THE NORTH BRITISH BANK, . . APPELLANTS.
EDWARD COLLINS, . . . RESPONDENT (*a*).

1852.
2nd and 3rd December.

An interlocutor directing a reference to an accountant may be appealed against under the 48 Geo. III. c. 151, § 15, although leave to appeal was not granted by the Court below, and although the interlocutor was pronounced without any difference of opinion.

Case assimilated to that of a reference as to title, upon a bill for specific performance in the Court of Chancery.

Although upon a *prima facie* case of impending ruin in the concerns of a joint-stock company the circumstances might be adequately dealt with by a general resolution of the shareholders, yet the Court will direct an inquiry at the instigation of a single shareholder, if it appear that it is impossible or very difficult to get the bulk of the shareholders to come forward.

But to induce the Court to interfere in such a case the circumstances must be strong.

The House approved of sending the accountant to inspect the books of the concern on the spot, so as not to interrupt its business. And he was to consider himself as an officer of the Court bound to all possible secrecy and discretion.

THE North British Bank was established at Glasgow as a Joint-Stock Company in the year 1845. By a clause in the deed of copartnery, it was provided that if it should "at any time be found, on balancing the Company's books," that loss of a certain declared amount had arisen, "such loss should, *ipso facto*, and without the necessity of any further procedure, dissolve and put an end to the Company."

By the summons, Mr. Collins, a shareholder, charged the Directors with gross and fraudulent mismanagement, and alleged that their administration had been disastrous and attended with loss, coming fully up to and exceeding the standard specified by the deed. He, therefore, prayed a declaration that the Company had ceased to exist as on a given day; or, in the alternative, he prayed that the Court would forthwith pronounce a sentence of dissolution.

The Directors, by their defence, insisted that the action was excluded. They maintained that the circumstances ought more properly to be dealt with by the shareholders at large in the exercise of their administrative functions. They urged that the loss which would ensue from suddenly stopping the bank would be serious. They denied the allegations of the summons. They disputed the jurisdiction of the Court; and they relied on a clause which declared that all differences should be referred to arbitration.

(*a*) Reported Second Series, vol. xiii. p. 349.

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The Court below was of opinion, that, before proceeding further, it would be desirable to ascertain whether the casualty contemplated by the deed, namely, such a measure of loss as would work a dissolution of the Company, had actually occurred. In order to determine this point, a reference was made to an accountant *ante omnia* to examine the books of the bank, the proceedings of the Directors, and the relative vouchers and documents; and to report whether at, or prior to, the 31st December, 1848, losses had been sustained by the Company of the amount specified in the deed; and what was the excess. To impeach this order was the sole object of the present appeal.

Mr. *Bethell* and Mr. *Anderson*, for the Appellants. The *Lord Advocate* (*Inglis*) and Mr. *Rolt*, for the Respondent.

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

The Appellants are forced, in order to give themselves a standing in this House, to admit that the interlocutor they complain of is on the merits of the cause. It contains a direction to an accountant to take certain accounts, with a view of ascertaining whether there was or was not a given loss which would confer a right *ipso facto* to dissolve this partnership. It is not indeed prefaced by any formal declaration upon the question of relevancy or competency. But, my Lords, the very direction to take the account is of itself impliedly a judgment upon the merits. The same question has arisen in the Court of Chancery a thousand times over. Thus a man files a bill for a specific performance. The Court directs a reference to the Master to inquire whether a good title can be made, without declaring that the Plaintiff is entitled to a decree for specific performance. But the very reference

(*a*) Lord St. Leonards.

Lord Chancellor's opinion.

implies this. Therefore the merits are clearly involved, and it is so in the present case. This interlocutor accordingly is an appealable interlocutor under the statute (*a*), although leave to appeal was not granted, and although the interlocutor was pronounced without difference of opinion.

My Lords, the provision of the deed is, that if at any time there shall be a given amount of loss upon the trading capital of the Company, there shall thereupon be an end *ipso facto* of the partnership. Now the Respondent avers that not only has there been reckless trading on the part of these Directors, and not only have they diverted the assets from the proper purposes of the bank, (acting, in fact, as general merchants, and as speculators, in every other description of business,) but he alleges that by this reckless trading, and by these improper speculations, a loss has accrued which renders it impossible for the business of the bank to be carried on. If the business has so been mismanaged; if, instead of carrying on the banking concern, they have been carrying on every other concern but banking; if they have ceased, as they admit, to be a bank of issue; a sufficient ground is established to support the Respondent's case, and consequently there is quite allegation enough to maintain an action of this sort in Scotland, supposing that the party is not estopped by the particular deed of partnership from resorting to a Court of Justice.

It is said, if this loss has arisen from the misconduct of the Directors, they are personally responsible for it, and it is not a loss which can by any means enable a Court of Justice to put an end to the partnership. This is a very singular argument. Why should not relief be given to stop impending ruin?

It is only necessary to look at the constitution of

(*a*) 48 Geo. III. c. 151, s. 15.

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this Company in order to see that it would be impossible, or very difficult, to procure a unity of proceedings among the shareholders; many of whom are under liabilities to the bank, and consequently incapable of independent action. To get such persons to come forward against the directory, would therefore be impracticable; and ruin must ensue if this action were excluded.

But, then, it was said, suppose a loss from which the bank recovers. In such a case, are you to have a dissolution of the Company? The answer is obvious. If the loss did not affect the prosperity of the Company, there need be no inquiry. But it is equally clear, on the other hand, that if, upon a just balance, loss of the specified amount appeared, any single individual shareholder of this Company could set that up, and it would not be necessary for all to combine.

What, therefore, my Lords, is there to prevent this account from being taken? The Appellants contend that there is no relevancy to warrant it; but they do not come forward to say—"We have plenty of assets to carry on the bank." They desire your Lordships to stop this proceeding, but they suggest no other. Their short object is simply to get rid of the investigation. At the same time, I am anxious to guard myself, and to guard your Lordships, against its being supposed that the decision of this House would in any manner allow a partner to attempt, contrary to the terms of the deed and without just cause, to break up the concern.

It was argued that this interlocutor ought to be altered, because of the inconvenient disclosures which would result from it; inasmuch as certain shareholders might obtain access to the books. Secrecy is, no doubt, by the deed of co-partnership enjoined, and

secrecy in point of honour ought to be maintained. The accounts should be taken in such a manner as not to interfere unnecessarily with the business of the concern; and, therefore, I observed with satisfaction the statement of the *Lord Advocate*, that the accountant was not to take away the accounts, but that he was to go to the bank, and there inspect the books; and he will, of course, as an officer of the Court, examine them with all possible discretion.

Lord Chancellor's opinion.

On the whole, I move your Lordships, that this interlocutor be affirmed.

GRAHAM, WEEMS, & GRAHAM—LAW, HOLMES, ANTON, & TURNBULL.