THE AMERICAN LAW REGISTER.

JANUARY, 1889.

PRIVILEGED COMMUNICATIONS.

I. TO LAWYERS.

§ 1. AT common law confidential communications made by a client to his attorney, counsellor, or solicitor, in the course of any professional employment, and relating to the subject thereof, are protected, on grounds of public policy, and the latter will not be permitted to testify to such communications, unless the privilege is waived by the client. This rule has been substantially incorporated into the statutes of various States, and, by these, information obtained by any physician or surgeon, while attending a patient, and necessary for his proper treatment, and confessions made to a minister or priest in his professional character, are also protected, and cannot be given in evidence by either of them without the consent of the patient or person confessing.

§ 2. The general rule on this subject, both at common law and under statutes, may be stated as follows: All communications made to an attorney or counsellor-at-law, in the course of any personal employment relating to the subject thereof, and which are made in consequence of the relation in which the parties stand to each other, and all communications made by a client to his attorney or counsel for the purpose of professional advice or assistance, are privileged and protected from disclosure, whether they relate to a suit pending or contemplated, or to any other matter necessary or

proper for such advice or aid ; and such attorney or counsellor cannot be compelled, nor will he be permitted, to disclose such communications in evidence without the consent of his client.

This general rule of evidence was grafted into the common law of England at an early date, for we find it recognized in a case in the reign of Elizabeth in the 16th century: *Berd v. Lovelace*, Cary (Eng. Ch.), 88. And the general doctrine was fully considered and illustrated in a subsequent, but early case, in which Lord Chancellor BROUGHAM, assisted by consultation with Lord LYNTHURST, TINDAL, C. J., and PARK, J., said: "This protection is not qualified by any proceedings pending or in contemplation. If touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or witnesses:" *Greenough v. Gaskell* (1833), 1 My. & K. 101.

These general principles of the law have been fortified and sustained by many decisions, both English and American, whether a suit was pending, or contemplated, or not, *Bacon v. Frisbie* (1880), 80 N. Y. 394 ; provided it is made for the purpose of obtaining professional advice, *Flack's Adm. v. Neill* (1862), 26 Tex. 273 ; *Parker v. Carter* (1814), 4 Munf. (Va.) 273 ; *Hatton v. Robinson* (1833), 14 Pick. (Mass.) 416 ; *McLellan v. Longfellow* (1851), 32 Me. 496 ; *Dunn v. Amos* (1861), 14 Wisc. 115 ; *Wetherbee v. Ezekiel* (1852), 25 Vt. 47 ; *Alderman v. The People* (1857), 4 Mich. 414 ; *Parkhurst v. McGraw* (1852), 24 Miss. 134 ; *Young v. Georgia* (1880), 65 Ga. 525. As to the ownership of the note in suit, *Miller v. Weeks* (1853), 22 Pa. 89 ; *Beltzhoover v. Blackstock* (1834), 3 Watts (Pa.) 21. Whether difficulty in granting a second lease

was suggested by counsel or client, *Turton v. Barber* (1874), 17 L. R. Eq. 329; or, in fact, anything passing between counsel and client during consultation, *Bigler v. Reyher* (1873), 43 Ind. 112; and even if the retainer or employment is declined, *Crisler v. Garland* (1848), 11 Sm. & Marsh. 136. As to correspondence between solicitor preparing to commence an action and third parties, *M'Corquodale v. Bell* (1876), 45 L. J. C. P. Div. 329. As to correspondence between solicitor and employes, *Wilson v. Northampton and Banbury Junction Rwy. Co.* (1872), 14 L. R. Eq. 477; *Macfarlan v. Holt* (1872), Id. 580. As to confidential correspondence with predecessors in title and their solicitors, *Minet v. Morgan* (1873), 8 L. R. Ch. App. 361; *Mostyn v. W. Mostyn C. & I. Co. Lmtl.*, (1876), 34 L. T. (N. S.) C. P. Div. 531.

It is not essential that any fee or compensation be actually paid, or that there should be a general retainer: *Bacon v. Frisbie*, *supra*; *Earle v. Grout* (1873), 46 Vt. 113; *Cross v. Riggins* (1872), 50 Mo. 335.

It is not sufficient that the witness is ready and willing to testify as to confidential communications which are privileged. They are protected as a rule of law, and the Courts will interpose and determine from the facts whether the witness was acting in a professional capacity when the communications were made: *Bank of Utica v. Mersereau* (1848), 3 Barb. Chan. 528; *Bacon v. Frisbie*, *supra*; *Foster v. Hall* (1831), 12 Pick. (Mass.) 89; *People v. Atkinson* (1870), 40 Cal. 284.

An attorney cannot be compelled or allowed to testify as to communications made to him by two clients in a suit by a stranger against one or both of them without the consent of both: *post*, § 7; *Whiting v. Barney* (1862), 38 Barb. (N. Y.) 397. Nor will he be permitted, on a bill of discovery, to disclose communications of his clients, nor produce letters passing between them, or through intermediate agents, and containing or asking legal advice: *Mitchell's Case* (1861), 12 Abb. Prac. (N. Y.) 259.

Counsel may be compelled to disclose the existence of the professional relation, *Chirac v. Reinicker* (1826), 11 Wheat. (U. S.) 280; and the abstract legal opinion asked where no communication of facts to be concealed was made, *McMannus v.*

State (1858), 2 Head, 213; and what occurred in his presence, as the execution of a document, although he was present in consequence of his engagement as counsel: *Patten v. Moore* (1854), 29 N. H. 163.

Friendly and confidential, but not professional, communications to a lawyer are not privileged: *Branden v. Gowing* (1854), 7 Rich. Law (S. C.) 459.

§ 3. *Other persons are privileged.*—The rule is not limited to the attorney or counsellor, but extends to his clerk, assistant attorney, or other agent, while in the discharge of his duty; and it covers confidential communications made to him, or in his presence or hearing, if made for the purpose of advice or assistance, by the client of the attorney or counsellor, as where it is made to an attorney's clerk to enable him to prepare a complaint or other paper: *Landsberger v. Gorham* (1855), 5 Cal. 450; *Taylor v. Foster* (1825), 2 C. & P. 195; *Port v. Hayne* (1824), 1 Id. 545; *Jackson v. French* (1829), 3 Wend. (N. Y.) 337; *Brand v. Brand* (1870), 39 How. Pr. (N. Y.) 193.

So the rule extends to a necessary interpreter, employed to translate communications between the client and the attorney or his assistants: *Jackson v. French*, *supra*; *Parker v. Carter*, *supra*; *Andrews v. Solomon* (1816), 1 Pet. C. C. 356.

The rule is limited to those who are in fact attorneys or counsellors-at-law, and their clerks or assistants, and does not extend to those who chance to be present at a conference between a client and his attorney: *Jackson v. French*, *supra*. Nor does it protect communications overheard by a clerk in the office, who does business for himself, or by others who may by chance be in the vicinity: *Id.*; *Barnes v. Harris* (1851), 7 Cush. (Mass.) 574; *Hoy v. Morris* (1859), 13 Gray (Mass.), 519; *Holmes v. Kimball* (1850), 22 Vt. 555; *Goddard v. Gardner* (1859), 28 Conn. 172; *Sample v. Frost* (1859), 10 Ia. 266. Nor those made when both parties are present: *Whitney v. Barney* (1864), 30 N. Y. 300; *Britton v. Lorenz* (1871), 45 N. Y. 51; *Gas Stove Co.'s Appeal* (1888), 117 Pa. 514; nor statements made by a third person to an attorney at the request of his client: *Perkins v. Guy* (1877), 55 Miss. 153.

Communications made by a former client after the relation

of client and attorney has ceased are not privileged unless artifice has been used to obtain them: *Gordon v. Hess* (1816), 13 Johns. (N. Y.) 492; *Maudeville v. Gurnsey* (1862), 38 Barb. (N. Y.) 225; *Williams v. Benton* (1857), 12 La. An 91. Nor information obtained from other sources, though the client may have communicated the same to the attorney: *Brandt v. Klein* (1820), 17 Johns. (N. Y.) 335; *Crosby v. Berger* (1844), 11 Paige (N. Y.), 377; *Chillicothe, etc., R. Co. v. Jameson* (1868), 48 Ill. 281. Nor acts nor transactions of a client with third persons or with an adverse party, though the attorney may be professionally engaged therein: *Coveny v. Tannahill* (1841), 1 Hill (N. Y.), 33; *Hebbard v. Haughian* (1877), 70 N. Y. 54; *Randel v. Yates* (1873), 48 Miss. 685. Nor letters written by an attorney pursuant to instructions of his client: *Reg. v. Downer* (1880), 43 L. T. N. S. 445. Nor statements made by a client to a third person in the presence of his attorney: *Satterlee v. Bliss* (1869), 36 Cal. 487; *Gallagher v. Williamson* (1863), 23 Id. 331; *Patten v. Moor* (1854), 29 N. H. 163; *Beeson v. Beeson* (1848), 9 Pa. 279. Nor communications made by a client which have no relation to the advice or aid sought or obtained by him: *Ante*, § 2; *State v. Mewherter* (1877), 46 Ia. 88; *Foster v. Hall*, *supra*. Nor communications made to one who is supposed to be an attorney, but who is not: *Fountain v. Young* (1807), 6 Esp. 113; see, also, *Rochester City Bk. v. Suydam* (1851), 5 How. Pr. (N. Y.) 254; *Foster v. Hall*, *supra*.

Generally the rule does not apply to communications made between parties to a controversy before an attorney solicited by them to draw up papers or agreements in relation to the matter, or where they relate to agreements made between such parties and the attorney of one of them, or where made by one party to his counsel in the presence of the other party or his attorney, or where made by one party or his attorney to the attorney of the other: *Gore v. Harris* (1851), 8 Eng. L. & E. 147; *McLean v. Clark* (1872), 47 Ga. 24; *Parish v. Gates* (1856), 29 Ala. 254; *Pulford's Appeal* (1880), 48 Conn. 247; *Dunn v. Amos* (1861), 14 Wis. 106; *Gas Stove, etc., Co.'s Appeal* (1888), 117 Pa. 514; *Root v. Wright* (1880), 21 Hun (N. Y.), 344; *Britton v. Lorenz* (1871), 45 N. Y. 57; *Hubbard v.*

Haughian (1877), 70 N. Y. 61; *House v. House* (1886), 61 Mich. 69.

Communications are not privileged when made by one who is merely a nominal party to a suit, and who has no real interest in it, or made to counsel after he has refused to act as such for the party making it, or to an attorney who has a personal interest in the matter to which the communication relates, or where the matter of the communication becomes necessary to be shown to protect the personal rights of the attorney: *Allen v. Harrison* (1888), 30 Vt. 219; *Rochester City Bk. v. Suydam* (1851), 5 How. (N. Y.) 254; *Setzar v. Wilson* (1844), 4 Ired. L. 501.

The rule is held not to apply to an attorney who is called upon merely to perform some manual service, as to draw up a written instrument, according to directions, without a request to give any legal advice or assistance, and without giving any: *Hatton v. Robinson* (1833), 14 Pick. (Mass.) 416; *Alden v. Goddard* (1882), 73 Me. 345; *Borum v. Fouts* (1860), 15 Ind. 50; *Randel v. Yates* (1873), 48 Miss. 685; *De Wolf v. Strader* (1861), 26 Ill. 225. Nor does the rule prevent a scrivener, who drew a will, from testifying as to the reasons and purposes of the testator in making certain bequests: *Sanford v. Sanford* (1872), 61 Barb. (N. Y.) 305; S. C. 5 Lans. (N. Y.) 486; *Russell v. Jackson* (1851), 15 Jur. 1117; see, also, *Matter of Austin* (1886), 42 Hun (N. Y.), 516; *Matter of Bourry* (1887), 8 N. Y. 809. And generally the rule applies only to such matters as the attorney has learned from his client or on his client's behalf, and which were committed to him in the capacity of an attorney, and in which capacity only he received them: *Rex v. Brewer* (1834), 6 C. & P. 363; *Annesley v. Anglesea* (1743), 17 How. St. Tr. 1239; *Gillard v. Bates* (1840), 6 M. & W. 547; *Greenough v. Gaskell* (1833), 1 My. & K. 104; *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Whiting v. Barney* (1864), 30 N. Y. 330.

§ 4. *The rule covers all methods of communication.*—The general rule covers all methods of communication and all sources of information, oral or otherwise, such as deeds and other papers, and paintings, pictures, photographs, weapons, and other instruments and mechanical devices, if they are

used to convey to the attorney information necessary or useful in the discharge of his professional duty to his client: *Kellogg v. Kellogg*, *supra*; *Crosby v. Berger*, *supra*; *Durkee v. Leonard* (1832), 4 Vt. 612; *Anon.* (1811), 8 Mass. 370; *Lynde v. Judd* (1807), 3 Day (Conn.), 499; *Mills v. Oddy* (1834), 6 C. & P. 728. And in such a case the contents of the deed or other document or instrument of writing would be protected by the general rule and the statute: *Genet v. Ketchum* (1875), 62 N. Y. 626; *Parker v. Carter* (1814), *supra*.

§ 5. *The privilege may be waived.*—At common law, as well as under the statutes, the protection continues forever, unless waived by the client. Even his death is not a waiver of it: *Hatton v. Robinson* (1833), 14 Pick. (Mass.) 416; *Bank of Utica v. Mercereau* (1848), 3 Barb. Ch. (N. Y.) 528; *Yordan v. Hess* (1816), 13 Johns. (N. Y.) 492; *Chase's Case* (1827), 1 Bland's Ch. (Md.) 206. As to waiver of the statutory protection of the "information," acquired by a physician or surgeon while attending a patient, see *post*, § 14. It has been held that if a party to an action offers himself as a witness on the trial, this gives the adverse party a right to cross-examine him as to any confidential communication made to his attorney: *Inhabitants of Woburn v. Henshaw* (1869), 101 Mass. 193; *Com. v. Mullen* (1867), 97 Id. 545. But, unless the party in such a case gave some evidence relating to such communication on his examination in chief, the weight of authority would seem to be against the waiver in such a case: *Duttenhofer v. State* (1877), 34 Ohio St. 91; *State v. White* (1877), 19 Kans. 445; *Bigler v. Reyher* (1873), 43 Ind. 112; *Barker v. Kuhn* (1874), 38 Ia. 395; *Bobo v. Bryson* (1860), 21 Ark. 387; *Hemenway v. Smith* (1856), 28 Vt. 701.

§ 6. *Unanimous consent required to waive where several communicate jointly.*—If the communication is made by or on behalf of two or more parties, in reference to a matter of joint interest or concern, the obligation of secrecy can only be removed by the concurrence of all the parties concerned, and one or more cannot permit or require a disclosure of such privileged communications as evidence, without the consent of all. The seal of secrecy can only be removed by unanimous consent: *Whitney v. Barney* (1862), 38 Barb. (N. Y.) 397; *Root*

v. *Wright* (1881), 84 N. Y. 72; *Chahoon v. Com.* (1871), 21 Gratt. (Va.) 822; *Robson v. Kemp* (1803), 4 Esp. 233; 5 Id. 52; *Sirode v. Seaton* (1834), 2 Al. & El. 171; *McLellan v. Longfellow* (1851), 32 Me. 494; *Bank of Utica v. Mersereau*, *supra*. Unless a controversy arise between the clients, *Rice v. Rice* (1854), 14 B. Mon. (Ky.) 417; because then the communications are made in the presence of all the parties to the controversy: *Britton v. Lorenz* (1871), 45 N. Y. 57.

§ 7. *Does not apply where advice is sought to aid commission of crime.*—Confidential communications made by a person to an attorney, with the view of obtaining advice or assistance in the commission of a crime, are not protected, and the attorney may be required to disclose such communications: *People v. Blakeley* (1859), 4 Park. Cr. R. (N. Y.) 176; *People v. Sheriff* (1859), 29 Barb. (N. Y.) 622; *Graham v. People* (1872), 63 Id. 483; *Coveney v. Tannahill*, *supra*; S. C. 37 Am. Dec. 287; *Bank of Utica v. Mersereau*, *supra*; *State v. Mewherter* (1877), 46 Ia. 88; *Orman v. State* (1887), 22 Tex. 604; *Queen v. Cox* (1884), 14 Q. B. Div. (Eng.) 153; 15 Cox Cr. Cas. 611; 5 Am. Cr. R. 140; *Rex v. Dixon* (1765), 3 Burr. (N. Y.) 1687; *Anon.* (1811), 8 Mass. 370. But the privilege does extend to communications made for the purpose of obtaining information and advice in the perpetration of a wrongful act not criminal *per se*, as where it consists of a fraud on creditors: *Gartside v. Outram* (1857), 26 L. J. Ch. 115; *Charlton v. Coombes* (1863), 32 Id. 284; *Maxham v. Place* (1874), 46 Vt. 434; *Peck v. Williams* (1861), 13 Abb. Pr. 71.

The attorney may be required to testify as to his custody of a written instrument, in order to lay the foundation for secondary evidence of its contents: *Mitchell's Case* (1861), 12 Abb. Pr. 259. And as to the date of a written instrument prepared by him, and whether it has been ante-dated or altered, or as to the date of its actual delivery, but not as to the object of its execution or the subject-matter of its execution: *Bank of Utica v. Mersereau*, *supra*; *Coveney v. Tannahill*, *supra*.

Where the same attorney acted for a mortgagee in lending money, and also for the mortgagor in preparing the mortgage

deed, and in doing so received a forged will from the mortgagor as a part of his title-deeds, on a trial of the latter for the forgery, it was held that the forged will was not a privileged communication, and the attorney was required to produce it: *Reg. v. Avery* (1838), 8 C. & P. 596. And where the attorney for the plaintiff wrote a letter for the defendant to a third person about the matter afterwards in suit, the communication was not privileged: *Shore v. Bedford* (1843), 5 Man. & Gr. 271.

II. TO PHYSICIANS.

§ 8. *Information acquired by a physician or surgeon, when protected.*—At common law confidential communications by a patient to his physician or surgeon, however necessary they might be to enable him to act in a professional capacity, were not privileged or protected from disclosure on the witness-stand. But by statutes in various States all communications made by a patient to his physician or surgeon, and all information acquired by him while attending a patient in a professional capacity, which was important to enable him so to act, are protected. And under these statutes, the general principles of construction, and doctrines deducible therefrom, would be the same as under the common-law rule of protection of confidential communications made to an attorney in his professional capacity.

§ 9. *The statutes on the subject are given at the close of this article.*

§ 10. *The statutes protect all information acquired by a physician or surgeon.*—It will be observed that the statutory provisions relating to physicians and surgeons are broader than those relating to attorneys and counsellors-at-law. The physician's knowledge may be acquired from the patient himself, from the statements of others who may surround the patient at the time, or from observation of his appearance and symptoms: *Edington v. Mutual L. Ins. Co.* (1876), 67 N. Y. 185; *Dilleber v. Home L. Ins. Co.* (1877), 69 Id. 256; *Briggs v. Briggs* (1870), 20 Mich. 34; *Gartside v. Conn. Mut. L. Ins. Co.* (1882), 76 Mo. 446; *Grattan v. Met. L. Ins. Co.* (1880), 80 N. Y. 281; *Campau v. North* (1878), 39 Mich. 606. The

statutes do not apply to one who is not licensed as a physician or surgeon: *Wiel v. Cowles* (1887), 45 Hun (N. Y.), 307; *People v. Schuyler* (1887), 43 Id. 88; *Renihan v. Dennin* (1886), 103 N. Y. 573. Nor do they apply to "information" acquired by a physician, if it was not obtained while he was acting in his professional character and the relation of physician and patient in fact existed. Thus, where a physician of a jail, where a prisoner charged with crime was confined, had medical charge of all the prisoners, and the defendant was examined by him at the request of both parties, it was held proper for him to testify as to the defendant's sanity: *People v. Schuyler* (1887), 106 N. Y. 298.

§ 11. *Construction of the statutes.*—Some controversy has arisen in reference to what is required to be shown as to the importance or necessity of the information, in order to protect it, and how and when this should be made to appear. It seems generally conceded that the word "necessary," as used in the statutes, was not used in its strict sense of absolute necessity, but was intended to cover all useful and convenient information for the purpose of proper professional treatment of the patient. It has been said that the plain language of the statute should not be made broader by construction, and that the necessity of the "information" acquired by the physician should be made clearly to appear before evidence thereof is excluded: See EARLE, J., in *Edington v. Aetna Ins. Co.* (1879), 77 N. Y. 564; *Campau v. North* (1878), 39 Mich. 606. On the other hand, it seems that the necessity of the "information" has been inferred from the relation of patient and physician and the character of the information: *Edington v. Met. L. Ins. Co.* (1876), 67 N. Y. 185. Thus, where the action was brought to recover damages for injuries sustained by negligence of the defendant, and the plaintiff called the physician who treated him for his injuries, to prove expenses incurred by such treatment as an element of damages, and upon cross-examination he was asked, if the plaintiff had the venereal disease while under his care as a physician, to which the plaintiff objected as calling for privileged "information," it was held that the question implied that, if the witness acquired any information

on the subject, he obtained it in a professional way, and that it was protected by the statute: *Sloan v. New York Cent. R. Co.* (1871), 45 N. Y. 125; *Gratton v. Met. L. Ins. Co.* (1880), 80 Id. 281. A physician's certificate, given in good faith, that another person is insane, would be privileged in an action against him for libel therefor, if the certificate was given in a legal proceeding under a statute: *Perkins v. Mitchell* (1860), 31 Barb. (N. Y.) 461. But if the statement in any such case is false in fact and malicious in motive, the injured party may recover: *Somerville v. Hawkins* (1850), 3 Eng. L. & E. 503; *Harrison v. Bush* (1855), 32 Id. 173; *Thorn v. Blanchard* (1809), 5 Johns. (N. Y.) 508; *O'Donaghue v. McGovern* (1840), 23 Wend. (N. Y.) 26; *Van Wyck v. Aspinwall* (1858), 17 N. Y. 190; *White v. Nicholls* (1845), 3 How. (U. S.) 266.

§ 12. *Information not necessary not protected.*—The statutes protect "information" that is "necessary," or valuable or useful, to the physician or surgeon to prescribe or act in a professional way and no other. As to any information, therefore, which has no relation to the treatment of the patient, the physician or surgeon may be required to testify, and neither the patient nor other person can object on the ground that it is within the statute. Thus, it has been held that a physician may testify to an admission made by his patient during treatment, that the injury which he was called upon to treat him for existed before the time of the alleged injury, for which an action for damages was brought, unless it appears affirmatively that such information was essential for a proper treatment: *Campau v. North*, *supra*; *Brown v. Rome W. & O. R. Co.* (1887), 45 Hun (N. Y.), 439; *Reniham v. Dennin*, *supra*; *Edington v. Ætna L. Ins. Co.*, *supra*. And information obtained from a person who consults with a physician or surgeon for the purpose of getting advice or direction how to perpetrate a crime, would not be protected by the statute, for the reason that the relation of patient and physician or surgeon would not exist for the purposes required, and the information would not be "necessary" for any treatment of the patient. Thus, where a physician was consulted by a person as to the means of procuring an abortion in an action for seduction against the latter, it was held that the

information acquired by the physician from the defendant was not within the protection of the statute, and that he was competent to testify thereto: *Hewett v. Prime* (1839), 21 Wend. (N. Y.) 79. See, also, *ante*, § 7; *post*, § 14.

In case of a conspiracy between a physician and his patient to commit a crime, neither could shield himself under the statute: *Ante*, § 8; *People v. Sheriff* (1859), 29 Barb. (N. Y.) 622.

§ 13. *Waiver of protection; who may waive it.*—The object of the statutes is to secure the confidence of the patient in disclosing whatever may be of importance to the physician or surgeon, and in furnishing all means and sources of information which may contribute to aid him in his professional investigations and duties, and, to accomplish this, such information is protected from disclosure. The protection is personal to the patient; and being so, the patient might waive the privilege on general principles of the law. But the statutes of various States expressly provide for such waivers. See the statutes in the note, *infra*. No physician or surgeon can give evidence of the protected "information," unless the protection is expressly waived by the patient. Even the death of the patient will not remove the seal of secrecy: *Westover v. Aetna L. Ins. Co.* (1885), 99 N. Y. 56; *Grattan v. Met. L. Ins. Co.*, *supra*. Without a waiver the evidence would be incompetent, as it is prohibited by the statutes.

And unless offered by the patient, would be open to the objection of any person interested: *Cahen v. Cont. L. Ins. Co.* (1876), 41 N. Y. Super. Ct. 296; *Johnson v. Johnson* (1834), 4 Paige (N. Y.), 460; *People v. Stout* (1858), 3 Park. Cr. R. 670; *Edington v. Met. L. Ins. Co.*, *supra*; *People v. Murphy* (1886), 101 N. Y. 126. It has, however, been held that the prohibited "information" of a physician or surgeon must be disclosed, when it is called for, either by the patient, or, in case of his death, by his representative. And this, because the object of the statute is to protect the patient: *Scripps v. Foster* (1879), 41 Mich. 742; *G. R. & I. R. Co. v. Martin* (1879), *Id.* 667; *Harriman v. Stowe* (1874), 57 Mo. 93; *Pier-son v. People* (1880), 79 N. Y. 424; *Fay v. Harlan* (1880), 128 Mass. 244; *Quaife et ux. v. C. & N. R. Co.* (1879), 48 Wis. 514; *Ill. C. R. Co. v. Sutton* (1867), 42 Ill. 438.

Thus, where an action was brought by the widow to recover damages for the death of her husband, caused by the negligence of the defendant, the testimony of the attending physician of the deceased, who treated him for the injury, as to "information" obtained while thus treating him, was held proper on her behalf: *Groll v. Tower* (1884), 85 Mo. 249.

But the physician cannot give evidence of such "information" against the objection of either the patient or his representatives. Thus, where an action was brought by a widow to recover on a policy of insurance on the life of her deceased husband, and the defendant offered to prove by the physician who attended him at the time that the deceased had the delirium tremens, an objection thereto was held properly sustained: *Gartside v. Conn. Mut. Ins. Co.* (1882), 76 Mo. 446.

It has been held in New York that, although the representative of a deceased person may claim the benefit of the statutory protection, he cannot waive it; that it would be the same with respect to confessions and communications to a minister or attorney. Thus, where an action in that State was brought upon a life-insurance policy issued to the plaintiff's testator, which provided that it should be void, if the insured should commit suicide; and he did commit suicide by hanging himself. The plaintiff claimed that the deceased was insane at the time, and, to sustain this, called a physician who had attended him a short time before his death. This was objected to by the defendant as incompetent under the statute, and on appeal the objection was sustained: *Westover v. Ætna L. Ins. Co.* (1885), 99 N. Y. 56; *Edington v. Met. L. Ins. Co.* (1876), 67 N. Y. 185; S. C., *supra*; *Grattan v. Met. L. Ins. Co.* (1880), 80 Id. 281; *Bowman v. Norton*, 5 C. & P. 177; *Pierson v. People*, *supra*; *Staunton v. Parker* (1879), 19 Hun (N. Y.), 55. If the patient calls the physician and examines him *in chief* as to the privileged matter, this is held to be a waiver, so as to permit the adverse party to examine him in relation thereto at any subsequent trial of the action: *Reniham v. Dennin*, *supra*; *De Witt v. Barley* (1853), 9 N. Y. 371; *McKinney v. Grand St., etc., R. Co.* (1887), 104 Id. 352; *People v. Barker* (1886), 60 Mich. 277. But the use of one physician's evidence in such a case would

not constitute a waiver of protection as to the "information" of other physicians: *Hope v. Troy & Lans. R. Co.* (1886), 40 Hun (N. Y.), 438; *Westover v. Aetna L. Ins. Co.*, *supra*. The patient's attorney may, on behalf of the patient, waive the privilege: *Alberti v. New York, etc., R. Co.* (1887), 43 Hun (N. Y.), 421.

§ 14. *Exception in criminal cases.*—The protection afforded to "information" obtained by a physician or surgeon covers all cases where he may be called as a witness, which would include criminal as well as civil cases, notwithstanding the purposes of justice in some cases would seem to demand an exception to the rule. But in a recent criminal case the statute was so construed as not to apply to the peculiar circumstances of it. The defendant was indicted and tried for murder by poisoning the deceased. The testimony of the physician who attended and treated him as to "information" obtained while he was his patient, and in reference to his symptoms and the cause of his death, was competent evidence. This decision is placed on the ground that the privilege of suppressing such information is personal, to prevent the abuse of the confidential relation between the patient and his physician, and for the benefit of the former, and that, when there is no desire or object for suppressing it, on the part of the patient or others personally interested on his behalf, and criminal justice demands it, it is competent evidence: *Pierson v. People* (1879), 18 Hun (N. Y.), 249; (1880), 79 N. Y. 424. See, also, *Grand Rapids & Ind. R. Co. v. Martin*, *Scripps v. Foster*, and *Edington v. Met. L. Ins. Co.*, *supra*; *People v. Murphy* (1885), 3 N. Y. Crim. R. 338.

"Information" obtained from a person who consults a physician as to the mode of producing an abortion, contrary to law, is not protected by the statute: *Hewitt v. Prime* (1839), 21 Wend. (N. Y.) 79; *Ante*, § 7. So it has been held that, as the protection is personal to the patient, a person charged with murder cannot object to the testimony of the physician who attended his victim: *Pierson v. People*, *supra*. See, also, *ante*, § 7. The statute in that case was construed as a shield to the patient and not to the guilty.

§ 15. *Protection of "information" extends to a physician's assistants.*—A reasonable construction of the statutes would

extend it to protect "information" obtained by those who may be called in to consult with the patient's regular physician or surgeon, and to such other persons as may be required to assist him in the discharge of his professional duty. The rule in this respect should be the same as in case of protected communications by a client to his attorney: See *ante*, § 3; *Reniham v. Dennin*, *supra*.

III. TO CLERGYMEN.

§ 16. *Confessions to clergymen not protected at common law.*—At common law a confession made to a clergyman or priest is not protected, and he may be required to testify to it as a witness in any civil or criminal proceeding, although it has been said that the law of England encourages the penitent to confess his sins, "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind." The law in this respect was, perhaps, generally regarded as unjust and against public policy, and it was urged that such communications should be protected in the interests of religion, so "that the guilty conscience may with safety disburden itself by penitential confessions, and by spiritual advice, instruction, and discipline seek pardon and relief."

§ 17. *Protected by statutes.*—In accordance with the public sentiment and policy referred to, there have been enacted in various States statutes protecting confessions made to priests and clergymen in their professional character: the statutes are given in full at the close of this article.

§ 18. *Conditions of protection.*—In order that a confession may be protected under the New York and other similar statutes, it is essential that the person to whom the confession is made be a clergyman or minister, and that it be made to him in his professional character. If not so made, it would not be protected: *People v. Gates* (1835), 13 Wend. (N. Y.) 311. The minister or priest must be one in fact. One appointed to such an office, in accordance with the rules and regulations of the religious organization or body to which he belongs, and exercising the functions of the office, would come within the statute. But it is probable that this would not be required in all cases. It will be observed that the statute in respect to

clergymen is not so specific as it is in respect to attorneys and physicians. We have observed that the statutes provide that confidential communications made by a client to "an attorney or counsellor-at-law" are protected, and that they mean such persons as are legally authorized to practise as such: *Ante*, §§ 1, 2, 3. The statutes on this subject relating to physicians and surgeons embrace only those who are "duly authorized to practise physic or surgery:" *Ante*, § 10. Those under consideration embrace "clergymen or other ministers of any religion." It is quite probable that this would be regarded as covering all who act in that capacity, and one recognized as such by any religious body or class of people, even though they may be, comparatively speaking, insignificant.

G. W. FIELD.

IV. STATUTORY PROVISIONS.

Arizona Revised Statutes of 1887, p. 818, provide that in criminal proceedings—

§ 2039. 2. An attorney or counsellor shall not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

In civil actions, the Compiled Laws of 1877, pp. 469, 470, included the above provisions, and also a similar provision for "licensed physicians or surgeons," but these provisions were repealed by the Revised Statutes, and in lieu, "the common law of England as now practised and understood," was restored: § 1862, title xxv., ch. 4, sec. 38.

Arkansas Digest of Statutes, 1883, p. 625, gives the following laws—

§ 2859. The following persons shall be incompetent to testify :

* * * *Fifth*. An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent.

§ 2861. No minister of the gospel or priest of any denomination shall be compelled to testify in relation to any confession made to him in his professional character, in the course of discipline enjoined by the rules, or practice of such denomination.

§ 2862. No person authorized to practise physic or surgery shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon.

California Code of Civil Procedure, 1885, § 1881, declares, as to attorneys and clergymen, in identical words with the Arizona statute above cited, save the words "as a witness," and "cannot" for "shall not," and proceeds—

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

The same rules apply to criminal cases: Penal Code, § 1102.

Colorado General Statutes, 1883, pp. 1062-3, provide—

§ 9. 2. An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A physician or surgeon duly authorized to practise his profession under the laws of this State shall not, without the consent of his patient, be examined as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

Dakota Compiled Laws, 1887, p. 910, § 5313, literally the same as the Colorado statute, except "cannot" is substituted for "shall not," and the words "duly authorized to practise his profession under the laws of this State," are omitted, thus agreeing with the statutes of Arizona and California.

Georgia Code, 1882, p. 987, provides—

§ 3797. There are certain admissions and communications excluded from public policy. Among these are * * * 2. Between attorney and client. * * *

§ 3798. Communications to any attorney or his clerk, to be transmitted to the attorney pending his employment, or in anticipation thereof, shall never be heard by the Court. So the attorney cannot be compelled to disclose the advice or counsel he may give to his client, nor to produce or deliver up the

title-deeds or other papers, except evidences of debt left in his possession by his client. This rule does not exclude the attorney as a witness to any facts which may transpire in connection with his employment.

Idaho Revised Statutes, 1887, p. 679, literally the same as the California statute, except the word "licensed" is omitted.

Indiana Revised Statutes, 1881 (edition of 1888 embracing all general laws subsequent to the revision), provide in criminal cases (§ 1796) and also in civil—

§ 497. The following persons shall not be competent witnesses :—

Third. Attorneys, as to confidential communications made to them in the course of their professional business and as to advice given in such cases.

Fourth. Physicians, as to matter communicated to them as such by patients in the course of their professional business or advice given in such cases.

Fifth. Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches.

Iowa Revised Code, 1884, p. 860, provides—

§ 3643. No practising attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made waives the rights conferred.

Kansas Compiled Laws, 1885, p. 645, provide—

(4133) § 323. The following persons shall be incompetent to testify :—

Fourth. An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent.

Fifth. A clergyman or priest, concerning any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

Sixth. A physician or surgeon, concerning any communication made to him by his patient, with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient: *Provided*, That if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if an attorney, clergyman or priest, physician or surgeon, on the same subject, within the meaning of the last three subdivisions of this section (*sic*).

Michigan General Statutes, 1882, pp. 1889-90, provide—

§ 7515. Sec. 85. Chap. 262. No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.

§ 7516. Sec. 86. No person duly authorized to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon.

Minnesota General Statutes, 1881, p. 792, chap. 73, title 1, § 10, literally the same as the California statute, except "a regular physician or surgeon" is used in place of "a licensed," etc.

Missouri Revised Statutes, 1879, p. 690, declare—

§ 4017. The following persons shall be incompetent to testify: * * * *
third, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client; fourth, a minister of the gospel, or priest of any denomination, concerning a confession made to him in his professional character in the course of discipline enjoined by the rules of practice of such denomination; fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.

Montana Compiled Statutes, 1887, p. 230, Civil Code, § 650, provide in the same words as the California statute, *supra*. These provisions are applicable to criminal trials: *Id.* p. 459, Criminal Code, § 294.

Nebraska Compiled Statutes, 1885, provide—

Sec. 328. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: * * * * *Fourth.* An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent in open Court or in writing produced in Court. *Fifth.* A clergyman or priest, concerning any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

Nevada General Statutes, 1885, p. 833, provide—

§ 3404. Sec. 382. An attorney or counsellor shall not, without the consent of his client, be examined as a witness as to any communication made by the client to him, or his advice given thereon, in the course of professional employment.

§ 3405. Sec. 383. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

§ 3406. Sec. 384. A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient: *Provided*, however, in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall require or give such consent, and any such witness shall give testimony, then such physician or surgeon, defendant, may call any other physicians or surgeons, as witnesses on behalf of defendant, without the consent of such patient or party suing or prosecuting.

New York Code of Civil Procedure (4 Rev. Stat. 1882, p. 164) declares:

§ 833. A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.

§ 834. A person duly authorized to practise physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.

§ 835. An attorney or counsellor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment.

§ 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client.

Ohio Revised Statutes, 1884, p. 1096, provide—

§ 5241. The following persons shall not testify in certain respects:—

1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject.

2. A clergyman or priest, concerning a confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

Oregon General Laws, 1872, p. 251, literally the same as California, except “shall not” for “cannot.”

Pennsylvania enacted, 1887 (P. L. 158, §§ 2, 5), that in any civil or criminal proceeding before any tribunal—

(d) Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client, or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client.

Tennessee Code, 1884, p. 897, declares—

§ 4748. No attorney or counsel shall be permitted, in giving testimony against a client, or person who consulted him professionally, to disclose any communication made to him as attorney by such person, during the pendency of a suit, before or afterwards, to his injury.

§ 4750. Any attorney offering to give testimony in any of the cases provided for in the two preceding sections shall be rejected by the Court, and is guilty of a misdemeanor, for which, on conviction, he shall be fined not exceeding one thousand dollars, to be assessed by the jury, and imprisoned not exceeding two years, and if a practising attorney shall also be stricken from the rolls.

Texas Revised Penal Code, 1888, p. 219, declares—

§ 2439. Art. 733. All other persons except those enumerated in articles 730 and 735, whatever may be the relationship between the defendant and witness, are competent to testify, except an attorney-at-law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship.

Utah Compiled Laws, 1876, p. 506, literally the same as the Nevada statute, *supra*.

Washington Territory Code, 1881, p. 102, provides—

Sec. 392. The following persons shall not be examined as witnesses: (then clauses 2, 3, and 4, literally as the California statute, except the words "shall not" for "cannot.")

Wisconsin Revised Statutes, 1878, p. 992, provide—

§ 4074. A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs, without consent thereto by the party confessing.

§ 4075. No person duly authorized to practise physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

§ 4076. An attorney or counsellor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment.

Wyoming Revised Statutes, 1887, p. 590, § 2589, literally the same as the Ohio Statute, *supra*.

JOHN B. UHLE.