PRIVILEGE OF ATTORNEY IN PRODUCING DOCUMENTS.[1]

The relation of attorney and client forbids the disclosure of any fact, or the delivery of any document, of which the attorney has cognizance or possession in virtue of that relation.

The above cases bore entirely on the production of documents; and first, how far the attorney may be questioned about it; secondly, on refusing to produce it, on what terms secondary evidence of its contents are admissible.

Although the decisions do not alter the principle of the law as it previously stood, the privilege of the attorney is so far limited, and the judgments of both Courts of Common Pleas and Exchequer are so positively given, that it is expedient to record both of these as leading cases on the subject.

As regards the first point,—the trust protected in the attorney is held so sacred that no question as to the nature of the document is permitted. It may not be even asked if it is a trust deed, or, if a will, whether of personalty or realty; and still less may the judge look at it to ascertain its nature. This was laid down in the judgment in *Doe* d. *Carter* vs. *Jones*, 2 Mood. & R. 47, and is cited and fully confirmed in *Volant* vs. *Soyer*. This rule admits of no exception. As Mr. Justice Maule observed, "In many cases the judge would be the very last person to whom the client would like his letter or deed to be shown." Whatever new powers may exist which facilitate the production of documents otherwise than by means of the attorney in possession of them, his right to withhold them, if he got possession of them in his professional character, is inviolate and "entire." It is sufficient if the attorney say he has received the document professionally to justify his refusal to produce it. See also *Harris* vs. *Hill*, 3 Starkie, 140. The privilege,

[1] This article is taken from the May number of the London Law Magazine, and is intended as a note to the late cases of Dwyer *v.* Collins, 7 Exch. 639; Volant *v.* Soyer and Symons, 22 Law Jour. C. P. 83.

however, extends only to *facts* which have exclusively come to the knowledge of the attorney by reason of his professional relation to his client. If he be cognizant of them *aliunde*, the privilege does not extend to such knowledge, and he is bound to disclose them; though it may be that, "if he had been employed as an attorney he probably would not have known them. Thus he may prove the client's swearing to the truth of an answer in chancery; and his handwriting, by seeing it in documents prepared by him in the name of his employer. In the same way he may prove the fact, that a particular document is then in his possession and in Court, for this is not a fact professionally communicated to him." (*Dwyer* vs. *Collins.*) See also, on this last point, *Bevan* vs. *Waters*, 1 Moo. & M. 235, and *Coates* vs. *Birch*, 2 Q. B. 252.

As regards the second point, it is settled law, that where the production of a document is refused on the ground of the attorney's privilege, secondary evidence of its contents is admissible. And as the law makes no degrees of secondary evidence, any will suffice. This was finally decided in *Doe* d. *Gilbert* vs. *Ross*, 1 Exch. 122.

In that case, however, another point was mooted, which was left undecided, namely, that though the attorney might refuse to produce a document—insisting on his privilege—the client might waive it: thus unless he also were subpœnaed to produce the document, and refused to do so, all was not done that might be done to show that the primary evidence was unattainable, so as to let in secondary evidence.

This point was again mooted in *Newton* vs. *Chaplin*, 19 Law Jour. C. B. 374, and in *Volant* vs. *Soyer;* in which latter case reference was made to the opinion expressed by Mr. Pitt Taylor in his very able work on evidence. He says:—

"It may be questionable whether, in the event of an attorney declining to produce an instrument on the ground of privilege, it be not necessary to show that his client has also been subpœnaed, and has relied on his right to withhold the deed."

The question is not solved in the last-named cases, and admits of further doubt. It is, however, not essential to subpœna the client,

if it be shown that the client as well as the attorney insist on the privilege to withhold the primary evidence in order to let in secondary. *Newton* vs. *Chaplin*, the client had been subpœnaed, though not *duces tecum*, and was in Court. He refused to allow the document to be produced, and of course thus let in the secondary evidence. In *Volant* vs. *Soyer*, however, when it was put by counsel, that "at all events it should be shown that the refusal of the attorney was by the direction of his client," Chief Justice Jervis interposed and said, "that must be assumed." Mr. Justice Cresswell also says: "It has been suggested that the client should have been called; but that was unnecessary." It certainly appears that the act and discretion of the attorney is that of his client, at any rate until the contrary be shown.

Nevertheless, the Common Bench did not seem to think so in the judgment in *Newton* vs. *Chaplin*, where it was held that secondary evidence was admissible, because—

"As the book was in Court, and the plaintiff had *procured the attendance of both the attorney and client*, who expressed to the Court *their* refusal to allow the book to be produced, he had done everything that could be done to make apparent the impossibility of using the primary means of proof; and, *consequently*, that he was entitled to resort to secondary evidence."—Per Maule, J.

The inference is clear, that had no means been taken to show the refusal by the client, the secondary evidence would have been held inadmissible by the Court.

In *Hibbard* vs. *Knight*, the Court of Exchequer seems to have held it sufficient to subpœna *duces tecum* the party who had possession of the deed, "and on receiving *his* refusal, being privileged," says Mr. Baron Parke, "you may give secondary evidence of the contents of the deed, *as you have done everything to obtain it.*"

There is therefore a discrepancy between the decisions of the Common Bench, in *Newton* vs. *Chaplin* and *Volant* vs. *Soyer*, and the Exchequer on this point, which must be left for future decision.

It has been further mooted, whether it be necessary to give a certain length of notice to the attorney to produce the document