of interpretation which have been many times stated and acted upon in this Court, the first matter for inquiry is what is the meaning of the language used taken in its ordinary sense? Taken in that sense the words clearly, I think, convey the meaning that all information is privileged from disclosure in Court which the doctor may have acquired in attending the patient, and which was necessary to enable him to prescribe or act for the patient. A question was raised as to whether the word "information" is to be read in its wider or in its narrower sense. One of the appellants' contentions was that the word covered only knowledge acquired from the written or verbal communication of the patient or of persons acting in his interests, and could not be accurately used to describe knowledge which the doctor may have acquired by his own personal observation. There is, however, a very general use of the word to describe knowledge acquired by any means whether by personal observations or from the communications of other persons. The protection of the section would be very ineffective if it did not include knowledge acquired by the medical man by either or both of these methods. The information intended to be protected is that acquired "in attending the patient." It not infrequently happens that the patient's condition makes it impossible for him to communicate information, and that the doctor's only means of acquiring a knowledge of the case sufficient to enable him to act is his own personal observation. There are cases too, surgical and other, of such a nature that the material and necessary information can be gathered in no other way than by the doctor's own examination of his patient's body. Under these circumstances it is, I think, plain that full effect will not be given to the section if the word information is read in so narrow a sense that the section will be, in effect, applicable to those cases only in which the patient is in a position to fully communicate to the doctor all knowledge necessary for his proper treatment. I take it, therefore, that "information" must be construed as covering all information respecting the case acquired by the doctor in attending the patient, both from the latter's personal communications or those of persons acting on his behalf or from the doctor's own

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

O'Connor J.

observations of the patient's condition, provided always that the information acquired was necessary to enable the doctor to prescribe or act in attending him. To constitute the position of doctor and patient which the legislature had in view, it is not necessary, in my opinion, that any confidential or contractual relation should be expressly created between them. The mere fact of the doctor attending a person needing a doctor's care will in most cases be sufficient evidence of the relation of doctor and patient. But there may be cases in which the *primâ facie* inference from that fact may be rebutted. As, for instance, where, in the case of litigation or anticipated litigation, the attendance is clearly for the purpose of obtaining information in the interest of some one other than the patient himself. Viewing the facts submitted to us on that principle, I take it as established *primâ facie* that the lady was Dr. Thring's patient within the meaning of the Act during the whole time he was attending her, whether before or after she entered the hospital. That being so, I turn again to the section to ascertain whether all, or, if not all, what portion of the information he acquired while so attending her is protected from disclosure. The answer is to be found by a consideration of the words "necessary to enable him to prescribe or act for the patient." The legislature has clearly indicated its intention to protect from disclosure in Court, not all information which may be acquired by a doctor in attending his patient, but that only which is necessary to enable him to prescribe or act. The line of limitation is no doubt purely arbitrary, but it is clearly drawn, and any Court charged with the duty of applying the section to any set of facts is bound to observe it. It is a well known principle of interpretation that where a Statute infringes a common law right it will be taken, in the absence of express words to the contrary, that the legislature did not intend to interfere further with the right than was necessary to effect the object of the enactment. *Primâ facie*, every litigant is entitled to bring before the Court all evidence material to the proof of his case. In respect of a doctor's evidence, where a Statute under certain circumstances abridges that right, it should be so interpreted as not to extend the exception or privilege beyond the limits which its language, fairly interpreted,

has expressly marked out. The Courts have always been careful to keep such privileges within their limits.

In applying the section to any particular set of facts it is therefore essential that the Court should be made aware of the circumstances surrounding the doctor's attendance in so far as it may be necessary to enable it to determine whether the evidence objected to falls on one side or other of the line which the Statute has marked out. As to a large portion of the evidence tendered there is no difficulty in deciding that it would be protected. All information coming from the patient herself, or from her nurse or attendant, if relating to her health and necessary to enable Dr. Thring to prescribe or act for her, would be privileged from disclosure. And that would be so whether the information was conveyed at the beginning of the attendance or from time to time during its continuance, and whether before or after the operation, so long as it was conveyed while the doctor was in attendance and it was necessary to enable him to prescribe or act for the patient. Similarly, all information derived by the doctor from his own observations of his patient's bodily condition, whether in respect of matters to which she had directed his attention, or in respect of other matters of which he deemed it necessary, for the purpose of treating her, to satisfy himself by his own examination and observations. So far the application of the section is clear enough. It is when we get to the operation that the real difficulty in the application of the section arises. To what extent, if to any, was the information acquired by the doctor during the operation admissible in evidence? That is a question which can only be determined by applying to the circumstances the line by which the Statute separates information which may be, from that which may not be, divulged in a Court of Justice. *Primâ facie* nothing which the doctor himself observes during the operation is privileged from disclosure, the protection of the section extending only to the information necessary to enable the operation to be carried out. While it is being carried out the medical attendant is *primâ facie* in the same position as any bystander of sufficient expert knowledge to understand and explain what he has seen. But that is true only where the operation in itself finally accomplishes the end at

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

O'Connor J.

which the medical man is aiming. An operation, however, is sometimes undertaken, not with any hope of finally accomplishing the healing of the patient, but to obtain further knowledge. It may be an exploratory operation whose very purpose is to acquire information on which future treatment may be based. Everything observed by the doctor during such an operation which could afford him information necessary for the treatment of his patient would be protected from disclosure. Again, there may be cases in which the doctor determines that an operation is necessary, but cannot decide what particular action to take with respect to the part to be dealt with until he sees its actual condition. Under such circumstances the information which he so acquires, in so far as it affects the part of the body which he is treating, must be taken to be necessary for further action, and so privileged from disclosure. Of this position the facts shadowed forth in the evidence tendered furnish an illustration. The evidence before the Court as to Dr. Thring's treatment of his patient shows that he attended her for septic peritonitis. That is a condition which might arise from many different causes, and we may assume, I think, on the facts appearing in evidence, that the peritonitis followed the operation. The material question is, what course of treatment did the doctor follow in operating? If he performed the operation with the view of finding out the actual cause of the patient's condition and of dealing with the ovaries and fallopian tubes by way of excision or otherwise in accordance with the state in which he found them, everything he saw of their condition would, it seems to me, be privileged from disclosure as being information necessary to enable him to decide upon the most judicious course of further treatment. On the other hand, if he had before the operation decided that the excision of these parts or either of them was the proper course of treatment, irrespective of the condition in which he might find them, his own observation as to their condition would not be necessary for the purpose of any further treatment, and the information thereby acquired would be information not protected from disclosure in Court. The learned Judge at the trial, acting on the authority of *Warnecke* v. *Equitable Life Assurance Society*

of the United States (1), shut out all the evidence tendered apparently on the assumption that the judgment in that case laid down the rule that all information acquired by a doctor in the course of attending his patient is privileged from disclosure in Court. Neither of the learned Judges taking part in that decision advert to the limitation of the protection of the section to those cases in which the information acquired is necessary to enable the medical man to prescribe or act. That question does not seem to have been raised by either party. On the face of it, all the case decides is that the protection of the section covers information acquired by the doctor from his own observation in attending the patient, as well as that communicated to him by some word or act on the part of the patient. If that statement of the law is to be taken as applying only to such information as may be necessary to enable the doctor to prescribe or act, it is correct, but in so far as it goes beyond that, it cannot in my opinion be held to be law. The learned Judge at the trial was apparently not asked to draw any distinction between the portions of the tendered evidence which involved information necessary to enable the doctor to prescribe or act and those portions which did not. In his decision he in fact drew no such distinction, but shut out all the evidence tendered, apparently on the ground that when once a doctor has begun to attend a patient all information which he acquires as to his patient's condition during the attendance is privileged from disclosure. The respondents relied on Mr. Justice *Dennison's* decision upon a similar provision of the New Zealand *Evidence Further Amendment Act* 1895: *Stack* v. *Stack* (2). On the facts of that case the decision was right. It would appear that the evidence shut out was information acquired by the doctor while attending the patient for a disease the treatment of which must have rendered necessary the doctor's examination of his patient's body. It seems to me clear from the report of that case that the doctor obtained the information for the purpose of treating his patient for that disease. A number of decisions in the American Courts were also relied on by the respondent's counsel, not as authorities binding on this Court, but as the decisions of American Judges on Statutes in practically the same language as that under

(1) (1906) V.L.R., 482; 27 A.L.T., 236. (2) 25 N.Z. L.R., 209.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD v. GODRICH.

O'Connor J.

consideration. Those decisions, no doubt, support the respondent's contentions to the fullest extent. In so far as they hold that information acquired by the doctor from his own observation of the patient must be dealt with on the same footing as that which comes to him by personal communication from the patient herself, I follow and wish to adopt the arguments used, but, in so far as they extend the privilege to all information acquired by the doctor while attending the patient, irrespective of whether it is or is not necessary for the patient's treatment, I cannot follow their reasoning. The learned Judge at the trial would therefore be in error in rejecting all the evidence tendered without distinguishing between that which involved information acquired by the doctor in attending the patient, and necessary to enable him to prescribe or act for the patient, from that which did not involve such information. But before the appellants can make use of that error for the purpose of obtaining a new trial, they must satisfy the Court on appeal that they have called the attention of the Judge at the trial to the point on which they complain of the decision. At first I was disposed to think that the tendering of the whole body of evidence, some of which was admissible, followed by rejection of the whole, was sufficient. In some cases that would be so. But on fuller consideration I have come to the conclusion that in this case the party tendering the evidence was bound to call the attention of the Judge to the special ground on which the really admissible part of the evidence ought to be received. That was not done. There was no suggestion in tendering the evidence that as to any portion of it the information acquired by the doctor was outside the protection of the section as being unnecessary to enable him to prescribe or act for the patient. Assume, however, that the real point on which the admissibility of the evidence turns had been properly raised before the Judge at the trial, I am of opinion that this is one of those cases in which the Court should apply Order XXXIX., Rule 6 of the Victorian Rules, which prohibits the granting of a new trial on the ground of error in the rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage of justice has been thereby occasioned at the trial. From what has been foreshadowed of Dr. Thring's evidence, it is obvious that the

great bulk of the information which he obtained from his patient would be privileged from disclosure. It is only in regard to information which he obtained as the result of his observation during the operation that any doubt could be raised as far as can be gathered from the facts already in evidence. If there were any circumstances tending to show that the information obtained during the operation would not come within the protection of the section, the appellants should have brought them to the notice of the learned Judge in the tendering of the evidence, and so to the notice of the Supreme Court on appeal. But no such circumstances have been indicated, and, on the facts presented to the learned Judge at the trial and to the Supreme Court, I find it difficult to escape from the conclusion that, if a new trial were granted, almost the whole of the evidence tendered would be found to be inadmissible, and that as to such portion of it as might be admissible, it would bear indirectly only on the issues which the jury would have to decide, and I do not feel able to determine with any certainty that it would have been likely to affect the verdict. Assuming, therefore, that the evidence was improperly rejected, I am of opinion that no substantial injustice or miscarriage of justice at the trial was thereby occasioned. On these grounds the decision of the Supreme Court must, in my opinion, be upheld, and this appeal dismissed.

ISAACS J. The purpose of the legislature is manifest on the face of the enactment. It was to prevent, within certain limits, any public tribunal being made the instrument to violate the confidence which a patient has reposed in a physician or surgeon as his medical adviser. Parliament has not thought fit to enact a general prohibition of disclosure of professional secrets. Outside the walls of the Court a medical man is left to the dictates of his honour, the ethics or rules of his profession, or the force of any compact he may have made with the person who confided in him. And even within the Court itself, where crime is charged, the interests of the public at large are still for obvious reasons thought sufficient to outweigh considerations of medical confidence. But, where individual rights only are in controversy, unless the patient's sanity is the matter in dispute, the State, setting private

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Isaacs J.

obligation against private obligation, refuses to be a participant in the breach of a personal trust, probably the result of physical suffering or the fear of death. So much is clear; the evil to be cured is unmistakeable, and within the limitations which the legislature has itself marked out, the remedy should be advanced: *Heydon's Case* (1).

The enactment works no abridgment of any substantive right, no invasion of liberty or property, nothing but a regulation of curial procedure to effect a desired reform in the law of evidence for the maintenance of good faith. There is therefore no legal reason to apply a grudging construction, or to place upon the words of the legislature a narrower interpretation than their ordinary sense requires. They should be given their full and fair meaning, nothing less, and nothing more.

I am not able to share the opinion of some learned Judges that such a law is undesirable. If their reasoning is sound, then the privilege with which the law surrounds confidences between solicitor and client, and between priest and penitent, should be similarly removed. Long before the humanity of some of the American States led the way in this legislative reform, its desirability was advocated by very eminent English Judges. As early as 1792 *Buller* J. said in *Wilson* v. *Rastall* (2):— "There are cases, to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the *information which they acquire by attending in their professional characters.*" It is noticeable that not only the principle but even the form of expression we now have to consider is substantially suggested.

In 1833 Lord Chancellor *Brougham* in *Greenough* v. *Gaskell* (3) expressed the view that the privilege then confined to the case of legal practitioners was not on account of any particular importance which the law attributed to their business, and that it was not easy to discover why a like privilege was refused to others, and especially to medical advisers. Very possibly injustice may be done in some cases. But that may be said of nearly every rule of evidence; and certainly of those cognate to the one under consideration.

(1) 3 Rep., 7b. (2) 4 T.R., 753, at p. 760. (3) 1 Myl. & K., 98, at p. 103.

And it is a question to be considered in each instance on which side the balance of public advantage rests. The Privy Council in the recent case of *Macintosh* v. *Dun* (1), speaking by Lord *Macnaghten*, quoted with approval and acted upon what is termed the striking language of *Knight Bruce* V.C. in *Pearse* v. *Pearse* (2), which was in these terms:—"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." From every standpoint, therefore, I see nothing to lead me to cut down the primary effect of the section.

Now, the material facts are that Mrs. Godrich was a patient of Dr. Thring. She was examined by him as her medical adviser, and then at once went into the Sydney Hospital, where on 29th August 1908 he performed an abdominal operation upon her. Septic peritonitis supervened, and I assume as a reasonable inference, though there is no direct evidence of it, that Dr. Thring continued to attend her till 3rd September, when she died. The question, and the only question we have to consider, is whether any of the statements she made to Dr. Thring, or any of the things he observed, from the time he began to examine and advise her until her death, should have been admitted in evidence.

There is no circumstance to suggest that any of the statements made or any of the observations noted were outside the scope of the relation of doctor and patient. The unbroken continuance of that relation, and the close connection of events, beginning with consultation and ending with death, strongly suggest and raise a *primâ facie* inference that all Dr. Thring's knowledge was gained strictly in his capacity of medical attendant and for the purpose of treatment to enable him to cure her or alleviate her sufferings.

The first point advanced on behalf of the appellants is that though statements made by the patient are protected from disclosure, yet whatever is personally observed by the doctor and

(1) (1908) A.C., 390, at p. 401. (2) 1 De G. &. S., 12, at p. 28.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Isaacs J.

not indicated by a statement of the patient, remains as at common law without statutory protection. In other words, it is said that the expression "information which he may have acquired" refers only to statements made to the doctor, and not to facts he detects for himself, by his sense of sight, hearing, or touch. If, for instance, a patient says "I have a cough," or "my hand is bleeding," that is protected; but if the doctor hears the cough, or perceives the wound, there is no protection for that.

The word "information" primarily denotes knowledge from any source; the word "acquired," in itself, regards the matter from the doctor's standpoint, and indicates the fact of his possession of the information howsoever obtained, and reading the two in conjunction, as the legislature has used them, they comprehend as well the perception of facts by the doctor as the statement of them by the patient. When we recollect that a patient consults a doctor to gain and not to give authentic knowledge of his condition, and that the doctor's knowledge of his patient's condition is acquired much more by means of his professional skill and experience than by any words of the patient, it is plain that the suggested construction would reduce the legislative provision almost to a nullity. A patient in submitting his body for examination is presenting a human document as legible to the eye of medical science as is an instrument of title to the practised eye of a legal adviser, or any ordinary printed matter to a general reader. It is a much more distinct, complete and certain presentation of the actual facts of his condition than any verbal statement by him could possibly convey, and, without the most violent restriction of the ordinary and natural sense of the words "information acquired," the suggested limitation is impossible. Besides, we have only to contrast the word "information" as here used with the word "communication" in sec. 54, and the word "confession" in the earlier part of sec. 55, to see that there must have been a deliberate intention on the part of Parliament to employ in this instance the expression of wider import. The foundation of the appellants' argument was the verbiage of some passages in text books which were in existence and in the Supreme Court library before 1857, when the law was originally passed. Briefly put, these passages referred to the American law

as protecting "communications" between doctor and patient, and it was argued that as communications clearly meant statements by patient to doctor, these must therefore have been what the Victorian Parliament meant when it used the quite different words "information acquired." Apart from the violence done to the natural meaning of the words used by Parliament, and the novelty of the assumption that Parliament was guided in its intention, though not in its language, by the American text books, the argument fails entirely when we consider the true meaning of the word "communication" in this connection. As applied to the case of solicitors, and it is often, as for instance in *Wheeler* v. *Le Marchant* (1), the only word used, it signifies every fact professionally communicated to him, and the object of the rule is to preserve the secrets directly or indirectly disclosed by the client to the solicitor in the course of their professional relations: *per Parke* B. in *Dwyer* v. *Collins* (2). If precedent were needed for the word "communicated" in the present connection, we have it in New Zealand, where the actual word employed in the enactment corresponding to the one now under consideration is "communication." There it has been held, in accordance with the precedent of legal confidences, that the term comprehends information acquired in any way by the senses: see *Stack* v. *Stack* (3).

The next point, in logical order, made for the appellants was that, assuming the section covered both statements and observation, the line of demarcation separating the protected information from the unprotected is the actual writing of the prescription or the actual commencement of the operation. The initial vice of the argument is that it finds no warrant in the words of the section, and is utterly opposed to its primary meaning and spirit. According to the words of the Act all information is protected which is necessary to enable the practitioner to prescribe or act. Probably "prescribe" refers to treatment as a physician, and "act" to treatment as a surgeon; though the same person may act in both capacities and be covered by both words. But "prescribe" and "act" are used in the widest sense to denote anything that the practitioner may

(1) 17 Ch. D., 675. (2) 7 Ex., 639. (3) 25 N.Z.L.R., 209.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Isaacs J

do professionally for the cure or relief of his patient. In this case there is no reason whatever to doubt that from the beginning to the end of Dr. Thring's attendance on Mrs. Godrich all he heard and perceived was exclusively to enable him to act for her. I cannot accede to the contention gravely presented that he was not acting for her within the meaning of the section after he commenced his operation. That assumes she employed him merely to perform the operation, and even then it would be a very strict, and, I think, an erroneous construction, to limit the protection to his knowledge acquired before the operation, and to exclude protection to that which was inevitably acquired during the operation and was therefore as much the subject of confidence as previous knowledge. Yet such was the argument. On the facts before us, the assumption is fallacious at its base. Mrs. Godrich, so far as appears, was Dr. Thring's patient for him to advise and cure if possible, and the operation was only part of his method of trying to cure her. It was not the end aimed at, it was but a step in his whole process of treatment, which was not complete until the healing of the wound and the patient's restoration to health, or else her death, unless the relation was sooner terminated. This treatment was continuous, and the confidence continuous, and it was all one inseparable action.

The second point is not maintainable. So far as any argument was rested on the assumption that Dr. Thring had, or might have, in fact acquired information outside any necessity to treat Mrs. Godrich, or that the learned Judge at the trial or the Full Court afterwards rejected such evidence, I am of opinion the point was not taken, or intended to be taken at the trial, and it is not open now.

As to the third point, I think the section applies wherever the confidence arose, whether in Victoria or elsewhere. A New South Wales solicitor, having obtained a confidential communication in that State, would not be free from his obligation of secrecy in Victoria, a clergyman to whom a confession was made in another State would not be permitted to divulge it in a Victorian Court, and so with regard to the physician. Equally with the case of a Victorian practitioner would the Court in the

event of divulgation be made the instrument of a breach of faith, and this is what is forbidden.

Lastly, I think death does not end the operation of the section. In many cases the necessity of preserving confidence is all the greater when the opportunity of controverting the physician's assertions has gone for ever. Frequently the physician does not communicate to his patient what he observes, and so the obligation of silence is even stronger than when the patient had at least some chance of reply. As I read the section, unless there can be shown some actual consent—express or necessarily implied—by the patient to the desired disclosure, then in such a case as the present, to borrow the words of some of the American cases, the lips of the medical adviser are sealed. No contention was raised that the circumstances in any way disclosed consent. Resting my judgment solely on the reasons I have stated, I agree in thinking that this appeal should be dismissed.

HIGGINS J. The construction of sec. 55 of the *Evidence Act* 1890 has been the principal subject of argument before us.

It is admitted by the appellants that Dr. Thring, whose evidence is treated as rejected, would have refused to answer the questions unless compelled by the Court. The section does not say that the evidence is not "admissible," as in sec. 57; it merely forbids the medical practitioner to divulge his information. Personally, I am by no means satisfied that if, through inadvertence or otherwise, the evidence had been given, it should be ignored. But the appellants' admission relieves us of the necessity of considering this aspect; and I treat the point in dispute as if it were, should the Court have compelled Dr. Thring to answer under the circumstances.

No question was, in fact, asked—Dr. Thring was not present; and it is not the practice to allow a new trial for rejection of evidence, however adverse the opinion of the Judge, unless a definite question be tendered and rejected: *Campbell* v. *Loader* (1). In this case, however, the parties made certain admissions with the view of avoiding the expense of bringing Dr. Thring from Sydney. It was admitted that Dr. Thring attended the

(1) 34 L.J. Ex., 50; 3 H. & C., 520.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Higgins J.

asssured as an ordinary patient on 29th August 1908, that she went into a hospital in Sydney on his advice, and that he operated on her in the hospital. She died on 3rd September 1908. Then comes this statement, which is the only indication of the questions that would have been asked :—

"Mr. *Starke* is to be taken to have tendered Dr. Thring to prove what statements Mrs. Godrich made to him before going into the hospital, and what observations he personally made, and the same allegations after she went into the hospital."

The language used is loose; but I shall assume that we may treat Dr. Thring as having been asked what statements Mrs. Godrich made, and what observations he made of her condition, before and after she entered the hospital. There is no evidence that Dr. Thring saw the assured after he operated, or that he saw her for any purpose except that of curing her from her malady, or that he observed anything not incidental to this function. If the questions were put in the form indicated by Mr. *Starke*—"What statements did Mrs. Godrich make?"—"What observations did you make?"—it is plain that, under the admissions, they would relate solely to the preliminary diagnosis, and to the operation which followed. The defendants have no ground of complaint if they meant to ask questions as to statements and observations made after the operation, or made independently of Dr. Thring's functions as a surgeon acting for the assured; for no foundation was laid for such questions. If the questions to be asked are too wide, if they cover some of the ground which the section forbids, they were rightly rejected; for they could not have been answered truthfully without disobeying the section. It would be grossly unfair to the Court, as well as to the plaintiff, to allow a new trial because the question *might* cover permissible matter, if that matter was not clearly separated from the forbidden matter, and if the attention of the Court was not specifically directed to the permissible matter.

Mr. *Mitchell's* argument was that the words "information acquired" in sec. 55 must be confined to words of the patient, verbal or written or expressed by signs. I can find no reason for such a limitation of the meaning. Under sec. 54 a wife is not compellable to disclose any "communication" made by her hus-

band, and *vice versâ*. Under sec. 55 no clergyman is to divulge any "confession" made—words clearly relating to verbal communications only. But in the latter part of sec. 55 there is no reference to "communications" verbal or otherwise; the prohibition is against any physician, &c., divulging "any information which he may have acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient." Sec. 57 expressly refers only to "statements." Probably the intention of the framers of the section was to put medical men in substantially the same position of privilege as lawyers under the common law; and in the case of lawyers, it is clear that the privilege is not confined to the client's statements: *Wheatley* v. *Williams* (1). But, whether this was the intention or not, there is absolutely no ground for treating this section as making the suggested distinction between information acquired through words and information acquired through the eye—between what the physician learns from the patient's explanation, and what he learns from the patient's exhibition of his body. The Courts of New York, in applying a similar section, have repudiated such a distinction: *Johnson* v. *Johnson* (2); *Edington* v. *Mutual Life Insurance Co. of New York* (3); *Grattan* v. *Metropolitan Life Insurance Co.* (4); *Nelson* v. *Village of Oneida* (5); *Westover* v. *Ætna Life Insurance Co.* (6). The New Zealand Supreme Court has ruled to the same effect, even though in the New Zealand Act the prohibition is limited to "communications" made by the patient: *Stack* v. *Stack* (7); *Godfrey* v. *Godfrey* (8). No doubt the section is sometimes a hindrance to the establishment of the truth; but so are all rules which fetter the giving of evidence. No doubt it leads to some curious results. In an action for negligence against a medical man the defendant would (it is said) be prevented from giving evidence of his diagnosis. But then (1) his mouth is admittedly closed also as to statements made by the deceased—which is an equal injustice; and (2) his counsel and the Judge would bring emphatically before the jury on the issue of negligence the

(1) 1 M. & W., 533.
(2) 4 Paige Ch. N.Y., 459.
(3) 67 N.Y. L.R., 185.
(4) 80 N.Y. L.R., 281.
(5) 156 N.Y. L.R., 219.
(6) 99 N.Y. L.R., 56.
(7) 25 N.Z. L.R., 209.
(8) 6 Gaz. L.R. (N.Z.), 289.

H. C. OF A. 1909.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. v. GODRICH.

Higgins J.

fact that his mouth is shut. The patient, if alive and suing, would be practically forced to consent to the evidence under this section. As for an action after death, under the provisions of *Lord Campbell's Act*, the position is different. When this section was first enacted in Victoria (1857) the provisions of that Act were comparatively recent (see 11 Vict. No. 32); and the legislature does not seem to have taken into consideration this peculiar exception to the common law. The section is, in the main, just and expedient in the public interest; but if, as seems probable, it needs to be amended to some extent, it is for the legislature, not for the Courts, to make the amendment. Mr. *Starke* urged that, even if the section protects information acquired by observation of the body, as well as that acquired from the words of the patient, yet the practitioner may give in evidence the operation performed, and the conditions under which he acted. Reliance was placed on the words "necessary to enable him to *prescribe or act* for the patient"; and it was said that the section protects only what takes place before the operation. But in *Eddington* v. *Mutual Life Insurance Co. of New York* (1), it is said:—"The point made that there was no evidence that the information asked for was essential to enable the physician to prescribe is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient." In short, anything that Dr. Thring saw during the operation must be taken to have been seen for the purpose of curing the patient of her malady; and his duty as surgeon was not necessarily complete even when the knife had done its work. His function was to carry the process to its completion, to act for the patient, even to prescribe for the patient, until he dismissed her cured—or death. In my opinion, the Victorian law forbids the proposed questions, and the surgeon could not be compelled by a Victorian Court to answer such questions in a trial in Victoria in a Victorian Court.

Even if my view of sec. 55 were adverse to the plaintiff, Mr. *Fink's* argument would have to be more fully considered—that the appellants has not shown, under Order XXXIX., sec. 6, that

(1) 67 N.Y. L.R., 185, at p. 194.

any substantial injustice has been done to the defendants by the wrongful rejection of the evidence. There is much to be said for the view that, if we may judge from Dr. Thring's written statement as to the cause of death, he could not have shown, or even have expressed an opinion, that the deceased had salpingitis at the time of her taking out the policy. But it is not necessary to decide this point. I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors, for the respondent, *W. H. Peers.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DAVID SYME & CO. . . . . APPELLANTS;
DEFENDANTS,

AND

SWINBURNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Trial by jury—Misconduct of juryman—New trial—Evidence—Discharge of jury—Withdrawal of discharge—Juries Act 1895 (*Vict.*) (*No.* 1391), *sec.* 4 (2)—*Libel—Excessive damages.*

A conversation between a juryman and one of the parties or his representatives is not of itself a ground for a new trial unless there is reasonable ground for believing that the course of justice has been, or was likely to be, substantially affected.