

IN RE COLE.

Case No. 2,975.

[8 Reporter, 105;¹ 7 Wkly. Notes Cas. 114.]

Circuit Court, E. D. Pennsylvania.

May 9, 1879.

PRACTICE—COMMISSION TO TAKE
TESTIMONY—EXAMINATION—REGULARITY—COUNSEL AND
CLIENT—PRIVILEGED COMMUNICATIONS—PERPETRATING CRIME.

1. Where a commission to take testimony has issued from the court of another circuit, and the aid of the court in whose jurisdiction the witnesses reside is sought to enforce it, the latter court will not inquire into the regularity of the issuance of the commission before compelling witnesses to answer.
2. Privileged communications between counsel and client are those which are lawful, and which relate to the business of the client, and fall within the scope of professional duty. A communication relating to the perpetration of a crime by the counsel is not privileged.

Motion for attachment. C. C. Cole, Esq., was of counsel for the Iowa Central Railroad, in a suit in the circuit court of Iowa, to foreclose a mortgage on said road. R. L. Ashhurst, Esq., was chairman of a committee of stockholders of the road; J. F. Cate was president of the said road; both the latter gentlemen were in frequent confidential communication with Cole, with reference to the litigation and matters connected therewith. During the case certain libellous publications appeared, attacking the character and motives of [Hon. John Dillon, United States circuit judge for the district of Iowa]² the judge before whom the case was. Cole was charged with the authorship of said publications, and proceedings were had by the Iowa bar association for the purpose of disbaring him as intending to obstruct the course of justice; and a commission was directed by the circuit court of Iowa to a commissioner in the eastern district of Pennsylvania, directing him to take testimony. Before the commissioner, Messrs. Ashhurst and Cate refused to answer certain questions as to whether they had received certain letters from Cole, &c., on the ground that they were confidential communications between counsel and client. Attachments were then asked for.

Cook & Lane, for the motion.

E. G. Platt and J. C. Bullitt, contra.

BUTLER, District Judge. Two questions were raised: 1. That the circuit court of Iowa had no authority to issue the commission. 2. That the communications were privileged.

As to the first, I, as a judge, have no authority to inquire into the jurisdiction of the circuit court of Iowa, or whether or not there is there pending a civil action. That court has decided that question, and issued a commission. It would be highly discourteous to look behind its record, and I decline to do so.

Secondly, are the communications privileged? The general law in regard to privileged communications is well understood, and originated far back in the history of jurispru-

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dence. How far, in modern times, the law has been modified, it is not now necessary to consider. It is sometimes said that all communications between counsel and client are privileged; but this is too general, and is inaccurate. They must relate to the business and interest of the client; and, moreover, they must be lawful; for, if unlawful, public policy forbids their concealment under the plea of privilege; and, if lawful, they must fall within the scope of professional duty. Communications by counsel to client, likewise, are usually privileged, because closely connected with the client's interest and business. See *Weeks, Attys. at Law*, p. 252. Suppose a case most favorable to the witnesses, viz., that these communications were by client to counsel, would they be privileged? I do not mean to imply any fault in these gentlemen. I have no doubt they are entirely free from blame. But suppose a client had devised, with the assistance of counsel, a scheme to obstruct the administration of justice, would the communications be privileged? The authorities applicable to such cases say not. The charge here is that Mr. Cole intended to promote perpetration of crime. Had it not been for the learned argument of counsel who opposed the motion, I should not have had the slightest doubt about the case. The matter does not fall within the scope of professional employment. Moreover, these communications have been already given to the public. The inquiry is not what they were, but who made them, and how are the client's interests affected by them? The protection is for the benefit of the client, not the counsel. I am of opinion

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that witnesses must answer [all material questions under this commission].³

[If it is intended that the process of the court should be invoked, the questions must be first written out and shown to be material.]³

[NOTE. The respondent Cole demurred to the information presented against him by the bar association, and the sufficiency of the information was passed upon by Mr. Justice Miller. See Case No. 2,973.

[In a note to the report of Mr. Justice Miller's opinion in 1 McCrary, 405, it is stated that before the final hearing Mr. Cole made a satisfactory acknowledgment and apology, whereupon, on motion of the committee of the bar association, the proceeding was dismissed.]

¹ [Reprinted from 8 Reporter, 105, by permission.]

² [From 7 Wkly. Notes Cas. 115.]

³ [From 7 Wkly. Notes Cas. 115.]