it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel, in reference to or in contemplation of, or pending the suit or action, for the purposes of which the production is sought.

The case of *Preston* v. *Carr* (1 Y. & J., 175) would seem to have carried the doctrine of *Radcliffe* v. *Fursman* this one most material step farther, but apparently without intending to do so, for one of the learned Judges says that he agrees with those who have expressed an opinion that it should not be carried farther.

There is, however, a decision of this Court since *Preston* v. *Carr*, by which I am disposed to be guided, in deference as well to all the principles upon which it proceeds, as to the authority of the noble and learned Judge who pronounced it; I mean the case of *Hughes* v. *Biddulph* (4 Russ., 190). I can see no difference between the letters there excepted from the order to produce documents and the cases laid before counsel. They were letters which passed between the client and the solicitor, and between two solicitors employed by the client in the progress of the cause, or with reference to the cause before it was instituted. This was the line which Lord Lyndhurst drew, and I can see no difference between the statements of a case in such correspondence and the statements which are laid before counsel in the form of a case for their opinion. Something which occurred in the correspondence might happen to be kept out of the case so laid before counsel, and that might be a motive in one instance for not refusing the production of the case, while the party might have a reason for refusing the letters. But that is accidental and **[97]** cannot affect the principle; for it is clear that the case may, and in such circumstances probably will, contain as much matter as the letters, which the client cannot safely disclose: and it may very well happen that the case prepared by the solicitor should contain more than the letters.

Vent v. *Pacey* (4 Russ., 193), which followed two years after, though reported next in the same volume, is said to throw a doubt upon *Hughes* v. *Biddulph*, at least as far as regards its application to this question. In the first place, however, the Vice-Chancellor, having acted on *Hughes* v. *Biddulph*, as regards the letters, his order was appealed from and affirmed. But next, it is said that a case laid before counsel appears incidentally to have been produced. The observation which I have made will explain that; for the party may not have resisted the production, on the accidental ground mentioned of the letters happening to contain what he was reluctant to disclose, though the case did not. But be that as it may, there was no contest on the production of the case, and the question was not decided.

I am therefore, upon the whole, of opinion that cases laid before counsel in the progress of a cause, and prepared in contemplation of, and with reference to, an action or suit, cannot be ordered to be produced for the purposes of that action or suit.

(1) 3 Sim., 467, where the facts of the case and the argument on the motion before His Honour are very fully reported.

(2) 1 Y. & J., 175; and see also *Newton* v. *Berresford*, 1 Younge, 337; *Whitebread* v. *Gurney*, *ibid.*, 541.

[98] GREENOUGH *v.* GASKELL. *Jan.* 17, 31, 1833.

[S. C. Coop. t. Brougham, 96; see *Russell* v. *Jackson*, 1851, 9 Hare, 391; *Ford* v. *Tennant*, 1863, 9 Jur. N. S., 293; *Ross* v. *Gibbs*, 1869, L. R. 8 Eq., 524; *Ramsbotham* v. *Senior*, 1869, L. R. 8 Eq., 579; *Wilson* v. *Northampton Railway Company*, 1872, L. R. 14 Eq., 481; *Anderson* v. *Bank of British Columbia*, 1876, 2 Ch. D., 648; *Queen* v. *Cox & Railton*, 1884, 14 Q. B. D., 166; *In re H. W. Strachan* [1895], 1 Ch., 444.]

On a bill which sought to charge a solicitor with a fraud practised on the Plaintiffs in the course of proceedings on his client's behalf, the Court refused to order the production of entries and memorandums contained in the Defendant's books, or of written communications, made or received by him, relating to those proceedings, and admitted by the answer to be in the Defendant's custody.

And, generally, it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation.

By an order made in the month of March 1831, in a suit for the administration of a testator's assets, a sum of £5000 was directed to be lent and advanced to one Thomas Darwell out of the fund in Court, upon Darwell executing a bond for double the amount, by way of security for the repayment. Under another order, dated the 26th of the following April, a sum of £1600 being part of the aforesaid £5000 was accordingly paid to a country solicitor of the name of Gaskell, who received the money on Darwell's account, although, as was alleged, he was aware at the time that his client had not given the required security. The mistake was soon afterwards discovered, and an order made for the repayment of the money; and on Darwell failing to obey that order, an attachment issued against him, under which he was arrested. In this state of things, application was made on his behalf to the Plaintiffs, who were ultimately prevailed upon to join in signing and delivering to Gaskell a promissory note for £1698 (which sum included a balance due for costs), and Gaskell, on receiving the note, advanced the money ordered to be replaced, and his client was immediately set at liberty. Darwell became a bankrupt shortly afterwards; and the present bill was then filed against Gaskell by the persons who had joined in executing the note, for the purpose of having it delivered up to be cancelled, and for an injunction against legal proceedings in the meantime.

[99] The bill, after setting forth in detail the circumstances above mentioned, alleged that the Plaintiffs had been persuaded to execute the note in question, at the pressing instance and solicitation of the Defendant; that the more readily to induce them to sign it, the Defendant had fraudulently concealed the fact that Darwell was then in a state of insolvency, or had committed an act of bankruptcy, and had falsely represented his client's difficulties, as being temporary only, although at the time the Defendant made such representations, he well knew the contrary to be the truth; and that inasmuch as the note was given for the purpose of raising the money which the Court had ordered to be replaced, and that money had been originally advanced under an order improperly obtained, through the agency and management of the Defendant, the Defendant would himself have been held liable by the Court if Darwell had failed to repay it; and the Defendant was therefore to be considered, in equity, as the principal debtor, for whom the Plaintiffs were no more than sureties. The bill moreover stated a variety of facts, tending to shew that the Defendant, who had acted for many years, and throughout the whole of the proceedings in the administration suit, and particularly upon the orders already mentioned, as the solicitor of Darwell, must have fully known the real situation and circumstances of his client.

The Defendant, by his answer, wholly denied that the note in question had been executed by the Plaintiffs at his instance or entreaty, but he admitted that he had been aware of the situation and circumstances of Darwell at the time of the transaction impeached by the bill; and, in answer to a charge to that effect, he also admitted that he had in his possession divers books, &c., containing entries and memorandums, and also divers papers and letters, relative to the matters in the bill mentioned; and he set forth a list of them in a schedule. **[100]** But he stated that such entries and memorandums were made, and such papers and letters were written, or received by him in his capacity of confidential solicitor for Darwell, for whom he had been professionally concerned for a number of years.

Sir E. Sugden and Mr. Koe, for the Plaintiffs, now moved, by way of appeal from the Vice-Chancellor, by whom the motion had been refused, that the scheduled books, papers, and letters might be produced, and that the Plaintiffs might have liberty to inspect them. The privilege which entitled solicitors to withhold a discovery of matters coming to their knowledge in the course of their professional business, was a privilege granted solely for the benefit of the client, and could never be allowed to shelter a solicitor who was sought to be personally charged with a fraud.

Mr. Pepys and Mr. Spence opposed the motion.

Jan. 31. THE LORD CHANCELLOR [Brougham] this day delivered the following judgment. We are here to consider not the case which has frequently arisen in Courts of Equity, and more than once since I came into this Court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so has, at different times, been a matter of controversy

And in two cases before Lord Lyndhurst (*Hughes* v. *Biddulph*, *Vent* v. *Pacey*, 4 Russ., 190, 193), and one since I sat here (*Bolton* v. *Corporation of Liverpool*, 1 My. & K., 88), the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending, or with reference to that suit when in **[101]** contemplation. But the party has no general privilege or protection; he is bound to disclose all he knows, and believes, and thinks respecting his own case; and the authorities therefore are, that he must disclose also the cases he has laid before counsel for their opinion unconnected with the suit itself.

Here the question relates to the solicitor, who is called upon to produce the entries he had made in accounts, and letters received by him, and those written (chiefly to his town agent) by him, or by his direction, in his character or situation of confidential solicitor to the party; and I am of opinion that he cannot be compelled to disclose papers delivered, or communications made to him, or letters, or entries made by him in that capacity. To compel a party himself to answer upon oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wider violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of.

As regards them, it does not appear that the protection is qualified by any reference to proceedings pending **[102]** or in contemplation. If touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any Court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important of all communications—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued.

If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But were it allowed to extend over such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. "It would be most mischievous," said the learned Judges in the Common Pleas, "if it could be doubted whether or not an attorney, consulted **[103]** upon a man's title to an estate, was at liberty to divulge a flaw" (2 Brod. & Bingh., 6).

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous. From the terms in which I have stated the proposition, it is manifest that several cases may arise, which, though apparently they are exceptions, yet do in reality come within it. Thus the witness, or the Defendant treated as such, and called so to discover, must have learned the matter in question only as a solicitor or counsel, and in no other way: if therefore he were a party, and especially to a fraud (and the case may be put of his becoming informer after being **[104]** engaged in a conspiracy), that is, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing; for in such a case his knowledge would not be acquired solely by his being employed professionally. So if you examine the cases in which the protection has been refused, until the late Nisi Prius cases (of which I shall presently speak more in detail), you will find that they all range themselves within one or other of the following heads, which are deducible from the proposition and in strict consistency with its terms. Those apparent exceptions are, where the communication was made before the attorney was employed as such, or after his employment had ceased; or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was therefore only applied to *as a friend;* or where there could not be said, in any correctness of speech, to be a communication at all; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases); or where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure; or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney made himself a subscribing witness, and thereby assumed another character for the occasion, and, adopting the duties which it imposes, became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with his client or on his client's behalf, **[105]** matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know.

I shall first advert to the cases which support the proposition, and then shew that those referred to as impugning it, previously to the year 1819, come plainly within its terms on one or other of the grounds I have just stated. In a case in Skinner (*Anon.*, p. 404), a Nisi Prius case, but before Lord Holt, an attorney, who had drawn an agreement between a sheriff and his under-sheriff, was examined to prove it a corrupt one; but the Lord Chief Justice held him not bound to answer; and it is to be observed that the only ground there taken against the privilege was his not being a counsellor, and Lord Holt said, "it seems to be the same law of a scrivener" as, indeed, Lord Nottingham had laid down in *Harvey* v. *Clayton* (2 Swan., 221, n.) many years before, where he would not compel a scrivener to discover whose money he held in trust or for whom, saying, that if he did, no man could hereafter employ him, and that a man shall not be wounded through the side of his scrivener. In *Gainsford* v. *Grammar* (2 Campb., 9), Lord Ellenborough would not allow an attorney to be examined touching a proposal which he had carried from his client to the Plaintiff, though no suit was then pending nor in existence for several months after. His Lordship gives apparently as a reason for considering that the witness was acting as an attorney, and not as an ordinary agent (the argument on the other side), that an attorney might be retained and confided in, in contemplation of a suit, but he appears

to rely simply upon its being a communication made to him while professionally employed as an attorney.

[106] This was clearly the opinion of Lord Ellenborough in other cases, of which two are reported in the fifth volume of Espinasse's Reports. In *Robson* v. *Kemp* (5 Esp., 52), a solicitor being called who had been employed in preparing a warrant of attorney, and who had subscribed it as a witness, Lord Ellenborough held him not bound to answer any question touching what passed at the concoction and preparation of the instrument, for those circumstances were confided to him professionally; and his Lordship observed, that by subscribing as a witness he had only pledged himself to give evidence as to its execution. Neither would he allow him to be examined as to its destruction, the attorney having become acquainted with that only in his professional capacity, and his Lordship concluded that the "one case was as much privileged as the other." And so, in *Brard* v. *Ackerman* (5 Esp., 119), the same eminent Judge would not allow an attorney to be examined as to the particulars of a bill of exchange which had come into his possession from his client. If it be possible that this bill might have been delivered to him *post litem motam*, it is at least quite clear in the former case that the transaction had no connection whatever with any suit commenced or in contemplation, for no one can maintain, without a great perversion of terms, that the warrant to confess judgment referred to a suit in the sense in which the term is used throughout the present argument.

The case of *Cromack* v. *Heathcote* (2 Bro. & Bingh, 4) is the only other authority to which it is necessary to refer. It is clear and distinct, and is the only decision in Bank upon the question. An attorney was there called to prove fraud in an assignment, he having been asked by the party against whom he was called to prepare the deed, **[107]** which he had refused to do, and another had then been employed. The cases were all considered, and the Court held that because the party consulted the attorney professionally, and instructed him as an attorney, although after receiving such communication the latter refused to draw the deed, yet the knowledge he had was obtained in his professional capacity, and they were unanimously of opinion that there being no suit pending in any Court made no difference as to the protection. Mr. Justice Richardson expressly puts the case of an attorney consulted on title, and says he never heard of the rule being confined to attorneys employed in a cause.

I have only adverted to such of the cases allowing the protection as maintain the proposition in its largest extent, and distinctly exclude the qualification of late partially introduced, of reference to legal proceedings.

But it will now be satisfactory to examine the cases in which the protection has been refused, and to find that down to *Wadsworth* v. *Hamshaw* they afford no real exception to the rule, but come within the description already given of exceptions only in appearance. Indeed the greater part of them afford strong confirmation of it in the *dicta* of the Judges as to how the decisions would have gone had the facts been otherwise.

In *Cuts* v. *Pickering* (1 Vent., 197), where the Defendant had disclosed to A B an erasure in a will to have been done by him, but disclosed it before A B was his solicitor, it was held he might be examined, but *secus*, had the disclosure been after his retainer. *Lord Say's case* (10 Mod., 40), was that of an attorney employed in levying a fine, and called to prove that the deed to lead the uses was not **[108]** executed till five months after the date. The Court agreed that he could not be examined to prove his client's secrets, but that the execution of a deed was a fact that he might know *aliunde*, and not a secret of his client's. But here no distinction was taken as to matter disclosed in a suit, or preparatory to or connected with a suit, and other secrets or secrets otherwise learned. In *Studdy* v. *Sanders* (2 Dow. & Ry., 347), an attorney's clerk was allowed to identify the client as the person who put in an answer, on the ground that this was a matter not confidentially disclosed to him. *Contrà*, in *Rex* v. *Watkinson* (2 Strange, 1122), which was an indictment for perjury assigned in an answer in Chancery, where the Master who took it could not identify the Defendant, the solicitor who was present when it was sworn was called, and as the Chief Justice would not compel him to give evidence, the Defendant was acquitted. Yet there the identity must have been known to many others, and the putting in the answer so far from being a secret disclosed, was in its very nature a matter of publicity. This case then I take not to be law at the present day. Indeed,

Lord Mansfield says, in *Doe* v. *Andrews*, he has known an attorney examined to prove that his client swore and signed an answer on which the latter was indicted for perjury. In *Doe* v. *Andrews* (Cowp., 845), in consequence of an attorney who was an attesting witness to an agreement, refusing to prove it, there was a nonsuit. But the Court afterwards set aside the nonsuit, holding that the attorney was bound to give evidence on collateral points, and that whoever becomes a witness to an instrument pledges himself to give evidence on it whenever called upon. There the attorney had been mixed up with the transaction, and had acted not as a **[109]** professional man: for though attorneys often witness deeds, that is accidental, and they do so not as attorneys. He had made himself, as Lord Ellenborough says in one of the Nisi Prius cases, "a public man" as to proving the execution, and not an attorney. *Cobden* v. *Kendrick* (4 T. R., 431) was the case of a communication from client to attorney after the action was compromised, and it was held not privileged: clearly, because it was not made professionally, but by way of idle and useless conversation, the words being, "I am glad it has been settled, for I only gave £10 and my note; it was a lottery transaction." Had this been confided with a view to some further proceedings, or without any regard to a suit, had it been communicated for a purpose of business, it would certainly have been protected. In *Duffin* v. *Smith* (Peake, 108) usury in a mortgage was proved by the Plaintiff's attorney who prepared the deed, and who was called by the Defendant to prove the consideration usurious; and Lord Kenyon in that case said, that "when the attorney himself is as it were a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person."

It may be doubted if the attorney preparing the deed be not confidentially entrusted as an attorney in so doing. But Lord Kenyon proceeds upon the assumption that he is not; that on the contrary he is *quasi* party, and he seems to liken the case to that of a co-conspirator, where clearly there is no protection. Had he not deemed him the party acting, rather than the attorney entrusted, the principal rather than the agent, it is plain that his Lordship would have held him exempt from interrogation. In *Wilson* v. *Rastall* (4 T. R., 753) an attorney was held **[110]** compellable to produce letters committed to him by the wife of another witness, who had, he said, consulted him in his profession as a confidential person, both before and after the wife gave him the letters; the letters, though not given by him, were kept with his privity and consent; and the witness himself said that they were committed to him in consequence of the Defendant consulting him professionally. But then he also said that he was under-sheriff, and had, on this account, refused to be employed as an attorney. And, therefore, all that could be said was that he had been confidentially consulted by a friend, who selected him for this purpose because of his professional knowledge. The Court, and particularly Buller J., put the decision upon this ground, that the letters were not given to him in his professional capacity.

So stand the authorities on both sides, or I should rather say, all substantially on one side, previously to the year 1819; the date of the first case I can find, in which the rule was laid down with the qualification that the communication must relate to a cause. That is also the case in which the qualification is stated the most largely, or with the greatest effect upon the rule.

The case I allude to is a Nisi Prius decision of Lord Tenterden at Guildhall (*Wadsworth* v. *Hamshaw*, given in a note to *Cormack* v. *Heathcote*, 2 Brod. & Bingh., 5). The question was, whether the Defendants were partners at the time when certain goods were delivered, and their attorney was produced by the Plaintiff to prove that they had called upon him to advise them professionally respecting the dissolution of their partnership. The Lord Chief Justice considered that this was not a privileged communication, holding that the protection **[111]** extended to those communications, which relate to a cause existing at the time of such communication, or then about to be commenced, and he cited a case from the Midland Circuit, which came on motion into the King's Bench, a case to which he frequently referred upon questions of this kind, and of which a better account is to be found in *Clark* v. *Clark* (2 Moo. & Malk., 3). Lord Tenterden, as I have often heard him say, was disposed to hold this privilege more strictly, that is, to allow it more sparingly than other Judges; indeed, he makes a similar remark in one of the cases reported, but in none did he ever lay the rule down with so large an exception as here, and from what he

afterwards says in *Clark* v. *Clark*, it can hardly be doubted that the report makes him restrict the privilege more than he intended.

It would follow from the decision in *Wadsworth* v. *Hamshaw*, if the words are to be taken literally, that a communication, however confidential, made to a professional man, with a view to the client's defence against any proceedings which might be commenced, would be without protection, because the disclosure was not on the eve of the suit.

The same doctrine is reaffirmed, though not, perhaps, quite so largely, in *Williams and Mundie* (Ry. & Mood., 34). That also was a case at Guildhall, occurring a few years after the former (in 1824), from which it only differs, inasmuch as the attorney was consulted by the Defendants relative to the commencement, and not to the dissolution of the partnership which, as before, was the matter in question. And here Lord Tenterden allowed the examination, but stated the rule somewhat less strictly against the protection. "I have invariably laid down," says his **[112]** Lordship, "that what is communicated for the purpose of bringing an action or suit relating to a cause, or suit existing at the time of the communication, is confidential and privileged, but what any attorney learns otherwise than for the purpose of a cause or suit he is bound to communicate."

It may be fairly said, taking these two cases together, that his Lordship would not have excluded communications made with a view to legal proceedings, though none such had either been commenced or were about to be instituted. Lord Wynford, who, in *Broad* v. *Pitt* (1 Moo. & Malk., 234), adopts the doctrine, appears so to understand the case, for he says it is enough if a proceeding is instituted or apprehended. In the case before him, however, though Lord Wynford approves of the rule, no decision can be said to have been made, for the counsel for the Plaintiff preferred proving their case by other evidence not open to the same objection, and did not press for the disclosure, although the Court had ruled that they might have it.

When a Judge of such eminence as Lord Tenterden states that "the question is one to which he has given great consideration" (Ry. & Mood., 35), even the contrary current of other decisions would leave the Court under considerable anxiety in departing from so high an authority; and it is therefore very material to inquire if the opinion ascribed to his Lordship has not been either reported by others, or propounded by himself in the course of Nisi Prius proceedings, with somewhat of looseness, or, which would be as satisfactory, to ascertain that he was subsequently disposed to modify that opinion, supposing it to have been accurately represented in the first instance.

[113] In *Clark* v. *Clark* (2 Moo. & Malk., 3), the attorney was called to prove a communication with him, when consulted upon a transaction, for the purpose of shewing that transaction to be fraudulent. A dispute had arisen between the parties, but there were no proceedings pending, nor, it should seem, in preparation or contemplated. The Plaintiff only consulted his attorney as to his rights, and put one of the documents connected with the transaction into his hands to get it stamped. Lord Tenterden held that the protection extended to this case. His Lordship, upon that occasion, referring to the reports, intimates an impression as existing in his mind that he had been made to state the rule more narrowly than he was likely to have laid it down; he allows that he has been more inclined to restrict it than other Judges, and refers again to the case from the Midland Circuit, in a way which proves that case to have gone on the undeniable proposition that the communication, to be protected, must be made to the attorney in his professional capacity; and he concludes by holding the communication in the case before him to be privileged, because it was made to the attorney in his professional character, with respect to a matter then in dispute, although no cause was in existence with respect to it.

But the distinction here taken between dispute and no dispute having arisen cannot be found in the cases; and neither Lord Tenterden himself, nor the rest of the Court of King's Bench, could have taken it into their consideration in *Bramwell* v. *Lucas;* for, if so, it would have put an end to the question there, and have precluded the necessity of a very different and nice inquiry as to the nature of the communication. The question related to an act of bankruptcy; and though bankruptcy, when proceeded upon, may be considered as a suit, yet **[114]** the act itself, out of which the proceedings may arise, is nothing of the kind; nor could any dispute be said to exist, for the fact

happened before the parties to the dispute, the assignees and petitioning creditors could have any existence.

This case of *Bramwell* v. *Lucas* closes the examination of the authorities, which I have felt called upon to institute; and it not only proves nothing against the general doctrine on which I have rested my opinion, but it comes distinctly within the principle stated, and ranges itself with all the rest of what I have termed the only apparent exceptions.

In *Bramwell* v. *Lucas* (2 B. & C., 745), an attorney of the name of Scott was called to prove his client's act of bankruptcy, by relating that a meeting of creditors having been appointed, the client Noakes asked him if he (Noakes) could safely attend without being arrested: and Scott advised Noakes to remain in his office till he could ascertain that they would give him safe conduct, and that Noakes accordingly remained two hours there to avoid arrest. Lord Tenterden, in delivering the judgment of the Court, says that the privilege is confined to communications made to an attorney, in his character of attorney, and that this was a question which might have been asked of anyone else, and the information or advice might have been given by anyone else as well as by an attorney; "he recommended Noakes, not as a legal adviser, but as any agent or any friend might have recommended him, to stay where he was till a certain matter of fact could be ascertained."

This decision, therefore, went upon the ground that the communication which passed between the parties was **[115]** not professional, as regarded the attorney. There may be some doubt whether the view of the fact taken by the Court was not somewhat bottomed in a refinement,—whether the communication with Noakes was, in point of fact, in Scott's professional capacity. But the doctrine of law laid down in the case is free from all doubt: it is, that the privilege shall be excluded, where the communication is not made or received professionally and in the usual course of business.

The great importance of this question, both in equity and at law, has induced me to go thus largely into it. The rules of evidence are the same on both sides of the Hall; the right which a party has on this side to a discovery from a defendant of what was communicated to him in his professional capacity, and the right which a party on either side has to obtain such information from a witness, are one and the same. Nor do I believe that there will be found any difference of opinion upon the question in the different courts.

[116] THOMPSON *v.* ANDREWS. *Rolls. Nov.* 19, 1832.

Where a testator directs his trade to be carried on after his death, that part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade.

By an indenture, dated the 1st of January 1817, a certain messuage, with the brewhouse therewith used and occupied, was demised to Thomas Rivers, his executors, administrators, and assigns, for the term of forty-eight years, at the yearly rent of £21, 5s. Thomas Rivers, who was a brewer and coal-merchant, occupied and used the demised premises for the purposes of his trades, and was in possession of them at the time of making his will and of his decease. His will, dated the 1st of June 1820, contained the following clause:—"It is my wish, that my wife and my son should continue to carry on the business, in the same way that I do now, for their joint benefit and mutual advantage, on the premises in which I now reside; and in furtherance of this my wish, I give and bequeath all my stock in trade, of what nature or kind soever and by me employed or used, to my said wife and son Thomas, in equal shares and proportions; but in case of disputes or controversies arising between my said wife and son, so that it shall be deemed expedient by my trustees hereinafter named, with the consent and approbation of my said wife testified in writing, that the said business should be discontinued and no longer carried on by my said wife and son; then I give and bequeath the lease of the said premises in which I now reside, with the appurtenances thereunto belonging, and all the said stock in trade so by me given to my said wife and son, unto Richard Andrews and William Goldhawk, their heirs, executors, administrators, and assigns, upon trust to sell and dispose of the same either by public