

CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

POLLOCK *v.* GARLE.

[1897 P. 406.]

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Nov. 3.

Practice—Discovery—Inspection of Banking Account—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7. (1)

An order for inspection of entries in a banker's books under s. 7 of the Bankers' Books Evidence Act, 1879, will as a general rule be made only where they are entries in an account which is in form or substance the account of one of the parties to the litigation. If the Court has jurisdiction under that section to order inspection of the banking account of a person not concerned with the litigation, it will exercise that jurisdiction with the greatest caution.

The plaintiff sued to rescind a contract for purchase by him of shares in a company from the defendant, on the ground that the defendant had induced him to enter into the contract by misrepresentations, one of which was that the company had a certain large balance at its bankers at that time. Before the action was set down for trial the plaintiff applied to the Court under s. 7 of the Bankers' Books Evidence Act, 1879, for liberty to inspect and take copies of any accounts of the company in their bankers' books. Kekewich J. made an order for inspection with the

(1) Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7: "On the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes

of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs."

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qualification, "but such inspection is to be limited to shewing the balance of the said company in the books of the said bankers on the 2nd of December, 1895":—

Held, that this order must be discharged.

THIS was an action to rescind a contract entered into on December 2, 1895, for the purchase of 150 l. shares in the Gresham Gold Exploring Syndicate, Limited, by the plaintiff from the defendant, and for repayment of the purchase-money. The ground alleged was that the defendant had induced the plaintiff to enter into the contract by untrue representations, one of which was that the company had at its bankers a sum of 87,000*l.* cash undivided. The defendant by his defence denied having made the representations, and further alleged that if they were made they were true, and in particular that at the date of the alleged representations the company had at its bankers 87,000*l.* cash undivided.

On June 29, 1897, the pleadings having been closed, but the action not having been set down for trial, the plaintiff took out a summons asking that he and his solicitor and agents might be at liberty, upon three clear days' notice, to inspect and take copies of or extracts from any accounts in the books of Messrs. Smith, Payne & Smith in the name of the Gresham Gold Exploring Syndicate, Limited, pursuant to the provisions of the Bankers' Books Evidence Act, 1879, such inspection to be held at the Banking House of the bankers.

On August 9, 1897, Kekewich J. in chambers made an order that the plaintiff should be at liberty, on three clear days' notice in writing to the bankers, "to inspect and take copies of or extracts from any accounts in the books of the said Messrs. Smith, Payne & Smith in the name of the Gresham Gold Exploring Syndicate, Limited, pursuant to the provisions of the Bankers' Books Evidence Act, 1879; but such inspection is to be limited to shewing the balance of the said company in the books of the said bankers on the 2nd of December, 1895."

The defendant appealed from this order.

Mark L. Romer, for the appellant. This is an unprecedented order for the inspection of an account with which the plaintiff

has nothing to do. The expressions in the Bankers' Books Evidence Act, 1879, s. 7, are very general; but it is clear from *Howard v. Beall* (1) that they are not to be construed as applying to accounts kept in the name of a person not a party to the action unless they are kept on behalf of a party to the action; and the same principle underlies *South Staffordshire Tramways Co. v. Ebbsmith*. (2)

[He was then stopped by the Court.]

Ernest Pollock, for the plaintiff. The bank clearly could be called upon under the old law by subpoena duces tecum to produce their account at the trial, and an order may now be made under the Bankers' Books Evidence Act for its inspection: *Arnott v. Hayes* (3); *In re Marshfield*. (4) The observations of the judges in *Howard v. Beall* (1), and in *South Staffordshire Tramways Co. v. Ebbsmith* (2) support the right to inspection. The plaintiff is anxious to ascertain the truth of the existence of this balance. If it really existed he probably would not go on to trial.

[THE COURT suggested an inspection shortly before the trial.]

A. J. Walter, for the company. We object to any inspection at all. The object of the Act was to enable bankers to give copies instead of producing their books in cases where they would have had to produce them under subpoena duces tecum, which was an intolerable inconvenience when the books were in present use. According to the judgment of Kay L.J. in *South Staffordshire Tramways Co. v. Ebbsmith* (2), in order to entitle a plaintiff to inspection of an account kept in the name of a person not a party to the suit, he must shew a connection between that person and a party to the action, so as to make the account substantially the account of such party, and he must shew that the entries are material evidence in support of his case. Here no such connection is shewn, and the entries are not material to the plaintiff's case—only the balance on a given day. Now, bankers do not balance their accounts daily; so that the balance on a given day could only be ascertained by balancing the account for a considerable period. The plaintiff,

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(1) (1889) 23 Q. B. D. 1.

(2) [1895] 2 Q. B. 669.

(3) (1887) 36 Ch. D. 731.

(4) (1886) 32 Ch. D. 499.

C. A. therefore, would be enabled to investigate the banking account
1897 of the company for a considerable period, and see all the
POLLOCK concerns of the company for that period.

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LINDLEY M.R. This case raises a question of great importance to the public, and especially to commercial men. The plaintiff says to the defendant, "I bought shares from you; you induced me to do so by misrepresentation, and in particular you misrepresented the balance which the company had at their bankers at the time." The plaintiff then applied to the Court for an order to compel the company's bankers to disclose to him the account of the company, and an order to that effect has been made. That comes to this—that when two people quarrel about a matter which can be proved by the banking account of somebody else, one of the two litigants may obtain an order for him to inspect and take copies of that account. This appears to me contrary to the principles of the law relating to discovery, and contrary to the settled practice of the Court. It is said, however, that the Court has power to make such an order under the 7th section of the Bankers' Books Evidence Act, 1879, and that it ought to be made. The Bankers' Books Evidence Acts were passed for the obvious purpose of getting over a difficulty and hardship as to the production of bankers' books. If such books contained anything which would be evidence for either of the parties, the banker or his clerk had to produce them at the trial under a subpoena duces tecum, which was an intolerable inconvenience to bankers when the books were in daily use. The leading object of the Acts was to protect bankers from that inconvenience. This is accomplished by the first six sections of the Act of 1879, which enable bankers to send attested copies of entries in their books instead of producing the books. Then comes s. 7, which has nothing to do with the protection of bankers, but has to do with the litigants. [His Lordship read s. 7.] If those words are taken literally, they say that on the application of any party to legal proceedings the Court may enable the applicant to inspect and take copies of any entries in the banking accounts of any other people. It is monstrous to

suppose that such was the intention of the Legislature. What was meant was entries in an account which is in form or in substance the account of a party to the litigation. One of the parties may be an undisclosed principal, and an account kept at a bank in the name of a third party may be really his, and in such a case inspection might properly be ordered. But when an account is the account of a person who has nothing to do with the litigation, the Court ought to look to the effect in practice of such an order on the rights of third parties, and to take care that this section is not made a means of oppression. It may be that at the trial the Court could order production of any account; but that is not the point with which we are dealing. The plaintiff wants to see the banking account that he may make up his mind whether to set the action down for trial. For that purpose he only wants to know the balance at a particular date; but the order would enable him to examine the account for some months, and see all the particulars on both sides of it, as the balance could not otherwise be ascertained. We ought to protect third parties against such a roving inspection of their accounts.

The order appealed from must be discharged, leaving the plaintiff to do what he can at the trial. This is not a case in which the Court ought at this stage to order the bankers to produce the account, even if it has power to do so.

CHITTY L.J. The Bankers' Books Evidence Act, 1879, consists of two portions. Sects. 3 to 6 protect bankers from production of their books. Sect. 7 is distinct from those, and relates to parties to the litigation.

The account to which the order under appeal relates is not in form or in substance the account of the defendant, but the account of third persons. Those persons object to having their account inspected. This is really an attempt to obtain discovery from third persons by means of s. 7 of the Act of 1879. That section is not in terms confined to entries in the account of a party to the action; but if the Court is asked for an order to inspect and take copies of the banking account of persons not connected with the litigation, it ought, if it can make such

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C. A. an order at all, to exercise the greatest caution in doing so. In
 1897 the present case, as bankers usually balance their customers'
 POLLOCK accounts half-yearly, the plaintiff, in order to ascertain the
 v. balance of the company's account on December 2, 1895, must
 GARLE. investigate the account from the time when the last previous
 Chitty L., balance was struck—that is, for about five months. He could
 look at the names and the various items, and so in fact would
 obtain discovery of all the receipts and payments of the com-
 pany during that period. In my opinion, s. 7 was not intended
 to be used for any such purpose; and I agree that it would
 inflict great injustice on third persons if it were to be worked
 in such a way as to support the order under appeal.

Solicitors for appellant: *Cheston & Sons.*

Solicitor for plaintiff: *H. F. Pollock.*

Solicitors for company: *Wilson, Bristows & Carpmael.*

H. C. J.

C. A. DAWSON v. AFRICAN CONSOLIDATED LAND AND
 1897 TRADING COMPANY.
 Nov. 10.

[1896 R. 1320.]

Company—Directors—Clause validating the Acts of de facto Directors.

No. 114 of the articles of a company provided that all acts done at any meeting of directors or by any person acting as a director should, notwithstanding that it should be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director. T., N., and S., the de facto directors, made a call, payment of which was resisted by some of the shareholders on the ground that T., N., and S. were not de jure directors. To shew that they were not, various irregularities were alleged, the most important of which was that N. had according to the articles vacated his office by parting with all his shares. After six days he acquired other shares sufficient for a qualification, and continued to act as director. His co-directors, who had power to fill up the casual vacancy occasioned by his parting with his shares, did not formally reappoint him, but all along treated him as a director; and it did not appear that they ever knew that for six days he had not been a shareholder:—

Held, by the Court of Appeal, that a clause such as art. 114 did not operate only as between the company and outsiders, but also as between