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unfair a change, as bodily transferring all accrued rights to damages, limited only by the *Statutes of Limitation* and existing independently of the continuance of the obligation under which they arose, and of the land upon which they were originally secured.

I am therefore of opinion there is no answer to the appellant's contention upon the first count.

For the rest I quite agree with what has been said by the learned Chief Justice.

*Appeal allowed.*

Solicitor, for appellant, *F. H. King.*

Solicitor, for respondent, *Marshall & Marks.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . PLAINTIFF;

AND

THE ASSOCIATED NORTHERN COLLIERIES AND OTHERS . . DEFENDANTS.

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SYDNEY, *Oct.* 19, 20, *Nov.* 7.

Isaacs J.

*Practice—Particulars—Object of granting—Order against Crown—Discovery—Civil action for penalties—Action by Crown—Discovery of documents by defendant.*

In any civil action to which the Crown is a party it is bound to the same extent as any other litigant to give particulars.

The object of granting particulars is that the opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, and to guard against "surprise." But a party is not entitled to be told the mode by which the case is to be proved against him.

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In a civil action for penalties, in the absence of statutory provision to the contrary, the plaintiff is not entitled to an order for discovery of documents against the defendant. This rule applies equally both to actions by the Crown and actions by a common informer.

SUMMONS in Chambers by the defendants for further particulars, and by the plaintiff for discovery of documents. The action was brought by the Crown to recover penalties from the defendants under secs. 4 and 6 of the *Australian Industries Preservation Act* 1906, No. 9, and for an injunction under sec. 10 of that Act, the allegation being that the defendants, who were colliery owners in the Newcastle district of New South Wales, and shipping companies trading in the Commonwealth, were members of a combination in relation to trade or commerce with intent to restrain trade or commerce to the detriment of the public. The action was commenced prior to the passing of the *Australian Industries Preservation Act* 1910. The facts and the arguments are sufficiently referred to in the judgment.

*Wise* K.C. and *Bavin*, for the King and the Attorney-General of the Commonwealth.

*Knox* K.C. and *Harry Stephen*, for the Associated Northern Colleries.

*Campbell* K.C. and *Ferguson*, for J. & A. & John Brown.

*Mitchell* K.C. and *Broomfield*, for certain shipping companies.

*Cur. adv. vult.*

November 7.

ISAACS J. read the following judgment :—Some of the matters to be dealt with in the summons for directions raise no difficulty. The most convenient place of trial is Sydney. The mode of trial is settled by Statute, namely, before a Justice without a jury : sec. 13 (1) of the *Australian Industries Preservation Act* 1906, as amended. Defendants' application for further particulars and plaintiff's application for discovery of documents have caused considerable controversy, arising principally from the somewhat

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unusual position in which this class of action stands. Sec. 13 (1) prescribes that proceedings for the recovery of pecuniary penalties for the offences alleged are to be instituted by way of civil action.

Mr. *Wise*, for the plaintiff, while asserting the freedom of the Crown from any liability to give particulars, stated that there was no desire to stand on strict legal rights, and that the Crown was prepared to give the defendants every possible information necessary to meet the case consistently with the welfare of the public. That was a correct position even if the Crown were under no obligation to give particulars. But I have no doubt that in any civil action to which the Crown is party it is bound to the same extent as any other litigant to give particulars of the case it presents, and requires its opponent to answer. It has been recently held by this Court in *The Commonwealth* v. *Miller* (1), that the Crown is in general liable to give discovery as if it were a subject litigant. And if discovery, which assists proof, then, *a fortiori*, particulars that are found to be essential to a proper understanding of the charge.

The three most important rules of practice upon this question are rules 1 and 23 of Order XIV., and rule 1 of Order XV. I have to consider principally how far the Crown has set out all material facts on which it relies to support its claim, but not the evidence by which they are to be proved, and how far I ought to order as particulars a further and better statement of the nature of the claim.

The statement of claim and the particulars already given go a considerable way in complying with the requirements of the rules in relation to such a case as the present, but not I think sufficiently. How far the further particulars should go has been to me no easy matter for determination.

I take the fundamental principle to be that the opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, shall be placed in possession of its broad outlines and the constitutive facts which are said to raise his legal liability. He is to receive sufficient information to ensure a fair trial and to guard against what the law terms "surprise,"

(1) 10 C.L.R., 742.

but he is not entitled to be told the mode by which the case is to be proved against him. See *Duke* v. *Wisden* (1); *Temperton* v. *Russell* (2); *Hennessy* v. *Wright* (3); *Benbow* v. *Low* (4). It has been urged that sec. 15 (*a*) of the *Australian Industries Preservation Act* 1906 as amended, by throwing the burden of proof on the defendants, entitled them to a strict pleading on the part of the plaintiff. In my opinion that section makes it more important than it would otherwise be to see that the statement of claim does give the necessary information, because, in ordinary circumstances, the obligation of the plaintiff to prove his case in the first instance affords considerable practical protection against surprise. That safeguard in a case like the present may be absent, whether it will or not cannot be foreseen, and therefore where I am in any doubt as to the sufficiency of the particulars I resolve it in favour of the defendants, so as to ensure their being in a position to fully understand and prepare for the case alleged against them. As *Buckley* L.J. said in *G. W. Young & Co. Ltd.* v. *Scottish Union and National Insurance Co.* (5), "the principle underlying particulars was that they were given in order to make the plaintiff's case plain"; and so the further particulars I propose to direct are for the purpose of making the plaintiffs' case plain. [His Honor then referred to the facts and the pleadings which it is not necessary to state for the purpose of this report, and continued.]

I come now to a question of considerable moment, but not, I think, when carefully examined, attended with any real doubt. The Crown applied for a direction that the defendants should make discovery of documents. It must be distinctly understood that this application stands apart from any connection with the particulars. I mean that it was not put on the ground that the particulars asked for could not be supplied except after the defendants made discovery. The contention was put broadly and plainly that this being a civil action the Crown is entitled to get discovery of documents as a substantive right, and the defendants, if they desire to protect any particular documents from produc-

(1) 77 L.T., 67.
(2) 9 T.L.R., 318.
(3) 57 L.J.Q.B., 594.
(4) 16 Ch. D., 93.
(5) 24 T.L.R., 73, at p. 74.

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tion, have to take the objection in the ordinary way, swearing to the tendency to criminate or penalize, as to which the Court would judge. The question is so important to these proceedings, and, as a precedent, that I consider it desirable to state my reasons explicitly.

The case chiefly relied on was *National Association of Operative Plasterers* v. *Smithies* (1). But in that case the plaintiffs sued in respect of past and prospective injury to a civil right and not for a penalty. The test whether an order for discovery can be made is whether the Court can see that the discovery may expose the party to a penalty or not. Very often that depends upon whether the action itself is a penal proceeding. It does not rest upon the fact that it is a civil action. An action is none the less civil merely because it is penal. "Penal actions," says Lord *Mansfield* in *Atcheson* v. *Everitt* (2), "were never yet put under the head of criminal law, or crimes." That was an action of debt by way of penalty for bribery, and Lord *Mansfield* said further: "It is as much a civil action, as an action for money had and received." So *per* Lord *Esher* M.R., in *Mexborough* (*Earl of*) v. *Whitwood Urban District Council* (3). But while this proceeding is made a civil action by sec. 13 (1) of the Act, it is nevertheless by the very terms of the same provision described as a proceeding for the recovery of pecuniary penalties, and so the matter turns on this:—"Is the plaintiff in a civil action for penalties entitled to an order for discovery of documents?"

There is an inherent distinction between a civil action to prevent or redress a civil injury on the one hand, and a civil action to recover a penalty on the other. In the latter case the whole and avowed object of the proceedings is the infliction of the penalty, and the discovery sought of documents relevant to the claim can therefore have no other intended consequence. It does not require in such a case the oath of the defendant to establish the fact that the production of the documents would tend to penalize him. The Court can see the effect of discovery from the nature of the proceeding. In the former case there is no such necessary consequence, and whether the objectionable tendency

(1) (1906) A.C., 434.
(2) 1 Cowp., 382, at p. 391.
(3) (1897) 2 Q.B., 111, at p. 115.

exists or not has to be otherwise ascertained, and claiming immunity upon oath in the course of making discovery is the most usual, but not the only other means of establishing it. Lord *Herschell*, in the *Derby Corporation* v. *Derbyshire County Council* (1), said:—"Of course it is admitted that where a proceeding is one to enforce a penalty, or where a proceeding is one—not that *must* end in a penalty, because the decision may be in favour of the person against whom it is taken, but where the proceeding is of such a nature that it *may* result in a penalty—it is a penal proceeding." The House of Lords in that case allowed discovery on the ground that the proceeding never could end in a penalty. At p. 553 there is an important declaration of the law showing that the ground on which discovery may be wholly resisted is that it must be made to appear that the discovery would tend to expose to a penalty. The other judgments were substantially to the same effect.

Mr. *Wise* relied very strongly on some expressions in *Mexborough* v. *Whitwood Urban District Council* (2) in support of a distinction he drew as to the right to discovery between actions for penalties at the suit of the Crown as representing the whole community, and those at the suit of a common informer. He said the former was a suit which the Court would not regard with disfavour, but would aid because it was purely in the public interest: whereas in the latter case the common informer pursued merely his own advantage, and this the Court according to its established practice would not assist. This, he contended, lay at the basis of the question, and so the special reference to common informer was made advisedly. I do not read the judgments in that case when taken as a whole as pointing any such distinction, but as differentiating between civil actions for penalties and ordinary civil actions not for penalties. The suggested distinction would have been irrelevant and could not have been made the foundation of the decision, which had reference to an action for forfeiture between lessor and lessee. And besides being irrelevant it would have been inconsistent with admitted rules and quite opposed to a vast current of authority and precedent, which, having regard to the earnestness and vigour of the argument and its extensive

(1) (1897) A.C., 550, at p. 552. (2) (1897) 2 Q.B., 111.

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operation if correct, I propose to indicate. It would have been inconsistent with acknowledged rules, because it is admitted that, at least, protection may be given when it is afterwards claimed on oath. But when that stage arrives the Court does not ask who the prosecutor is likely to be, and then distinguish according as it is the Attorney-General or a common informer. And why should it adopt any different course merely because it acts at an earlier stage? Then as to the authorities and precedents. In 1736 Lord Chancellor *Hardwicke* in *Smith* v. *Read* (1) said:—"There is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or anything in the nature of a penalty," and the Lord Chancellor added, "Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself." A plea to a bill of discovery was on those grounds allowed. And so in the succeeding case of *Harrison* v. *Southcote* (2). *Hare on Discovery* (1836), p. 131, says:—"If the answer of the defendant might be evidence tending to subject him to punishment by any judicial or competent authority, or to any penalty or forfeiture, or disability in the nature of a penalty, the defendant will not be compelled to make the discovery." This is in accordance with what is cited in *Mitford on Pleading*, 5th ed., pp. 229-230, and *Daniell's Chancery Practice*, 6th ed., p. 1852.

In the same year, 1836, Lord *Langdale* M.R. decided *Glynn* v. *Houston* (3), allowing a demurrer to a bill for discovery in aid of an action for damages for assault and false imprisonment. The demurrer was allowed on the ground that the discovery was sought of matters, which, if established, would have subjected the defendant to penal consequences. The Master of the Rolls said:—"In what way he would be so subject, whether by indictment, information, impeachment, or, if necessary, by a bill of pains and penalties, is immaterial. It is sufficient that he would be subject to penal consequences." He quotes in support what *Sir Anthony Hart* said in another case that every statement of fact in every bill is either conducive to the general result, or it is unimportant

(1) 1 Atk., 526, at p 527. (2) 1 Atk., 528.
(3) 1 Ke., 329, at p. 337.

and irrelevant, and that where the sole gist and object of the suit is to convict a man in a penalty the Court will not give incidental discovery.

In 1843 *Wigram* V.C. decided *Attorney-General* v. *Lucas* (1). That was an information by the Attorney-General and, therefore, though at the relation of a subject, was clear of the objection that it was by a common informer, because there is no distinction between an information filed *ex officio* by the Attorney-General and a proceeding by him at the relation of a third party, except as to costs (see *Attorney-General* v. *Logan* (2)). The Vice-Chancellor said (3):—"There are certain questions which, whatever may be the merits of the case, the plaintiff has *no right to ask*," and he instances "such matters as may subject the defendant to pains and penalties," &c., adding "it is perfectly immaterial whether the objection be taken by *demurrer or answer*." His Honor on that ground allowed the objection to answer at all as to certain discovery sought, obviously treating forfeiture on the same footing as a penalty—just as Lord *Esher* M.R. did in *Mexborough's Case* (4). And as to demurrer in such a case see *per Lindley* L.J. in *Martin* v. *Treacher* (5).

In 1867 in *United States of America* v. *McRae* (6) Lord Chancellor *Chelmsford* (affirming in this respect *Wood* V.C.), allowed a plea to discovery where on the pleadings it appeared that the defendant making it would be exposed to penalties even abroad. This case in which the plaintiff was a sovereign State is also quite inconsistent with the doctrine of limitation to common informers. The Vice-Chancellor allowed the plea as to discovery, on the ground (7) that if the defendant answered he might be liable to convict himself; and the Lord Chancellor (8) refers to the well-known rule "that no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty or forfeiture." The case is an illustration of the rule that, at whatever stage it appears to the Court the discovery may expose the defendant to penalties, no order will be made. That suit was to enforce a civil right, and yet the plea being admitted

(1) 12 L.J. Ch., 506.
(2) (1891) 2 Q.B., 103.
(3) 12 L.J. Ch., 506, at p. 507.
(4) (1897) 2 Q.B., 111, at p. 117.
(5) 16 Q.B.D., 507, at p. 513.
(6) L.R. 3 Ch., 79.
(7) L.R. 4 Eq., 327, at p. 338.
(8) L.R. 3 Ch., 79, at p. 83.

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to be true was held sufficient material upon which the Court could and did ground its refusal to compel any discovery.

In 1899 the Court of Queen's Bench in *Jones* v. *Jones* (1) held the plaintiff not entitled to an affidavit of documents in an action for pound-breach and rescue of chattels distrained for non-payment of the rent charge, the claim being for treble damages under an Act which gave what it described as "a special action on the case for wrong thereby sustained" and allowing "treble damage," &c. Lord *Coleridge* C.J. said (2):—"The true principle in my opinion is that the liability of a defendant to file an affidavit of documents depends upon whether the action in which the application is made is or is not a penal action." He pointed out (p. 428) that the rule was one accepted by Courts of both Common Law and Equity; and it is a rule which *Chitty* L.J. in *Mexborough* v. *Whitwood Urban District Council* (3), following *Crompton* J. in an earlier case, thought was probably borrowed originally from the principles of the common law. (See also *Hare*, at p. 131). Consequently whether or not I am bound to apply to this question the practice of New South Wales, where the two systems of common law and equity are still separate, the result is the same.

That case was followed by the Court of Appeal in 1890 in *T. W. Hobbs & Co. Ltd.* v. *Hudson* (4), where the principle is distinctly stated. In 1892 the Court of Appeal, Lord *Esher* presiding, applied them in *Saunders* v. *Wiel* (5), not a common informer's action.

In 1893, in *Huntington* v. *Attrill* (6), the Privy Council adverts to the distinction between civil rights and criminal wrongs, and to the equivocal meaning of the words "penal" and "penalties," which may apply to proceedings by the State in the interest of the community or by private persons in their own interest, and that the penalty imposed by the Statute may fall within either class. Then Lord *Watson* refers to cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer

(1) 22 Q.B.D., 425.
(2) 22 Q.B.D., 425, at p. 427.
(3) (1897) 2 Q.B., 111, at p. 121.
(4) 25 Q.B.D., 232.
(5) (1892) 2 Q.B., 321.
(6) (1893) A.C., 150.

And then comes a passage which entirely destroys the ground work of the suggested distinction even if that were material (1):—"An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

Plainly then it is the result to the defendant, and not the *personnel* of the plaintiff, that affects the determination of the Court, and the statement of the law on the subject down to 1st March 1910 is thus summarized in Lord *Halsbury's Laws of England*, vol. XI., at p. 41:—"In civil proceedings where the action is brought merely to establish a forfeiture or enforce a penalty discovery will not be allowed, and if allowed may be resisted." Subsequently to that date in April of the present year the principle was again relied on by three and probably four Justices of the Court of Appeal. *In re a Debtor* (2) decided that the petitioning creditor in a bankruptcy petition cannot before the hearing of the petition obtain an order for interrogatories or discovery. *Fletcher Moulton* L.J. said:—"When the real issue is of a penal nature neither discovery nor interrogatories will be allowed." And he considered the loss of civil status was a penal consequence, to which the rule applied. *Farwell* L.J. and *Buckley* L.J. expressly, and *Kennedy* L.J. apparently, also agreed with him on this point.

In view of these clear and undeviating authorities I am bound to refuse the application to compel the defendants to give discovery. Two or three references are apposite to the suggestion that the defendants would in fact be sufficiently protected by the subsequent refusal to order production. There is the observation of Lord *Lindley* in *Martin* v. *Treacher* (3), and the similar statement of *Chitty* L.J. in *Mexborough's Case* (4), that in such a case the proper course is to stop the matter *in limine*; and the other reference is to that of Lord *Coleridge* C.J. in *Jones* v. *Jones* (5), that if the suggested course were taken the very mischief sought to be prevented would ensue. Said the learned Lord Chief Justice:—"The whole case for the plaintiff may depend upon his power to

(1) (1893) A.C., 150, at p. 158.
(2) (1910) 2 K.B., 59, at p. 66.
(3) 16 Q.B.D., 507, at p. 513.
(4) (1897) 2 Q.B., 111, at p. 121.
(5) 22 Q.B.D., 425, at p. 428.

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trace a particular document into the possession of the defendant, and, upon its non-production, to prove its contents by secondary evidence."

Nothing short of distinct legislative provision to the contrary can overcome a principle so deeply rooted and consistently enforced, and as there is no such relevant provision, I must take the law as I find it.

It was further requested by Mr. *Wise* that discovery should at least be ordered in aid of the claim for injunction, as apart for the claim for penalties. But the issues are not independent (see *per* Lord *Esher* M.R. in *Mexborough's Case* (1) and *per* Lord *Langdale* M.R. in *Lichfield (Earl of)* v. *Bond* (2)); they are indistinguishable and indivisible, and it would be impossible to make any discovery whatever without forfeiting the protection to which the defendants are entitled. I cannot therefore apply the principle of *Attorney-General* v. *Brown* (3). Indeed, the cases af *Glynn* v. *Houston* (4) and *Lichfield* v. *Bond* (5) are direct authorities against the plaintiff on this point.

The summons stands otherwise adjourned to a day to be fixed.

*Order accordingly.*

Solicitor, for plaintiff, *Charles Powers*, Crown Solicitor for the Commonwealth.

Solicitors, for defendants, *Minter, Simpson & Co.*; *Sparke & Millard*; *Malleson, Stewart, Stawell & Nankivell.*

(1) (1897) 2 Q.B., 111, at p. 117.
(2) 6 Beav., 88, at p. 49.
(3) 1 Swans., 265, at pp. 294, 305.
(4) 1 Ke., 329.
(5) 6 Beav., 88.

C. E. W.

END OF VOL. XI.