[HIGH COURT OF AUSTRALIA.]

PETER F. VARAWA . . . . . APPELLANT;

AND

HOWARD SMITH & CO. LTD. . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1910.

SYDNEY, *April* 11.

Griffith C.J., O'Connor and Isaacs JJ.

Practice—Discovery—Interrogatories—Privilege—Communications between solicitor and client—Abuse of process—Allegation of fraud.

The plaintiff sued the defendants for malicious arrest and for abuse of the process of the Court. The plaintiff administered interrogatories to the defendants as to whether the defendants had obtained any advice from their solicitors as to the liability of the plaintiff before they arrested him.

Held, that if the arrest was unlawful, the unlawful proceeding did not begin until after the advice had been given, and that as the communication between the defendants and their solicitor was not shown to have been made in furtherance of an illegal object, it was privileged.

Leave to appeal from the Supreme Court of Victoria refused.

APPLICATION for leave to appeal from an interlocutory judgment of the Supreme Court of Victoria refusing an application by the plaintiff for further and better answers to interrogatories in an action for malicious arrest.

The statement of claim alleged that on 21st January 1905 the defendants sued the plaintiff for £8,000 damages for breach of a contract for the sale of the s.s. *Peregrine* by the defendants to the plaintiff, and in this action the present plaintiff was ultimately successful. On the same day the plaintiff was arrested under a writ of *ca re* issued at the instance of the defendants.

The plaintiff further alleged that these proceedings were had and taken by the defendants not for the purpose of enforcing or securing the payment of money which they believed to be due to them by the plaintiff by way of damages or otherwise, but for the purpose and in the hope of terrifying the plaintiff, and forcing him to pay them, or to procure the Russian Government to pay to them, money to which they did not in good faith consider themselves entitled, and to which they were not in fact entitled, that such proceedings were an abuse of the process of the Court in which they were had and taken, and that the said order was falsely and maliciously procured by the defendants by means of affidavits containing representations which were, to the knowledge of the defendants, wholly false and misleading.

The plaintiff administered to the defendants the following interrogatory: "Did the defendants, their agent or agents, on or before 21st January 1905, obtain from any and what lawyer or other legal adviser at Melbourne, Sydney or elsewhere any and what advice as to the liability of the plaintiff and/or any and what other persons in respect of the alleged sale of the steamship *Peregrine* by the defendants to the plaintiff?" The defendants objected to answer this interrogatory upon the ground that the matters inquired into were confidential communications between the defendants and their legal advisers. The answer also stated: "and I further say that the defendant and its officers consulted the said legal advisers in reference to a claim for damages which the defendant and its officers believed to exist against the plaintiff Varawa for breach on the part of the said Varawa to carry out a contract to purchase the s.s. *Peregrine* from the defendant and for the purpose of enforcing such claim and not otherwise. And I further say that the defendant and its officers did not take the proceedings mentioned in the statement of claim herein for the purpose and in the hope of terrifying the plaintiff, and forcing him to pay to the defendant or to procure the Russian Government to pay to the defendant, money to which the defendant did not in good faith consider the defendant entitled, and to which the defendant was not in fact entitled. The said proceedings were taken *bonâ fide* for the purpose of enforcing or securing the payment of money which the defendant believed to be due

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to it by the plaintiff for damage as aforesaid, and not otherwise."

The Supreme Court of Victoria refused to order the defendants to give a further and better answer.

Wise K.C. and *Bavin*, for the appellant. The defendants admit that they have had conversations with their solicitor in reference to what the appellant charges as fraud. They therefore cannot rely on privilege, and it is immaterial whether the solicitor is or is not a party to the intended fraud: *Williams* v. *Quebrada Railway Land and Copper Co.* (1); *In re Postlethwaite*; *Postlethwaite* v. *Rickman* (2); *R.* v. *Bullivant* (3); *R.* v. *Cox and Railton* (4).

GRIFFITH, C.J. Mr. *Wise* moved for leave to appeal from an interlocutory decision of the Supreme Court of Victoria refusing to make an order for further and better answers to interrogatories. The action was brought by the plaintiff against the defendants for a malicious arrest, which means that the defendants without having reasonable and probable cause of action maliciously put the process of the Court in force to procure the arrest and imprisonment of the plaintiff. By an amendment of the statement of claim it was alleged that the proceedings were had and taken by the defendants not for the purpose of enforcing and securing the payment of money which they believed to be due to them by the plaintiff, by way of damages or otherwise, but for the purpose and in the hope of terrifying the plaintiff, and inducing him to pay them, or to procure the Russian Government to pay them, money to which they did not in good faith consider themselves entitled, and to which they were not in fact entitled, and that such proceedings were an abuse of the process of the Court. If that allegation is true, it proves both want of reasonable and probable cause and malice; it does not go any further. It only shows that the plaintiff had a good cause of action for malicious arrest. Plaintiff administered interrogatories to the defendants, asking "Did the defendants, their agent or agents, on or before 21st January 1905, obtain from any and what

(1) (1895) 2 Ch., 751.
(2) 35 Ch. D., 722.
(3) (1900) 2 Q.B., 163; (1901) A.C., 196.
(4) 14 Q.B.D., 153.

lawyer or other legal adviser at Melbourne, Sydney or elsewhere any and what advice as to the liability of the plaintiff and—or what other persons in respect to the alleged sale of the steamship *Peregrine* by the defendants to the plaintiff?" The defendants objected to answer the question, on the ground of privilege, and the Supreme Court of Victoria held that the objection was good. The point is taken now that the objection of privilege does not apply to a case of fraud, or intended fraud, or of intended crime. I am not sure that the exception has ever been extended beyond these two cases. But I am sure that it has never been held to apply to a case where all that is alleged is that the evidence will show that the plaintiff knew he had not a good cause of action. The rule was laid down very distinctly by Lord *Halsbury* L.C. in *Bullivant* v. *The Attorney-General for Victoria* (1): "I think the broad propositions may be very simply stated: for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no Court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding." The rule is very well illustrated in the case of *R.* v. *Cox and Railton* (2), in which the communication stated and put in evidence was a communication made by a solicitor to his client for the purpose of enabling him to carry out an unlawful enterprise. In the present case the supposed communication inquired into is one made by the solicitor before the enterprise was commenced. How can that be said to be part of a criminal or unlawful proceeding? There is nothing criminal or unlawful in a solicitor telling his client that he does not think he has a good cause of action. So far there is nothing in the nature of a crime or unlawful proceeding. The unlawful proceeding does not begin until after the advice has been given. There is therefore nothing to take the communication inquired into out of the general rule of privilege. For these reasons, which are not quite the same as those given by the

(1) (1901) A.C., 196, at p. 200. (2) 14 Q.B.D., 153.

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Judges of the Victorian Supreme Court, I think that leave must be refused.

O'CONNOR J. I cannot adopt all the reasoning of the learned Judges in the Court below, but I have no doubt that their conclusion was right. The law applicable in a case of this kind is concisely stated by Lord *Halsbury* L.C. in the *Bullivant Case* (1), in a passage that has been read by the learned Chief Justice. The Lord Chancellor, after stating the general principle that communications which take place between solicitor and client in the course of professional employment are privileged from disclosure in a Court of Justice, goes on to explain the ground of the privilege, and the exception which arises when the communications have relation to crime or civil fraud. I shall not requote the passage, but I wish to refer to the last line of it, in which he says that the privilege cannot be lost except in a case in which there is "some definite charge of something which displaces the privilege." The class of cases in which the privilege will be displaced are set out in the judgment of Mr. Justice *Stephen* in *R.* v. *Cox and Railton* (2). The result of these authorities I take to be this, that the privilege will not be lost unless in the course of the proceeding in which the evidence is tendered it is definitely charged that the communication was in itself a step in the commission of a crime or preparatory to or in aid of the commission of a crime. The same rule applies where the communication is a step in, or preparatory to, or in aid of what has been called "civil fraud," that is the carrying out of a fraud not amounting to a crime, but in respect of which the Civil Courts will give relief. A communication made under any of those circumstances loses the privilege, and it is immaterial whether the solicitor was or was not aware of the criminal or fraudulent purpose of the communication at the time when the communications were going on. Such being the state of the law, I turn now to the allegations in these proceedings upon which Mr. *Wise* has relied as bringing the communication referred to within the exception. It is charged against the defendants that they were guilty of a civil fraud in the sense I have explained in

(1) (1901) A.C., 196. (2) 14 Q.B.D., 153, at p. 167.

maliciously arresting the plaintiff, and in maliciously putting the law in motion against him, and it is alleged that they took the steps complained of after having been advised by their solicitor that they had no cause of action against the plaintiff. The communication which the plaintiff seeks to have disclosed is that in which this advice was given. I do not think it necessary to decide whether the defendants' conduct as alleged amounted to "civil fraud." For the purposes of this appeal I assume that it did. But I cannot understand how the mere fact that the company did what is complained of after obtaining their solicitor's advice necessarily, or even reasonably, leads to the inference that the communication with their solicitor was in itself a step in the wrong-doing or preparatory to, or in aid of it, within the principle laid down by Mr. Justice *Stephen* in *R.* v. *Cox and Railton* (1). The only information we have as to the nature of the communications and the circumstances under which they took place is that furnished by the pleadings, interrogatories, and answers which have been brought before us. I see nothing in them sufficiently definite to establish, at this stage of the case at all events, such a state of facts in regard to the communications in question as will take them out of the protection of the privilege. For these reasons I agree that the appeal cannot be allowed.

ISAACS J. I agree that this application for leave should be refused. While I state my reasons for so doing I desire to guard myself very particularly against saying anything which can affect the future course of this case. There will, perhaps, hereafter be legal contentions advanced on one side or the other, and I do not desire that anything I now say should affect the substance of the matter. So far as is material to the present application the reasons leading me to agree are these. The action was commenced originally for malicious arrest, and with reference to the issue of a writ of *capias ad respondendum*, and alleging the defendant acted maliciously and without reasonable and probable cause. That is a well known form of action. An amendment was afterwards put in, which may be shortly described as an action for abuse of the process of the Court. It was the impres-

(1) 14 Q.B.D., 153.

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sion of the learned Chief Justice of Victoria for the moment that this was an unknown cause of action. But the learned pleader probably had in view *Grainger* v. *Hill* (1), where *Tindal* C.J. refers to actions for abusing the process of the law by the issue of a *capias* as applicable where the process is resorted to in order to extort property from the defendant, and the learned Chief Justice draws a distinction between such an action and one for malicious arrest. That view was supported by *Vaughan* J., so that it cannot be said that such an action is altogether unknown. I say nothing more as to that. In taking the two issues together, it is an action practically for having the now plaintiff arrested in order to extort from him money which the now defendants knew was not owing to them, practically a fraud, as that class of conduct is termed in the case of the *Duke de Cadaval* v. *Collins* (2). In that state of things the interrogatories are put, and the question that is asked practically in each one of them is as to the advice which the defendants in this action got from their legal advisers in Melbourne or Sydney regarding the liability of the plaintiff in respect of the cause of action that was originally sued upon. It was as to the liability of the plaintiff, not as to the defendants' right to issue a *ca. re.* That, as the learned Chief Justice has put it, is not a part of the matter that forms the gist of the present action. It was an antecedent matter—something which was done, it is assumed, in order to ascertain the true legal position of the now plaintiff and defendants. It is urged by Mr. *Wise* that inasmuch as a fraud on the part of the present defendants is alleged, and an abuse of the process of the Court is alleged, an illegal act in connection with procedure, therefore he is entitled to obtain from the opposite party information as to the advice they received from their solicitor relating solely to their original right of action. The line that separates the admissibility from the non-admissibility of this class of question has been already stated, and I agree with my learned brothers. But I will add a few words in order to show why I assent to it. The words of Lord *Halsbury* L.C., which have been quoted by the learned Chief Justice, include this statement (3):—"For the perfect administration of justice, and for the

(1) 4 Bing. N.C., 212. (2) 4 A. & E., 858, at p. 864.
(3) (1901) A.C., 196, at p. 200.

protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production." The words "for the perfect administration of justice" are all important, because, as was pointed out by *Turner* V.C. in *Russell* v. *Jackson* (1), the privilege which protects any confidential disclosure between solicitor and client is not intended simply to protect that confidence, but it rests upon the necessity of carrying it out. Otherwise justice could not be administered, as the Courts would not have the proper opportunity and means of administering the law between the litigants. That being the foundation of the rule, says the learned Vice-Chancellor, the Court must, of course, have regard to the foundation on which it rests, and not extend it to cases which do not fall within the mischief which it is designed to protect. Certainly the rule adopted for the protection of the administration of justice cannot be applied to things which would prevent the disclosure of crime or fraud. "Can it then be said that the communication should be protected, because it may lead to the disclosure of an illegal purpose?" asked the Vice-Chancellor (2), who answered the question in this way:—"I think that it cannot; and that evidence which would otherwise be admissible, cannot be rejected upon such a ground. On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." When the House of Lords came to deal with the *Bullivant Case* (3) they required a definite and distinct allegation that the matters sought to be discovered were matters that were used as a means to evade the law within the meaning of the law. The word "evade" was used in the pleading, but in a totally different sense, and it was because they differed from the Court of Appeal in that respect that they differed in the final result. How has that been carried out? It must be something,

(1) 9 Ha., 387. (2) 9 Ha., 387, at p. 392. (3) (1901) A.C., 196.

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either part of the commission of the act, which in one sense embraces everything, or incidental to it, which is really saying in other words that it must be in furtherance of the illegal object. I think that phrase embraces it all. If it is in furtherance of some illegal object it cannot be protected from discovery by a mere denial of the purpose, and, as the Lord Chancellor pointed out, if the party charged is free to get rid of it by a mere denial, there is an end to it. *Stephen* J., in speaking for the whole Court, in *Cox and Railton's Case* (1), said the question was whether, if a client applies for advice intended to facilitate or guide him in the commission of a crime or fraud, the legal adviser being ignorant, is such a communication privileged? If the client is a person intending to commit a fraud he may either bring in the solicitor as co-conspirator with him, in which case the position is beyond dispute, or else he might use the solicitor as an unconscious instrument in the commission of a crime, thereby deceiving his legal adviser. The privilege where it exists being that of the client, his guilt is sufficient to destroy it, whether the solicitor is party to it or not. The keynote of the position, however, must be that the information as to which privilege is denied must be as to some act which is in furtherance of an illegal object. If so, then the foundation of the rule disappears, and it comes under the ordinary principle that the party may be compelled to give relevant discovery for the administration of justice. For these reasons I agree that the leave should be refused.

Application refused.

Solicitor, *J. Woolf.*

C. E. W.

(1) 14 Q.B.D., 153, at p. 165.