McTiernan J., in addition to citing *re Browne's Policy* and *re Collier* to support his view, also referred to *re Parker's Policy*,[16] where it was held that an after-taken wife was within the Married Women's Property Act, 1870, s.10 (England). The policy in that case was expressed to be for the widow and children of the assured. It was argued that by the word 'widow' the assured intended his wife living at the date of the issue of the policy if she survived him, but Eady J. said that 'widow' meant quite definitely 'the person who at the death of the husband shall become the widow'. It is worth noting that the majority made no reference to this important decision. McTiernan J.'s analysis leads him to conclude that he would decide the case on reasoning similar to that used by Kekewich J. 'I think it is appropriate for a number of reasons', he said. 'The wife of the assured is not indicated by name. It is not effected "for the benefit of his named wife *simpliciter*". The words, "the wife of the assured" are capable of referring to the assured's surviving wife. The policy grants an interest to "the wife of the assured" intended to be contingent upon her surviving him.'[17]

Certainly the more practical will prefer this realistic approach which shows greater awareness of social pressures. In the great number of cases of this kind there can be little doubt that the true intention of the assured is to pass on the benefit of his policy to his later-acquired wife. The contention of the majority, then, that 'reason and authority support this decision' must be viewed at least through questioning eyes.

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[16] [1906] 1 Ch. 526. [17] [1955] A.L.R. 107, 115.

EVIDENCE — PHYSICIAN AND SURGEON — PRIVILEGE — PATIENT — SANITY — CONSENT — EVIDENCE ACT 1928 S. 28

X v. Y (No. 1)[1]

The father of an infant ward of the Court sought to have the guardianship of his child determined. He tendered in evidence the affidavits of three doctors to the effect that his wife suffered from mental disturbances. His wife objected to the admission of these affidavits on the ground that it would violate the Evidence Act 1928 s. 28[2]; but she tendered affidavits herself from other doctors testifying to the soundness of her mental state. It was held that she had not thus waived her privilege but the affidavits tendered by her husband were nevertheless admissible. The case fell within the

[1] [1955] A.L.R. 181. Supreme Court of Victoria; Sholl J.

[2] As amended by s. 7 of Act No. 5183: 'No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding (unless the sanity or testamentary capacity of the patient is the matter 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.'

exception 'unless the sanity or testamentary capacity of the patient is the matter in dispute'. Moreover two of his doctors were not testifying to the condition of their 'patient'.

At common law 'a surgeon has no privilege';[3] but the doctrine was, as early as 1792, sharply criticized.[4] The first statute was in New York in 1828; many other American states have followed suit.[5] Neither the United Kingdom nor the Australian States, except Victoria, have done so. New Zealand, however, has such a statute. The Victorian section was first passed in 1857 but although it has thus been in operation for almost a hundred years, there are only six reported cases on it. This however does not seem to be the result of insignificance but rather, at least latterly, of the assumption of practitioners that the section is of the very widest kind, and has almost unlimited operation. The effect of this approach may be seen in *Carroll v. Warrnambool Racing Club,*[6] where Lowe J. said, 'On the whole I think it wiser to give a wide construction to this section to make it as remediable as possible.'

Sholl J.[7] professes to some doubt whether the section amounts to an absolute prohibition of admission without consent so that evidence admitted inadvertently in contravention of it cannot be considered, or whether it merely enables privilege to be claimed so that if privilege is not claimed and the evidence is admitted it may be acted on. It is submitted that the contrasting wording of s. 30 which provides that the evidence there concerned 'shall not be admissible' is persuasive in favour of the latter view of s. 28.[8]

When is a person a 'patient' within the section? It is not necessary that 'there should be a contract of employment between doctor and patient. An accident may take place and a person be injured who is not sufficiently conscious to give instructions to a medical man and he may be treated by a medical man.'[9] In public hospitals the honorary physicians and surgeons have no contract with those they treat, yet in *Long v. C.T.A.* (No. 2)[10] Cussen J. held such a relation privileged. Wigmore[11] attempts to narrow the class of patients to those having a confidential professional relation with a doctor. But the section does not itself require this, and it does not seem that Lowe J.[12] would accept it. Sholl J.[13] in the course of a most careful judgment adopts another test: 'The section does not apply to these

[3] Duchess of Kingston's Trial, 20 How. St. Tr. 573 *per* Lord Mansfield.
[4] *Per* Butler J. in *Wilson v. Rastall* 4 T.R. 753, 760 *cf.* Lord Chancellor Brougham in *Greenough v. Gaskell* (1833) 1 Myl. & K. 98, 103.
[5] Wigmore, *Evidence* (3rd edn., 1940; hereafter cited as Wigmore) s. 2380.
[6] [1953] A.L.R. 1160 C.N. No. 3. [7] [1955] A.L.R. 181, 182-3.
[8] See Higgins J. in *Godrich's* case (1909) 10 C.L.R. 1, 39, and the comments of Sholl J. on *F. (otherwise M.) v. F.* [1950] V.L.R. 352 in [1955] A.L.R. 181, 183.
[9] *Carroll's* case [1953] A.L.R. 1160 C.N. No. 3, *per* Lowe J.
[10] [1917] V.L.R. 453. [11] *Op. cit.*, s. 2381.
[12] *Carroll's* case [1953] A.L.R. 1160 C.N. No. 3.
[13] [1955] A.L.R. 181, 185.

affidavits because it is not established that (the wife) was a patient of these doctors at the material time, for whom as such they intended to prescribe or act.' All the doctors had done was to examine and then certify her for reception into a receiving house. However, this test and this result seem to conflict with *Carroll's* case[14] where a surgeon who was employed by the defendants and had examined the plaintiff, not to prescribe for her but so that he could report on her condition to the defendants, was forbidden to give evidence of the plaintiff's condition. Further, the section does not require that the doctor intend to prescribe or act; and it will be noted that Sholl J. speaks of the doctor's intention and Lowe J. of the patient's intention. The statute forbids the divulging of information acquired in attending the patient. It is submitted therefore that a better test is that a patient is someone a doctor attends. 'Attends' imports 'deals with as a doctor in his professional capacity'. A patient is one on whom a doctor exercises his professional skill, whether it be to diagnose, to treat, to cure, or merely to describe the patient's medical condition. By this test the wife in *X. v. Y.* (No. 1)[15] is a patient of all three of her husband's doctors.

Since *National Mutual Life v. Godrich*[16] there has been no doubt that 'the word "information" primarily denotes knowledge from any source; and the word "required" 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 words 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.'[17] In *F. (otherwise M.) v. F.*[18] it was contended that the information excluded was only that which depended on medical knowledge, and that a doctor's evidence of his patient's physical characteristics when examined by him in bed was admissible in so far as they were observations anyone might make. This argument was rejected. In *X. v. Y.* (No. 1)[19] it was urged that a doctor could disclose his opinion though he could not disclose the information on which it was based. Sholl J.[20] very wisely rejected this argument 'because to permit the statement of an opinion would by inference give the substance of the basis of factual information on which the opinion was founded, and perhaps also because "information" within the meaning of the section includes an opinion founded as a result of communications and observations'. Thus, the meaning of 'information' receives another extension.

Sholl J. admitted the evidence of the doctors on a further ground. He said[21] that it 'relates to the issue of the sanity of Mrs X. within

[14] [1953] A.L.R. 1160 C.N. No. 3.
[15] [1955] A.L.R. 181. [16] (1909) 10 C.L.R. 1.
[17] *Ibid.*, 36, *per* Isaacs J., affirming *Warnecke v. Equitable Life Assurance Society* [1906] V.L.R. 482.
[18] *Supra*, n.8. [19] [1955] A.L.R. 181. [20] *Ibid.*, 187. [21] *Ibid.*, 185.

the meaning of the words in parenthesis in the section. I read that parenthesis . . . as meaning, except where the issue to which the said evidence of the witness is tendered is the issue whether the patient was or is sane or was of testamentary capacity.' But this ground will not stand with the first ground. Having decided that the wife is not a patient, it is impossible to say when her sanity is in question that 'the sanity . . . of the patient is the matter in dispute' for she is not a patient. If she is not a patient the section does not apply at all. However, assuming that she is a patient, does the exception apply to her? It may be noted that the exception does not read 'unless the sanity . . . of the patient is disputed'. It is not enough for sanity to be disputed; it must be 'the matter in dispute'. For the exception to operate the section requires that in a civil suit the matter in dispute be the sanity of the patient. What is the matter in dispute? In this suit it is the relative suitability of a mother and father for guardianship. Mrs X's sanity is only a disputed matter relevant to this. That Sholl J. does not give full weight to the actual words of the section is evidence from his statement of the argument he rejects. He asks,[22] 'is the sanity of Mrs X a "matter in dispute" '? It is submitted that this is not the question. Is it 'the matter in dispute'? However it is also submitted that Sholl J.'s interpretation is possible and convenient.

There is the further question whether Mrs X had implicitly consented to the admission of the affidavits by giving evidence herself and tendering the affidavits of other physicians to prove the soundness of her mental health. An English[23] and a Canadian[24] case on the analogous privilege between attorney and client hold that direct examination about matters within privilege is a waiver permitting cross-examination on these matters. In America the rulings on sections similar to the Victorian one are divided equally each way, both where the party himself voluntarily testifies[25] and where he calls a physician to testify to his state of health[26] but objects to other physicians testifying to it. It seems equitable to hold that such conduct amounts to an implied waiver of the privilege: 'What further reason is there for secrecy if the patient has thrown it aside by permitting one physician to testify',[27] or by testifying himself? However, 'notwithstanding Professor Wigmore's opinion to the contrary, and notwithstanding that an unfair result might follow', Sholl J.[28] treated secrecy of communications to physicians as an end in itself and held there was no implied consent in this case. Thus it seems that professional honour will be jealously protected and that implied consent will seldom be found.

B. J. SHAW
J. G. WILKIN

[22] *Ibid.*, 186. [23] *Mackensie v. Yeo* (1841) 2 Curt. Eccl. 866.
[24] *Forsyth v. Charlebois* (1868) 12 Lower Canada Jurist. 264.
[25] Wigmore s. 2389, and cases cited. [26] *Ibid.*, s. 2390, and cases cited.
[27] *Ibid.* [28] [1955] A.L.R. 181, 184.