

ARNOTT *v.* HAYES.

[1885 A. 1226.]

Inspection of Bankers' Books—Ex parte Order—Evidence—42 & 43 Vict.
c. 11, s. 7.

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An order giving liberty to inspect a banker's books and take copies of any entries therein for the purposes of legal proceedings, may be made under 42 & 43 Vict. c. 11, s. 7, on the application of a party to such proceedings *ex parte* and without evidence; though generally it is better that notice of the application should be served on the person whose account is to be inspected, and in some cases the Court may require evidence of the *bona fides* of the application, and of the materiality of the inspection.

Decision of *Kekewich*, J., affirmed.

THE case made by the statement of claim in this action, the Defendants to which were *Hayes* (proceedings against whom had been discontinued), the *Automatic Boiler Feeder, Limited*, *Webb* and *Beall*, was to the following effect:—That in January, February, April and May, 1885, the Defendant *Webb*, by and with the authority of the Defendant *Beall*, represented to the Plaintiff that the shares in the *Automatic Boiler Feeder, Limited* (other than those allotted to the vendor as paid up), had been subscribed for and allotted, and were selling at a premium, and suggested to the Plaintiff that he should purchase shares; that the Plaintiff, relying upon these representations, arranged with *Webb* to purchase at par 600 £1 shares fully paid up, from some person whose name did not transpire; that the Plaintiff accordingly bought the 600 shares and paid for them; that the vendor was in fact *Beall*, and that the purchase-money was received by or on account of *Beall*, who applied it to his own purposes; that the 600 shares were transferred to and registered in the name of the Plaintiff; that the representations made by *Webb* as above were untrue to the knowledge both of *Webb* and *Beall*, and that the shares were of no value; that the company never was a *bonâ fide* company, but was promoted and carried on by and for the benefit of *Beall*; that the signatories to the memorandum of association were creatures of *Beall*; that the directors were his

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nominees, and in his pay, and the broker of the company entirely dependent on him; that there were scarcely any *bonâ fide* shareholders of the company; that *Beall*, in order to give an appearance of *bona fides* to the company, had fraudulently placed many persons upon the register who had never applied for shares, and who had never paid, and were unable to pay, anything in respect thereof, and had never agreed to become shareholders; that the money that had been received in respect of shares had been wrongfully and fraudulently received by and converted to the use of *Beall*; that the company had never carried on, and was never intended to carry on any business, and the sole object of the formation of the company was that *Beall* might be able improperly and fraudulently to obtain money by the issue of the shares. The Plaintiff claimed rescission of the contract to take shares, repayment by *Beall* and *Webb* of the £600, and in the alternative £1000 damages, and to have the name of the Plaintiff removed from the register.

On the 13th of June, 1887, an order was made at Chambers, on the application of the Plaintiff and for the purpose of obtaining evidence for the trial, "That the *Royal Exchange Bank, Limited*, do at all seasonable times, on reasonable notice, produce at their head office their books containing the account of the Defendant company and the Defendant *Edward Beall* respectively, and that the applicant be at liberty to inspect and peruse the entries in the said books relative to such accounts, and to take copies and abstracts thereof and extracts therefrom at his expense."

This order was made *ex parte* and without any affidavit in support of the application.

The company and *Beall* gave notice of motion that this order might be varied or rescinded, and that an injunction might issue to restrain the *Royal Exchange Bank* from acting upon it.

The motion was heard before Mr. Justice *Kekewich* on the 28th of June, 1887.

Herbert Reed, in support of the motion.

Warmington, Q.C., and *Swinfen Eady*, for the Plaintiff.

Herbert Brown, for the Bank.

KEKEWICH, J. :—

The first objection to the order made in Chambers is, that sect. 7 of the *Bankers' Books Evidence Act*, 1879 (42 & 43 Vict. c. 11), does not in the case of civil proceedings give jurisdiction to make an *ex parte* order for inspection of the banking account of a party to the cause. In support of that objection the opinion of Mr. Justice Day in *Davies v. White* (1) was referred to. But the learned Judge himself there said that it was not necessary for him to express any opinion as to the jurisdiction. On the other hand, in *In re Marshfield* (2) the books sought to be inspected were those of a firm in which the testator had been a partner, and there Vice-Chancellor Bacon held that any party who before the Act would have had a right to a *subpœna duces tecum* could now obtain an order to inspect and take copies. What the Vice-Chancellor said in that case applies directly where the books in question relate to the accounts of a party to the action. Further, in *Morgan v. Haggart* (before Mr. Justice Denman and Mr. Justice Grantham, 10th of June, 1887) the order was made with respect to the account of a defendant, so that if the expressions of Mr. Justice Day amounted to a decision, which they do not, I should feel no difficulty in not following that decision.

The next objection is, that, even if there is jurisdiction to do so, the order ought not to be made *ex parte*, and in *Davies v. White* such an order was set aside. If the practice rested on that case my duty would have been to follow it, but I find that in the later case of *Morgan v. Haggart* (10th of June, 1887) the order was made *ex parte*, and in *Doyle v. Mulkern* (3) it appears from the Registrar's book that on the 24th of March, 1881, an order was made which is on the face of it *ex parte*.

Apart from these authorities my own construction of the Act is, that the order may be made *ex parte*, and that in a proper case it ought to be so made, just as a *subpœna duces tecum* may be issued without notice. I hold that in this case the order was properly made *ex parte*.

It was further objected that the order was made without any evidence in support. But I find that in the cases recorded in

(1) 53 L. J. (Q.B.) 275.

(2) 32 Ch. D. 499.

(3) Reg. Lib. 1881. A. 572.

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the Registrar's book there were not any affidavits, though it appears that there were in *In re Marshfield* (1). My view is, that whether the application should be supported by affidavit or not must depend upon the circumstances of each case. Here the statement of claim contains allegations as to the dealings of *Beall* with money paid and bills given by the Plaintiff, which amounts to an allegation that *Beall* had an account with a bank through which cheques and bills passed. In this particular case therefore there is, as it appears to me, no necessity for an affidavit in support of the application.

Lastly, it is said that the order is too wide in its terms, and I agree that it is so. In the present case the matters in question appear to begin from the registration of the company, and the inspection must be limited to the account from that time.

As, however, the Applicants have failed upon every point except the last, I shall not make any order as to costs except that the Applicants do pay the costs of the bank and add them to their own, and that the costs of the Applicants and of the Plaintiff be costs in the action.

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C. A. The order was accordingly varied by inserting after the words "the account of the Defendant company and the Defendant *Edward Beall* respectively," the words "as to the said company from the 27th day of October, 1884, the date of the registration of the said company, and as to the said *Edward Beall* from the 25th day of October, 1884."

The company and *Beall* appealed from this order and the order of the 13th of June. The appeal was heard on the 27th, 28th, and 29th of July, 1887.

Herbert Reed, and *G. Eugene Humphreys*, for the Appellants:—

We object to the order on three grounds: (1) that it was made *ex parte*; (2) that it was made without evidence; (3) that its terms are too wide. It was made under the powers of 42 & 43 Vict. c. 11, s. 7. It was never intended that this section should give a right of discovery which did not formerly exist. The order

(1) 32 Ch. D. 499.

ought not to be made *ex parte*, *Davies v. White* (1), so as to expose a person's private account without notice to him, and to deprive him of the power of sealing up parts which are irrelevant. The words "any other party" in the clause do not refer to parties to the action. It is not reasonable that it should be made without evidence that the entries are material for the purposes of the action.

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Swinfen Eady, for the Plaintiff:—

Sect. 7 does not require an affidavit, and the nature of the case on the pleadings shews that entries of this kind may be most material.

Before these Acts any litigant might have issued a *subpoena duces tecum*, and have had the books in Court. The account could then be put in against the customer.

[COTTON, L.J.:—Not without proof that it had been recognised by the customer.]

The right to a *subpoena duces tecum* is taken away by sects. 3 and 6 of the Act of 1876, and production of the books can only be obtained in this way. Any party who could before the Act have sued out a *subpoena duces tecum* is now entitled to an order under the Act: *In re Marshfield* (2). The words in sect. 7 are wider than the words in an affidavit as to documents made by a party. The allegations of the statement of claim in respect of which we wish to see the books are, that the money paid for the Plaintiff's shares passed through the hands of *Beall*, that there are hardly any *bonâ fide* shareholders, and that money received has been improperly applied by *Beall*.

[BOWEN, L.J.:—I am not satisfied that you are entitled under the Act to inspect anything except documents of which you may want copies for evidence.]

We must inspect the books to find out what copies are required. I contend that as before the Act we could have had these books in Court under a *subpoena duces tecum*, and examined upon them, we are entitled to inspection under the Act and to take copies,

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which by the Act are made evidence against every one : *Harding v. Williams* (1). As to the order being made *ex parte*—

[*Per Curiam* :—You need not address yourself to that, nor to the words “any other party,” nor as to the *bona fides* of the application.]

Humphreys, in reply :—

There is no reported case in which general inspection of the private banking account of a party to an action has been allowed.

COTTON, L.J. :—

This is an appeal from an order made in Chambers for the production of bankers' books, and subsequently modified by Mr. Justice *Kekewich* in Court. Various objections are taken to the order. The first was that the order ought not to have been made *ex parte*. We have heard nothing to shew that an order for production ought not to have been made, and, if the Act gives the Judge jurisdiction to make it *ex parte*, we cannot discharge it merely because we think it better that such orders should not in general be made *ex parte*. I am of opinion that the Act 42 & 43 Vict. c. 11, s. 7, does give the Judge such jurisdiction. It says that the order may be made “either with or without summoning the bank or any other party.” It is urged that “party” here does not mean “party to the action,” but it must include parties to the action. There is, therefore, power to make the order *ex parte*, though under ordinary circumstances I think it better that the person whose account is to be looked at should be served.

Another objection was that the order was made without any affidavit. In my opinion an affidavit is not necessary. It may be that in some cases the Court might in its discretion require an affidavit to shew that the inspection sought was material for the purposes of the action, but if that appears from the pleadings there is no occasion for an affidavit. Though pleadings do not shew that the allegations of fact contained in them are true, they

shew the nature of the case and of the evidence required to support it. In some cases an affidavit as to *bona fides* might be required. In the present case there is no question as to the materiality of these accounts to the issues raised, the Court has not to decide any preliminary point before ordering production, and the objection that the order was made without evidence fails.

Then is the order in other respects right? The main object of the section is to enable evidence to be given at the trial. I do not say that it cannot be used for any other purpose; but in the present case the object sought is to obtain evidence for the trial. If any attempt were made to use the information thus obtained for purposes other than those of the action the Court would interfere. Now, what is the object of this Act? It takes away the power of summoning a banker to produce his books at the trial. So far it is an act for the relief of bankers—it relieves them from the great inconvenience of having to attend at the trial and bring with them books which are in daily use in their business. Then it enables copies of the entries to be given in evidence. How can the suitor know what entries are wanted? Only by examination of the books, and though this order gives a wider power of inspection than a suitor had before, it is an inspection for the very purpose of the Act. It was urged, and I was at first struck by the observation, that this is making the Act give a power of discovery. But that is a fallacy. This is not giving the Plaintiff discovery from the Defendant to assist the Plaintiff's case, but giving him a power of examination for the purpose of ascertaining what copies he will require for the purpose of being put in evidence.

The examination of the books is to be only for the purposes of the action, and the Judge ought to be careful not to make his order wider than necessary. I have considered whether we could introduce into this order any further limitations without narrowing it too much, but I cannot see how to do it. The order does not cover too wide a space, and if we limited it further we might shut out very material entries. In some cases an order of a more limited description might be proper; but I do not see my way to any further limitations in the present case. It was argued that the Act only enables the entries to be inspected, not the

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books ; but that is mere matter of form, the argument is verbal, not substantial.

BOWEN, L.J. :—

I am of the same opinion. I also think that great caution should be exercised in acting under this power, and I have no reason to doubt that the Judges do exercise such caution. Consider the state of the law at the time when the Act of 1876 was passed. At that time there was no power of discovering the contents of a banker's books except by the circuitous process provided by the *Common Law Procedure Act*, a cumbrous process which was hardly ever used. In practice a *subpoena duces tecum* was issued, and a clerk was called to refresh his memory by the entries. In no other way could the books be put in evidence. In practice no counsel ever thought of insisting on the laborious proof of all the items, and practically the book was put in as if it had been a pass-book approved by the customer. Then the *Bankers' Books Evidence Act* was passed for the benefit of bankers, but containing also provisions for the benefit of suitors. I do not say whether this section might not be used for the purpose of discovery in cases where there would have been a right to production of the books if they had been in the hands of the customer. In the present case we must look at the section to see what is the proper limitation to be imposed when the order is merely made for the purposes of the hearing. It seems to me obvious that, the object of the section being to enable the applicant to get copies of the entries, inspection is necessary in order to determine what entries should be copied, and the Judge should in such a case be careful as far as possible to limit the order to entries which may be wanted. In the present instance it is impossible to say that this order will do more than is necessary to enable the Plaintiff to get copies of the requisite entries. If we could see any indirect attempt to use this power for purposes not intended by the Legislature, or that a wider power of inspection was given by this order than is necessary for its proper purpose, we would impose some further limitations ; but I see nothing to lead to a suspicion of any improper object, nor can I see that the order is too wide. It is said that the Court ought not to make

an order without an affidavit. There may be cases where an affidavit would be necessary, but on the pleadings here fraud extending over the whole period in which the entries are is alleged, and nobody doubts but that a *bonâ fide* attempt is about to be made to establish the allegation, and it is manifest that these entries may be material.

As to the order having been made *ex parte*, I agree with the Lord Justice *Cotton*. I think a Judge ought to be careful about making such orders *ex parte*, but I think he has jurisdiction to do so.

FRY, L.J.:—

I concur. I agree with what the Lord Justice *Cotton* has said as to making these orders *ex parte*. I cannot read “other party” as not including parties to the action, and I cannot agree with the contention that it is to be construed as “person not a party to the action.” I should myself rarely make such orders *ex parte*, but there is jurisdiction to do it, and that jurisdiction has been exercised here after full consideration.

Then as to the general construction of the Act, it is said that this order gives the Plaintiff a discovery of documents which he has no right to inspect. But this inspection is necessary for the purposes of the Act. Before the Act it was necessary to call the banker by a *subpœna duces tecum*, and the party could not see the books till they were put in. The books are not now to be produced, but copies are to be used. How are copies to be obtained? The party requiring them cannot call on his adversary for copies; he therefore must himself make a copy, and he must have liberty to look at the books for that purpose.

The legislation on this subject began in 1876. The Act of that year (39 & 40 Vict. c. 48) in its preamble states two objects: “Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings, and whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books.” I see no reason to suppose that when the Act of 1879 (42 & 43 Vict. c. 11) was substituted for

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this Act, the Legislature had not the same two motives. I think, therefore, that the facilitating the proof of the transactions recorded in the books was as much an object of the Act as the relief of bankers. The right to inspection appears to me a necessary result of the provisions of the Act.

Solicitors for the Plaintiff: *Blair & W. B. Girling.*

Solicitors for the Defendants: *Beall & Co.*

Solicitors for the Bank: *Snell, Son, & Greenip.*

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PROCTOR v. BENNIS.

[1886. P. 4943.]

Patent—Combination—Novelty of Parts—Infringement of Patent for Combination—Acquiescence—Estoppel.

Where a patent is taken out for a combination, it is not material to its validity that the specification should point out what parts are old and what are new, though, if an alleged infringement consists only in taking part of the combination, it is necessary that the patentee should in his specification have claimed the part so taken as new. Neither is it necessary that the patentee should explain the novelty and the merit of the invention.

Foxwell v. Bostock (1) explained.

A patent for a combination of known mechanical contrivances producing a new result, held to be infringed by a machine producing the same result by a combination of mechanical equivalents of the above contrivances, with some alterations and omissions, which did not prevent the new machine from being one which took the substance and essence of the patented invention.

Curtis v. Platt (2) distinguished on the ground that there the result was old, and the novelty of the invention consisting only in improvements in a known machine for producing that known result, the patentee was to be tied down strictly to the mode which he had described of effecting the improvements.

In an action by *P.*, patentee of a stoking machine, for infringement against persons who had purchased stoking machines made by *B.*, it was proved that before the purchase *P.*, knowing that they were going to set up stoking machines, went to them and asked them to try his machine, saying that they would find it a better machine than *B.*'s, without giving any intimation that he considered *B.*'s machine to be an infringement of his

(1) 4 D. J. & S. 298.

(2) 3 Ch. D. 135, n.; 35 L. J. (Ch.) 852.