it is part of the ordinary business or practice of a bank to collect cheques for their customers. If therefore a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals. Their Lordships think therefore that the evidence of bank officials in *Kendall's* case as to the practice of banks was rightly tendered and received, as indeed the Court in that case decided.

Coming now to the reasons alleged for holding the learned trial judge to have been wrong in holding no negligence proved, they really amount to this, that the bank ought not to have collected a cheque for a customer who was of such recent introduction and about whom they knew nothing. There was, however, nothing suspicious about the way the account was opened. A customer, however genuine and respectable, could hardly, assuming him to start with a deposit of £20 in cash, have opened it in any other way. Was then the fact that a cheque was paid into that account for collection two days after the account was opened a circumstance of an unusual character calculated to arouse suspicion and provoke inquiry? For if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque it would render banking business as ordinarily carried on impossible; customers would often be left for long periods without available money. Now if the cheque here had been for some unusually large sum, perhaps suspicion might have been aroused. This is really a question of degree, and their Lordships cannot say that the trial judge was wrong in thinking that £743 was not a sum of such magnitude as to create the duty of inquiry.

If the cheque had been in different form things might well have been otherwise. Their Lordships cannot help remarking that to a certain extent the appellants have themselves to thank for what has happened, owing to the terms of their instructions. If they had insisted that in the case of payments made at the office, as they did insist in the case of drafts sent by post, the cheques should be made payable to the Commissioners of Taxation, then there would have been something on the face of the cheque to arouse inquiry. The fact that the cheque was to bearer distinguishes this case from the case of *Permewan*. In that case, in the case of thirty-six cheques, the cheques were drawn in favour of the Commissioners, or had such markings on them as showed that they were drawn for the purpose of paying duties. This was held, their Lordships think rightly, to be a circumstance which ought to have put the bank on inquiry when such cheques were presented by a private individual. Their Lordships do not think it necessary to consider and decide as to whether the majority or minority were right as to the other twenty-two cheques in that case, the point being whether the markings on those cheques did or did not sound such a note of alarm as ought to have put the bank on their guard. There was here no note of warning of any kind on the cheque, and accordingly the conditions which arose in the *Permewan* case do not apply.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Counsel for the Appellants—Rome, K.C. —Austen-Cartmell. Agents—Light & Fulton, Solicitors.

Counsel for the Respondents — R. A. Wright, K.C.- Jowitt. Agents—Slaughter & May, Solicitors.

HOUSE OF LORDS.

Thursday, February 26, 1920.

(Before Lords Finlay, Sumner, Parmoor, and Wrenbury.)

O'ROURKE *v.* DARBISHIRE AND OTHERS.

(On Appeal from the Court of Appeal in England.)

Agent and Client—Privileged Communication — Solicitor Acting Both as Trustee and Agent of the Trust — Allegation of Fraud—Extent of Privilege.

The fact that the solicitor of a trust is also a trustee does not affect the privilege attaching to confidential communications seeking or giving professional advice. *In re Postlethwaite*, 1887, 35 Ch. D. 722, *considered* and *distinguished.*

Where fraud is claimed to defeat such privilege a *prima facie* case must be established—dicta of Romer, L.-J., and Lord Davey in *Bullivant* v. *Attorney-General for Victoria*, [1900] 2 Q.B. 163, [1901] A.C. 196, *considered.*

The right to refuse production of documents on the ground that they relate solely to the case of the resisting party is not confined to such documents as the resisting party could put in as evidence in support of his own case.

Knight v. *Waterford* (*Marquess of*), 1836, 2 Y. & C., Ex. 22; *Hey* v. *De la Hey*, 1886, W.N. 101, *distinguished.*

Bewicke v. *Graham*, 1881, 7 Q.B.D. 400, *approved.*

Appeal—Arbitration—Judicial Reference—Competency of Appeal.

Observations on the competency of appeal against the decision of a judge who, in the course of proceedings before him for discovery, at the request of both parties has looked at certain documents to ascertain whether they should be produced.

Decision of the Court of Appeal, [1919] 1 Ch. 320, *affirmed* (Lord Finlay dissenting with regard to one item).

The *facts* appear from their Lordships' considered judgment, which was delivered as follows:—

Lord Finlay — This case raises some important questions with regard to the right to require production of documents.

The order made by Peterson, J., for production was reserved by the Court of Appeal, from whose judgment the present appeal has been brought.

The writ in the action was issued on the 11th February 1915. The plaintiff's claim is to the estate of the late Sir Joseph Whitworth, who died on the 22nd January 1887, leaving property, real and personal, said to be of the value of £1,000,000 or more. The plaintiff claims as representing the heiress-at-law and one of the two next-of-kin of the testator. The representatives of the executors of Sir Joseph Whitworth are defendants. The defendants Ellen M'Gowan and Elise Jenkins are the executrices of the other next-of-kin of the testator.

The amended statement of claim was delivered on the 12th April 1916, and the defence in June of the same year. The affidavit of documents was filed on the 1st May 1917, and a further affidavit on the 3rd May 1918. In this last affidavit the defendants claimed that they were not bound to produce a number of documents on the ground of professional privilege, and on the further ground that the documents relate solely to the defendants' case and not to the plaintiff's case, and do not in any way tend to support the plaintiff's case or to impeach that of the defendant's.

The statement of claim alleges that the deceased Sir Joseph Whitworth left a will, dated the 3rd December 1884, and four codicils, the effect of which is stated, and that the widow Lady Whitworth, Mr Christie, and Mr Darbishire were the trustees and executors.

By the will and the first three codicils it is alleged that provision was made for educational purposes, and various legacies were given, the fourth codicil being in the following terms (par. 8 of the statement of claim)—"I declare that the gift in my first codicil of all other property if any not effectually disposed of beneficially by my said will or by that codicil to my wife and Richard Copley Christie and Robert Dukinfield Darbishire for their own absolute benefit in equal shares which gift I have augmented by the provisions of my second codicil shall include all the real and personal estate belonging to me and not otherwise disposed of by my will or any codicil thereto. And I accordingly give to them such real and personal estate in equal shares for their own benefit having full confidence that they will respectively desire to carry out my wishes to the utmost of their power but nothing in this codicil or in my will or my first three codicils contained shall be construed so as to impose any trust upon my residuary legatees and devisees or any of them or in any manner to abridge or qualify their absolute ownership or rights. And subject to the provisions herein contained I hereby confirm my said will and first three codicils.

The statement of claim charges in pars. 11 and 12 that the trustees and executors took the residuary estate upon a secret trust which was never defined or was invalid by reason of the Mortmain Acts or otherwise (so that there would be a resulting trust for the heir-at-law and next-of-kin), and further that if the trustees and executors took for their own useand benefit, the dispositions had been obtained by them from the testator by fr aud. Particulars were delivered under these two paragraphs stating that the fraud was in devising and carrying out the scheme embodied in the will and codicils whereby the testator was left in the belief that his wishes as to the disposal of the residue of his estate for educational purposes would be carried out by the executors, whereas they intended to appropriate the greater part of the testator's estate for their own use.

The statement of claim further alleges (par. 23) that a deed of release, dated the 31st December 1889, was made between Fanny Uniacke of the first part, Ellen M'Gowan of the second part, the defendant Joseph Whitworth M'Gowan of the third part, and Whitworth's executors of the fourth part. This deed recited that the parties of the first, second, and third parts (the heiress and next-of-kin of the testator) had expressed their intention to take proceedings for the recall of the probate of Sir Joseph Whitworth's will and codicils, and that a compromise had been arranged on the terms that Whitworth's executors were to pay £75,000 to be divided in the proportion specified between Fanny Uniacke and her children and Ellen M'Gowan and Joseph M'Gowan. By this deed the first, second, and third parties released to Whitworth's executors all the real and personal estate of the testator discharged from all claims. The statement of claim alleges that the execution of this release was procured by the fraud of Whitworth's executors in concealing from the other parties to the deed the facts as to the testator's will and codicils, as alleged earlier in the statement of claim, and that the executors appropriated to their own use a considerable part of the testator's estate.

The claim made in the action is that Whitworth's executors should be declared to be trustees for the heir-at-law and next-of-kin of the testator, and that the deed of release should be cancelled or declared not to be binding.

The application for production of documents was heard in the first instance by Petersen, J., and he made the order of the 3rd July 1918 for the production of the documents described in the schedule to that order. The Court of Appeal, consisting of Bankes, Warrington, and Scrutton, L.JJ., reversed this order, holding that the documents in question were covered by professional privilege. On the present appeal it was urged on behalf of the plaintiff—(*a*) That the professional privilege did not exist, the solicitor being himself one of the trustees and executors; (*b*) that the plaintiff had what was called a "proprietary right" as one of the cestui que trust to see all documents relating to the trust; (*c*) that no privilege exists where the communication has been made for the purpose of carrying out a fraud, and that this was the case with regard to the documents in question.

I shall take these points in order—(*a*) Mr Darbishire, one of the three trustees, acted as solicitor for the trust. The privilege is claimed in respect of communications between him as such solicitor and his co-trustees with reference to the trust. Peterson, J., held on the authority of *Postlethwaite's* case (35 Ch. D. 722) that there could be no privilege where the solicitor consulted was himself one of the trustees. In my opinion any such proposition is erroneous in point of law, and I think that no such proposition is involved in the decision of North, J., in that case. Trustees are entitled to consult a solicitor with reference to the affairs of the trust, and the communications between them and their legal adviser are privileged if for the purpose of obtaining legal advice. Why should such communications be less privileged because the solicitor is himself one of the trustees? There is no valid distinction between such communications with the solicitor who is himself a trustee, and such communications with a solicitor who is outside the trust altogether. Of course the privilege is confined to communications genuinely for the purpose of getting legal advice. It would not extend to mere business communications with reference to the trust, not for the purpose of getting legal advice. In the present case the affidavit of the 3rd May 1918 states that the communications were for the purpose of getting legal advice. No sufficient reason has been shown for discrediting this affidavit as untrue or as made under some misconception of fact or law. The statement is not inherently incredible, as was suggested on behalf of the appellant, and I think that the Court of Appeal was right in giving effect to it.

When the decision in *Postlethwaite's* case is examined it will be found that it does not really support the proposition contended for.

The judgment must be read with reference to the facts of the case. The plaintiffs were admittedly cestui que trust of the testator's property. They averred that one of the trustees had himself secretly purchased part of the trust property and made a profit out of it. As cestui que trust they had a right to see all the documents relating to the trust passing between the trustees, and this right could not be got rid of by the employment by the one trustee of the other as his solicitor.

(*b*) It was further urged that the plaintiff, as representing the heir and one of the next-of-kin of the testator, has a right to see any documents relating to the trust as being one of the cestui que trust. I assume that the plaintiff is the representative of the heir and next-of-kin, but it does not follow that he is a cestui que trust. By the will and codicils the property is expressed to be given to the trustees and executors absolutely free from any trust. The plaintiff's case is put in the alternative. The first alternative is that the trustees and executors took the property on the terms of a secret trust, and that as such trust has failed owing to its not having been sufficiently defined or by reason of the statutes of Mortmain, the representatives of the heir and next-of-kin of the testator are entitled to the property as on a resulting trust. Whether there was such a secret trust, which has failed, is a matter in dispute in the action, and at present there is not even a *prima facie* case that the plaintiff is a cestui que trust on this ground. The second alternative put forward by the plaintiff is that the trustees and executors induced the testator to leave the property to them by fraudulently leading him to believe they would apply it for educational purposes in accordance with his wishes, while in fact they from the first intended to appropriate it to themselves as it is alleged they have done. No more serious charge could well be put forward. It cannot be assumed to be true for the purpose of obtaining inspection of documents, and it is putting the case with great moderation to say that the appellant has not made out any *prima facie* case of the truth of these charges. There is a complete absence of evidence to show that the appellant is in a position to claim inspection on this ground, and there is nothing to show that the "proprietary right" on which the appellant relies in fact exists. To establish any such right it would further be necessary for the appellant to get rid of the deed of release of the 21st December 1889. The release was given so long ago as 1889 and the fraud alleged has yet to be proved. There is certainly no *prima facie* case that it can be set aside, and so long as the deed stands the appellant cannot be a cestui que trust.

(*c*) The appellant also relied on the proposition that no privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud.

This is clear law, and if such guilty purpose was in the client's mind when he sought the solicitor's advice professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some *prima facie* evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a *prima facie* case as would make it right to treat the claim

of professional privilege as unfounded.

A great many cases were cited to your Lordships on the question of professional privilege, but I do not think it is necessary to go through them. *Bullivant's* case ([1901] A.C. 196) was cited by the respondents. The question there arose not on application for discovery but with regard to a witness who was being examined under a commission from the Courts of New Zealand, and who claimed professional privilege. The House of Lords decided that in the absence of a definite allegation of fraud the privilege prevailed. The question, what more is necessary to get rid of the privilege, was not discussed.

For these reasons I agree with the Court of Appeal in thinking that inspection should in this case be refused on the ground of professional privilege, subject to what I shall say as to item 434 later in the judgment.

The Court of Appeal thought that professional privilege was sufficient to dispose of the case, and gave no judgment on the second ground, which was thus stated in par. 4 of the further affidavit: — "To the best of our knowledge, information, and belief the said documents numbered 434 and 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action, or in so far as they do relate to the same relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach our own."

This claim was rejected by Peterson, J., on the ground that on perusal by consent of the documents in item 434, for which amongst others this privilege had been claimed, he thought that they might tend to support the plaintiff's case to some extent. He therefore declined to give effect to this claim with respect to any documents, as in his opinion the defendants' affidavit must have been made under a misconception of the law applicable to this head of privilege or a misapprehension of the effect of the documents. I agree with the Court of Appeal in thinking that this mistake as to item 434 was not a sufficient reason for treating this claim as unfounded in all cases. This ground of privilege has been elaborately argued before us, and I propose to state the conclusions at which I have arrived.

The grounds on which privilege under this head was denied were—(1) That such privilege is confined to documents which are admissible in evidence; (2) that it sufficiently appears in this case that the affidavit in which this privilege is claimed is untrustworthy. There is no case confining privilege of this kind to documents which are admissible in evidence, and such a limitation would be inconsistent with the principle on which it rests.

A great many passages were cited from Wigram on Discovery (2nd ed. 1840) in which the documents which are the subject of this privilege are described as "evidences," and it was urged that this showed that the privilege could not be claimed in respect of any document not admissible in evidence. It is, however, a mistake to suppose that "evidences" (an old phrase in English law) necessarily denotes only documents which are admissible in evidence. The principle laid down by Wigram on Discovery (p. 264, par. 346) is that a plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case or to the evidence by means of which that case is to be established. It is obvious, as Mr Tomlin pointed out in his extremely clear and cogent argument, that to exempt from inspection only documents which are admissible in evidence would leave open to inspection many documents which might reveal what the case of the opponent is and the evidence by means of which it is proposed to establish it.

A party is entitled to get inspection of any documents relating to his own case. He is not entitled to see documents relating exclusively to his opponent's case in order that he may prepare means of meeting it or try to discover flaws in it. The whole of the plaintiff's argument on this head seems to me to rest on a misconception of the meaning of the terms "evidences" as used in this connection. Of course in a very great number of cases the documents which have come into question have been title-deeds or other documents which are admissible in evidence, but there is an entire absence of authority to show that the privilege is confined to such documents, and if it were so confined the value of the privilege would be greatly lessened. The affidavit in the present case is in the form which has been in use for a great many years, and your Lordships are now in effect asked to say that judges, counsel, and solicitors have all failed to appreciate the law on a matter of everyday practice, and that every affidavit which has been made claiming such privilege within the memory of man has been erroneous and insufficient. The proposition put forward on behalf of the appellant on this head seems to me to be entirely novel, erroneous in principle, and destitute of authority.

I think the affidavit in the present case is sufficient, and that if it were necessary to rely on this head of privilege the defendants have properly claimed it.

Some questions of a special nature have arisen with regard to documents under item 434. These documents consist of—(1) A case and opinion of counsel taken on behalf of the testator; (2) a case and opinion of counsel taken by the trustees and executors after the testator's death.

In my opinion the appeal as to these documents should not have been entertained by the Court of Appeal; the decision of Peterson, J., with regard to them was not appealable. The learned Judge was invited by the defendants' counsel to inspect these documents and to say whether they should be produced. He did so and decided that the plaintiff should see them. An order made under the circumstances was in the nature of an award, not a judgment.

The statement of Peterson, J., as to what took place is set out in the appendix. He begins by touching on certain legal con-

siderations, and points out that the plaintiff could not claim to inspect the documents under the second head of item 434. He then says that the plaintiff also rested his claim to inspect on the ground that fraud was charged, and proceeds thus—"Whether this is correct or not I need not consider for the purpose of this part of the case, as in both cases comprised in item 434 counsel for the defendants invited me to peruse the two cases and opinions and say whether in my judgment they ought to be produced. I have done so, and although I do not say that the plaintiff will derive much comfort and support from them, in my opinion he ought to have the opportunity of seeing them."

There are of course many cases in which documents are shown to the judge to give him materials for his judgment and to form an element for his appreciation of the case as a judge. Peterson, J., in the passage which I have quoted above expressly states that he considers it unnecessary to determine a legal point which was raised as he had been invited to say on perusing the documents whether they should be produced. This seems to me to show that he understood that he was invited to decide summarily what should be done as a matter of fairness and not to decide merely on legal considerations. In other words, that he was to arbitrate. His language is quite unequivocal and his decision would be appealable only if it appeared that he had misunderstood the effect of what passed before him.

A reference to the proceedings as set out in the supplemental appendix shows I think that he was quite right.

At the beginning of the discussion as to this item the counsel for the respondents said—"Now so far as item 434 is concerned, although our views are that we have good grounds for resisting the production of those—[those are the two opinions]—we are quite content that your Lordship should see those, and if your Lordship thinks that they ought to be produced, then they shall be produced, so that I need not trouble about the principle concerned there."

This to my mind is a clear statement that the respondents would produce the documents if the learned Judge on seeing them thought they ought to be produced, and on this basis the parties dispensed with discussion of principle. The undertaking that the documents should be produced if the Judge on seeing them thought that they ought to be produced is quite inconsistent with there being any right of appeal from his decision on this point.

Later in the argument respondents' counsel said—"If the views I put before your Lordship are sound, I submit that this application must fail except so far as your Lordship thinks it is proper that they should succeed on those two cases. Perhaps I may hand those up. [*Same handed to his Lordship.*] Those are item 434, and if your Lordship thinks that the notes and memoranda in item 435 are not sufficiently claimed we do not mind their seeing those, but with regard to all the rest I submit that the claim must fail."

Then followed a discussion in which counsel on both sides took part as to whether it was desirable that the Judge should have the drafts as well as the cases themselves, and in answer to an observation from the other side as to the case submitted to Mr Theobald the respondents' counsel said—"My friend must not take it in that way. If it is going to be disputed I submit there is great dispute about the first. I invite your Lordship to look at them. As a matter of fact your Lordship will see that that was a case to advise, amongst others, the executors nominated personally. Even if my friend relies upon *Russell* v. *Jackson* ((1851) 9 Hare 387, 10 Hare 204) that would not necessarily avail him. It would apply to the right which they might have with regard to advice they had taken for themselves personally. I am leaving it in your Lordship's hands. I do not in the least admit that the first case is a clear case."

These passages appear to me to show clearly that the matter was left in his Lordship's hands to determine summarily and not in the ordinary way as a judge, and they are in conformity with the view which he himself took of his functions under the consent of the parties.

At the close of the judgment Peterson, J., went through the documents with counsel, stating that the documents to be produced included both cases in item 434. The defendants' counsel then asked for leave to appeal "in regard to such parts of your decision as are against us," which Peterson, J., granted, nothing being said by anyone as to excepting from the appeal the decision as to item 434. But I do not think that this can alter the effect of what had taken place before the decision. The leave to appeal can operate only on what is appealable. The question is not whether the parties entered into an express agreement that there should be no appeal, but whether they took a course which is inconsistent with the existence of a right to appeal. The fact that general leave to appeal was given may have been due to inadvertence, or to the fact that the parties had not present to their minds at the moment the effect in this respect of the course which had been adopted.

I should add that the perfect good faith of counsel in this matter is beyond question. The only point raised is as to the legal effect on the right to appeal of what passed.

In *Rustros* v. *White* (1876, 1 Q.B.D. 423) Sir George Jessel, M.R., delivering the judgment of the Court of Appeal, said that where to avoid further affidavits the Judge at the desire of both parties has looked into the documents himself and decided whether they should be produced, it is not competent to either party to appeal (p. 427). The view so expressed by an exceptionally strong Court of Appeal, consisting of eight Judges (Jessel, M.R., Kelly, C.B., James, and Mellish, L.JJ., Baggalay, J.A., Lush and Denman, JJ., and Pollock, B.) has never, so far as I am aware, been dissented from and in my opinion it is right. It appears to me to be directly applicable to the facts of the present case in which this course was taken to avoid a legal argument.

I cannot agree with the view expressed by Bankes, L.J., that Peterson, J., was asked to look at the documents merely in order that he might see whether the claim of privilege on the ground that they related only to the defendants' case was justified. Such a view is in conflict with what took place on the argument, and is contradicted by the terms in which Peterson, J., in his judgment gave his view on what had taken place.

If the right to inspection of the documents 434 had to be determined by legal considerations applicable in cases where the parties have not consented to cut the knot in the fashion adopted here, I think that as to the documents under head (1) the appellant would succeed, and that he would fail as to those under head (2).

As to (1) the case was submitted to counsel and his opinion taken in the lifetime of the testator. Both the plaintiff and the defendants claim under the testator, the plaintiff as representing their heir and the next-of-kin, the defendants as representing his trustees and executors under his will. The foundation of the law of professional privilege is that it is necessary in order that a person may be able without danger to make full disclosure to his professional advisers. It follows that as between him or his representatives and third persons claiming not under the testator but adversely to him, the privilege exists, but as was pointed out by Turner, V.C., in *Russell* v. *Jackson* (1851, 9 Hare 387 and 10 Hare 207) the reason of the privilege does not exist in the case of competition between persons all claiming under the testator, as the disclosure in the latter case can affect no right or interest of the client. The bill in that case was filed by the next-of-kin against the executors of the deceased, who were also his residuary legatees and alleged that the gift of the property was made upon a secret trust for the foundation of a school and that the defendants were trustees for the heir-at-law and next-of-kin—(See judgment 10 Hare, pp. 207, 208). The solicitor to the testator, who after his death became solicitor to the executors, was examined under commission, and a motion was made to suppress parts of his deposition on the ground of professional confidence. It was held that the communications between the testator and his solicitor might be read, but that the communications between the executors and the solicitor after the death of the testator were privileged. The Vice-Chancellor gives his reasons at length (9 Hare, p. 391-3). Bankes, L.J., in his judgment says—"With reference to the case and opinion in the lifetime of the testator, in my opinion that first case is covered by the conclusion which Peterson, J., arrived at in another part of his judgment, namely, that a person who claims a document under a proprietary right must first of all establish the existence of that right, and that not having been done in this case it appears to me that the plaintiff must fail in his claim with reference to that first case." This rule has no application to the point under discussion. As was explained by Turner, V.C., in the case just cited it is not by "proprietary right" that the privilege is negatived but by the fact that as both claim under the testator the ground of this kind of privilege fails.

The production of the documents under head (1) could not be resisted on the second ground put forward by the defendants—namely, that they relate only to the defendants' case. Peterson, J., himself inspected these documents and came to the conclusion that they related in part to the plaintiff's case.

With regard to head (2) under 434 professional privilege would have prevented any right to inspect. The parties have, however, taken a course which makes it unnecessary to consider these legal questions.

The Court of Appeal reversed the order of Peterson, J., *in toto*. By some inadvertence it was not realised that this order would exempt from inspection in item 435 "memoranda and notes of evidence in actions," and in item 437 "draft and fair copies, bill of costs July 1882 to December 1886, and diaries before the 22nd January 1887," for which protection had not been claimed. These matters should be set right and for the reasons I have given I think that the appeal ought to be allowed under item 434 as regards the cases and opinions both in the lifetime of the testator and after his death; otherwise the appeal should be dismissed.

LORD SUMNER—This appeal has raised three questions which, as they were copiously and earnestly argued and go to the root of long-settled practice, require a reasoned solution, though I do not imagine that the answer to them could ever have been in doubt. These questions are—(1) Does a pleaded charge of fraud strip those against whom it is made of the ordinary right to rely on professional privilege as a ground for resisting production of documents? (2) Is that privilege taken away because the relation of solicitor and client, on which it rests, arises between persons who are trustees and executors, and are in effect parties to the action? (3) Is the claim to refuse production of documents on the ground that they do not support his opponent's case but only his own, a claim which is available solely for such documents as the claimant could give in evidence in support of his own case?

(1) No one doubts that the claim for professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties. To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud. No one doubts again that you can

neither try out the issue in the action on a mere interlocutory proceeding, nor require the claimant to carry the issue raised to a successful trial before he can obtain production of documents which are only relevant to that issue and only sought for the purpose of proving it. I am, however, sure that it is equally clear in principle that no mere allegation of a fraud, even though made in the most approved form of pleading, will suffice in itself to overcome a claim of professional privilege properly formulated.

North, J., in the first of the grounds of decision in *In re Postlethwaite* (35 Ch. D. 722) seems to have otherwise held. I think that he overlooked the fact that in one of the cases which he relied upon no fraud appeared on the pleadings at all, and that in the other numerous facts had already been admitted or ascertained. So far I think that his decision was wrong.

If the dicta in *Bullivant's* case of Romer, L.J. ([1900] 2 Q.B. at p. 169) and of Lord Davey ([1901] A.C. at p. 203) are to be read as supporting such a view, I think they ought not to be followed. As I read the opinion of Lord Halsbury, he clearly holds that a *prima facie* case must be "made out" without purporting to define in what "mode" this is to be done, and without sanctioning a mere pleaded allegation as sufficient. The right of the one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection, are parallel rights; in itself neither is paramount over the other. It is therefore the business of the party claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach, because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this by establishing a *prima facie* case of fraud in fact. Evidence, admission, inference, from circumstances which are common ground, or "what not," as Lord Halsbury says, may serve for this purpose. I do not pretend to define what material may and what may not be used. The imperfections of his pleadings or the dubious character of his procedure in the action may militate against the claimant's case. The fact that a motion to strike out his pleadings has been made and has failed does not establish that he has a sufficient *prima facie* case for this purpose. The stage in this action is only an interlocutory one and the materials must be weighed, such as they are, without the apparatus of a formal trial of an issue. On such materials the court must judge whether the claim of privilege is displaced or not.

This is, as I understand it, the view taken by the Court of Appeal, though expressed in somewhat different language. It is not my business even to form any opinion now as to the plaintiff's prospects at the trial, but I see no ground for thinking that on the material before it the Court of Appeal was not justified in holding that no sufficient foundation had been laid for setting aside the respondents' claim of professional privilege.

(2) The necessity which has sometimes been said to be the foundation for the claim of professional privilege is not the necessity for confiding in the particular solicitor consulted, but the necessity for letting a litigant confide in some solicitor. It is equally obvious that this principle involves allowing the litigant to choose his own solicitor and to consult the person in whom he feels confidence. To limit the persons among whom he can choose might be to deny him a choice. To say that if he chooses to consult a co-executor he does so on the terms that their written communications will be open to his opponent, so penalises that particular choice that in effect it is a prohibition. For reasons stated later I say nothing of the special case when a solicitor and client are executors of a will under which the party claiming production is a beneficiary, but I do not wish to be understood as accepting the appellant's argument, which I think it irrelevant at present to discuss.

(3) No case has been cited which decides that the right to refuse production of relevant documents, on the ground that they only support the possessor's case, is limited to "evidences" of his case in the sense that they are such as could be put in evidence by him and form part of his title. Before the Judicature Acts many cases were decided on claims to refuse production of documents which their possessor might have put in evidence, and none are forthcoming, it seems, in which the documents could not have been so used. The two cases which were said to have decided the point —*Knight* v. *Waterford* (*Marquis of*), 1836, 2 Y. & C., Ex. 22, and *Hey* v. *De la Hey*, 1886, W. N. 101—turn out on examination to be decisions on other grounds. Very little can be inferred from such a condition of the reported authorities. It may be accidental. In any case the point turns on different considerations. The orders and rules made under the statutory authority of the Judicature Acts are the code which is paramount in matters which they regulate. The same word "relate" is used in them in connection with the obligation to make discovery by affidavit and with the right to refuse production on the specified ground in question. In terms neither is limited, and relevancy and that alone is the test. In substance that must be so as to discovery, and no reason has been suggested why it should not equally be so as to privilege from production, and for many years this has been regarded as settled practice. The contrary would work injustice. I think the appellant's contention fails.

As to the questions arising upon item 434 the two cases for the opinion of counsel and the opinions of counsel thereon I am not disposed to allow the appeal. If the documents were submitted to the learned Judge in order that he might decide once for all whether they should be produced or not his decision could not be appealed (*Bustros* v. *White*, 1 Q.B.D. at p. 427), but the reason for this must be that both parties have so intended. The joint request of both parties that the learned Judge should inspect the

documents for himself would in itself raise a presumption that the intention was to submit them for his final decision, but the special language used may negative that. Contrary to the respondents' contention I think in the present case the language used would not in itself negative that presumption, though it is true that after the judgment of Peterson, J., was given counsel for the now respondent said—"Will your Lordship give us leave to appeal in regard to such parts of your decision as are against us?" which included these particular documents, and leave was given, and at the request of the other side was made "mutual." The case, however, goes further. If the learned Judge's decision is unappealable it is because the parties have agreed that it should be so, and here this is in dispute. Mr Tomlin says that whatever words he used this never was his meaning. The agreement whatever it was never was reduced into writing and signed, and in themselves the words are susceptible of more than one interpretation. It has not been contended for the appellant that by accepting Mr Tomlin's language in the wider sense his position has in any way been changed on the faith of the words being so intended and understood, and the question therefore is whether there was any *consensus animorum* between counsel if the decision Mr Tomlin asked for was meant to be appealable, and the decision Mr Hughes assented to take was understood to be unappealable.

This controversy has been raised before the Court of Appeal and in substance decided. Such a case must be exceptional, and I think must be rare and must depend mainly upon the statements of counsel. It is hardly a matter suitable for appeal to your Lordships' House, and I see no sufficient reason for interfering with the determination of it at which the Court of Appeal arrived.

There is a further point as to the opinion of counsel, No 1 of No 434. It was taken in the lifetime of the testator, and though the defendants' first affidavit covers it by the description "Cases and instructions to counsel to advise the executors of Sir Joseph Whitworth as to his will and codicils, and counsel's opinion and notes thereon," their second affidavit showed that it consisted of communications "between the testator and his counsel," and only the second is said to have been between counsel and the executors. The Lords Justices examined the documents in the first item as Peterson, J., had done. They agree with Peterson, J., that they might be used to support the plaintiff's case, and one of the grounds on which protection was claimed fails accordingly, but they go on to say that the claim of professional privilege covers them. This is the claim of the client, and if the testator alone was the client I do not quite see how the defendants could set up professional privilege. It may be, however, that the proposed executors and legatees joined in taking this opinion. I have not seen the papers. Peterson, J., rejected the claim to refuse production, partly on what has been called the "proprietary" ground, partly because he thought that no professional privilege can be claimed between co-executors. He does not negative the possibility that the proposed executors were also Mr Theobald's clients in the matter, and if so, the view of Bankes and Warrington, L.JJ., would be explained. I am not satisfied that your Lordships should interfere. It is a question of particular documents, not of general principle.

The remaining matters relate to the application of well-settled rules to the particular facts of this case in a mere interlocutory proceeding. I agree that the appellant has no claim to see these documents, including the first of the two cases for opinion in No. 434, except under the law relating to discovery, because while the releases obtained by "Whitworth's executors" stand, to say nothing of the fourth codicil, he cannot claim to see them as being his documents in any sense. I am satisfied that if the two letters dated 30th December 1895 and 26th January 1895 have been wrongly appreciated by the respondents in relation to discovery (which I by no means decide) their error has not been such as to cast doubt on their general understanding or observance of their obligations, or to vitiate their claims to withhold disclosure in respect of other documents.

In drawing up the order of the Court of Appeal an error has been made as to which I think the respondents have been to blame, and might well have been made liable in costs to some extent, but as two of your Lordships think differently, as the appellant has already seen some of the documents which the order has erroneously dealt with, and as counsel has undertaken for the production of the others when requested, and as the order being interlocutory is only of importance as affecting production, I acquiesce in their views.

I agree that the appeal should be dismissed with costs.

LORD PARMOOR—Sir Joseph Whitworth died in January 1887, seized or possessed of real or personal estate of great value. The appellant is the legal personal representative of Fanny Uniacke, who was the heiress-at-law and one of the two next-of-kin of the testator. The respondents are the respective legal personal representatives of the executors of Sir Joseph Whitworth. The action related to the estate and testamentary disposition of Sir Joseph Whitworth, and the plaintiff charged that there was either a secret trust or that the executors took the residuary real and personal estate for their own absolute use and benefit, and that the form in which the testamentary disposition was arranged or settled was a mere fraudulent device or scheme for appropriating to the use of the executors a very large portion of the estate of the testator. It is not necessary to determine how far the action is well constituted, so long as the probate of the will and codicils of the testator have not been recalled. The appeal must be determined on the pleadings as they stand. The question is whether an order for production of the documents con-

tained in the second part of the schedule of documents should be made. These documents relate to the matters in question in the action, but their production is refused on the ground that they are privileged either as being documents which consist solely of professional communications of a confidential nature, which for the purpose of obtaining legal advice have passed between the executors and their solicitors, or on the ground that the documents either do not in any way relate to the matters in issue in this action, or in so far as they do relate, relate solely to the case of the defendants and not to the case of the plaintiff, and do not in any way tender a support to the plaintiff's case or impeach that of the defendants. In form this privilege is sufficiently claimed, but it was urged on behalf of the appellants that over a long period of years the meaning of the claim for privilege on the ground that the documents related exclusively to the case of the defendants had been misunderstood, and that the privilege only extended to such documents as might be admissible in evidence to support the defendant's case. The claim for privilege was disputed by the appellant on various grounds, and the question for determination is whether and how far these objections raised on behalf of the appellant can be maintained.

A cestui que trust in an action against his trustees is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission or the establishment of the status on which the right is based. I agree in the view expressed by Peterson, J., that the rule as to the right of a cestui que trust to the production of trust documents for inspection does not apply when the question to be tried in the action is whether the plaintiff is a cestui que trust or not. In the present case not only is the status of the appellant as a cestui que trust disputed, but in addition a release was executed, which unless it can be set aside is a bar to his claim. It is not necessary to consider on what grounds the release is attacked, but it is obvious that there may be formidable difficulties in the way of the appellant under this head. The attention of your Lordships is directed to various authorities, but it is sufficient to refer to *Wynne* v. *Humberston*, 1858, 27 Beav. 421, and to *Compton* v. *Earl Grey*, 1826, 1 Y. & J. 154.

The second point raised on behalf of the appellant was based on the proposition that professional privilege does not apply to a case in which a solicitor who is a trustee has acted as professional adviser to himself and his co-trustees, who are co-defendants in the action. It was not contended that this principle would apply where professional advice was taken on a personal matter affecting one of the trustees, but in the present case the affidavit of documents shows that the privilege is claimed in respect of documents which do relate to the trust matters in question. It is notorious that in many cases solicitors are appointed as co-trustees with full power to act as solicitors in their professional capacity in relation to trust matters, and to make in respect thereof ordinary professional charges.

As a matter of principle, it is difficult to understand why confidential communications made to a solicitor in his professional capacity should cease to be privileged because such solicitor has been appointed as a co-trustee by the testator with a power to act as solicitor in the affairs of the trust. There is no less necessity in such a case to protect in the interests of justice such a disclosure of the facts and conditions as is required to obtain professional and confidential advice. To hold otherwise would deprive a lay trustee of a privilege which would attach to communications made to an outside solicitor, with the result that it might be necessary for him to take such advice in preference to that of the solicitor especially cognisant of the trust affairs. It is not a relevant consideration that communications between co-defendants, none of whom are solicitors, are not privileged. In the argument on behalf of the appellant reliance was placed on the case of *In re Postlethwaite*, 35 Ch. D. 722. In this case the plaintiff, who sought the production of documents, was undoubtedly a beneficiary. Further, a charge was made in the statement of claim that the purchase in the name of a third person was a fraudulent device intended to cover up a real purchase by one of the two trustees. As to this it is not necessary to say more since the decision turned on the special circumstances of the case. I agree with Warrington, L.J., that the claim to have the documents produced was placed on the proprietary right of the plaintiff, and not on the ground that the claim of privilege was destroyed owing to the fact that the solicitor consulted was also a co-trustee. If, however, the judgment of North, J., can be extended to cover the claim made by the plaintiff in this case the principle is stated in too wide terms and cannot be maintained.

The third point relied on by the appellant as an answer to the claim of professional privilege is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. Such a case must be differentiated from a case in which after the commission of a crime, or in order to meet a charge of fraud made against him in a civil action, a client consults a solicitor

in his professional capacity, employing him to obtain the benefit of his confidential advice and assistance. The appellant does make in his pleadings a charge that a fraud has been concocted between the solicitor and client, and the question which arises is whether such a *prima facie* case of a definite character has in some way been brought to the notice of the Court as to justify the Court in holding that the appellant has the ordinary right of production of documents relating to his case, the defendents in respect of such production not bringing themselves within the protection of professional privilege.

It may be that the allegations in the statement of claim, apart from any other source of information, are sufficiently explicit to negative the claim of professional privilege, but the proposition that the mere pleading of fraud is in itself sufficient necessarily to defeat the claim of professional privilege cannot be maintained. To admit this proposition would be equivalent to saying that the claim to protection for professional privilege—a claim founded in the interest of the proper administration of justice—could be defeated by the skill of a pleader and the use of technical language whenever it was desired to obtain an inspection of documents otherwise privileged in the expectation of the discovery by this means of information to support a charge of fraud. On the other hand in order to obtain the production of documents it is certainly not necessary to prove the existence of fraud, and such an obligation might result in the non-production of documents which in a particular instance might constitute the only evidence on which the plaintiff relied to establish his case.

In the case of *Bullivant* v. *Attorney-General for Victoria* ([1901] A.C. at p. 201) Lord Halsbury in advising the House says—"The line which the Courts have hitherto taken and I hope will preserve is this—that in order to displace the *prima facie* right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation, or affidavit, or what not." This passage relates to the giving of evidence before commissioners, but there is no difference in the principle applicable in such a case and the principle applicable to the production of documents on an interlocutory application. Whether the circumstances brought to the notice of the Court in a particular case are sufficiently explicit to establish a *prima facie* case of definite fraud either by allegation, affidavit, or in some other way, will depend on special facts in each case—*Reg.* v. *Cox and Railton*, 1884, 14 Q.B.D. 153. But something more is required than mere pleading, or than mere surmise or conjecture. If in the present appeal there is disclosed a real *prima facie* case of definite fraud, this must be found in the allegations contained in the pleadings and particulars, seeing that there has been no affidavit and no information from any other source. In the statement of claim fraud is alleged as an alternative to a secret trust, on the ground that the form in which the testamentary disposition of the testator was settled or arranged by Christie and Darbishire was a mere fraudulent device or scheme for appropriating to the use of Whitworth's executors a very large portion of the testator's estate. This allegation is not supported by the statement of any facts which might give positiveness or distinctness to the charge, but rests on nothing more than pleading or mere surmise and conjecture. In my opinion this is insufficient either to support the right of the appellant to inspection or to defeat the claim of the defendant to the protection of professional privilege, and I agree with the decision arrived at by the Court of Appeal under this head. I desire to add that the refusal of the Court to strike out the statement of claim on the application of the defendants does not of itself establish any case of *prima facie* fraud or make the case other than one of mere surmise and conjecture.

The next question for consideration is whether the claim of privilege has been sufficiently made in the statement that the documents relate solely to the case of the defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach that of the defendants. It was argued on behalf of the plaintiff that to support the claim for privilege the documents must be such as might be admissible in evidence to support the case of the defendants. I think that this is an impossible contention, and that to assent to it would be to admit a proposition which is not supportable either in principle or by authority. The affidavit for discovery of documents includes all documents in the possession and power of the deponent which relate to the matter in question and clearly is not limited only to such documents as may be admissible in evidence. Such a limitation would destroy in great part the value of discovery; but if documents must be disclosed in the affidavit of documents independently of whether they are admissible in evidence or not, it is difficult to suggest any reason why the claim of privilege against production should not cover the same documents. For instance the copy of a document, although not in itself admissible in evidence, comes within the same category as the original document in so far as concerns the privilege of production, but if there were an obligation to produce, it would give the same information as the document itself, though such a document would itself be protected on the ground that it is admissible in evidence. This novel doctrine assumes that the word "relate" can be read as synonymous to admissible in evidence—an assumption for which there is no warrant.

The attention of your Lordships was called to a number of passages in the works of Hare and Sir J. Wigram. It is not necessary to consider these passages in detail, but I can find none which support the proposition that there is no privilege attaching to documents which relate exclusively to the case of one party to an action, unless such

documents may be admissible in evidence in support of his case. To quote one passage to the contrary from Sir J. Wigram's book, p. 264—"A plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case, or of the evidence by means of which that case is to be established."

Numerous authorities were quoted to your Lordships in the argument on behalf of the plaintiff, but there is no case which holds that a document not admissible in evidence is outside the claim of privilege although such document relates solely to the opponent's case and not to the case of the party seeking production—*Bewicke* v. *Graham* (7 Q.B.D. 400) is a direct authority that the claim of privilege is sufficiently made in the form similar to that used in the present case. Compare *Budden* v. *Wilkinson*, [1893] 2 Q.B. 432.

The only cases which could present any difficulty are *Knight* v. *Marquis of Waterford*, 2 Y. & C. Ex. 22, and *Hey* v. *De la Hey*, 1886 W.N. 101. I have had the advantage of reading the opinion expressed by Lord Wrenbury on these cases and desire to express my entire concurrence. It was further argued that the affidavit filed on behalf of the defendants was on its face untrustworthy. This argument raises no question of principle, but there appears to be no adequate reason for displacing the oath of Mr Darbishire. The test to be applied is well stated in the case of *Roberts* v. *Oppenheim* (1884, 26 Ch.D. 724) by Cotton, L.J.—"We ought not to speculate in order to get rid of the protection claimed, and we ought to accept the affidavit as conclusive unless the Court can see distinctly that the oath of the party cannot be relied on."

In the course of his exhaustive argument Mr Hughes handed in for the convenience of your Lordships a chart of the documents. Documents 434 (1) if privileged from production are only so privileged as documents which relate entirely to the case of the defendants — Documents 434 (2) may be privileged either under the claim of professional privilege or as documents which relate entirely to the case of the defendants. These documents were inspected by the learned Judge, and it was argued that he acted as arbitrator between the parties with their consent, and that no appeal would lie against the order for production. The matter is not free from doubt, and there was a difference in the understanding of the two counsel both of whom with evident sincerity referred to what passed before the learned Judge at the trial. It is sufficient to say that I am not prepared to differ from the conclusion of the Court of Appeal. The order of the Court of Appeal includes documents, to the production of which the counsel for the defendants agreed in the hearing before Peterson, J., and on which no appeal was opened in the Court of Appeal, and documents for which no privilege was claimed in the affidavit of Mr Darbishire. The order should be that, the respondents undertaking to produce these documents, the appeal should be dismissed with costs.

LORD WRENBURY — As legal personal representative of the heiress-at-law and one of the next-of-kin of the testator the plaintiff claims to be entitled to certain part of the testator's estate. His claim is made not under the will but upon the footing of an intestacy as regards so much of the estate as upon the face of the will was given to the three executors absolutely in equal third shares. If he is right the executors are trustees for him and none the less by reason of the fact that he claims not under a gift contained in the will but by reason of there being, as he says, no effectual beneficial gift there contained. The executors are trustees for whomsoever is beneficially entitled to the testator's property.

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestui que trust, and the beneficiaries are entitled to see them because they are beneficiaries. The first case in *Talbot* v. *Marshfield* (1865, 2 Dr. & Sm. 549) is an instance.

But this plaintiff cannot as matters stand say that he is a beneficiary. That is the very question to be determined in the litigation. Before he can establish that he is a cestui que trust he has two difficulties to surmount. The one is that he must establish that there is property undisposed of by the will. The will on its face purports to dispose absolutely of the whole. He says there was a secret trust, that this trust failed, and that the funds in the hands of the executors are, as between them and him, bound by a trust which he can enforce, viz., a trust for those who would be entitled if the secret trust failed as he says it did. One question at issue in the action is whether there was any such secret trust or whether the executors are right in saying as they do that the property was given absolutely to them in equal third shares. The other difficulty is that Mrs Uniacke (as whose legal personal representative he sues) executed on the 21st November 1889 a release which laid the above question at rest in a manner fatal to his claim, and unless and until he succeeds in setting that release aside he has no claim to any part of the estate. That release is thirty years old, the parties to it are dead. Evidence has thus been lost, and there is no presumption that it will be, and no *prima facie* case made to lead to the belief that it will be, set aside.

In this state of facts the plaintiff cannot assert a proprietary right to the documents on the footing that they are his, and cannot enforce inspection on that ground. If authority be needed, *Wynne* v. *Humberston* (27 Beav. 421) is clear authority upon the point.

This being so the plaintiff must succeed, if at all, upon the ground that he has a right to discovery of the documents—a right to inspect them nothwithstanding they are not his—because they relate to the matters in question in the action. *Prima facie* he is entitled to inspection on that ground. It is for the defendants to show valid grounds for protecting them from inspection. The grounds upon which they resist inspection have to be considered under three heads.

The first is professional privilege. As to this the plaintiff says—There is no professional privilege, because the solicitor who was consulted was himself one of the trustees. In my opinion this contention cannot be supported. Professional privilege is based upon public policy. It is considered that for purposes of justice a client ought to be in a position to go to his solicitor and be wholly untrammelled in speaking to him without any reserve; that he ought to be in a position to obtain his advice, and that all this should be done under the veil of professional confidence. Lord Brougham in *Greenough* v. *Gaskell* (1833, 1 My. & K. 98) gives the true foundation of the doctrine. I see no ground of principle why this should be affected by the fact that the solicitor is a co-trustee with the client. The appellant says that the solicitor trustee is bound to answer the cestui que trust as to any matter relating to the trust. So he is, unless he is constrained by some superior duty. To say that professional confidence is not a superior duty is to beg the question. If the trustee who is not solicitor is asked the question he is entitled to claim privilege, for otherwise public policy would be defeated in compelling him to answer. His privilege cannot lapse because the solicitor whom he consults owes a duty to another. And if the trustee who is solicitor is asked he is entitled to reply that he is constrained by the privilege of his client which he is not entitled to break. But, says the appellant, the trustee should have gone to some other solicitor. In the present case the testator in fact by his first codicil authorised the trustee solicitor to act as solicitor to the trust. But I do not rely on this as differentiating the case. There is nothing wrong in employing a co-trustee as solicitor. If privilege would have existed if the solicitor had not been trustee I cannot see anything that will destroy privilege when he is. Other considerations would arise if the case made were that the trustees were conspiring to defraud the trust, for it is no part of a solicitor's duty to advise his client how to commit a fraud. This is a separate ground which I shall deal with presently.

The appellant relies on *In re Postlethwaite*, 35 Ch. D. 722. The case differs from the present in material particulars. The plaintiff there was a cestui que trust; there was no question about that. He had a proprietary right, and had that right to see every document in the trustees' hands which had been obtained by them as trustees. Protection could only be claimed (and it was claimed) on the ground that the documents came into existence on an occasion when the lay trustee was consulting the solicitor trustee not as solicitor to the trust but as his private solicitor. The illustration given by North, J., in *In re Postlethwaite* upon his second ground is far from convincing. Not everything that is said at a professional interview between solicitor and client is privileged any more than the whole of a letter, some part of which contains professional advice and other part bears no such character, is privileged.

In my opinion this plaintiff, who cannot at present affirm that he is, or even say that he has established a *prima facie* case that he is, a cestui que trust, cannot succeed on the ground of proprietary right, and cannot on the mere ground that the solicitor was a co-trustee exclude the privilege if in other respects it is rightly claimed.

The second question for consideration is whether privilege has rightly been claimed by the defendants on the ground that the documents relate solely to the defendants' case and not to the case of the plaintiff, and do not tend to support the plaintiff's case, and do not contain anything impeaching the defendants' case. Upon this the plaintiff has advanced a contention which is startling to me, that privilege under those words can only be claimed for documents which the defendants could put in evidence at the trial. The words are to be understood, he says, as if they ran "relate solely to and could be used by the defendants in support of their case." My first observation upon this is that these are not the words, and it would have been easy to require these words if this were the meaning. The second observation is that this cannot be the meaning of the words, and for this reason. The verb used is "relate." The same word is used in defining the whole class of the documents as to which the affidavit of documents is to be made. They are all the documents which "relate" to the matters in question in the action, whether they be capable of being given in evidence or not. The documents to which the affidavit is to extend is not confined to documents which somebody could use in evidence. The same meaning must be attributed to the word in the language under consideration.

Further, it is obvious that there are many documents which the defendants could not put in evidence which they would be entitled to protect from inspection. The defendant's private diary, which may be most useful to him in enabling him to determine and speak to a relevant date, is a document which he cannot put in evidence, but the plaintiff could not get inspection of it. So if the defendant has made a copy of a deed relating only to his own title, or has made for his own use a translation of a document in Norman French, or has prepared for his own guidance a note or abstract of what he is in a position to say in evidence, he could not put the copy or translation or note in

evidence (unless as regards the copy deed or the translation the original had been lost, and he was entitled to use secondary evidence), but the plaintiff could not obtain discovery of such documents as those so as to acquaint himself with the contents of the deed or the nature of the proposed evidence. Numerous authorities have been cited by the appellant in which the word "evidences" has been used, and in which documents which were "evidences" in the sense that the defendant could use them as evidence have been protected. But no cases have been cited in which an order has been made that documents which were not "evidences" be discovered on the ground that although privilege was appropriately claimed in all other respects the opposite party was entitled on that ground to inspect them, unless it be *Knight* v. *Waterford* (*Marquess of*) (2 Y. & C. Ex. 22) and *Hey* v. *De la Hey* (1886, W. N. 101). Neither of these cases goes this length. In the former case the map, it was said, "may possibly be evidence of the extent of the manor, and may therefore throw some light on the plaintiff's claims" (*see* 2 Y. & C. Ex., at p. 41). The Court rolls were "a collection of Court rolls which he holds for the benefit of others," and as to the answer and the letters reasons are assigned which support production on grounds of special matters, not grounds of general application. In *Hey* v. *De la Hey* the defendants by their affidavit claimed that the documents "were intended to be or might be used by the defendants in evidence," and the Court ordered production on the ground that they could not be so used. They were letters between co-defendants, and the ground was obviously a good one. The documents were discoverable unless there were some other ground of privilege on which the affidavit and the report are alike silent. To found anything upon a report of this kind in the Weekly Notes is, in my opinion, impossible.

Upon this point *Bewicke* v. *Graham* (7 Q.B.D. 400) is important and establishes, I think, the law as I understand it to be—(see Bray on Discovery, 1885 ed. p. 485).

The defendants' claim of privilege under this second head is, in my opinion, good.

Then the scene changes and the plaintiff says—"Granted all this, it remains that these documents are discoverable because I allege a case of fraud." Here he relies principally upon *Bullivant's* case ([1900] 2 Q.B. 163; 1901 A.C. 194), and in particular upon the words of Romer, L.J., "the claim of privilege is unavailing in cases where fraud or illegality is alleged, and the existence of that fraud or illegality being in issue the documents are relevant to that issue." To cite these words and rely upon them as laying down a general principle apart from the context and the facts with reference to which they were uttered is, of course, quite inadmissible. For instance, if the affidavit showed that the documents related to professional advice sought for and obtained by the party in anticipation of litigation or under the stress of litigation in respect of the alleged fraud, no one could dispute that they were protected. The Lord Justice's words must, of course, be qualified accordingly. Not every document relevant to the issue of fraud, but documents which are not upon some other ground privileged, are exposed to production. For the present purpose it is sufficiently accurate to say that documents relating to the conception and carrying out of the alleged fraud are not, but documents arising in professional confidence as to defence against the alleged fraud are protected.

Further, as regards documents which upon the principle above stated are open to inspection, the plaintiff must in asking for them go at any rate so far as to satisfy the court that his allegations of fraud are not merely the bold assertions of a reckless pleader, but are such as to be regarded seriously as constituting *prima facie* a case of fraud resting on solid grounds. Here again a sentence from Lord Davey's opinion in *Bullivant's* case is to be read carefully and its meaning to be ascertained from the circumstances in which it was uttered. "I do not dissent," he says, "from what was said by Mr Haldane, that it must be assumed for the present purpose that the case stated in the pleadings is true for the purpose of testing the right to production.

In *Bullivant's* case an information had been filed in the Supreme Court of Victoria and a commission had been issued to take the evidence of a witness in this country. Upon this examination he was called upon to produce a certain book. The question in the action was whether the defendant was "evading" a statute. In the Court of Appeal the case was decided upon the footing that the allegations of intent to evade were allegations of fraud. The House of Lords reversed the Court of Appeal on the ground that evasion of a statute is not, in one sense of the word, a fraud and that there was no sufficient allegation of fraud. Upon this state of facts Lord Davey's words obviously fell far short of the meaning that if fraud be alleged the Court must assume that it is true. Lord Halsbury's words are that "before professional confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." If I may venture to express this in my own words, I should say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the Court good ground for saying that *prima facie* a state of things exists which, if not displaced at the trial, will support a charge of fraud. This may be done in various ways—admissions on the pleadings of facts which go to show fraud—affidavits in some interlocutory proceedings which go to show fraud — possibly even without admission or affidavit allegations of facts which if not disputed or met by other facts would lead a reasonable person to see at any rate a strong probability that there was fraud, may be taken by the Court to be sufficient. Every case must be decided on its merits—(*Reg* v. *Cox*, 14 Q.B.D. 163). The mere use of the word "fraud" or the prefix of the adverb "fraudulently" from time to time throughout the narrative will not suffice

The Court of Appeal found in the present case no sufficient allegation of a case of fraud. I agree. Par. 11 of the statement of claim "charges" that the testator communicated to his executors a secret trust which was either too indefinite or was invalid by reason of the Mortmain Acts. Suppose he did. Who was defrauded by his doing so? Not the testator, for *ex hypothesi* it was he who made the communication; he was a party to it and intended it. Par. 12 "charges" that the form in which the testamentary dispositions was (*sic*) arranged or settled by two of the executors was a fraudulent device for appropriating to the executors a part of the testator's estate and that the third executor was a party to it. This is a "charge" of the existence of a "scheme," not the allegation of any facts which tend *prima facie* to support a case of fraud. And there is nothing whatever in the way of admission or evidence or circumstances of suspicion to found a probability or a *prima facie* case of fraud. This ground therefore in my judgment fails.

It follows that the appeal wholly fails, subject to something which must be said as to some particular documents. . . .

As regards the documents Nos. 434 (1) and (2), these were inspected by the judge with the consent of the parties. It is a matter of everyday occurrence that to save time and dispute the parties say, "Let the judge see the document," meaning that he is to look at it as further material upon which to base his judicial decision whether it is privileged or not. No one in such a case intends to make the judge an arbitrator, and I am satisfied that the parties in the present case did not so intend. As to the right decision as regards those, the matter stands thus—No. 434 (1) is a case and opinion taken in the testator's lifetime. No. 434 (2) is a case and opinion taken after his death. In my opinion both of these are protected, and the order under appeal is right. No. 434 (2) is protected by professional privilege —No. 434 (1) is not—(*Russell* v. *Jackson*, 9 Hare, 387). No. 434 (1), however, is protected upon the grounds stated by Lord Sumner in his judgment.

The defendants giving an undertaking to produce the documents Nos. 435 (2) and 437 (1), as to which the order under appeal is obviously wrong by a slip, this appeal should in my judgment be dismissed, with costs.

Appeal dismissed.

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HOUSE OF LORDS.

Friday, March 5, 1920.

(Before the Lord Chancellor (Birkenhead), the Lord Chief Justice (Reading), Lords Haldane, Dunedin, Atkinson, Sumner, Buckmaster, and Phillimore.)

REX *v.* BEARD.

Criminal Law—Murder—Act of Violence Done in Furtherance of Rape—Plea of Drunkenness—Intent.

Homicide by an act of violence done in the course or in the furtherance of a felony involving violence is murder.

Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Observations on *Rex* v. *Meade*, [1909] 1 K.B. 895.

Their Lordships' judgment was delivered by

Lord Chancellor (Birkenhead) — Arthur Beard was convicted of murder at Chester Assizes and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal servitude. The case is brought to your Lordships' House under section 1, subsection 6, of the Criminal Appeal Act 1907 upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance. The facts which are relevant may be shortly stated.

About 6 p.m. or a little later on the 25th July 1919 a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and when she struggled to escape from him he placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation. There was some but not much evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. This evidence was of a character which is not unusual in crimes of violence, but in view of the legal problems to which this case has given rise it requires examination.