

I understand him, that it was not law, or that at this time of day it could be overruled. Although I think that the observations of that learned judge are always of great value, if he meant that, I could not agree with him. I think that the law as laid down in that case has been established by so long a course of practice that it would be impossible now to overrule it. For these reasons I think that the learned judge below came to a right conclusion, and this appeal should be dismissed.

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*Appeal dismissed.*

Solicitors for plaintiff: *Nicholson, Graham & Graham, for R. Tucker, junr., Bridport.*

Solicitors for defendant: *Lovell, Son & Pitfield, for Symonds & Son, Dorchester.*

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 E. L.

[IN THE COURT OF APPEAL.]

SOUTH STAFFORDSHIRE TRAMWAYS COMPANY v.  
EBBSMITH.

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 Nov. 11.

*Practice—Discovery—Inspection of Bankers' Books—Privilege—Entries not relevant—Account of person not party to Action—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), s. 7.*

The jurisdiction to order inspection of entries in bankers' books under s. 7 of the Bankers' Books Evidence Act, 1879, ought to be exercised in conformity with the general law as to discovery, by which a party to an action is entitled to refuse discovery of entries which he swears to be irrelevant.

Therefore, where the defendant in an action stated on affidavit that entries in his banking account were irrelevant to the matters in dispute:—

*Held*, that an order for inspection of those entries before the trial ought not to be made under the above-mentioned Act.

*Semble*, inspection of entries in a banker's books relating to an account kept in the name of a person not a party to the action can be ordered under the Bankers' Books Evidence Act, 1879, where the Court is satisfied that those entries will be admissible in evidence against a party to the action at the trial; but such an order ought not to be made without notice to such person, nor then unless very strong grounds are shewn for thinking that there are entries in the account which are material to the case of the party asking for inspection.

APPEAL from an order of Hawkins J. at chambers, which reversed an order of a master giving the plaintiffs leave to

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The plaintiffs were a tramway company incorporated by Act of Parliament, which under the provisions of the Act took over the property and rights of a previously existing company called the South Staffordshire and Birmingham District Steam Tramways Company, Limited. The plaintiffs by their statement of claim alleged that the defendant had been a promoter of and solicitor to the last-mentioned company, and as such had occupied a fiduciary position towards the company, and that in breach of his duty to them he had made secret profits out of the company; that he had caused to be registered a company called the Dickinson Tramway Appliance Company, Limited, which was a sham company, and in fact himself, the signatories to its memorandum of association being his partners in business or clerks, its secretary his cashier, and 1500 out of the 1507 shares in the company issued being held by him; that certain worthless patents which had been bought up by him for small sums were assigned by him to the Dickinson Tramway Appliance Company; and that he then procured the South Staffordshire and Birmingham District Steam Tramways Company and the plaintiffs to purchase articles the subject-matter of the patents and licences to use the patents at exorbitant prices, and without any disclosure of the extent and nature of his interest in them, and without any regard for the interest of the South Staffordshire and Birmingham District Steam Tramways Company and the plaintiffs; and they claimed damages, an account of the profits made by the defendant in respect of the matters alleged, a rescission of the plaintiffs' contracts with regard to the patents, and a return of all sums paid to the defendant in respect of them.

The plaintiffs applied at chambers under the Bankers' Books Evidence Act, 1879, s. 7, for an order that they might be at liberty to inspect the books of the bank at which the defendant and the Dickinson Tramway Appliance Company had kept accounts for the years 1885 to 1894, both inclusive, containing entries of the accounts of the defendant and of the accounts of the Dickinson Tramway Appliance Company, Limited, and to

take copies of such entries, on the ground that it was essential for the working out of the evidence in support of their case that they should have such inspection.

The defendant made an affidavit in which he swore that, with the exception of three items, of which he produced copies certified to be correct by an official of the bank (1), there were no entries in his account of which inspection was sought relating to the matters in question in the action.

Affidavits were filed for the plaintiffs to the effect that the signatures to the memorandum of association of the Dickinson Tramway Appliance Company were the defendant's partners, cashier, and clerks, and that the defendant was originally and continued for some years the holder of 1500 out of the 1507 shares in the company issued. It appeared, however, that his interest in these shares had been subsequently transferred to a company called the Corporate Trust, Limited; and there was a conflict of evidence on the affidavits as to whether this really took place in 1889 or not till 1893. As will be seen, the grounds upon which the judgment was given render it unnecessary for the purposes of this report to give particulars of the statements contained in the affidavits with regard to the relations between the defendant and the Dickinson Tramway Appliance Company. The master made the order for which the plaintiffs applied, but the learned judge on appeal reversed his decision.

*Sir F. Lockwood, Q.C.*, and *Scrutton*, for the plaintiffs. It is submitted that there is clearly jurisdiction under the statute to order inspection of the defendant's account, and the plaintiffs ought to be allowed to have inspection of it. The bank could have been compelled by the plaintiffs to produce the books containing that account at the trial on a subpoena duces tecum. The object of the Act is to obviate the necessity for such production, and any party who had that right can now obtain an order for leave to inspect and take copies of entries in the books:

(1) It should not be assumed that this was the correct mode of procedure. No objection was offered by the plaintiffs' counsel to this mode of giving inspection of the entries ad-

mitted to be relevant, the contest really being as to the right of inspection of the entries which the defendant swore to be irrelevant.

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*In re Marshfield* (1); *Arnott v. Hayes*. (2) There is also jurisdiction to order inspection of the account of the Dickinson Tramway Appliance Company. It is submitted that the effect of the affidavits is to shew that that company was substantially identical with the defendant, at any rate down to 1893. Therefore, inspection ought to be allowed of the account down to that date: *Howard v. Beall* (3); *Perry v. Phosphor Bronze Co.* (4)

*G. S. Bower*, for the defendant. It has been held by the Court of Appeal that it was not intended by the Bankers' Books Evidence Act, 1879, to give an increased right to discovery, or to deprive a party to a legal proceeding of his right to refuse discovery of entries in his bank-book on the ground that they are irrelevant to the matters in dispute: *Parnell v. Wood*. (5) The authorities clearly shew that on an application for discovery the affidavit of the party against whom inspection is asked for to the effect that a document or a portion of a document is irrelevant must be accepted as conclusive. This application is in substance the same as that refused in *Parnell v. Wood*. (5) There certain entries in the plaintiff's pass-book were sealed up, and it was sworn that they were irrelevant. It was held that the applicants could not get behind the affidavit of the plaintiff by obtaining inspection of the bank-books under the Act. The defendant here has done that which is equivalent to what the plaintiff did in that case. He admits certain entries, of which he gives inspection, to be relevant, and swears that all other entries in the account are irrelevant.

[KAY L.J. Ought not the defendant in strictness to give inspection of his pass-book, having sealed up the entries which he swears to be irrelevant?]

The defendant could do that if required; but no question seems to be really raised as to the entries which are admitted to be relevant. The object of the Act was to prevent the inconvenience to bankers of having to produce their books in court. It was never intended that one party to an action should be given a roving commission to inspect the other party's account to see if

(1) 32 Ch. D. 499.

(2) 36 Ch. D. 731.

(3) 23 Q. B. D. 1.

(4) 71 L. T. 854.

(5) [1892] P. 137

he can find any entry which may help him in the action. [He also cited *Emmott v. Star Newspaper Co.* (1)]

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*Loehnis*, for the Dickinson Tramway Appliance Company. The Court has no jurisdiction under the Act to order the inspection of the banking account of a person not a party to the action. It is submitted that there is no evidence that the defendant and the company were identical, at any rate after 1889. It is quite clear that at the present time they are not identical. Apart from the Act, there is no power before the trial to order discovery of documents in the possession of a third party, and it was not intended by the Act to give that power. The company could not be compelled before the trial to make discovery of documents in their own possession. The effect of ordering the inspection asked for is to compel discovery of the documents of a third person not a party to the action because he happens to have a banking account.

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*Sir F. Lockwood*, in reply.

[LORD ESHER M.R. What entries material to the plaintiffs' case do the plaintiffs suggest the existence of in the Dickinson Tramway Appliance Company's account?]

It is suggested that entries will be found which will assist the plaintiffs in shewing that, with regard to the patents which were bought up by the defendant for nominal sums, and then transferred by him to the Dickinson Tramway Appliance Company for much larger sums, the transactions were shams, and that the moneys ostensibly paid by the South Staffordshire and Birmingham District Tramways Company to the Dickinson Tramway Appliance Company really went to the defendant—in fact, that that company was a mere conduit pipe in the matter.

LORD ESHER M.R. In this case an application was made under the Bankers' Books Evidence Act, 1879, s. 7, for an order that the plaintiffs might be at liberty to inspect the account of the defendant, and also that of a company called the Dickinson Tramway Appliance Company, Limited. This application was refused by the judge at chambers, and from his decision the plaintiffs have appealed to this Court. I will deal first with the

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application in relation to the account of the defendant. I have no doubt that the Court has jurisdiction under the section to make the order asked for; but we have to consider and endeavour to lay down the rule of conduct by which the Court ought to be governed in exercising that jurisdiction. This is an application for inspection before the trial; and it appears to me that, where such an inspection is asked for, the conduct of the Court in the exercise of this jurisdiction ought to be regulated by the general rules laid down by the decisions in relation to inspection of documents before the trial. It was the rule of the Court of Chancery, where such an inspection of documents was asked for, that the Court granted it subject to this, namely, that, if in answer to the application the defendant pledged his oath to the fact that certain entries were irrelevant to the matters in dispute, the Court accepted that answer, leaving the defendant exposed to the risk of a prosecution for perjury, if it was untrue. I think that in exercising its jurisdiction under the 7th section of the Bankers' Books Evidence Act, 1879, the Court ought to be governed by the same rule. The defendant has taken upon himself to pledge his oath that the items which he gives from his banking account are the only items relevant to the matters in issue between him and the plaintiffs; and I think that for the time the Court must accept that statement on oath, and, as he cannot at the present stage of the proceedings be cross-examined upon it, the Court must act upon that statement. The Court must, therefore, refuse to order the inspection applied for before the trial, leaving it to the judge at the trial to make such order as he may think fit in the matter.

With regard to the application for inspection of the banking account of the Dickinson Tramway Appliance Company, in that case also I think it clear that the Court has jurisdiction to order such an inspection for the reasons given by Mathew J. in *Howard v. Beall* (1); but I think that is a jurisdiction which ought to be exercised with great caution. The application is for an order to inspect before the trial an account which is *primâ facie* not that of a party to the suit. I am disposed to think that the rule of conduct which the Court would observe in relation to such an

application—though it is impossible to define it exhaustively—would be that, if the Court were satisfied that in truth the account which purported to be that of a third person was the account of the party to the action against whom the order was applied for, or that, though not his account, it was one with which he was so much concerned that items in it would be evidence against him at the trial, and there were no reason for refusing inspection, then they might order the inspection; but, unless they were so satisfied, they ought not to do so. In this case I am very strongly inclined to believe that the account of which inspection is sought was, up to a certain date, really the account of the defendant, or contained items which would be admissible in evidence against him; but I think with regard to such an application for inspection as this the Court ought to be very cautious, and to require more than that to be shewn. I think that the party asking for the inspection ought to be able to shew the Court very strong grounds for suspicion, almost amounting to certainty, that there are items in the account which would be material evidence against the defendant upon the matters in issue. I requested the counsel for the plaintiffs to tell me what grounds he had for the suggestion that there were items of that character in this account. I think the answer which he gave was too general. He did not appear to me to be able to fix upon any definite items in the account which would help the plaintiffs; and no items suggest themselves to my mind which would furnish the plaintiffs with facts beyond those of which they are already in possession. It seems to me that, if we made the order sought for, we should be granting an application of a fishing character, made by the plaintiffs with a view to obtaining an opportunity of trying to find in the account items favourable to their case, but the existence of which they have at present no sufficient ground for suspecting. Under those circumstances I do not think we ought to overrule the discretion exercised by the learned judge at chambers. For these reasons I think the appeal must be dismissed.

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KAY L.J. Prior to the Bankers' Books Evidence Acts the Court had no power to order the inspection before the trial

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of the books of bankers who were not parties to the action. The Bankers' Books Evidence Act, 1879, amongst other things, enables the Court, where a customer of a bank is a party to an action, to order inspection of his account prior to the trial. The rule as to inspection of documents has always been that it is granted subject to the liberty of the person against whom it is asked for to seal up any part of a document which he swears by affidavit made for the purpose not to be relevant to the issues in the action, and that the other party cannot get behind the statement so made by him upon oath. It is obvious that, if the statement so made could be controverted, there might be a great contest on affidavits on the threshold of the litigation before the case came on for trial. Therefore the Court made it a rule that there could not be any contest with regard to the truth of the statement so made, but it must be accepted as true so far as the question of inspection was concerned. The only exception to that rule was where, from some other document brought before the Court in the cause, it appeared that the affidavit was inaccurate, and that some of the items which were sealed up ought to be inspected. No such exception applies in the present case. The question is whether that rule is altered by the Act. It would be very strange if it were. I quite agree with what was said in *Parnell v. Wood* (1), to the effect that it was not intended by the Act to do away with any privilege which a litigant possessed by virtue of which he was entitled to resist or limit the extent of inspection, but only to give inspection subject to such privilege in a certain case where it could not have been given before. The defendant in this case has made an affidavit setting out certain items in his banking account, and he swears that those are the only items which are relevant to the issues in the action. I see no reason for disbelieving that statement at present, and I think we must accept it. For these reasons it appears to me that the appeal must be dismissed so far as regards the inspection of the defendant's account.

There is a second question of great importance. The application is not merely for inspection of the defendant's account, but also for inspection of the account of the Dickinson Tramway

(1) [1892] P. 137.



Appliance Company, which is not a party to the action. It was sought to get over that *primâ facie* difficulty by shewing that, although that company being a corporation was not in law personally identical with the defendant, yet, as he had substantially all the shares in the company and was really the only person interested in it, the company was practically identical with himself, and their account was his; and it was argued that it was just as if he had kept an account with a bank in the name of a son or a friend, and there had been an application to inspect that on evidence shewing that the person in whose name the account was kept was practically identical with the party to the action. I do not think it necessary for the purposes of this case to give any decided opinion on that point; but I do not at present see any reason for differing from the opinion expressed in *Howard v. Beall* (1), to the effect that, if such a case could be made out, the Court could order inspection. It has been said, however, in the cases on the subject, that the Court ought to act with great caution when asked to order inspection of the account of a party to the action under this Act; and it is obvious, if that be so, that they ought to act with still greater caution when the account of which inspection is sought is that of some person who is not a party to the action. I should say that the Court would never dream of ordering such inspection without having that person before them. No difficulty, however, arises on that score in the present case, because the company has been brought before us and has been heard. I think that strong grounds have been shewn for suspecting that for some time, at any rate, the defendant being the owner substantially of all the shares in the company, he practically was the company. But the evidence is conflicting on the question when his ownership of these shares ceased. According to the affidavits on one side, it would appear that he ceased to own the shares in 1889; whereas, according to the affidavits on the other side, he continued to be the real owner of them till 1893. On this state of affairs it seems to me very doubtful whether the inspection asked for could be given. But I do not think we are driven to decide that point, because I agree with the Master of the Rolls

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that, before we grant inspection of the account of the company, the plaintiffs ought to be able to shew, not only that the company can be identified with the defendant, but also that there are entries which will probably be in the account—on which a finger can almost be laid—material to the questions at issue in the action, and which will be evidence against the defendant at the trial. I do not think they have succeeded in shewing that, and I am not satisfied that there are such entries. I think, therefore, that we should be acting rashly in granting the inspection asked for at this stage of the litigation. I do not say anything with regard to what may take place at the trial. By what we are now doing we do not intend to interfere with the power of the judge at the trial to make any order he may think fit with regard to the production of these books or a certified copy of entries in them. All we say now is that we think the learned judge at chambers was justified in the exercise of his discretion in refusing inspection of these accounts before the trial. For these reasons I think the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Munns & Longden.*

Solicitors for defendant: *Walter Webb & Co.*

Solicitors for Dickinson Tramway Appliance Company :  
*Walker, Son & Field.*

E. L.