

## ORIGINAL CIVIL.

*Before Mr. Justice Pigot.*BIPRO DOSS DEY v. SECRETARY OF STATE FOR INDIA  
IN COUNCIL.\*1885  
May 21.*Discovery—Production of documents—Privilege—Solicitor and Client—  
Act XIV of 1882, s. 133.*

Letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor.

In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor.

THIS was an application by the plaintiff for an order that the defendant should produce before the Commissioner appointed to examine Major Hallett in the above cause, certain documents numbered 5 and 6, set out in the second part of the schedule to the defendant's affidavit verifying his list of documents. In support of this application the plaintiff filed the usual affidavit as to the relevancy and materiality of the documents in question. The suit was brought for moneys claimed by the plaintiff in respect of certain Commissariat contracts which the plaintiff had entered into with the Government in 1879, and the documents, production of which was desired, were two letters, one dated the 23rd November 1883, from Major C. F. Thomas, Examiner of Commissariat Accounts, to Major Hallett, and Major Hallett's reply thereto, dated the 3rd of December 1883. In opposition to the application the defendant filed an affidavit of Major Thomas, the material portions of which are as follows:—

"(1.) That on the 18th September 1883, Baboo Gonesh Chunder Chunder, the then attorney of the plaintiff, wrote a letter to my office (submitting on plaintiff's behalf certain re-charge bills and other documents), from which letter the following is an extract:—'Under the circumstances, I submit that my said client's claim cannot be rejected. If, however, you do not think fit upon these explanations to pass my client's said bill, you

\* Original Suit No. 357 of 1884.

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will be pleased to return the same with all the vouchers and papers sent for its support to enable my client to adopt such measures as he may be advised.'

"(2.) That on the 26th idem, I wrote to him asking for originals of some documents referred to by him in his letter abovementioned.

"(3.) That on the 5th November 1883, the said Baboo Gonesh Chunder Chunder wrote another letter to my office forwarding some original documents alleged to be in support of the plaintiff's claim.

"(4.) That on the 23rd November 1883, I addressed to Major Hallett a letter included in part II of the said schedule to defendant's affidavit of documents, sworn on the 12th day of February last, to which I received the reply, dated the 3rd December 1883, also referred to in the said part of the said affidavit.

"(5.) That in consequence of the threat by the said Baboo Gonesh Chunder Chunder in his letter of 18th September 1883, of possible legal proceedings, and because the matter having been placed by the plaintiff in the hands of a solicitor, I regarded his taking such action as likely to lead to legal proceedings, I addressed my said letter to the said Major Hallett with a view to further possible litigation, in order that all such information might be submitted to the Solicitor of the Government of India, for advice as is usual when I have any reason for anticipating a lawsuit. After receipt of Major Hallett's said letter, I, on the 4th of January 1884, forwarded all the documents connected with the plaintiff's claim to my superior officer, the Controller of Military Accounts, that he might, in accordance with the practice in all such cases, submit the same to the said Solicitor to Government.

"(6.) That I am informed and believe the Controller did so submit all such documents to the said Solicitor to Government with a letter, dated the 21st January 1884.

"(7.) That on the 4th April 1884, the said Gonesh Chunder Chunder issued the usual notice of plaintiff's intention to sue Government, and in July the plaint herein was filed."

Mr. Hill for the plaintiff.

The defendant objects to produce these letters, on the ground of privilege, but they are not within the rule. In *Southwark Water Co. v. Quick* (1), Lord Justice Colton, citing *Cockburn*, C.J., in *Friend v. London, Chatham and Dover Railway Company* (2), lays it down that a document to be privileged must have come into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice. That is clearly not the case made on this affidavit. See also *Wheeler v. Le Marchant* (3); *Anderson v. Bank of British Columbia* (4).

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The *Advocate-General* (Mr. G. C. Paul) for the defendant contended that the letters were privileged—*Southwark Water Co. v. Quick* (1).

FIGOR, J.—I think the question in issue in this matter is more as to what is to be gathered from a fair construction of the words in the affidavit of Major Thomas, than any question of law at issue between the parties.

The case of *Southwark, &c. Water Co. v. Quick* (1) is relied on by the *Advocate-General* for the defendant, and also by Mr. Hill for the plaintiff.

I construe the affidavit thus: the letters of which production is sought were, a letter by Major Thomas to Major Hallett, and Major Hallett's reply to it; the first being a letter written for the purpose of giving Major Hallett information with a view to possible future litigation. It does not appear that it, or the reply to it, was written for the purpose of being communicated to any solicitor. It is consistent with the terms of the affidavit, that both letters were written without such a purpose; but that they were of such a nature that they might, in the event of litigation, be communicated to solicitor. This does not show enough to entitle the documents to protection. It is for the party claiming the privilege to show that the documents were prepared for the use of his solicitor; that they came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him to prosecute or defend an action, as *Cotton, JJ.*, at page 322, or as *Brett, L.J.*, at p. 320, in

(1) L. R., 3 Q. B. D., 315 (323).      (3) L. R., 17 Ch. D., 675.  
(2) L. R., 2 Ex. D., 437.                (4) L. R., 2 Ch. D., 344.

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*the case of the Southwark and Vauxhall Water Co. v. Quick*, says (modifying the words of *Mellish*, L.J., in *Anderson v. Bank of British Columbia*), "merely for the purpose of being laid before the solicitor for his advice or consideration."

I think the affidavit does not show that these letters were written for the purpose—which I think means substantially "merely" for the purpose—of being communicated to the solicitor. It does not say that Major Thomas' letter was addressed to Major Hallett in order that it might be submitted to the solicitor of the Government; but that "all such information"—an ambiguous phrase as it is here used—should be submitted to him.

Nor would it, I think, be enough to protect these letters, if they were written with a view to possible future litigation, and with the intention that, in that case, they should be laid before a solicitor.

I think the plaintiff is entitled to the discovery sought with regard to the letters mentioned in paras. 4 and 5 of Major Thomas' affidavit.

## APPELLATE CIVIL.

*Before Mr Justice Field and Mr Justice O'Kinealy.*

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 May 22.

SATISH CHUNDER RAI CHOWDHURI AND ANOTHER (JUDGMENT-DEBTORS)  
 v. THOMAS AND ANOTHER (DEBTEE-HOLDERS).\*

*Sale in execution of decree—Setting aside sale—Irregularity and injury—  
 Civil Procedure Code, Act XIV of 1882, s. 311.*

Where an application is made to set aside a sale in execution of a decree on the ground of irregularity, it is not to be presumed from the proved existence of irregularity and injury that the latter occurred by reason of the former, in the absence of evidence to show that the injury is the result of the irregularity.

*Macnaghten v. Mahabir Pershad Singh* (1), and *Lala Mobaruk Lal v. Secretary of State for India in Council* (2), disallowed.

THIS was an application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of decree on the ground

\* Appeal from Order No. 7 of 1885, against the order of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 17th of September, 1884.

(1) I. L. R. 9 Calo., 656; L. R. 10 I. A., 25.

(2) I. L. R. 11 Calo., 200.