

one agricultural season by farming, to have acquired the condition of an agriculturist [631] under the Act. The *status* of agriculturist and of trader is not to be taken up and laid aside momentarily in order to embarrass a creditor. It may be that the defendants can prove that they are *bona-fide* agriculturists, and so on a full investigation establish the exemption they claim.

They must be allowed an opportunity of doing this, and I will accede to the application for taking evidence, as to the *status* of the defendants, by commission, except as to the defendants themselves and any depositions they may personally have to make.

Motion granted.

NOTE.—Evidence on commission having been taken and returned, it was, on the 20th November 1880, decided that, as one of the defendants gained his livelihood chiefly by agriculture, the jurisdiction of the High court was excluded.

Attorneys for the plaintiff.—Messrs. *Hore, Conroy and Brown.*

Attorneys for the defendants.—Messrs. *Jefferson, Bhaishankar and Dinsha.*

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ORIGINAL CIVIL.

Before Mr. Justice Marriott.

KAY AND TWO OTHERS (*Plaintiffs*) v. POORUNCHAND POONA LAL JAVHERRY (*Defendant*).^{*} [11th September, 1880.]

Practice—Privileged communication—Inspection—Production.

The plaintiffs resided in England, and sued the defendant in Bombay for specific performance of an agreement to purchase certain premises. This agreement had been made on behalf of the plaintiffs by S., their agent in Bombay. The defendant pleaded that by the terms of the agreement it was provided that the deed of assignment should contain a covenant by the three plaintiffs to indemnify the defendant against any claims upon the premises that might be made at any time by or on behalf of the representatives of one N. The defendant's solicitor prepared a draft assignment which contained this covenant, and sent it to the plaintiffs' solicitors (Messrs. Prescott and Winter) for approval. On the 19th March 1880, Mr. Winter called upon Mr. Payne, the defendant's solicitor, and informed him that M., the third plaintiff, refused to sign any deed which contained the above covenant. At this interview Mr. Winter read to Mr. Payne portions of a letter written with reference to the proposed deed by McG. & Co., (solicitors for the first two plaintiffs) to V., the solicitor of the third plaintiff, and of another letter written by V. to his client, the third plaintiff. The defendant called upon the plaintiffs to produce these letters for inspection.

[632] *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.

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 Sandau 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

^{*} Suit No. 287 of 1880.

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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 premises. 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 [633] insist upon a covenant of indemnity from H. B. Muir, and said that otherwise the contract must fall through.

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. Tenant* (2).

Inverarity, for the defendant, *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.

(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.

The letter can no longer be considered confidential, and that is the only ground of privilege: *Memon Hajee v. Molvi Abdul Karim* (1).

[634] *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 the suit they would have been privileged: *MacCorquodale v. Bell* (2).

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JUDGMENT.

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 everything 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. *Prescott and Winter.*

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

4 B. 635.

[635] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

A. C. BOEVEY, TALUKDARI SETTLEMENT OFFICER (*Applicant*).*

[28th April, 1880.]

The Minors Act (XX of 1864), s. 11—Construction—“ May ”—“ Shall ”

The provision in s. 11 of the Minors Act (XX of 1864), that when the estate of a minor consists of land the Court “ may ” direct the Collector to take charge of the estate is not obligatory.

THIS was an appeal from an order made by H. M. Birdwood, Judge of the district of Surat. Mr. Crawley-Boevey, Talukdari Settlement Officer in Gujarat and Administrator of the property of Zulficar Ali (a minor) and guardian of his person, applied to the Court of the District Judge to have Mr. Lely appointed to succeed him as administrator and guardian, being himself about to leave India on furlough and Mr. Lely having been appointed to act for him as Talukdari Settlement Officer. The District Judge was of opinion that the appointment of Mr. Lely would not be legal, and that as the minor's estate consisted partly of land, the Collector of the district, in which the larger portion of the land was situated,

* Appeal No. 3 of 1880 under Act XX of 1864.