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than the claimant. No male heir appears to have intervened. The case in Morris, at most, recognized the custom of property descending from a courtesan mother to her courtesan daughters. There was a precedent, also referred to at the Ecclesiastical side of this Court in 1856, in which administration of the goods of a deceased courtesan was granted to an applicant claiming as courtesan daughter by adoption. That order was made *ex parte* and I think improvidently." It would, therefore, seem, although it was not necessary to decide the point, that the Court was of opinion that the adopted daughter of a courtesan was not entitled to inherit. Although I fully concur with the Court in its opinion against any extension of the principle, and its regret that the Court should ever have given a legal *status* to the immoral profession of prostitution by having recognized a separate code of law for dancing girls and courtesans, I cannot but think that the adoption is recognized by the law, and the right of the adopted daughter to inherit must follow from it as in other cases. In Strange's Manual of Hindu Law, Adoption, s. 104, it is said that dancing girls form an exception in Hindu community. They do not marry, but live in professional concubinage, which does not degrade them from caste if not carried on with an out-caste. Having no husbands, adoption cannot be made in that channel. They are, consequently, allowed to make adoption themselves for transmission of their property, and this must be of a daughter, as a descent from a female is in the female line. To adopt, the dancing girls must be daughterless. It is immaterial whether she have a son or not. Probably this may be taken to be a correct statement of the law, and that, when it becomes necessary to decide the point, the Court would not feel itself justified by considerations of public policy in allowing the adoption to be legal and, at the same time, not giving its legal effect to it. In the present case it is not necessary to decide it, whether the adopted daughters could or could not take by descent. The testatrix having power to make a will, and there being no provision in Hindu law by [576] which exercise of her power is to be regulated (*Sonaton Bysack* v *Sreemutty Juggutsoondree Dossee* (1)) restraining her from doing what, from the language she has used, appears to have been her intention, *viz.*, giving her property to them as joint tenants, I think that intention should be carried into effect. The decree will, therefore, declare, that, in the event which has happened, the plaintiff is entitled to the whole of the testatrix's estate, and direct an enquiry by the Commissioner, whether the plaintiff has attained the age of twenty-one years, and, if not, when she will attain that age, and for taking the usual accounts, reserving further directions and costs. [This case is also referred to in 4 B. 545.]

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Before Mr. Justice West.

MUNCHERSHAW BEZONJI (*Plaintiff*) *v.* THE NEW DHURUMSEY SPINNING AND WEAVING COMPANY (*Defendants*).*

[12th August, 1880.]

Evidence—Indian Evidence Act (I of 1872), ss. 34, 129, 145—Privileged communication—Case for counsel—Production—Inspection—Suit for wrongful dismissal—Evidence in justification must be confined to matters set forth in written statement—Practice—Supplemental written statement, time of filing—Evidence affecting credit—Civil Procedure Code (X of 1877), ss. 110 and 130—Previous statements made in writing, used to contradict a witness—Books regularly kept in course of business, what are.

In a suit for wrongful dismissal in which the defendants pleaded justification by reason of the plaintiff's misconduct, *held*

(1) That the defendants at the hearing could not give evidence of a transaction involving instances of misconduct not set forth in their written statement. They should either have filed a supplemental written statement before the hearing, or have furnished the plaintiff with particulars of the misconduct in question, and intimated to him their intention of relying on the transaction as going to establish the general allegation of misconduct.

(2) That although the transaction in question could not be made the subject-matter of an ancillary issue, and evidence of it, as such, could not [577] be

* Suit No. 428 of 1879.

(1) 8 M. I. A. 66.

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received, yet that questions relating to it might be put to the plaintiff in cross-examination for the purpose of affecting his credit.

Supplemental written statements cannot be filed after the parties have entered upon their case at the hearing.

Statements laid by clients before counsel for the purpose of obtaining legal advise, are privileged.

A was employed by B, at intervals of a week or fortnight, to write up B's account books, B furnishing him with the necessary information either orally or from loose memoranda.

Held, that the entries so made could not be given in evidence to contradict A, under s. 145 of the Indian Evidence Act, as previous statements made by him in writing. The statements were really made not by A but by B, under whose instructions A had written them.

Held, also, that it is only such books as are entered up as transactions take place that can be considered as books regularly kept in the course of business within s. 34 of the Indian Evidence Act.

[N.F., 27 C. 118 (P.C.)=4 C.W.N. 147=7 Sar. P.C.J. 586=26 I.A. 254; R., 23 B. 63 (66); 25 B. 616 (624); 13 C.L.J. 139 (142)=8 Ind. Cas. 81; 2 O.C. 311 (314).]

ACTION for wrongful dismissal. The plaintiff had been secretary to the defendant's company under an agreement, dated 4th November 1874, by which it was provided that he should hold the appointment for twenty-five years at a salary of Rs. 500 per month. He was dismssed in May 1879, and now brought this suit, claiming Rs. 60,000 as damages.

The defendants filed a written statement, alleging general misconduct on the part of the plaintiff, which, they contended, justified his dismissal. The written statement also set forth specific instances of the plaintiff's misconduct, on which the defendants intended specially to rely at the hearing of the case.

In his examination-in-chief the plaintiff had stated that he had not dealt with the money of the company subsequently to the 25th August 1874. In his cross-examination the counsel for the defendants proposed to put questions to him relating to an entry in the books of the company, dated the 31st August 1874, by which a sum of Rs. 1,250 was debited to brokerage. This entry the defendants alleged to be false, the sum having been appropriated by the plaintiff. This alleged false entry was not one of the instances of misconduct mentioned in the written statement.

Lang (with *Farran*), for the plaintiff, objected.—The defendants cannot go into evidence of matters not set forth in the written statement. We are prepared to meet the case there stated [578] but this is a matter not referred to. If the defendants intended to rely upon this as part of their justification, they should have given us notice of their intention. Counsel referred to *Saunders* v. *Jones* (1).

Inverarity (with him *Jardine*), for the defendants.—We did not know of this matter when the written statement was filed. We may give evidence of misconduct which has subsequently come to our knowledge. Under the general allegation of misconduct, contained in the written statement, this evidence may be given.

JUDGMENT.

WEST, J.—I think that when a defendant proposes to rely on a specific transaction as an instance of misconduct on the part of plaintiff, which transaction is not a merely indefinite cumulative instance, but well-defined and severable from those set forth in the written statement, he must either file a supplemental written statement before the hearing,

(1) 7 Ch. D. 435.

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adducing such transaction as a material ground of defence, or, at any rate, furnish the plaintiff with particulars of it, and intimate to him that he intends to rely on the transaction as establishing, or going to establish, the general allegation of misconduct. In the present instance, the defendants did not know of the transaction when they filed their written statement; but they knew of it before the first hearing and, having failed to bring it forward, they cannot, I think, now go into evidence of it.

Inverarity then applied to be allowed to put in a supplemental written statement, referring to s. 112 of the Civil Procedure Code, (Act X of 1877) and the English Judicature Acts and Rules—Order XXVII, Rule I.

WEST, J.—From s. 110 of the Civil Procedure Code, it is clear that parties to a suit must file their written statements before or at the first hearing, by which is meant, I think, that they must be filed before the parties have entered upon their case. I cannot allow the defendants now to file a new written statement.

Inverarity then applied to put the questions to the witness, not for the purpose of eliciting evidence to be used by the defendants as justifying the dismissal of the plaintiff, but in order to contradict the statement of the witness, that he had not dealt with the money of the company after the 25th August, 1874; and [579] secondly, to injure his credit by showing that he had made a false entry in the books of the company.

Lang objected.—This is an indirect way of giving inadmissible evidence. The defendants seek to give evidence in justification by getting in an evidence affecting credit. The reason for which it has already been rejected, should still exclude it, *viz.*, that it is unfair to take the plaintiff by surprise by examining him as to matters of which he had no notice.

WEST, J.—I think that, for the purposes now suggested, the evidence must be admitted. I could not permit this special transaction to be made the subject-matter of an ancillary issue, but I am bound to allow the proposed questions to be put for the purpose of affecting the witness's credit. His answers, of course, will be final, or cannot be contradicted.

Messrs. Merwanjee and Co. were agents of the defendants' company. In the year 1878 a quarrel took place between the plaintiff and the agents, the plaintiff alleging that the agents were ruining the company. In November 1878, the agents published a pamphlet in which they sought to vindicate themselves, and in which they impugned the conduct of the plaintiff as secretary to the company.

Inverarity tendered the pamphlet in evidence.

Lang objected.—The pamphlet is a mere statement of facts alleged by the agents in vindication of their own conduct.

Inverarity.—I tender it, not as evidence of the facts stated, but as showing what was said against the plaintiff in 1878, in order that his conduct at that time in relation to the pamphlet may be understood.

WEST, J.—I think the pamphlet must be admitted, but for one purpose only, *viz.*, that of showing, in so far as it deals with the conduct of the plaintiff himself, what accusations were actually made against him as connected with what he did, or omitted to do, in consequence. It is not admissible, and will not be used, as it bears on the conduct of other people not parties to this suit, or as any evidence of the objective truth of the statement of facts contained in it.

The defendants alleged that the plaintiff while in their employment had taken sookrie (*i.e.*, a percentage on payments made by customers). The plaintiff stated that he had done so with the permission of the agents, who

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were his official superiors. He said that he had had a letter from them [580] expressly allowing him to accept *sookri*; that he had lost the original document, which in the year 1878 he had submitted to counsel with a case for opinion upon matters connected with it. He now produced a translation of this document.

Inverarity called for the production of the case submitted to counsel. He contended that, although it could not be used in evidence under s. 129 of the Evidence Act, yet his client was entitled to have inspection of it under s. 130 of the Code of Civil Procedure (X of 1877). He also contended that, although by s. 129 of the Evidence Act, the "case" could not be disclosed *to the Court*, there was nothing in that section which forbade its disclosure to the opposite party. He cited and relied on *Radcliffe* v. *Fursman*(1), *Smith* v. *Daniel*(2), *Macfarlane* v. *Rolt*(3).

Counsel on the other side were not called upon.

WEST, J.—The question here is as to the right construction of s. 129 of the Indian Evidence Act, which is in these terms:—"No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others."

Relying on this, *Mr. Inverarity* for the defendants, calls on the plaintiff to produce a case laid by him before counsel as to one of the matters now in question before the litigation had begun. He relies on *Radcliffe* v. *Fursman* (1) and several cases in which that decision, though really disappproved, has been followed (see Taylor on Evidence, s. 846), and contends that even though the Court may not be bound or disposed to order the production of the document in question as evidence, yet the defendants have a right to a disclosure of it as likely to afford information of value to them for the purposes of the case.

In drawing up the Indian Evidence Act, chiefly from Taylor on Evidence, Sir James Stephen plainly intended to adopt in s. 129 the principal contended for in ss. 846, 847 of the work [581] he was condensing; but with this qualification, not expressed at that place, that, if a party becomes a witness of his own accord, he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony. The narrow privilege recognized in *Radcliffe* v. *Fursman* (1), after being several times condemned as insufficient (see Gresley's Law of Evidence by Cathcart, pp. 39—41) was definitely widened by *Bolton* v. *Corporation of Liverpool* (4), *Herring* v. *Clobery* (5), and *Lawrence* v. *Campbell* (6), in which Kindersley, V. C., lays down the principle of protection as founded on the exigencies of human affairs in the broadest terms (7). In *Pearse* v. *Pearse* (8), Knight Bruce, V. C., refers *Radcliffe* v. *Fursman* (1) to the principle that the advice was sought by the party pressed to disclose his case, not in his strictly personal character, but as a trustee, and in this state of the authorities the Indian Evidence Act was

(1) 2 Brown's Parl. Ca. 514. (2) L. R. 18 Eq. 649. (3) L. R. 14 Eq. 580.
(4) 1 My. & K. 88. (5) 1 Ph. 91. (6) 4 Drew. 485; see p. 489.
(7) *Ibid.* In line 4, p. 490. the word "production" has been printed by mistake instead of "production" See S.C. 28 L.J. Ch., p. 781.
(8) 1 De G. & Sm. 12.

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framed. *Wilson* v. *Northampton and Banbury Railway Co.* (1) had not then been decided by Malins, V.C. In that case it is said: "It is of the highest importance, as laid down in *Greenhough* v. *Gaskell* (2), that all communications between a solicitor and client upon a subject which may lead to litigation, should be privileged, and I think the Court is bound to consider that.....almost any contract .....may lead to litigation before the contract is completed." And, again: "All correspondence between solicitors and clients relating to the subject-matter of a contract which has been entered into, and which may lead to litigation.....whether it has done so or may do so, whether it is probable or improbable that it may do so, ought certainly to be privileged." Judicial opinion on the point in question, having thus far ripened the case of *Minet* v. *Morgan* (3), afforded to Lord Selbourne an opportunity of settling the law in a wise and liberal sense. He adopts in the fullest extent the principles laid down by Kindersley, V. C., and Knight Bruce, V. C., Mellish, L. J., concurred with the Lord Chancellor, and the distinctions formerly taken, can now no longer be maintained. Lord Selbourne thought it had already been swept away, and such [582] is the impression naturally produced by Lord St. Leonards' discussion of the subject (4), but general principles have to be asserted again and again in order to contend against particular convenience.

The argument that albeit the document may not be such that the Court can properly order its production as evidence, yet the opposite party may demand a perusal of it, is, I think, opposed to all principle. If a communication is protected by its confidential character, it is protected in an especial degree as against an adversary in litigation. The cases in the English Courts, indeed, deal chiefly with disclosures sought by an adverse party for the purposes of the suit. In *Smith* v. *Daniell* (5) the communications were not confidential.

Here the document, which the plaintiff is asked to produce, is in its nature a confidential communication. The plaintiff wanted advice for his personal guidance in fulfilling a contract of service. The statement which he laid before counsel with this view, is his own property in substance as well as form, it not being suggested that the consultation was in furtherance of any fraud. I do not find it necessary to compel a disclosure of it, in order to explain the evidence given by the plaintiff, and in the absence of such necessity, it would be wrong to put pressure on the plaintiff. It is obviously desirable that communications with professional advisers should be unembarrassed by any such fears as a contrary decision would give rise to. Cunning men would easily evade a rule which would make frank communications unsafe. Truthful men would be placed at a disadvantage by their candour. Advice would have to be given on maimed and distorted statements, and useless litigation would thus be promoted in numberless cases in which an exact knowledge of the facts would have enabled a counsel or solicitor to nip it in the bud by timely warning or suggestion. Lastly, a compulsory disclosure of confidential communications is so opposed to the popular conscience on that point, that it would lead to frequent falsehoods as to what had really taken place. The rule of protection seems to me to be one which should be construed in a sense most favourable to bringing professional [583] knowledge to bear effectively on the facts out of which legal rights and obligations arise, and

(1) L.R. 14 Eq. 477. (2) 1 M. & K. 98, (103). (3) L. R. 8 Ch. 361.
(4) Sugden's Vendors and Purchasers, ch. 24, sec. 2. (5) L. R. 18 Eq. 649.

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disclosures made under s. 129 should not be enforced in any cases except where they are plainly necessary. I decline, therefore, to order the production of the paper.

Cassumbhai Dhurumsi had been one of the directors of the defendants' company, and was concerned in some of the transactions about which evidence was given. He was not a party to the suit, but had been required by the defendants to produce his account books at the hearing. One of the plaintiff's witnesses, named Khimji Thakersi, stated in cross-examination that he had formerly been employed by Cassumbhai Dhurumsi, at intervals of a week or fortnight, to make entries in his (Cassumbhai's) cash-book relating to private transactions, which he (the witness) did from Cassumbhai's loose memoranda or from oral instructions given by Cassumbhai. Counsel for the defendants then tendered in evidence certain entries in this cash-book which it was alleged would contradict the evidence given by the witness in Court.

Inverarity.—These are previous statements made by the witness in writing, and are admissible under s. 145 of the Evidence Act. They are also admissible, under s. 34, as entries in a book of account regularly kept in the course of business.

Farran.—The evidence shows that this book was not regularly kept. Section 145 is not applicable. It does not make the contents of a book evidence without proof of their truth.

WEST, J.—I do not think that the entry in the cash-book is admissible.

As a previous statement in writing, it is merely the statement of Cassumbhai, from whose memoranda or oral dictation alone the witness wrote it, not as any statement of his own.

Under s. 34 of the Evidence Act, I do not think this book comes within the designation of books of account regularly kept in the course of business. It is Cassumbhai's private account book entered up casually once a week or fortnight, and with none of the claims to confidence that attach to books entered up from day to day or (as in banks) from hour to hour as transactions take place. These only are, I think, "regularly kept in the course of business." See Pothier by Evans, I, 483; II, 189.

[584] *Inverarity* subsequently proposed to ask the witness whether he had not made an entry of a certain nature (giving the substance of it) on the 26th August 1874.

Farran objected. This statement in writing, even if it was made by the witness, was not written by him as his own, but as the statement of his employer.

WEST, J.—The question, though in terms directed to a statement made by the witness, yet relates to an entry which, as he has sworn, was one of those which he made from the oral or written dictation of Cassumbhai. It is no more than if he had copied for Cassumbhai out of a book or a newspaper. Such an entry is not, as I have already decided in this case, a previous statement made by the witness. As a mere statement of a physical act, the statement desired would by itself be irrelevant. I think the question is not admissible.

Inverarity then tendered the entry itself in evidence.

WEST, J.—It cannot be admitted. It is an entry in a book of a third party, and one not, in my opinion, proved to have been regularly kept in the course of business.

Attorneys for the plaintiff.—Messrs. *Hearn, Cleveland and Little.*

Attorneys for the defendants.—Messrs. *Crawford and Boevey.*