PROFESSIONAL CONFIDENCES

By R. G. Menzies, K.C.

A Meeting of the Medico-Legal Society was held at the B.M.A. Hall on November 12th, 1932, and was made the occasion of the delivery of an address by the Attorney-General, Mr. R. G. Menzies, K.C., the subject being Professional Confidences.

The President, Dr. C. H. Mollison, said it was not necessary for him to introduce the lecturer, and it was certainly not his intention to attempt, as some chairmen did, to anticipate what the lecturer was going to say. He would content himself merely with calling upon Mr. Menzies, K.C., to address the meeting on the subject of "Professional Confidences."

Mr. Menzies said that, following established custom, the first thing he wanted to do was to make one or two general observations. First he would say that the existence of the Medico-Legal Society appeared to him to be infinitely more important than the general run of members of both professions realized. His experience of Parliament, in case any members looked in that direction to have the interests of the professions safeguarded, was that if they wished to have their legitimate interests protected and preserved in such a fashion that they might do their best work for the public, they must do the protecting themselves. They could hardly hope, except as the result of many years of agitation, to get much help from any popularly elected Parliament. If proof of this were needed, they only had to throw their minds back to the parliamentary ineptitude displayed in connection with the dental profession. They would realize that parliamentary decisions upon matters affecting professions rested almost invariably on a basis of votes. If there were more unqualified men than qualified men, then the unqualified men had a good chance of winning. It was quite true that Parliament had not made any sort of attack upon the privileges of the medical or legal professions—at any rate, not recently. It was, nevertheless, important that

the professions should get into the habit of looking for the solving of professional problems to their own professions. To do this, it was first necessary to have a clear conception of what was in the best interests of the professions, and having established that position, to discipline the professions. With that preface, he would turn to the subject of Professional Confidences. Parliament had already spoken on this matter in so far as each profession was concerned, and, because it had, it was perhaps necessary to refer to it at greater length. In comparatively recent years each profession represented at the meeting had probably had some occasion to regret, no doubt, conduct on the part of some of its members who imagined that rules of professional conduct were rather antiquated. Those members were generally interested in making a good living in a very short time. Of course, he could not speak of the medical profession, but he did know that in the legal profession, in both of its branches, the bodies that control and discipline the profession had occasion to regret that there were a few members who regarded with disfavour anything considered as an inheritance of the bad old conservative days. Yet these rules were of the first importance. Following the practice of every lawyer, he would start off on the sound foundation of what the position was at common law. Members of the legal profession greatly admired the common law (that is, those who did not practise equity—and perhaps even they admired it although they didn't admit it). Common law antedated statute law. Consequently if the position on any given subject was to be fully stated, almost invariably consideration must be given first to what the position was before any Act of Parliament was passed, and it must be then determined, if possible, what changes Parliament had made, and then again, if possible, what those changes meant. Now at common law, as far as he could see, the only man who had established a right to receive communications from a client in a confidential or a privileged character was the lawyer. At least that was so up to recent times. However, at common law the position was that if

a client made a communication to a solicitor in the course of the business for which the solicitor had been retained, and having reference to the matter for which the solicitor had been retained, a position of confidential professional character was established in relation to the communication, and the privilege extended so far with the lawyer that he was not at liberty, without the consent of his client, to give evidence about the matter so communicated to him. Now that, it would be agreed, was a very wise and sensible provision. It meant that people who had to have recourse to a legal adviser were able to speak quite freely. It was a principle established very early that had the desirable result of producing or tending to produce confidence between the client and the adviser. He regretted that it was not a complete confidence. Of course, it was recognized that the lawyer's client was at times no more frank with the lawyer than the doctor's patient was with the doctor. And that was so, notwithstanding the lawyer's clients had the knowledge that communications they made rested with men who were privileged not to disclose them even in a court of law. But at common law there was no such protection in relation to communications with medical men. There was also no such protection in relation to communications between the penitent and his spiritual adviser, and therefore, whatever was said even in confidence to medical men or spiritual advisers could be compelled to be disclosed in a court of law. It was not without interest to remember that at least one church got over the difficulty by ruling that any statement made in the confessional to one of its members was not made to him, the man, but that it was made to him as a representative of God, and that consequently he had no personal knowledge of the matter at all, and so was at liberty to swear in a court of law when questioned about it that he had no knowledge of it. He would pursue this acute and subtle piece of reasoning no further. To that state of affairs Parliament came and proceeded to make some changes, and the particular changes it made were in relation to statements made to clergymen and medical men. It was

particularly to the position of statements made to medical men that he would refer. The provision made by Parliament was contained in the Victorian Evidence Act 1928, Section 28. The appropriate part of the Section read: "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 is in dispute) any information which he has acquired in attending the patient, and which was necessary to enable him to prescribe or act for the patient." The words "And which was necessary to enable him to prescribe or act for the patient" were perhaps a flourish of humour on the part of the parliamentary draughtsman. However that may be, that Section stated the present position in relation to communications or information given by a patient to his medical man. Several things would be noticed about the provision. In the first place, it would be noticed that it was confined to civil proceedings. There was still no protection or privilege attaching in criminal proceedings to statements made or information handed on by a patient to his medical adviser. The Section was a complete and exhaustive statement of the rule, as given by Parliament, in relation to medical men. It was not without interest to observe this, for comparatively recently, approximately twenty years ago, in the High Court, a very ingenious attempt was made to limit the protection which was afforded to communications from patients to medical men, in a case which involved an action on an insurance policy, and in order that the attempt could be appreciated he would direct one or two words to the case. An attempt was made in that case to confine "information" to some verbal or written communication, and it was argued that the doctor was still at liberty to give evidence of matters which he had observed either in the course of a diagnosis, or in the course of treatment; that so long as he stated merely from his own observations, he was not privileged from disclosing these observations, but was, in fact, compelled to give evidence about them; and that the privilege attached only to any statement made to him by

word of mouth or in writing. This was a very ingenious distinction, but it didn't find favour with the High Court. The absurdity about the distinction was that if a patient said, "I have a boil on my arm," the statement was privileged, but if he took off his coat and showed the boil, it was not privileged. The High Court decided that the word "information" covered all information in its widest sense, and included not only communications made by the patient, but also all knowledge that might be obtained by the medical adviser in the course of cure or treatment or examination as to the cause of the patient's malady which necessitated the treatment. The next phrase was "which he has acquired in attending the patient, and which was necessary to enable him to prescribe or act for the patient." An attempt was made to limit the phrase in this way. It was established that the privileged relationship between the medical man and the patient existed as to what the doctor discovered on examination. But suppose the examination induced the doctor to decide that the patient's leg required amputating. Everything connected with the amputation was privileged, but it was argued that the observations during the course of the amputation were not subject to privilege from disclosure. The matter involved the evidence of a Sydney surgeon who, in the course of operating upon a woman, had made observations which would have been highly material for subsequent litigation. The court said that when the doctor was amputating the leg, he was then acting for the patient. The argument submitted was that everything he observed up to that time was necessary to enable him to prescribe or act for the patient, but beyond the cutting the privilege did not extend. Fortunately that view did not find approval. That appeared to be substantially the position now established in the Victorian Evidence Act. And, having mentioned that, he said he wished to go back and to glance at the common law rule which was limited in its operation to legal men, because some observation on the basis of the rule might tend to throw some light on how the rule should operate. The basis had been very

clearly expressed in a passage which was now a classic, and therefore he apologized for reading it. It was a passage in a judgment by the late Lord Justice Knight Bruce. It read: "Truth like all other good things may be loved unwisely, may be pursued too keenly, may cost too much: and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear into those communications which must take place, and which, unless in the condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself." That admirable statement of the rule, covering as it did the whole reason for the rule, was extremely interesting and helpful. It was helpful because it was frequently necessary to balance one good against another. Even in such a company as was present there would be found someone at some time prepared to make experiments with the rule. If a rule were necessary, it should be rigid in application. And when there was general knowledge that the application of the rule would be rigid, then its influence would be powerful. That undoubtedly was what Lord Justice Knight Bruce had in mind, and it might be stated thus: it might frequently be true that the interests of justice would be best served in a number of cases by leaving the legal adviser free to give evidence of a communication made by a client or to give evidence of something shown by a client. It might be that by the absence of this evidence some gross injustice might be inflicted, that some member of the client's family might be deprived of property or rights, which result the evidence, if given, would prevent. Or it might be that the evidence if given would prevent a very difficult problem in connection with the case from arising. That might be, but unless people were able to go to their legal advisers and talk with the utmost freedom and with the knowledge that they were able to give a full disclosure of the facts, without which a legal adviser would be unable to give proper advice (and it could only be done if there was absolute protection and

security), the result would be that people would not consult their legal advisers at all. In other words, there must be a complete professional confidence if the object of the rule was to be achieved. Now it might be thought by some that it would not be any great tragedy if people did not take advantage of consultation with a legal adviser. He assured them that it would be, and that the tragedy would be the client's tragedy, and not the legal adviser's. The lawyer had become almost as much an object of derision as the mother-in-law, in music-hall circles particularly, but nevertheless in a moment of emergency, when doubt and trouble assailed him, the average man had no hesitation in consulting his lawyer, and the result was that many thousands of people had been saved from utter confusion, and helped to put their affairs in order, and thereby been able to do justice to people dependent upon them. Without a doubt, it could be said that an enormous amount of real justice depended upon the free access of the client to his legal adviser, and upon the client's knowledge that whatever he said would remain with his adviser and not go beyond him, and above all things would not be divulged in Court. Similarly the law had a firm basis in this respect in Victoria in connection with the medical profession. A great many people fondly imagined that the medical profession existed for the sole purpose of letting people fall into a state of ill-health, and then, for fee or reward, trying to get them out of that state. A great deal was heard from people in opposition to the rule applying to the medical profession, and yet it was perfectly well known that the efficacy of the work of the medical man very largely depended upon the intelligence and candour displayed by the patient in revealing the full facts of and leading up to the illness. It was known perfectly well that the medical man's sphere of activity would be limited unless he could rely upon a full disclosure of the facts. But unless people got into a frame of mind to divulge to the doctor the full facts about the case, the treatment was not likely to be very successful. Suffering had been caused to many thousands of people in

the State by undue reticence on the part of patients when consulting their doctors. That was the position now, but what would it be if there were no privilege attaching to the communications between medical man and patient? To what extent would people who had everything to lose by disclosure of a certain condition of health—of some bodily or mental infirmity—communicate their troubles? What position would they take up if they knew that by consulting a doctor they would be arming some third party with information which they knew he was compellable to disclose if ever the matter came into a court of law? Indubitably the health and sanity of the community would be severely affected. The statutory provision was a splendid one, the benefits from which were not fully realized by the community, and it redounded to the credit of Parliament that even at long last it did enact it. To realize this, it was necessary to balance the two positions, one against the other—a position under which there would be full disclosure, and the position under which there could be no disclosure, even in a court of law. In the case of legal men, the position still was that to a very large extent recourse must be had to the rules established at common law, the basis of which in practice was argued to be good common sense. There was this difference too, that in the case of the lawyer, there was a limitation that communications in connection with illegal or fraudulent projects were not privileged. He could find no trace of that limitation having been introduced in the case of medical men. A man could not go to his lawyer in order to find out how to go about engaging in a recondite crime, with any degree of confidence that the statement of the thing he was about to do was privileged. The reason was that the rules were based on public policy, and public policy did not go the distance of encouraging the lawyer to help people to commit crimes, or to break the law. But there was one comfortable thing to be said about that limitation of the rule—it was not fraudulent to seek to avoid income tax provided the avoidance was a legal one! He would add a few words upon the limits of the rules he

had been discussing. Professional privilege did not expire with the decease of the patient or the cessation of the particular activities of the legal or medical man. A man might have given his confidence or made his communications to a lawyer who meantime had been struck off the rolls, and he might feel at the time the matter came before the court that his confidant was not legally a lawyer. But the communications made to the man who was a lawyer at the time would continue to be privileged. Again, the privilege was the privilege of the client or the patient, and not that of the lawyer or the doctor. That was something he (the speaker) imagined was often overlooked. Professional men were too prone to think that the privilege in question was one which they enjoyed, and one which they might demand. The privilege, when claimed, should always be on behalf of the client or patient. As it was his privilege he might waive or dispense with it. He might say: "You can go ahead and give evidence in connection with this matter." The privilege then disappeared altogether. The rule as stated in these terms seemed to present little difficulty. But there was the case where a barrister or solicitor was not consulted professionally at all. Someone might have recourse to a lawyer in a friendly way, or might have recourse to him for the purpose of mutual discussion on a business deal. Some lawyer too, might find himself director of a company, and in that capacity receive information. But unless at the time he received the information he was acting professionally for the client, then no privilege existed. It was only when the information passing between them was in connection with and for the purpose of the solicitor's legal employment that it was privileged. A final observation was needed in connection with communications in respect of crime. The matter seemed to be open to some small degree of question, but it appeared that the privilege which the lawyer possessed was a privilege which extended to criminal as well as civil proceedings. But the privilege did not, in respect of medical men, extend to criminal cases. Privilege in Victoria to medical men was

statutory, and it was limited to civil proceedings. He thought that he had stated accurately the law in relation to evidence of knowledge gained in professional confidence, so far as it affected the professions represented. Having thus said something about what might be called the letter of the law, he wished to add a few observations about the spirit of the law. In considering the spirit of these matters, one was bound to consider that there were two aspects of professional confidences, the one arising when the adviser, legal or medical, was asked to give evidence of the confidence, and the other arising when some disclosure outside of court had to be considered. The second aspect involved the very vexed question of professional ethics, and frequently it introduced a subject which gave rise to a great deal of difference of opinion. It had to be admitted that some very nice problems arose as to the rule which should rule and direct the professions. To illustrate the point, he would propound a hypothetical case. Take the case of a lawyer who, in the course of his professional activities, in discussing with a client matters with reference to the business upon which the client consulted him, received information which showed definitely that the client was an unreliable rogue—a man of fraudulent practices, a man who was unworthy to be trusted in the handling of money. And suppose the lawyer heard that a friend proposed to engage that man as accountant or cashier, or to put him in some position of trust where he would be handling money. A good many people in these days would say at once that that surely was a case where the observing of the rule was not warranted, and they would say it was a case when the lawyer should say: "Don't you employ that man. I know from that man himself that he is not to be trusted in money matters; don't give him the job." Undoubtedly the temptation to make a disclosure in such circumstances would be tremendous. Circumstance could be imagined in which the temptation would be almost irresistible. But, if the rule was to be subjected to exceptions, what was the rule worth? It was when there were real motives to disclose that the rule needed to be remem-

bered. Take the case of a medical man who, in the course of his practice, and in the course of examining a patient, and discussing his state of health with him, discovered that he was suffering from venereal disease. Suppose that the doctor later heard that the man who was his patient was to marry a daughter of a friend. That medical man indeed would be placed in a dilemma. What should he do? Should he say: "No, I must obey the rule"? or should he say: "I am going to tell my friend about this case. I am not going to see his daughter involved in this tragedy without giving some warning." If he adhered to the rule he would say: "No, what I know about that man I know because he was my patient, and I am the repository of his confidence. I must, therefore, exclude from my mind all matters learned during the time I treated that patient. The information I got during the time that man was my patient concerns no other party." The rule was either a good one, well-founded, or a bad one, ill-founded. That was a problem with which medical men might be confronted. The inclination would be to say: "No, no one can tell me any mere professional rule overbears the common obligations of humanity. The obligations of humanity are much more important to my friend John Smith, whose daughter is going to marry that man, than is the observance of the rule." Medical men would have to ask themselves, if that attitude to the rule were to apply, whether some people suffering from venereal disease and who now went to medical men for advice and treatment, would go if they thought their condition might be made public to their detriment? It was quite true that some would go. Some, alarmed about their health or careless of their reputation, would say: "I am going to a doctor, and I don't care what he is going to do about it." Another man would say: "I am not going to be treated by a doctor, because I am not going to have this thing talked about." What the consequences to the public would be if that latter attitude were generally adopted, could be imagined. The natural result of the inclination "not to have the trouble talked about" would be the distribution of the infection

among other people. The consideration to be balanced was therefore very serious—the daughter of the friend against the ever-growing number of people who might become tainted as a result of a general unwillingness to run the risk of having a disclosure made by a medical adviser. That problem was one which called for serious discussion. What he (the speaker) suggested might be regarded as a counsel of perfection. But what he wanted to impress upon everybody at least was that many of the regrettable features which presented themselves were due to the hit or miss way of making rules as things proceeded. Ought not the professions to say: "All these problems are problems which must be solved, not by the individual in the way he thinks fit, but in the way laid down by the professions"? At any rate, the least the professions should do was to make some attempt to offer guidance to their members and others as to how the rule should really be applied. While he knew that nothing he had said had thrown fresh light upon the question, he was satisfied that good would be achieved by an exchange of views of those present.

Discussion

Dr. Murray Morton said that it appeared that in Victoria confidences to medical attendants were quite fully protected from disclosure in Courts of Law, when the case before the court was in the civil jurisdiction. He would like to know if a doctor had that privilege if he were called in a divorce case to give evidence upon a question of a party who was his patient having a venereal disease. In England the law seemed to be that the doctor was compellable to disclose such a confidence. He referred to a sub-leader in the British Medical Association Journal of July, 1921.

Mr. Fullagar said that Dr. Murray Morton had drawn attention to the remarkable fact that there was, in England, no statutory provision giving privilege to medical men. It must be remembered that privilege was based on public interest. The probable reason why legal men had at Common Law a principle that medical men did not, was that the legal profession had become organized earlier than the medical profession. Thus it came about that when the medical profession had assumed a position of influence the

Common Law had become less elastic and less facile, and judges had felt unable to carry the privilege further. Mr. Menzies had said that at Common Law communications to clergymen were not privileged. There existed strong opinions that they were, but the position seemed to be in a great deal of confusion. The Roman Catholic Church had framed very stringent prohibitions against any disclosure by a priest of communications made to him in the confessional, and the difficult position occasionally arose of a priest being directed by the law to divulge a confidential communication, and being prohibited by his Church from doing so. In England, where the B.M.A. prohibited a doctor from making a disclosure of a professional confidence, and the law, through a judge, enjoined him to do so, a similar position to that of the priest seemed to have arisen. It should be noted that in Victoria the privilege to refuse to disclose in such proceedings professional communications was not a privilege of the doctor, but that of the patient. The doctor was not given a discretion whether he would make the disclosure; he was forbidden to do so without the consent of his patient.

Dr. Wilkinson said that modern legislation had made great inroads upon the old conditions of professional secrecy. He referred to the Health Laws, which required a doctor to report certain diseases to the Health Authorities.

The position of a doctor in respect of the disclosure of confidences other than in a Court of Law was often very difficult. No rule was so perfect that it could be applied under all circumstances without exceptions, and it might be that circumstances might arise which would compel the doctor to make a disclosure.

Mr. P. D. Phillips said he did not join in the general approval of Section 28 of the Evidence Act 1928. That Section might operate against justice. In 1776 it was finally decided that medical men had no privilege, but from time to time judicial dissatisfaction with that rule had been expressed. In 1920, the B.M.A. itself had voted against a proposal to invite the British Parliament to enact a provision similar to the Victorian Section. He gave some illustrations of the manner in which the privilege, in the form enacted, worked to effect injustice. He said that an American Committee had examined some 300 cases, and had come to this conclusion, that a similar American provision had been, in operation, prejudicial to doctors and also to the administration of justice.

Mr. E. G. Coppel suggested that Mr. Phillips' criticism of the Section really went to its form, and not to the principle embodied. It would be simple, and it would enable the Courts to avoid injustice, if it were enacted that the same privilege which extends to the legal profession extended to the medical profession. The Court could then examine each instance as it arose. No legal professional privilege extended to communications which are not made in the legitimate course of professional business, and hence communications having a criminal object are not protected.

Mr. C. Gavan Duffy said that there was a wide divergence of opinion upon what it was right and proper to regard as a confidence, and when it was right to divulge it. To make the recipient of confidence the judge of when he may disclose it, would be to rob the public of the certainty to which it was entitled, that confidential communications will ever remain confidential.

Dr. Felix Meyer moved a vote of thanks to Mr. Menzies.

The vote was carried by acclamation.