

moreover admitted that the applicant was in actual attendance at the Court on the day of hearing under a subpoena issued in this case. He says, however, that he went away having been informed that his presence was not required. I must hold that his non-appearance at the hearing was voluntary, and that in no sense was he prevented from appearing. The result is that the rule must be discharged with costs.

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Mr. *Apear* applies on behalf of the plaintiff for his costs of the application.

SALE, J.—You may add your costs to your claim.

Rule discharged.

Attorney for the applicant, the defendant Tin Cowrie Ghose :
Mr. *N. C. Bose.*

Attorney for the plaintiff: Mr. *Rutter.*

Attorney for the defendant Pran Gobind Shaha: Babu *Norendro Nath Sen.*

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Before Mr. Justice Sale.

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COMPANY, LIMITED.*

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Inspection of documents—Affidavit of documents, Sufficiency of—Practice—Right to put in further affidavit in support of claim of privilege where original affidavit is not sufficient—Documents referred to in pleadings, as stating facts on which party setting them up relies.

Where an affidavit of documents stated, with regard to certain documents of which the plaintiffs asked for inspection, that the defendants objected to produce them for inspection "because such documents were obtained after dispute arose, and for purposes of litigation that might arise between them and the plaintiffs," *Held*, in an application for their production and inspection, that the affidavit was not sufficient to support the defendant's claim to privilege.

Held also, in such an application the party claiming privilege is entitled to put in and use a further affidavit in support of the claim of privilege, and is not confined to the grounds made in the affidavit in which the claim is first set up. *M'Corquodale v. Bell* (1) referred to. Where, however, the party comes into Court relying on the original affidavit as

* Original Civil Suit No. 48 of 1894.

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sufficient to support his claim of privilege, but asks the Court, if it should think otherwise, for leave to put in a further affidavit in support of his claims, *quere*, whether he should be allowed to do so.

In a suit brought in January 1881 to recover money for work done and materials supplied in the erection of certain mills for the defendants, in which the defence was that the quality of the work was inferior to that contracted for, and the defendants stated in their written statement that, "in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs, they caused the same to be inspected by two independent engineers, in the month of July 1893, and they at once discovered such extensive defects therein that the costs of making good such defects will far exceed any possible sum due to the plaintiffs:" *Held* that the defendants could not set up a claim of privilege for the reports of the two engineers. *Anderson v. Bank of British Columbia* (1) referred to.

Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit, and then sets up those facts by way of answer to the plaintiffs' claim, he cannot afterwards attempt to make the case that the documents are confidential and intended merely for his legal advisers, or for the purpose only of evidence in the case.

THIS was an application by the plaintiffs for inspection by them of certain documents in the possession of the defendant company.

The suit was instituted on 19th of January 1894 for the recovery of Rs. 61,467 for work done and materials supplied by the plaintiffs for the defendant company under a contract between them in connection with the erection of the defendant company's mills at Mahesh near Serampore, for Rs. 24,456, being the value of certain plant, materials, implements, &c., belonging to the plaintiffs, but detained by the defendant company, and for Rs. 20,000 for damages for breach of contract by the defendant company. The written statement of the defendant company, filed on 17th April 1894, alleged that there was delay on the part of the plaintiffs in carrying out the work, and that the materials supplied and work done was inferior to the quality contracted for, and that on 21st of July 1893 they took the said work out of the hands of the plaintiffs, and on 13th September gave notice to the plaintiffs that they would measure the work done by them, and as the result of the measurements thereafter made they contended that the amount of Rs. 29,764, which admittedly would have been payable

(1) L. R., 2 Ch. D., 644.

to the plaintiffs, was not payable by reason of the inferiority of the work done and materials supplied. In the 13th paragraph of their written statement the defendant company stated that "in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs they caused the same to be inspected by two independent engineers in the month of July 1893, and they at once discovered such extensive defects therein that the costs of making good such defects will, as they are informed and believe, far exceed any possible sum due to the plaintiffs. Among other things they discovered that the concrete, which was an essential part of the foundation, the mill being built on a sandy chur soil, had been omitted, and in place thereof rammed brick of inferior quality had been substituted without a trace of lime in it; in some cases a top dressing of mortar having only been given—a defect which would necessitate the underpinning of the walls throughout; that the earth of the floors had been so badly rammed that the stone flooring had subsided everywhere, and the whole of the floors would have to be taken up and reset; that the wood work of the loom-shed would have to be taken down and fresh trusses substituted; that the iron beams were of inferior foreign quality, and it was doubtful if they would stand the strain provided for those in the plans; and various other defects necessitating in some cases a very large expenditure to put matters right and in other cases involving considerable extra and useless expense to the defendant company were also discovered."

On the 20th February 1894 the plaintiffs obtained the usual order for the defendant company to file an affidavit of documents relating to the suit, and on the 13th April an affidavit was filed by Vasantrao Morojee Kirtikar, the Secretary of the defendant company, in which he stated "that the defendant company have in their possession or power the documents relating to the matters in question in this suit set forth in the first, second, and third parts of the schedule hereto annexed and marked A; that the defendant company object to produce for inspection the documents set forth in the second part of the said schedule, because the same are cause papers prepared by their attorneys and containing instructions given by them to enable their attorneys to act for

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them in this suit, and that the defendant company also object to produce for inspection the documents set forth in the third part of the said schedule, because such documents were obtained after dispute arose and for the purposes of litigation that might arise between them and the plaintiffs."

The schedule annexed to this affidavit, so far as the documents which the defendant company object to produce are concerned, was as follows: "Part II. The cause papers in this suit. Part III. Report made by W. Arundell, Esq., dated 15th July 1893. Report made by J. Hammet, Esq., dated 27th July 1893."

It was of these two reports that the plaintiffs desired and claimed inspection which was refused by the defendant company.

In the affidavit of Hurish Chunder Day, one of the plaintiffs, filed in support of the application for inspection, it was stated that though the summons was served on, and appearance entered on behalf of the defendant company on the 24th and 26th January 1894, respectively, the written statement of the defendant company was not filed until 17th April 1894; that the two reports mentioned in Part III of the Schedule to the affidavit of documents filed on behalf of the defendant company, inspection of which the defendant company claimed to withhold, were the reports of the two engineers mentioned in paragraph 13 of the defendant company's written statement; that the suggestion in the defendant company's affidavit that the said reports were obtained for the express purpose of this litigation was misleading, and that in fact the said reports were obtained merely for the purpose of enabling the defendants to ascertain the nature of the work done by the plaintiffs in the terms of the contract and they could only have been so obtained indirectly for the purpose of litigation; and in support of this allegation a letter from the secretary of the defendant company to the plaintiffs, dated 1st July 1893, was set out in which they said: "In acknowledging receipt of your letters 501, 502 and 503 of the current month I have to repeat that I entertain great doubts about your work generally. I consider it to be only second class instead of first class work contracted for, and with a view to remove this doubt I have requested Mr. W. Arundell, M. S. A., the Consulting Architect of 8, Russell Street, Calcutta, to survey the company's buildings at

Serampore and report on same. As soon as this survey is over and the report submitted I shall be in a position to judge whether or not your work, so far done for the company, is in accordance with your agreements with this company."

The plaintiffs submitted that these documents were not privileged.

Mr. *O'Kinealy* appeared for the plaintiffs in support of the application.

Mr. *Graham* for the defendant company.

SALE, J.—In this case the plaintiffs obtained the usual order on summons in Chambers calling on the defendant company to show cause, why they should not produce for inspection of the plaintiffs the documents set forth in Part III of the schedule of the affidavit of documents of the defendant company, and why the documents should not be deposited with the Registrar of this Court, with liberty to the plaintiffs and their attorneys to inspect the same and to take copies thereof, and why the costs of the application should not be paid by the defendant company.

In the affidavit of documents of the defendant company the documents, of which production and inspection are sought, are thus referred to: "The defendant company also object to produce for inspection the documents set forth in the third part of the said schedule, because such documents were obtained after dispute arose and for the purposes of litigation that might arise between them and the plaintiffs." Turning to Part III of the schedule the documents are described as the "Report made by W. Arundell, Esq., dated the 15th July 1893, and the report made by J. Hammet, Esq., dated the 27th July 1893."

The suit itself was instituted on 19th January 1894 by the plaintiffs to recover a large sum of money for work done and materials supplied for the defendant company in the erection of certain mills for the defendant company at Mahesh near Serampore. On the hearing of the application the case of the defendant company was put in two ways—1st, it was said that the affidavit of documents sufficiently raised the claim of privilege, and that under that claim the documents were protected, and next the defendant company sought, if the view taken by the Court

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be against them, to put in a further affidavit of documents for the purpose of supporting their claim to privilege.

On the part of the plaintiffs it is contended in the first place that the claim of privilege as set up in the affidavit of documents is insufficient, and further that the defendant company are confined to the grounds set up in that affidavit, and that they were not at liberty to put in any further affidavit setting forth further grounds in answer to the plaintiff's application.

There can be no question that the affidavit as it stands does not protect these documents from production and inspection as sought by the plaintiffs. The terms used are vague, and it is not stated that the reports were confidential in the sense that they were prepared at the instance of the legal advisers of the defendant company, or for the purpose of being submitted to them for their advice, and no authority was cited to show that the claim of privilege was ever so extended as to cover grounds such as those alleged in this affidavit. But I think the rule is that in an application of this kind for production and inspection of documents the party is entitled to put in and use a further affidavit in support of the claim of privilege, and that he is not confined to the grounds made in the affidavit in which the claim is first set up. The case of *M'Corquodale v. Bell* (1) is a sufficient authority for this proposition. That case goes further than is required for the point now raised, inasmuch as it shows that a party can set up grounds not taken in his first affidavit of documents for the purpose of supporting his claim of privilege.

The case, however, is different when the party comes in relying on the original affidavit as sufficient to support the claim of privilege, but asks the Court, if it should think otherwise, for leave to put in a further affidavit in support of his claim. It is at the least doubtful whether a party should be allowed to take up a position which would give him an undue advantage. It is obvious that in putting his case in that alternative form he has the opportunity of hearing the objection taken to his original grounds and of mending his own case accordingly. But however that may be, I think, beyond doubt that I ought not to give the leave
 8, Russ.

sought by the defendant company in this case, because, in my opinion, having regard to the statements contained in paragraph 13 of the written statement, it is no longer open to the company to claim privilege for these documents.

Paragraph 13, it is admitted, refers to these documents in these terms: "The defendant company, in consequence of the information which they had received with regard to the quality of the work done by the plaintiffs, caused the same to be inspected by two independent engineers in the month of July 1893, and they at once discovered such extensive defects therein that the costs of making good such defects will, as they are informed and believe, for exceed any possible sum due to the plaintiffs."

The written statement then proceeds to set forth the various facts obtained from the reports of the two engineers as facts upon which the company rely as an answer to the plaintiffs' claim. Now, it seems to me that when a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit, and then sets up those facts by way of answer to the plaintiffs' claim, it is too late for him to turn round and attempt to make the case that the documents are confidential and intended merely for their legal advisers or for the purpose only of evidence in the case.

The reports are in fact statements of relevant facts made by the agents of the defendant company admittedly for the information of the defendant company, and are the best evidence of the knowledge of the defendant company of those facts. I therefore think that the documents themselves are not privileged, and moreover that they clearly fall within that class of documents which are governed by the ruling in *Anderson v. Bank of British Columbia* (1).

An order will be made in terms of the summons, with costs as against the defendant company. I will certify for Counsel.

Application granted.

Attorneys for the plaintiffs: Messrs. *Morgan & Co.*

Attorneys for the defendant company: Messrs. *Sen & Co.*

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