

1880

Held, that the letters were privileged, and that the fact, that portions of them had been read to the defendant's solicitor, was no waiver of the privilege as regarded the parts which were not read.

KAY

v.

POORUN.

POONA'LA'L
JAVHERRY.

SUMMONS calling on the plaintiffs to show cause why they should not produce to the defendant the letters from Messrs. McGregor, Donald & Co., solicitors for the first and second plaintiffs, to Messrs. Van Sandau and Cumming, solicitors for the third plaintiff, and from Messrs. Van Saudan and Cumming to Mr. H. B. Muir, the third plaintiff, both dated the 26th February, 1880.

In ~~this~~ suit the plaintiffs sought specific performance of an agreement whereby the defendant agreed to purchase certain premises from the plaintiffs. The plaintiffs were residing in England, and the agreement with the defendant was made in Bombay by their constituted attorney, J. L. Symons.

In his written statement the defendant averred that it was provided by the agreement that the said purchase should be completed on the 15th March, 1880, and that he should on that day be put into possession, and that the plaintiffs should, in the deed of assignment of the said premises, specially covenant to indemnify the defendant against any claim in the said premises which might at any time be preferred by or on behalf of the representatives of one W. H. Nicholson.

The defendant's solicitor prepared a draft assignment of the premises containing the above special covenant, and he sent this draft to the plaintiffs' solicitors (Messrs. Prescott and Winter) for their approval. On the 19th March, 1880, Mr. Winter, of the firm of Messrs. Prescott and Winter, called upon the defendant's solicitor, Mr. H. W. Payne, and informed him that the third plaintiff, H. B. Muir, refused to join in the special covenant of indemnity, and declined to sign any deed of assignment which contained any covenant, except one to the effect that he had not incumbered the said premise. At this interview Mr. Winter read to Mr. Payne portions of certain letters which had passed with reference to the deed of assignment between the solicitor of the third plaintiff H. B. Muir and the solicitor of the other plaintiffs, and, amongst others, read parts of the two letters mentioned in the summons. Mr. Winter proposed that the defendant should not

insist upon a covenant of indemnity from H. B. Muir, and said that otherwise the contract must fall through.

1880

KAY

v.

POORUN.

POONA'LA'L
JAVHERRY.

The plaintiffs objected to produce the two letters mentioned in the summons, on the ground that they were privileged communications. Thereupon the defendant obtained the present summons. Mr. Winter filed an affidavit in which he stated that he regarded what had passed between him and Mr. Payne on the 19th March as "without prejudice".

Farran for the plaintiffs showed cause. The defendant is not entitled to see the letters, parts of which were read to his solicitor Mr. Payne, at the interview on the 19th March. Mr. Payne may give in evidence what was read to him. If Mr. Winter had taken extracts from these letters, and sent them in writing to Mr. Payne, such extracts might be used, and it could not be contended that the fact of giving such written extracts would entitle the defendant to see the letters from which they were taken. The fact that the extracts were communicated to the defendant's solicitor by word of mouth, instead of by writing, does not extend the defendant's right of inspection. Counsel relied on *Gore v. Bowser*⁽¹⁾, *Ford v. Tennant*⁽²⁾.

Inverarity, for the defendants, *contra*.—The letters in question were not written with reference to this suit. The agreement with defendant having been made in Bombay, one of the plaintiffs, who is in England, refuses to carry it out, and writes to his solicitor to that effect.

The plaintiffs now sue for specific performance, and it is material for our defence to show that the plaintiffs were not ready and willing to fulfil their part of the agreement. These letters would prove the defendant's case. There is nothing confidential in them, *Paddon v. Winch*⁽³⁾, *Smith v. Daniell*⁽⁴⁾, *Radcliff v. Fursman*⁽⁵⁾. The privilege, if it ever existed, was waived by the disclosure at the interview of 19th March. The letter can no longer be considered confidential, and that is the only ground of privilege: *Memon Hajee v. Molvi Abdul Karim*⁽⁶⁾.

(1) 5 De G. & Sm. 30

(2) 32 Bea. 162.

(3) L. R. 9 Eq. 666.

(4) L. R. 18 Eq. 649.

(5) 2 Brown's Parl. Cas. 514.

(6) I. L. R., 3 Bom. 91.

1880

KAY

v.

POORUN-

POONA'LA'L
JAVHERRY.

Farran in reply.—The cases referred to, have reference only to letters between the solicitors of a third person. If the correspondence had been with reference to this suit they would have been privileged: *MacCorquodale v. Bell*⁽¹⁾.

MARRIOTT, J.—One of the letters, of which inspection is here sought, is a letter written by the solicitors of two of the plaintiffs in the suit to the solicitors of the third plaintiff, and the other is a letter written to the third plaintiff by his own solicitors. I am of opinion that the defendant has no right to see them. They must be regarded as confidential communications, and, as such, need not be produced. I do not think that the privilege has been waived. Mr. Winter, it is true, read to Mr. Payne certain portions of these letters at the meeting which took place on the 19th March, 1880, and Mr. Winter may be called as a witness and may be required to state in evidence every thing that then took place, including the substance of the portions of the letters so read by him to Mr. Payne. But more than that he cannot be required to disclose, and I do not think that the fact of his having read to Mr. Payne parts of his client's letters, was any waiver of privilege as to the parts which he did not read, or gives any right to the defendant to have inspection of documents which are clearly of a confidential nature. The summons must be dismissed with costs.

Summons dismissed.

Attorneys for plaintiffs.—Messrs. *Prescot and Winter*.

Attorney for defendant.—Mr. *H. W. Payne*.

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