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CRIMINAL REFERENCE.

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Before Mr. Justice Candy and Mr. Justice Fulton.

FRAMJI BHICAJI *v.* MOHANSING DHANSING.* [4th April, 1893.]

Attorney and client—Professional communication—Privilege—Extent of the privilege—Solicitor bound to give the name of the client on whose behalf the privilege is claimed, but not the nature of his employment—Evidence Act (I of 1872), s. 126(1)—Evidence,

The law relating to professional communications between a solicitor and a client is the same in India as in England.

[264] It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional advice.

Where a solicitor claims privilege under s. 126 of the Indian Evidence Act (I of 1872), he is bound to disclose the name of his client, on whose behalf he claims the privilege. The mere fact that the client's name had been communicated to him in the course and for the purpose of his employment as solicitor by another client, affords no excuse, unless it was communicated to him confidentially, on the express understanding that it was not to be disclosed.

But a solicitor is not at liberty, without his client's express consent, to disclose the nature of his professional employment. Section 126 of the Indian Evidence Act protects from publicity not merely the details of the business, but also its general purport, unless it be known *aliunde* that such business falls within proviso I or II to the section.

At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named A. B. who was in his client's company, and whose name was communicated to him in the course and for the purpose of his professional employment. A. B. was afterwards tried for defamation. At the trial, the solicitor was called as a witness for the prosecution, and was asked (*a*) the name of his client, (*b*) the name of the person who accompanied the client and made a statement to him, and (*c*) the matter in which his client employed him. The solicitor declined to answer all the three questions on the ground of privilege.

Held, that (*a*) the solicitor was bound to disclose the name of the client.

(*b*) He was bound to disclose the name of the person who accompanied the client and made a statement to him.

(*c*) He was *not bound* to disclose the matter in which the client employed him

[R., 8 Ind. Cas. 897=4 S.L.R. 88.]

THIS was a reference by C. P. Cooper, Esquire, Chief Presidency Magistrate, under s. 432 of the Code of Criminal Procedure (Act X of 1882).

* Criminal Reference, No. 36 of 1893.

(1) Section 126, Indian Evidence Act, I of 1872 :—

"No barrister, attorney, or pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for [264] the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

"Provided that nothing in this section shall protect from disclosure.

(1) any such communication made in the furtherance of any illegal purpose ;

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

"It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

"*Explanation* :—The obligation stated in this section continues after the employment has ceased."

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One Mohansing Dhansing was tried on a charge of defamation in the Court of the Chief Presidency Magistrate.

[265] It was alleged by the prosecution that on the 18th June, 1891, the accused, in company with two other persons, went to the office of Messrs. Craigie, Lynch and Owen, solicitors of the High Court, and that the accused had there made a statement to Mr. Craigie (partner in the above firm) which had been taken down in writing, and which the prosecution were desirous of having produced and put in evidence. Mr. Craigie was, accordingly, called as a witness, but claiming professional privilege he declined to say whether the accused had visited him on that day in question, alleging that he had learned the name of his visitor in the course of and for the purpose of his professional employment.

Mr. Craigie's evidence was as follows :—

"I am a solicitor and attorney of the High Court, Bombay. On the 18th day of June, 1891, the last witness Mr. Kapadia came to me at my office. Cursetji Devitre came with him and *another person. I decline to answer the question, who the other person was, on the ground of privilege.*

Q.—Who was the third person, who came?

A.—I believe, it was the third person who communicated the name.

Q.—What was the name ?

A.—I decline to answer the question.

Q.—Who was your client?

A.—The only knowledge which I have of the name of my client is derived from a communication made to me in the course of, and for the purpose of my employment as an attorney."

On a subsequent day Mr. Craigie was re-called and re-sworn and examined by the Court.

Q.—Who was your client?

A.—I beg respectfully to decline to answer that question.

Q.—In what matter was he your client?

A.—I beg respectfully to decline to answer the question, as it is impossible for me to do so without disclosing a communication made to me in the course and for the purpose of my professional employment.

[266] *Q.*—Did one Mohansing Dhansing make a statement to you?

A.—I am totally unable to say whether a man of the name of Mohansing Dhansing made a statement to me; my only knowledge of the name of the person who made a statement to me is derived from a communication made to me in the course and for the purpose of my professional employment.

Q.—Did any person make a statement to you on the 18th of June, 1891, between 1 and 2 o'clock in the day?

A.—A person made a statement to me on the 18th of June, 1891. Whether it was at the time stated in the question, I can't say.

Q.—Who were present at that occasion?

A.—Mr. Kapadia, Mr. Devitre and the person who made the statement.

Q.—Who brought the person who made that statement to your office?

A.—I don't know who brought that person to the office; they all three came in together, so far as I recollect.

Q.—Was the statement taken down in writing ?

A.—Yes.

Q.—By whom ?

A.—By me.

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Q.—Did the person making the statement give his name as Mohansing Dhansing?

A.—I respectfully decline to answer this question for the same reason.

Q.—On whose behalf did you take down this statement?

A.—On behalf of my client.

Q.—Did you take the signature of the person making the statement to the statement after it was written by you?

A.—No.

Q.—Did you sign the statement with your name or initials or the name or initials of your firm or in any other way to identify or authenticate the statement?

[267] *A.*—I did not sign the statement with the name or initials of my firm or myself. The statement was in my handwriting, and I did not add anything to the statement for the purpose of identifying it or authenticating it. The statement is in Court.

COURT:—I call upon you to produce that statement, as you have placed before me no grounds entitling you to retain it.

Mr. Craigie respectfully declines to produce it on the same grounds as before.

Q.—Were you paid for your professional services in taking down that statement?

A.—Yes.

Q.—By whom?

A.—My client.

Q.—By what person?

A.—I decline to give his name for the same reasons as before.

* * * * * *

The Magistrate overruled Mr. Craigie's objections, but as he still refused to answer the questions on the ground of privilege, the Magistrate made the following reference to the High Court:—

"Mr. Adair Craigie, a solicitor of the High Court, on the 1st and 15th of March instant, was called as a witness on behalf of the complainant and duly sworn. A question arose as to his privilege as a solicitor under s. 126 of the Evidence Act to answer certain questions. I stated what I considered the law as to the right to put certain questions. I said s. 126 of that Act forbids the disclosure of (1) any communication made to a solicitor in the course and for the purpose of his employment; (2) the contents or condition of any document with which the solicitor has become acquainted in the course and for the purpose of such employment; that it was the Court and not the solicitor (witness) who had to decide whether the disclosure by the latter of any matter was or was not within the veto of the section, and in order to enable the Court to come to a decision the examination of the solicitor (witness) was permissible and necessary; that those questions I thought should be directed to the following points. Did the communication or the acquaintance [268] with the contents or condition of the document, as the case might be, come to the solicitor's knowledge in the course and for the purpose (it must be both in the course and for the purpose) of his professional employment? I referred to the cases of the *Queen* v. *Cox and Railton* (1); *Bursill* v. *Tanner* (2); *Crawcour* v. *Salter* (3).

3. "I then put, amongst others, the following questions to Mr. Craigie:—Who was your client? In what matter was he your client? Did

(1) 14 Q. B. D. 153. (2) 16 Q. B. D. 1. (3) 18 Ch. D. 30.

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the person making the statement to you give his name as Mohansing Dhansing? By whom were you paid for your professional services in taking down that statement?

4. "Mr. Craigie declined to answer those questions, on the ground that the answers would involve a disclosure of communications made to him in the course and for the purpose of his professional employment. I decided that he was not entitled to claim the privilege, under s. 126, of refusing to answer those questions, and that he was bound to give the name of his client, to what matter the employment had reference, and the name of any party making the statement to him.

5. "The question, referred to the High Court for opinion, is whether Mr. Craigie was bound or not to give the name of his client; the matter of the employment and the name of the person making any statement to him; and whether, having refused to answer such questions, he was in any way sheltered, on the ground of privilege under s. 126 of the Evidence Act, from answering relevant and admissible questions put to him in the course of his examination as a witness."

The reference was argued before Candy and Fulton, JJ.

Craigie:—The first question referred to this Court is whether I was bound to give the name of my client, on whose behalf I claimed the privilege. I submit, I was not bound to disclose my client's name. *Crawcour* v. *Salter* (1) and *Queen* v. *Cox and Railton* (2) are not in point. In *Bursill* v. *Tanner* (3) it is no doubt laid down that a solicitor, who claims privilege, is bound to state the name of his client, on whose behalf he claims the privilege. And that has been the rule ever since the case of *Parkhurst* [269] v. *Lowten* (4). But it is a rule of practice under the English law, and not under the Indian law. It does not follow that, because the rule has been observed for some time, it is a just or a proper rule. Many rules of practice have been followed for a much longer period, and yet have been at last set aside as unjust. The mere fact that the rule relating to a solicitor's privilege has been followed in England for over seventy-five years, is immaterial. The English rule is not binding on this Court, unless it is based on reasonable grounds. It is clear that great injustice may sometimes be done to a client if a solicitor is compelled to disclose his client's name. Suppose a woman was ill-treated by her husband and she went to a solicitor to consult him as to what her remedies were. If the solicitor was afterwards called upon to disclose her name, and relate the interview, the consequences to the wife might be serious. It may be no doubt that to conceal a client's name may cause difficulty and inconvenience. On the other hand, however, the interest of one man should not be sacrificed simply for the purpose of advancing the interest of another. A solicitor is an officer of the Court, and is entitled to credit. If he states that an interview with him related strictly to professional business, it should be treated as strictly confidential, and the solicitor should not be compelled to disclose any part of the interview. Suppose a client A comes to me and consults me as his legal adviser. Suppose he is accompanied by another man B. In the course of my interview with A, B's name is disclosed and disclosed simply for A's business. After A's business is over, B comes to consult me on business relating to his own affairs. I submit that under such circumstances, B's name would be privileged, because it was communicated to me in connection with A's business. If

(1) 18 Ch. D. 30.
(2) 14 Q. B. D. 153.
(3) 16 Q. B. D. 1.
(4) 2 Sw. 194.

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I were afterwards called as a witness, and examined with reference to my interview with B, I would be justified in saying that B's name was known to me during the course and for the purpose of my professional employment on behalf of A, and that, therefore, B's name would not be disclosed. Of course, if a further question were put to me on whose behalf I claimed the privilege, I would be bound to give A's name. The facts in the present case are analogous to those [270] in the hypothetical case I have just put to the Court. I was asked to give the name of the person who had made the statement to me, and I refused to disclose his name. I was then asked the name of my client. I refused to give my client's name, on the ground that the name was communicated to me in the course and for the purpose of my professional employment by another client. If I had been asked that client's name, I would have been bound to disclose it. But that question was not put to me. The first and third questions stand on the same footing. As regards the second question, I submit that if a solicitor were to state the nature of the business on which his client consulted him, the most valuable part of the privilege would be lost. Section 126 of the Evidence Act prevents a solicitor from disclosing the matter of his employment.

Jardine, contra:—When a solicitor is in the witness-box, he is in the same position as an ordinary witness, and he must, therefore, answer every relevant question put to him, unless he can make out a clear case that he is prevented from answering such a question. A solicitor has no privilege at all. He can only claim it on behalf of his client. He is, therefore, bound to give the name of the client on whose behalf he claims the privilege. Until the client's name is disclosed, how can you say that the client does or does not object to the solicitor's disclosing certain facts? To establish the privilege, the solicitor must mention the name of his client, and the purpose of his employment.

[FULTON, J.—Is there any authority to show that he must state the purpose of his employment also?]

Jardine.—I do not think there is any; but the words of s. 126 of the Evidence Act are to the effect that the solicitor must state the purpose of his employment in order to establish privilege. It should not be left to the solicitor to determine whether he should answer certain questions or not. The authorities cited by the Magistrate in his reference show that the disclosure of the client's name is not a matter of professional communication, and that, unless the name of the client is disclosed, no privilege can be claimed.

JUDGMENT.

[271] CANDY, J.—The reference by the Chief Presidency Magistrate is thus put by him: "Whether Mr. Craigie was bound or not to give the name of his client, the matter of the employment, and the name of any person making any statement to him; and whether having refused to answer such questions he was in any way sheltered on the ground of privilege under s. 126 of the Evidence Act, from answering any relevant and admissible questions put to him in the course of his examination as a witness."

Mr. Craigie appeared in person before us to support his objections to answer the questions put to him by the Magistrate, and he contended that the opinions of Judges in England, however eminent, on the question of privilege were not binding on this Court, and had no application to the law

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in India regarding the question. Mr. Craigie, however, did not show in what respect the law in India on this point differed from the law in England.

The law in India is contained in s. 126 of the Evidence Act, and with one exception appears to be the same as the law in England, which has been established by many decisions through a long course of years. The one exception relates to the substitution of "illegal purpose" for "criminal purpose" in the first portion of the proviso to s. 126; and, as Mr. Field says in his Law of Evidence in British India, this "carries the principle enunciated in the proviso somewhat further than what can be said to be the established law in England, but is in conformity with the expressed opinion of several able Judges." It is unnecessary to consider this point further, for the Magistrate in making the reference has not alluded to the proviso to s. 126. He has then apparently asked this Court to give an opinion on the question referred solely as regards Mr. Craigie's contention that he is prevented by the body of s. 126 from answering the question put to him.

That the law in India on this point is practically the same as in England, and that in interpreting s. 126 of the Evidence Act this Court may rightly refer to English cases, is shown by the judgments of Westropp, C.J., and Sargent, J., in the case of *Memon Haji Harun* v. *Moulvi Abdul Karim* (1) in which [272] Chief Justice Sir M. Westropp said: "Communications to be protected by that section (126 of the Evidence Act) must, we think, be confidential." The words contained in it are indeed "any communication, &c.," but the word "disclose" shows, and common sense seems to demand, that the privileged communication must be confidential or private. Sargent, J., said: "The use of the word 'disclose' in s. 126 of the Evidence Act shows that the communications to be privileged must be of a confidential nature between a solicitor and his client." Both Judges in the course of their judgments quoted English cases.

This was exactly the principle followed in England in *Ex parte Campbell*; *in re Cathcart* (2). In that case the solicitor (writer to the signet) refused to disclose the place of residence of his client, because he said it came to his knowledge in his professional capacity and in consequence of the professional employment in which he was engaged on his behalf, and in no other way. Justice James, L.J., said: "That is not sufficient, according to my view of the law, to protect the solicitor from answering. What a solicitor is privileged from disclosing is that which is communicated to him '*sub sigillo confessionis*'—that is to say, some fact which the client communicates to the solicitor for the purpose of obtaining the solicitor's professional advice and assistance: the principle being that such communications ought to be privileged, because otherwise a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. But a solicitor's knowledge of his client's residence, even though he knows it simply in consequence of the professional business in which he has been acting for him, is not on that ground alone a matter of confidence, so as to be in the nature of a privileged or confidential communication. The solicitor may know it because the client may say, "I have got a lease to execute—you must send it to me there and I will execute it," or because he may have received letters, dated from such a place, telling him where he may see [273] him for the purpose of making a communication. The client's place of residence in such case is a mere

(1) 3 B. 91. (2) L.R. 5 Ch. 703.

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collateral fact, which the solicitor knows without anything like professional confidence and, therefore, the mere statement "The place of residence of my client came to my knowledge in my professional capacity, and only in consequence of my employment as his solicitor," is not to my mind nearly enough to warrant the solicitor in refusing to answer the question as to where his client is residing. If, indeed, the gentleman's residence had been concealed; if he was in hiding for some reason or other, and the solicitor had said: "I only know my client's residence because he has communicated it to me confidentially, as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world," then the client's residence would have been a matter of professional confidence; but the mere statement by the solicitor that he knows the residence only in consequence of his professional employment, is not sufficient."

So here Mr. Craigie refused to state the name of his client on a certain occasion on the 18th June, 1891, because it came to his knowledge in his professional capacity, and in the course and for the purpose of his professional employment and in no other way. That is not sufficient. Mr. Craigie does not say, nor is it asserted that he could say, "I only know my client's name because he communicated it to me confidentially as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world." Therefore his ground of objection fails.

The same principle was followed in 1885 in the case of *Bursill* v. *Tanner* (1), in which judgment having been signed in an action against a married woman, an enquiry was directed to be held as to whether she was possessed of a separate estate. A solicitor being called as a witness by the judgment-creditor under a subpœna to give evidence on such enquiry and produce documents, stated that there was a settlement executed upon the defendant's marriage, and that he knew who the trustees of the settlement were, and that his firm acted as their solicitors, [274] but he refused to state the names and addresses of the trustees, or to produce the settlement or give any information as to its contents on the ground of his privilege as a solicitor. Lord Esher, Master of the Rolls, said: "I agree with the opinion expressed by Lord Justice James in *Ex parte Campbell*; *in re Cathcart* (2), that the fact who the clients were, was not the subject of a professional confidence. The client does not consult the solicitor with a view to obtaining his professional advice as to whether he shall be his solicitor or not." Lord Justice Cotton said: "It is not everything that solicitors learn in the course of their dealings with clients that is privileged from disclosures. This matter was much discussed in the case of *Lyell* v. *Kennedy* (3). The privilege extends only to confidential communications. In my opinion, the names of the trustees did not constitute such a communication. The mere fact who the trustees are, cannot be said to be a matter communicated to the solicitor confidentially for the purpose of obtaining his professional advice, or, at any rate, it is highly improbable that it should be so. There is also another ground for compelling the disclosure of their names. The solicitor claims this privilege as that of his clients. He must, then, state the names of the persons for whom he claims the privilege. On both these grounds I think he was bound to answer the question and to give the names and addresses of the trustees."

(1) 16 Q.B.D. 1. (2) L.R. 5 Ch. 703. (3) 23 Ch. D. 387=9 Ap. Ca. 81.

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On both these grounds, then, Mr. Craigie is bound to give the name of his client. We understood Mr. Craigie in the course of his argument before this Court to assert that he refused to state to the Magistrate the name of the persen who was his client when Mr. Kapadia and Mr. Devitre and another person came to him to his office on the 18th June, 1891, because the name of that person had been communicated to him in the course and for the purposes of his employment as attorney by another client on a previous occasion, and that he would be willing, should the ruling in the case of *Bursill* v. *Tanner*(1) be held to apply in India, to state the name of the person who was his client on the previous occasion. The principles indicated above would still apply. Supposing Mr. Craigie gives, as he is willing to do, the name B as the person [275] who consulted him professionally on the previous occasion, and that in the course and for the purpose of his employment as B's attorney A's name was communicated to him, then the simple question would be, Did that constitute a confidential communication? Ordinarily it would not be so, it would be a mere collateral fact which Mr. Craigie would know without anything like professional confidence. But if B said: "This gentleman's name A has been concealed, and he and I wish it to remain concealed, I communicate it to you confidentially for the purpose of your advising me, but it must not be communicated to the rest of the world," then no doubt Mr. Craigie would not be allowed without B's express consent to disclose A's name in connection with his employment as B's attorney. But that is not the case here. Mr. Craigie is being examined in regard to his employment by A as A's attorney. Before he can refuse to give the name of his client he must be able to say: "That client communicated his name to me confidentially for the purposes of being advised by me, and he has not communicated it to the rest of the world; or he must be able to say, "A for the purposes of being advised by me told me, that his name, which had been confidentially communicated to me by or on behalf of B in the course and for the purpose of my employment as B's attorney, must still be treated as confidential communication for the purpose of my employment as his (A's) attorney, not having been communicated to the rest of the world, and, therefore, it was not a mere collateral fact which I knew without anything like professional confidence." I do not understand that Mr. Craigie asserts that such was the case, and it is highly improbable that it should be. His contention is that every communication made by a client to an attorney must be privileged, and that contention is unsound. The hypothetical instances suggested by Mr. Craigie afford no support to his contention. The fact that a client falsely charged with assault may prove an *alibi* by calling his attorney, is no argument for holding that an attorney cannot without his client's express consent state his client's name. The attorney comes to know that his client is at one place and not another at a certain time by the circumstance of his being the client's attorney, but "of which fact any other man, if there would [276] have been equally conversant" (per Lord Brougham in the case of *Greenough* v. *Gaskell* (2).)

The second portion of the question referred by the Magistrate is whether or not Mr. Craigie was bound to give the matter of his employment. As I understand the Magistrate's reference, the answer to that portion of the question should be, I think, in the negative. The Magistrate apparently thinks that if a solicitor claims privilege for a client, the

(1) 16 Q.B.D. 1. (2) 1 Myl. & K. 96.

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Court is entitled to demand the nature of the solicitor's employment, and the solicitor is bound in every case, without asking his client, to disclose the nature of the employment whatever it may have been. That such is not the law may be seen by a reference to the case of the *Queen* v. *Cox and Railton*(1). There the solicitor was asked the purpose for which his clients had consulted him. The answer to that would have disclosed the confidential communication which had passed between solicitor and clients. It was not then contended that in any case the solicitor was bound to state the nature of his employment by his clents ; but it was contended that in that particular case the rule of law did not protect the communications from disclosure, because they had been made in furtherance of a criminal purpose; in other words, if the case had occurred in India, the proviso to s. 126, Indian Evidence Act, would have been relied on as compelling the disclosure, and the fact that the solicitor may have been an innocent instrument, would make no difference. It was strongly urged in argument in the *Queen* v. *Cox and Railton* (1) that, speaking practically, the admission of any such exception to the privilege of legal advisers in that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose, would generally diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. The answer to that given by the full Court of ten Judges was that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence whenever it seemed probable that the client consulted the solicitor for a criminal or fraudulent purpose. In that particular [277] case the facts proved made it probable that the visit to the solicitor really was intended for a criminal purpose, and, therefore, it was held that the Court had been right in questioning the solicitor as to the nature of his employment.

It has been necessary to refer to the above case of the *Queen* v. *Cox and Railton* (1) at some length, as it shows clearly the circumstances under which a solicitor would be bound to answer the question as to the nature of his employment. But it appears in the present case that the Magistrate, though quoting *Queen* v. *Cox and Railton*, did not hold that the facts brought out in evidence before him made the proviso to s. 126 applicable. On the contrary, in his referring letter he did not once quote that provision, but confined himself to the body of the section. Looking at the case, then, apart from the proviso to s. 126, it is obvious that, when the solicitor had given the name of his client it would not be necessary to ask the solicitor the nature of his employment. If the employment was in its nature public and not private, there would be no necessity to ask the solicitor to disclose it. For instance, if a man asked his solicitor to defend him as he had been committed to the Criminal Sessions on a charge of forgery, or to file a plaint for him in the Civil Court, those facts would not partake of the nature of confidential communication. They would be public and known to all. On the other hand, in the majority of cases to disclose the nature of his employment would be for the solicitor to tell the very essence of the confidential communication made to him. And that is forbidden, unless it comes within the proviso of s. 126 of the Evidence Act.

The third portion of the question as put to us seems rather vague. It is difficult to say whether Mr. Craigie is bound to give the name of the

(1) 14 Q.B.D. 153.

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persons making any statement to him. If this portion of the question refers to the third person who (Mr. Craigie says) accompanied Messrs. Kapadia and Devitre at the interview in his office on the 18th June, 1891, and who Mr. Craigie says made a statement to him, then the same principle as indicated above must be applied. Mr. Craigie would identify this third person if he could; he is willing to say that the man [278] came to his office and that he (Mr. Craigie) acting as attorney for his client took down in writing the man's statement, but he is unwilling to state the name given to him as the man's name, because he says it came to his knowledge in the course and for the purpose of his professional employment. The answer to that, apart from relevance or any other point, is that, unless Mr. Craigie can depose that he was told the name in confidence with a view to its not being disclosed, he must state the name so far as privilege is concerned. If there was no secrecy about the man's name, there was no privilege. As Baron Parke said in *Dwyer* v. *Collins* (1), "the privilege does not extend to matters of craft which the attorney knows by any other means than confidential communications with his client, though if he had not been employed as attorney, he probably would not have known them."

I am not sure whether I correctly understand the fourth and last part of the question referred by the Magistrate. If Mr. Craigie's refusal to answer any question is not justified, then he is bound to answer it. A person relying upon the privilege is undoubtedly bound to bring himself clearly and distinctly within it, as per Lord Cottenham in *Desborough* v. *Rawlins*. His refusal, whether justified or not, would not entitle him to claim the shelter of s. 126 of the Evidence Act in refusing to answer any other relevant or admissible question, if that shelter did not exist. The application of s. 126 must depend upon the facts of the case and the form of the question.

FULTON, J.—On the first question put by the Magistrate, I think our answer must be that, as Mr. Craigie claims privilege on behalf of his client, he must answer the question "who was your client?" by naming him. The cases of *Parkhurst* v. *Lowton* (2) and *Bursill* v. *Tanner* (3) show that when a solicitor claims the privilege, he must state the name of the client, on whose behalf he claims it. There appears to be no doubt that such is the law in England, and equally little that the law in India is the same. The case of *Parkhurst* v. *Lowton* (2) and the more recent case of *Ex parte Campbell*; *in re Cathcart* (4) were within the cognizance of the Legislature, and the fact that it was intended to [279] make the law on this point the same in India as in England appears from the identity of language used in s. 126 of the Indian Evidence Act with that employed by Mr. Pitt Taylor in dealing with the subject. The passage from Taylor on Evidence to which I refer will be found in s. 832 (ed. 1864) and is as follows:—"The rule is now well settled that when a barrister, solicitor, or attorney is professionally employed by a client, *all communications which pass between them in the course and for the purpose of the employment* are so far privileged that the legal adviser, whether he be called as a witness, or be made a defendant in equity on a bill of discovery being filed against him, cannot be permitted to disclose them." The similarity between the words in italics and the corresponding words in s. 126 is apparent.

(1) L.R. 7 Exch. 646.
(2) 2 Sw. 194.
(3) 16 Q.B.D. 1.
(4) L.R. 5 Ch. 703.

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Mr. Craigie indeed contended that we were not bound by English authorities; but holding, as I do, that it was the intention of the Legislature to adopt the English practice, I think we must look to the English decisions, of which *Bursill* v. *Tanner* is the most recent, to ascertain what that practice is. In the course of argument it was suggested that the question "who was Mr. Craigie's client?" was really irrelevant to the issue before the Magistrate, and that, therefore, Mr. Craigie was not bound to answer it; but I do not take this view. The question (though probably otherwise irrelevant) became relevant on Mr. Craigie's refusal to answer other questions to enable the Magistrate to decide whether those questions ought to be answered or not, for after such an objection has been raised it becomes, I think, obligatory on the Magistrate to ascertain whether the claim to privilege that has been advanced is valid, and for this purpose to ascertain the name of the client. If Mr. Craigie on behalf of his client withdraws the objection, he need not of course disclose his name unless it is otherwise relevant. Mr. Craigie in this Court explained that his objection to give the name of the client in the business transacted at the interview of the 18th June, 1891, whom for convenience we may call A, was because it was disclosed to him in a communication made to him in the course and for the purpose of professional employment by another client who may be called B; that he did not know A's name *aliunde*; and that, therefore, he could not **[280]** disclose it without breach of confidence towards B. In my opinion, this objection cannot be sustained. The name borne by A, and under which he employed Mr. Craigie as a solicitor, is a fact now within Mr. Craigie's knowledge and cannot be called a communication. Doubtless (as he says) he learnt it in the course of B's business, but he is not asked how he learnt it, or by whom the knowledge was communicated to him, or anything connected with B's business. All he is asked is what his client's name is, and the answer to this is not in any way affected by the manner in which he got to know that name. My answer, then, to the first question would be that Mr. Craigie must disclose the name of the client on whose behalf he has claimed privilege.

Turning to the second question, I am of opinion that Mr. Craigie is not at liberty, without his client's express consent, to disclose the matter of the employment. From one case (*Beckwith* v. *Benner* (1),) it seems at first sight that an attorney may be compelled to divulge the character in which his client employed him, but in an American case (*Chirac* v. *Reinicker*(2)) the opposite view has been upheld. An examination of *Beckwith* v. *Benner* leads me to doubt whether the decision of Gurney, B., can be relied on as an authority for holding that a solicitor may disclose the matter of his employment, inasmuch as the order seems to have been based on the fact that the answer might be inferred as a necessary consequence on certain circumstances peculiar to that particular case; and it appears to me it would be impossible so to hold without infringing the privilege and frustrating the object of s. 126. The judgment of Mr. Justice Story in *Chirac* v. *Reinicker* will be found in point as showing that, though the fact of professional employment must be disclosed, the nature of the business cannot be revealed. It may be argued that, unless we are told the matter of the employment, we cannot judge whether the communication was made in the course and for the purpose of such employment, but, as was urged in argument in the case of the *Queen* v. *Cox and Railton* (3), we cannot require the privilege to be violated in order to

(1) 6 C. and P. 688. (2) 11 Wheat. 90. (3) 14 Q.B.D. 153.

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see whether it exists. It was [281] suggested that a mere statement of the matter of the employment without going into details would not be a violation of professional confidence, but in some cases a vague statement of the matter would do more harm to the client than a complete disclosure of the details. A merchant going to consult his solicitor about a mortgage might find his credit affected by a general statement, that his business was to effect a mortgage on his property, whereas the bad impression might be entirely removed if the details of some family settlement, for which the mortgage was required, were made known; but it would be rather unreasonable that he should be required to explain his private family affairs, because his solicitor had been compelled to state generally the matter in which he was employed. Such, however, does not seem to be the law contained in s. 126, which, I think, protects from publicity not merely the details of the business, but also its general purport, unless it be shown *aliunde* that such business, or the communications made in respect of it, fall within proviso (1) or (2).

So far there seems no special difficulty in answering the questions that have been referred to us, but when we come to the third question, the case is different. We are asked, in the 5th paragraph of the Magistrate's letter, whether Mr. Craigie is bound or not to give the name of the person making any statement to him. The question thus put is not very precise, but to ascertain exactly what is intended we must look to the deposition. The undermentioned questions were put and answered as follows:—"*Q.*—Did one Mohansing Dhansing make a statement to you? *A.*—I am totally unable to say whether a man of the name of Mohansing Dhansing made a statement to me. My only knowledge of the name of the person who made a statement to me is derived from a communication made to me in the course and for the purpose of my professional employment. *Q.*—Did any person make a statement to you on the 18th June, 1891, between 1 and 2 P.M.? *A.*—A person made a statement to me on the 18th June, 1891. Whether it was at the hour stated in the question I cannot say. *Q.*—Did the person making the statement give his name as Mohansing Dhansing? *A.*—I respectfully decline to answer the question for the same reason. *Q.*—[282] On whose behalf did you take down the statement? *A.*—On behalf of my client." The question, then, which Mr. Craigie declined to answer was "Did the person making the statement give his name as Mohansing Dhansing?" and I understand that we are now asked to determine whether he was bound to answer it or not.

The accused in Court was Mohansing Dhansing, and the point at issue was whether he had made a certain statement. Whether on such an issue, the question whether the man who made the statement had given the name of Mohansing Dhansing was relevant to show that the accused was that man it is not necessary to determine, as the matter has not been referred to us, and no argument was addressed to us on the subject. But assuming that it was relevant, I should say that s. 126 of the Evidence Act would not debar Mr. Craigie from answering it, unless he were prepared to swear that the name was told to him by the client, or by some one on behalf of the client, as a secret in confidence. As pointed out in *Memon Haji Harun Mahomed* v. *Moulvi Abdul Karim, &c.* (1), although the words used in s. 126 are "any communication," the use of the word "disclose" shows, and common sense, as remarked by

(1) 3 B. 91.

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Westropp, C.J., seems to demand that the privileged communication must be confidential or private. Now, the fact that a particular person bears a particular name is not a confidential matter, except in very peculiar circumstances. It is a fact which is known to all that person's acquaintances, and is not usually a secret. If it could be argued that the fact that a particular person had made a statement was privileged, his name doubtless would be equally privileged; but the language of s. 126 does not apply to such a fact which cannot be called a communication, and no authority has been shown us to support the opinion that such a fact is privileged. Consequently, unless the name were made the subject of special confidence, and it were stipulated by or on behalf of the client that it was not to be disclosed, there seems nothing in s. 126, as interpreted in the Bombay case above noted, to protect the name from disclosure. Under these circumstances, I think our answer to the [283] third question should be that, unless Mr. Craigie swears that the name was told him confidentially as a secret by or on behalf of his client, he must state what name was told him, provided such statement is otherwise relevant.

The fourth question hardly arises now that the first question has been answered; but if for any reason the name of the client is not disclosed, no privilege can be claimed under s. 126, and all relevant and admissible questions put to Mr. Craigie in the course of his examination as a witness must be answered.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

TRIBHOVANDAS JEKISANDAS (*Original Plaintiff*), *Appellant v.* KRISHNARAM KUBERRAM AND OTHERS (*Original Defendants*), *Respondents.** [6th April, 1893.]

Bhag—*Bhagdari Act (Bombay) V of* 1862, *s.* 3—*Mortgage—Alienation of a portion of* bhag—*Deed — Property comprised in deed — Construction — General words—Particulars of property stated in deed—Leading description*—Falsa demonstratio —*Vendor and purchaser.*

A mortgage-deed of certain *bhagdari* lands stated that "all the properties appertaining to the entire *bhag*" were thereby mortgaged to the plaintiff. The *bhag* comprised (*inter alia*) four *gabhans* (building-sites). But the clause which set forth the particulars of the property mortgaged thereby, specified only two *gabhans*, one only of which belonged to the *bhag* and the other did not. The deed then proceeded:—"According to these particulars, lands, houses and *gabhans*, barnyards, wells, tanks, *padars* and pasture lands also, together with whatsoever may appertain to the *bhag*—all the properties appertaining to the whole *bhag* have been mortgaged and delivered into your possession . . . . . There is no other property appertaining to the said *bhag* of which mention is not made here."

Held, that the particulars were "the leading description," and the supplementary description of them as constituting the entire *bhag* should be regarded as "*falsa demonstratio*."

Held, also, that the mortgage, so far as it included property belonging to the *bhag*, was void under the 3rd section of the Bhagdari Act (Bombay) Act V of 1862 (1), but was valid as to property not comprised in the *bhag*.

[Rel. on, 17 O.C. 256; 24 Ind. Cas. 465.]

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* Second Appeal, No. 627 of 1890.

(1) Section 3 of the Bhagdari Act (Bombay Act) V of 1862:—

It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any *bhag* or share in any bhagdari or narwadari village [284] other than a