

## WHEELER v. LE MARCHANT.

[1880 W. 1793]

*Practice—Production—Privileged Communications.*

C. A.

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V.-C. B.

April 2.

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April 6.

In an action for specific performance of a building contract to take on lease building land from the Defendants, the Defendants sought to protect from production letters which had passed between their solicitors and their surveyors :—

*Held*, by *Bacon*, V.C., that the letters were privileged.

*Held*, on appeal, that the Defendants must produce the letters, except such of them (if any) as the Defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the Plaintiff and the Defendants, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action.

THIS was an action for specific performance of an agreement under which the Defendants were to grant a lease of certain land to the Plaintiff on his erecting certain buildings, and were to make advances of money to him as the buildings proceeded. The Defendants were the trustees of the will of Mr. *Brett*, whose estate was being administered in an action of *Brett v. Le Marchant*. The Defendants in the present action, under the usual order for an affidavit as to documents, filed an affidavit in which they objected to produce the documents in the second part of the first schedule thereto, “on the ground that many of them consist of [instructions and briefs to counsel, with their opinions, notes, and observations and indorsements thereon, and orders and copies and drafts of orders and other documents, all in the matter of *In re Brett's Estate*, *Brett v. Le Marchant*, in which the estate of our testator, *G. A. Brett*, deceased, is being administered under the direction of the Chancery Division of the High Court of Justice, and the remainder of such documents consists of confidential correspondence between ourselves and our former solicitors and our present solicitors and our former estate-agent and surveyor, Mr. *Wilkinson*, and his agent, Mr. *N. Kempthorne*, and our present estate-agent and surveyor, Mr. *Ellis*, and between such solicitors and agents] and drafts and originals of instructions to counsel and counsel's

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opinions thereon, accounts, and other documents in this action which were prepared and written for the purpose of our defence to this action, and all of which documents are privileged from production."

The Plaintiff took a summons for the production of such of the documents comprised in the second part of the first schedule as came within the description inclosed in brackets in the above paragraph of the affidavit. This summons was adjourned into Court.

*Seward Brice*, for the summons:—

Letters passing between a surveyor employed by the Defendant's solicitor and the solicitor, are not protected on the ground of professional confidence: *Anderson v. Bank of British Columbia* (1); *Bustros v. White* (2); *McCorquodale v. Bell* (3).

To inspection of the documents in the other action relating to our estate we are clearly entitled.

*Marten, Q.C.*, and *Hadley*, *contra*:—

It is perfectly settled that communications between a solicitor and his client are privileged. It was only after some litigation that the protection was extended to communications between solicitors and their agents or surveyors; but that is now also established: *Herring v. Cloberry* (4); *Pearse v. Pearse* (5); *Manser v. Dix* (6); *Lawrence v. Campbell* (7); *Wilson v. Northampton and Banbury Junction Railway Company* (8); *Macfarlan v. Rolt* (9); *Minet v. Morgan* (10); *Steele v. Stewart* (11); *Lafone v. Falkland Islands Company* (12); *Walsham v. Stainton* (13); *Nicholl v. Jones* (14); *Cossey v. London, Brighton, and South Coast Railway Company* (15); *Skinner v. Great Northern Railway Company* (16);

(1) 2 Ch. D. 644.

(2) 1 Q. B. D. 423.

(3) 1 C. P. D. 471.

(4) 1 Ph. 91.

(5) 1 De G. & Sm. 12, 25.

(6) 1 K. & J. 451, 453.

(7) 4 Drew. 485.

(8) Law Rep. 14 Eq. 477.

(9) Law Rep. 14 Eq. 580.

(10) Ibid. 8 Ch. 361.

(11) 1 Ph. 471.

(12) 4 K. & J. 34.

(13) 2 H. & M. 1.

(14) Ibid. 588.

(15) Law Rep. 5 C. P. 146.

(16) Ibid. 9 Ex. 298.

*Friend v. London, Chatham, and Dover Railway Company* (1);  
*Southwark and Vauxhall Water Company v. Quick* (2); *Turton v.*  
*Barber* (3).

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As to the second point, *Brett v. Le Marchant* has nothing to do with this action, and the Plaintiff has no right to inquire into it: *Bullock v. Corry* (4).

*Seward Brice*, in reply.

BACON, V.C.:—

This subject is always a difficult one. On the one hand, I have to consider the right of the Plaintiff to discovery, and on the other hand, to consider what are the rights of the Defendants to protect themselves against disclosing anything that has taken place in the course of confidential communications.

The Defendants, having stated in their affidavit that they have in their possession documents relating to the matters in question in the action, go on to say, that they desire to protect themselves against discovery or production, and they state it in this way:— [His Lordship read the passage from the affidavit, and continued:—] There are two sets of things. I take first the papers in the administration suit of *Brett's* estate. Now what reason can there be why the Plaintiff should ask to see these? No reason has been suggested. What right can a plaintiff have to say to a defendant, "You are engaged in a litigation with somebody else, and you ought to produce the papers in that action." The only relation the papers can have to this action is that *Brett's* estate is the subject-matter of that action, and therefore they may be said to have some relation to this action. But what right can the Plaintiff have to look into the papers in *Brett's* administration suit? There has been no case referred to and no reason suggested why the Plaintiff, in this suit for specific performance of an agreement as to a piece of land taken for the purpose of building, should ransack the proceedings in the administration suit of *Brett's* estate. That is wholly and entirely unreasonable.

The other ground of exemption is that the documents are con-

(1) 2 Ex. D. 437.

(3) Law Rep. 17 Eq. 329.

(2) 3 Q. B. D. 315.

(4) 3 Q. B. D. 356.

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fidential communications. This contention has given rise to a very long discussion. A great many authorities have been referred to, but the principle is perfectly distinct and plain. A man is not to be so impeded in his business transactions, whether he is, or is likely to be, engaged in litigation or not, as to prevent him from employing a solicitor, for the purpose, first, of obtaining his advice, and next of collecting evidence; or from employing any agent, not being a solicitor, who is engaged for the like purpose; and if the Defendant takes upon himself to say that these were all confidential communications, what right have I to say that his confidential communications should be disclosed? The case of *Anderson v. Bank of British Columbia* (1) is totally different and distinct. The manager of one branch of a bank writes to the manager of another branch, and says, "Send me the full particulars of so and so" (being a transfer of money from one branch to the other). That is an act done by which the rights of parties may be affected. With regard to cases of reports made by medical officers, it was held that they were protected from discovery because they were made with respect to litigation actually going on. There is no doubt about the law. The general principles laid down by Lord *Lyndhurst* in *Herring v. Cloberry* (2), in my opinion, govern and cover the whole ground of the right to production. I should have hesitated more than I do if I had heard any suggestion why the Defendants should be compelled to produce communications which took place during the dispute between the parties, shewing the advice or assistance which the Defendants procured from their solicitors or their surveyors—surveyors being necessarily employed in a matter of this kind. Why are these gentlemen, who are so unfortunate as to be made Defendants, to be compelled to disclose all that has taken place between them and the persons employed by them? There is no reason for it. In my opinion the affidavit might have been more distinct than it is; but that concerns those who if they were not satisfied with the affidavit as it stands should have insisted on another and better and more distinct statement. In my opinion, the Plaintiff has no right to look into the proceedings in the administration suit, or into the letters which are said to

(1) 2 Ch. D. 644.

(2) 1 Ph. 91.

be confidential communications and therefore privileged. The opinions of counsel, instructions, drafts, and so forth, are of course protected against discovery. In my opinion there is no ground for seeking to trespass on the privilege which the Defendants claim, and I must therefore refuse this summons with costs.

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The Plaintiff appealed. The appeal was heard on the 6th of April.

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*Davey*, Q.C., and *Seward Brice* for the Appellant:—

We object to the order so far as it protects communications which passed between the surveyors of the Defendants and the solicitors of the Defendants before any dispute had arisen, and there is no authority for holding such communications privileged. The rule is laid down in *McCorquodale v. Bell* (1).

[JESSEL, M.R., referred to *Lafone v. Falkland Islands Company* (2).]

*Marten*, Q.C., and *Hadley*, for the Defendants:—

We contend that all communications between the solicitors and the representatives of the client ought to be held privileged. The surveyor is a person whom the solicitor must consult to enable him to advise his client properly, and all communications with persons whom he consults confidentially for the purpose of enabling him to advise his client are within the principle of the rule as to protection. Communications between the solicitor and client are privileged, whether litigation is commenced or contemplated or not: *Herring v. Cloberry* (3); and the same rule ought to apply to communications between the solicitor and agents of the client: *Lawrence v. Campbell* (4).

[BRETT, L.J.:—Scotch legal advisers stand on the same footing as English legal advisers.]

In *Macfarlan v. Rolt* (5), communications between the agents of the Defendants and their solicitors *ante litem motam* were held

(1) 1 C. P. D. 471.

(2) 4 K. & J. 34.

(3) 1 Ph. 91.

(4) 4 Drew. 485.

(5) Law Rep. 14 Eq. 580.

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privileged. *Wilson v. Northampton and Banbury Junction Railway Company* (1) nearly decides the present point, and *Walsham v. Stainton* (2) is very similar to it.

[COTTON, L.J.:—Your proposition is that all communications by a solicitor with third parties, for the purpose of enabling him to give advice, are privileged. Has any case protected them except when made *post litem motam* ?]

The cases as to medical referees do : *Cossey v. London, Brighton, and South Coast Railway Company* (3) ; *Friend v. London, Chatham, and Dover Railway Company* (4). The protection of all communications between the solicitor and client was not settled till *Minet v. Morgan* (5), the rule having been made uncertain by *Lord Walsingham v. Goodricke* (6). The question is whether the rule, though not distinctly carried to such a length by any of the cases, ought not to be extended to meet this case ; and in *Macfarlan v. Rolt* (7) Vice-Chancellor *Wickens* expresses his opinion that the rule in *Manser v. Dix* (8) ought to be extended. *Mostyn v. West Mostyn Coal and Iron Company* (9) bears strongly in our favour.

[*Southwark and Vauxhall Water Company v. Quick* (10), *Hooper v. Gumm* (11), *Ross v. Gibbs* (12), and *Turton v. Barber* (13), were also referred to.]

JESSEL, M.R.:—

As regards the main question in dispute, this appears to be an attempt on the part of the present Respondents to extend the rule as to protection from discovery. It was fairly admitted by their counsel that no decided case carries the rule to the extent to which they wish it carried, but they urged that as a matter of principle it ought to be so extended. What they contended for was that documents communicated to the solicitors of

(1) Law Rep. 14 Eq. 477.

(2) 2 H. & M. 1.

(3) Law Rep. 5 C. P. 146.

(4) 2 Ex. D. 437.

(5) Law Rep. 8 Ch. 361.

(6) 3 Hare, 122.

(7) Law Rep. 14 Eq. 580.

(8) 1 K. & J. 451.

(9) 34 L. T. (N.S.) 531.

(10) 3 Q. B. D. 315.

(11) 2 J. & H. 602.

(12) Law Rep. 8 Eq. 522.

(13) Law Rep. 17 Eq. 329.

the Defendants by third parties, though not communicated by such third parties as agents of the clients seeking advice, should be protected, because those documents contained information required or asked for by the solicitors, for the purpose of enabling them the better to advise the clients. The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence, but it has never hitherto been decided that documents are protected merely because they are produced by a third person in answer to an inquiry made by the solicitor. It does not appear to me to be necessary, either as a result of the principle which regulates this privilege or for the convenience of mankind, so to extend the rule. In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is

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restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently.

Now, keeping that in view, what has been done is this: The actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants. The idea that documents like these require protection has been started, if I may say so, for the first time to-day, and I think the best proof that the necessities of mankind have not been supposed to require this protection is that it has never heretofore been asked. It seems to me we ought not to carry the rule any further than it has been carried. It is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety. That rule does not, in my opinion, require to be carried further, and there



fore I think this appeal ought to be allowed, and an order made in the terms which will be read by Lord Justice *Cotton*.

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BRETT, L.J.:—

The proposition laid before us for approval is, that where one of the parties to an action has in his possession or control documents which passed between his solicitor and third parties, they are protected in his hands from inspection, on the ground that they were documents which passed between the solicitor and the third party for the purpose of enabling the solicitor to give legal advice to his client, although such information was obtained by the solicitor for that purpose at a time when there was no litigation pending between the parties, nor any litigation contemplated. It seems to me that that proposition cannot be acceded to. It is beyond any rule which has ever been laid down by the Court, and it seems to me that it is beyond the principles of the rules which have been laid down. The rule as to the non-production of communications between solicitor and client is a rule which has been established upon grounds of general or public policy. It is confined entirely to communications which take place for the purpose of obtaining legal advice from professional persons. It is so confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case.

It was said, however, that there were two cases which supported, although they were not absolute decisions in favour of the proposition. One was the case of *Mostyn v. West Mostyn Coal and Iron Company* (1), which when looked at gives no support at all to the present contention. The other case was *Wilson v. Northampton and Banbury Junction Railway Company* (2). I think that probably some documents were shut out from production in that case which were of such a character that if the decision really intended to shut them out it might give colour to the proposition now contended for. But if that is so, then, with deference, I think that decision was wrong. There is no authority and there is no principle which obliges us to extend the doctrine to the extent now contended for.

(1) 34 L. T. (N.S.) 531.

(2) Law Rep. 14 Eq. 477.

C. A. COTTON, L.J.:—

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The only contest here is whether the Plaintiff can compel the Defendants to produce certain communications which took place between the solicitor of the Defendants and their surveyor and between the surveyor and the solicitor. I feel a little difficulty in dealing with the matter, because we do not know precisely in what way the Defendants intend to put their claim for protection. We have not an affidavit by them stating the exact circumstances under which these communications passed, or on what ground they seek to protect them. Their case is put, as I understand it, in this way: It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives." If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for

bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these. In my opinion the Plaintiff is entitled to have an order for production of the documents as to which the contest has arisen, except such, if any, as the Defendants shall state by affidavit to have been prepared confidentially after dispute had arisen between the Plaintiff and Defendants and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to this action.

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Solicitors for Plaintiff: *Boxall & Boxall*.

Solicitors for Defendants: *Gregory, Rowcliffes, & Co.*

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ATTORNEY-GENERAL *v.* BIRMINGHAM, TAME, AND  
REA DRAINAGE BOARD.

[1881 A. 221.]

*Action in nature of Supplemental Suit—Action to enforce Judgment against Successors in Title—Nuisance—Injunction—District Board—38 & 39 Vict. c. 55, s. 275.*

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A decree was made in 1875 against the corporation of *B.*, as the sanitary authority of *B.*, granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health or a nuisance to the Plaintiffs; but the injunction was suspended for five years, to give the corporation an opportunity to execute certain works. After the expiration of that period the Plaintiffs desired to enforce the injunction, but in the meantime the *B.*, *T.*, and *R.* District Board had been constituted under the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), as the sanitary authority of the district, in the place of the corporation of *B.*

The Plaintiffs brought an action against the *B.*, *T.*, and *R.* Board, claiming a declaration that they were entitled to the same benefit of the decree as against the Defendants in the present action as if they had been Defendants in the former suit. The Defendants demurred:—

*Held* (reversing the decision of *Bacon*, V.C.), that the *B.*, *T.*, and *R.*