

[HIGH COURT OF AUSTRALIA.]

THE MARCONI'S WIRELESS TELEGRAPH
COMPANY LIMITED

}

PLAINTIFFS;

AND

THE COMMONWEALTH

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DEFENDANTS.

[No. 2.]

H. C. OF A. Practice—Inspection—Document or thing in possession of the Crown—State secret
1913.
—Claim of privilege—Opinion of Minister that inspection would be detrimental
to public welfare—Duty of Court to inquire into facts as to possibility of detri-
ment—Patents Act 1903-1909 (No. 21 of 1903—No. 17 of 1909), secs. 92, 96—
Judiciary Act 1903 (No. 6 of 1903), secs. 56, 64—Rules of the High Court 1911,
Part I., Order XLIII., r. 1.

MELBOURNE,
March 7, 10,
11, 20.

Griffith C.J.,
Barton and
Isaacs JJ.

Where a claim is made by the Crown that inspection of a thing should not be granted on the ground that, in the opinion of a Minister of the Crown, such inspection would be detrimental to the public welfare, it is not the Court's duty to concede the claim without any inquiry, but it ought first to ascertain what is the nature of the alleged State secret, and whether facts discoverable on inspection of the thing can, in any intelligible sense, prejudice the public welfare: By *Griffith C.J.* and *Barton J.*, *Isaacs J.* dissenting.

In an action against the Commonwealth for infringement of patent it was alleged that an apparatus used by the Commonwealth for wireless telegraphy was an infringement of the plaintiffs' patents. An application by the plaintiffs for inspection of the apparatus was opposed on the ground that the Post-master-General was of opinion that such inspection would be prejudicial to the public interest and welfare of the Commonwealth.

Held, by *Griffith C.J.* and *Barton J.*, *Isaacs J.* dissenting, that there was nothing to warrant even a conjecture that the inspection could disclose anything that could reasonably be called a secret in any sense of the word, and, therefore, a *prima facie* case of infringement being made out, that inspection should be allowed.

REFERENCE by *Higgins J.*

In an action brought in the High Court by the Marconi's Wireless Telegraph Co. Ltd. against the Commonwealth for infringement of patent, an application had been made by the plaintiffs before the defence was filed for inspection of certain wireless telegraphic apparatus used by the Commonwealth. That application was on appeal to the Full Court not granted, and the appeal is reported in the last preceding volume (1). In addition to the facts there stated, it appeared that subsequently the plaintiffs gave further particulars of the alleged infringement, and the defendants delivered their defence on 3rd December 1912. The plaintiffs also delivered interrogatories, which were answered. The plaintiffs then took out a fresh summons for inspection of the apparatus. On behalf of the defendants an affidavit was sworn by Justinian Oxenham, secretary to the Postmaster-General's Department, in which he stated (paragraph 3) that the Postmaster-General had directed him to inform the Court that the Minister was of opinion that it would be prejudicial to the public interest and welfare of the Commonwealth to allow any inspection of the defendants' wireless telegraphic stations or the plant and apparatus therein, and (paragraph 4) that the Postmaster-General had directed him to inform the Court that the opinion of the Postmaster-General was not based upon the pecuniary or commercial interests of the Postal Department of the Commonwealth, or upon any desire to defeat the plaintiffs' claim in the action, but solely upon the interests of the public welfare and the naval and military defence of the Commonwealth.

The summons coming on before *Higgins J.* was by him referred to the Full Court.

Irvine K.C. (with him *Mann*), for the plaintiffs. The gist of the plaintiffs' invention is a system whereby there are two circuits tuned together. There are different ways of tuning them together. The defendants say that in their apparatus they do not tune the circuits together. The plaintiffs contradict that. The adjustment of the apparatus is part of the plaintiffs' claim,

(1) 15 C.L.R., 685.

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and they are entitled to see how the defendants' apparatus is adjusted. See *Marconi v. British Radio Telegraph and Telephone Co. Ltd.* (1). The defendants have an apparatus which if used in one way is an infringement of the plaintiffs' patent, and the plaintiffs are entitled to an inspection to see whether it is used in that way. As to discovery, the Commonwealth is in the same position as a private person: *The Commonwealth v. Miller* (2). The privilege of the Crown as to inspection is a mere legal privilege. It does not rest upon prerogative or the claim of the Minister: *Beatson v. Skene* (3). If a document sought to be put in evidence is, from its nature as described, such that its exposure would be detrimental to the public welfare, the Court will hold it privileged. The Court may be able to say for itself that the particular document is one whose disclosure would be detrimental to the public welfare. As to others which may be of the class whose disclosure would be detrimental to the public welfare, and as to which the Court is doubtful whether they fall within the class, the Court will accept the assertion of the public officer in whose charge the document is. [Counsel referred to *Taylor on Evidence*, 10th ed., p. 641; *Hennessy v. Wright* (4); *Kain v. Farrer* (5); *Bovill v. Moore* (6); *Seton on Decrees*, 6th ed., p. 655; *Germ Milling Co. Ltd. v. Robinson* (7); *Russell v. Cowley* (8).]

[ISAACS J. referred to *Hughes v. Vargas* (9); *Davenport v. Jepson* (10); *Chitty's Forms*, 13th ed., p. 227.]

Starke (with him *Macfarlan*), for the defendants. The principle of the Crown's privilege from inspection extends to other things than documents: *Halsbury's Laws of England*, vol. XIII., p. 572. If the responsible Minister of the Crown says that the inspection of anything is against the public interest, the Court will accept his statement and allow the claim of privilege: *Williams v. Star Newspaper Co. Ltd.* (11); *Beatson v. Skene* (3).

(1) 28 R.P.C., 181, at pp. 205, 208.

(2) 10 C.L.R., 742.

(3) 29 L.J., Ex. 430; 5 H. & N., 838.

(4) 21 Q.B.D., 509.

(5) 37 L.T., 469.

(6) 2 Coop. temp. Cott., 56.

(7) 3 R.P.C., 11.

(8) 1 Web. Pat. Cas., 457.

(9) 9 R., 661; 9 T.L.R., 551.

(10) 1 N.R., 307.

(11) 24 T.L.R., 297; 72 J.P. (Jo.),

[GRIFFITH C.J. The Court always inquires what is the nature of the document for which protection is sought.]

That is only where the affidavit is made by a subordinate officer. The statement of a Minister is conclusive. The right given by the *Patents Act* against the Crown is subject to all the rules of privilege. The private right must go down before the public interest. Unless the claim of privilege is obviously frivolous or futile, no inquiry will be made into the question whether disclosure would be detrimental. If the specifications of Balsillie's patents give all the information which is necessary, there is no need for inspection. If they do not, then the Minister is the only person who can be in a position to say whether anything more should be disclosed. The Courts have never said that they will not place implicit trust in the statements of a Minister. There is more reason for privilege in respect of instruments and other physical things than in respect of documents.

[GRIFFITH C.J. I think the Court is entitled in each case to inquire what is the nature of the danger.]

The only person who can judge of that is the Minister. [Counsel also referred to *Taylor on Evidence*, 10th ed., pp. 673, 674; *In re Joseph Hargreaves Ltd.* (1).]

[ISAACS J. referred to *Robertson's Civil Proceedings by and against the Crown*, pp. 604, 605.]

The plaintiffs have not made out a *prima facie* case of infringement so as to justify an order for inspection. If the Court allows some inspection, it should be by independent inspectors: *Seton on Decrees*, 6th ed., p. 655.

Irvine K.C., in reply.

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. This is an action by the plaintiff company against the Commonwealth for an infringement of the plaintiffs' patents, granted in the States before federation, and now subject to the *Patents Act* 1903. The defendants, who, by the law of the Commonwealth, have a monopoly of telegraphic communi-

(1) (1900) 1 Ch., 347, at p. 350.

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cation, have erected and are using several wireless telegraph stations in the Commonwealth for commercial purposes as well as for communication with ships at sea. The plaintiffs allege that the apparatus used at these stations is an infringement of their patents, as being substantially identical with them, or at best a colourable variation. No point is made of defendants' monopoly. The application for inspection, which has been before the Court on three separate occasions, is resisted on two grounds, the first of which is that the Postmaster-General is of opinion that it would be prejudicial to the public interest and welfare of the Commonwealth to allow an inspection, "such opinion not being based upon the pecuniary or commercial interests of the Postal Department or upon any desire to defeat the plaintiffs' claim, but solely in the interests of the public welfare and the naval and military defence of the Commonwealth."

Sec. 92 of the *Patents Act* 1903 provides that a patent shall to all intents have the like effect against the King as it has against a subject. Sec. 56 of the *Judiciary Act* provides that any person making any claim against the Commonwealth, whether in contract or in tort, may bring a suit against the Commonwealth in the High Court, and sec. 64 provides that in any suit to which the Commonwealth is a party, the rights of the parties shall as nearly as possible be the same as in a suit between subject and subject. This Court has already held that the right to discovery is one of the rights thus conferred: *The Commonwealth v. Miller* (1).

Before dealing with this claim, which may be called a claim of privilege, it is necessary to consider the nature of the invention and of the facts as to which information is sought to be obtained by inspection.

The plaintiffs' English patent, which is substantially identical with those now sued upon, was the subject of discussion in the case of *Marconi v. British Radio Telegraph and Telephone Company Ltd.* (2), which was heard by *Parker J.* I take the description of the invention from the judgment of that very learned judge (3):—

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

(2) 28 R.P.C., 181.

(3) 28 R.P.C., 181, at p. 208.

"As I interpret the specification, the essential features of the invention thereby disclosed are as follows:—In order to get over the well known difficulty in applying the principle of resonance, as between transmitter and receiver, in a system of wireless telegraphy—a difficulty involved in the impossibility of a single circuit being at once a good radiator or absorber and a persistent oscillator—the inventor proposes to substitute for a single circuit, in both transmitter and receiver, a pair of circuits, one of which is so constructed as to radiate or absorb readily, and the other of which is so constructed as to oscillate persistently and be a good conserver of energy. The two circuits of the transmitter are tuned together, and linked by means of a transformer in such a way that electrical oscillations in the closed and persistently oscillating circuit build up, and (inasmuch as the primary can act as a reservoir of energy for the secondary) maintain, similar oscillations in the open and readily vibrating secondary. Similarly, the two circuits of the receiver, tuned to the same time period as the circuits of the transmitter, are linked through a transformer in such a way that electrical oscillations in the readily absorbing primary build up similar oscillations in a closed and conserving secondary, until such oscillations have strength to break down the coherer."

Since the action was begun, Mr. J. G. Balsillie, an officer in the Postmaster-General's Department, has applied for patents for a "Wireless Telegraphic Transmitter" and for "Improvements in Wireless Telegraphic Receivers," the complete specifications for which have been accepted and made public, and were put in evidence. Mr. Balsillie's rights have been transferred to the Government, and it is sworn that the apparatus used by them and of which inspection is sought are those described in the specifications, and no other.

On examination of the first specification, to which alone it is necessary to refer in detail, it appears that the two inventions have several points in common. The plaintiffs' invention, as described by *Parker J.*, comprises a "pair of circuits," which he calls the "primary" and "secondary," tuned together and linked in the manner described in the passage quoted. Balsillie's specification speaks of four circuits, one of them, which he calls the

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"primary," being the generator. This is common to both systems, and is antecedent to that called by *Parker J.* the "primary" circuit. The second of *Balsillie's* circuits, which corresponds to this "primary circuit," is called by him the "charging circuit." It, like the plaintiffs' primary circuit, is an oscillating circuit, and, like it, is connected with the open circuit which actually transmits the waves through the ether, and which is called by *Parker J.* the "secondary" circuit and by *Balsillie* the "radiator" circuit. But interposed between the charging circuit and the radiator circuit, *Balsillie's* specification describes what he calls an "exciting circuit," some of the elements of which are common both to it and to the charging circuit, and which contains, as does the plaintiffs' primary circuit, two electrodes separated by a short space, and through which the current passes—whether by way of spark or continuous discharge is controverted. This "exciting circuit" is directly connected with the radiator circuit, and some of its elements, as already said, also form part of the charging circuit. So far, the difference between the two apparatus would seem to be in the mode of linking the plaintiffs' "primary" (defendants' "charging") circuit and the plaintiffs' "secondary" (defendants' "radiator") circuit. The defendants allege that the action of *Balsillie's* exciting circuit is not oscillating but continuous. The plaintiffs deny the physical possibility of such a result in an apparatus so constructed. So far as regards "tuning," *Balsillie's* specification points out the necessity of obtaining a "balance" of "circuits," and that when it is desired to obtain more power with a given adjustment the constants of the charging circuit must be so altered or varied that a distinctive frequency therein is not obtained. It is evident that some adjustment in the nature of tuning is essential to the efficient use of the apparatus.

Similar observations are applicable to the specification of the receiving apparatus.

The object of both plaintiffs' and defendants' systems is the same, namely, to reinforce the action of the secondary or radiator circuit.

The plaintiffs say that, on inspection of the defendants' apparatus while working, it will be apparent both whether the current in the defendants' "exciting circuit" is continuous or

oscillating, and also whether the mode of linking their "charging circuit" to the radiator circuit by means of the exciting circuit is merely a colourable variation of the plaintiffs' mode of linking their primary and secondary circuits.

It may now, I suppose, be taken to be a matter of common knowledge that the system of wireless telegraphy depends upon such an adjustment of the apparatus of the transmitting and receiving stations respectively that what is called the time periods of both may be identical or in harmonic relation, so that the apparatus of the receiving station may respond to ether waves of the particular length sent from the transmitting station.

The plaintiffs' invention and that described in Balsillie's specification do not deal with this adjustment or synchronization between the two stations, but with an adjustment or syntonizing or "tuning" of different circuits within the single apparatus at the terminal stations. The question on the issue of infringement is whether Balsillie's apparatus is substantially the same as that described in the plaintiffs' patents, or a mere colourable variation of it.

With this statement of the facts sought to be discovered by inspection, I proceed to consider the objection of privilege set up by the defendants. They base their argument on the well known doctrine that the production of documents relating to affairs of State will not be compelled if it is claimed by the head of the department having custody of them that their production would be injurious to the public interest, and that he and not the Court is the judge of that fact. They contend that this doctrine is not confined to documents, but extends to the inspection of anything in the possession of the Government, and that the opinion of the head of the department is conclusive on the question of injury to the public interest.

It is conceded by the plaintiffs that the doctrine is not limited to documents, but may extend to other things such as fortresses, or ships of war, or parts of implements of war, such as the secret chamber of a torpedo. But they deny that it extends to every instrument which is, in fact, used by the Government for governmental purposes. They say that while the protection of State secrets from disclosure is for the public interest, it is not enough

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for a Minister or head of a department to say that a particular thing is a State secret, but that it is the duty of the Court to inquire whether the thing as to which the claim is made is such that facts discoverable on inspection of it can, in any intelligible sense, prejudice the public interest, that, if it comes within that class, a similar rule may well be applied, but that the Government official cannot by his mere *ipse dixit* add to the class of State secrets recognized by law.

The decision mainly relied upon by the defendants was *Beatson v. Skene* (1), an early and important case on the question of the production of secret State documents. In that case there was no question as to the general character of the documents of which production was asked.

In later cases—e.g., *The Bellerophon* (2), and *Hughes v. Vargas* (3)—the Court did not think it irrelevant to point out the reason for the doctrine, and they have never abdicated the duty of considering whether the documents, in respect of which the claim is made, come within the reason of the rule: See especially *per Lindley L.J.* in *In re Joseph Hargreaves Ltd.* (4).

In my opinion the claim of privilege put forward by the defendants cannot be supported to its full extent. The doctrine appealed to is not limited in its application to such matters as may be discovered by production or inspection, but extends to all information which might be obtained by the examination of witnesses. To allow such a claim would be entirely inconsistent with the law as declared in the well known case of *Farnell v. Bowman* (5), and would, in effect, be a denial of the rights conferred by sec. 92 of the *Patents Act* and sec. 64 of the *Judiciary Act*, already mentioned, in any case in which the Government thought fit to object to the plaintiff's proving his case.

In my opinion, therefore, the claim is examinable, and the Court cannot, without abdicating its duty, refuse to examine it. The Court is, consequently, bound to inquire into the facts so far as to ascertain what is the nature of the alleged State secret. If, for instance, inspection were asked of a typewriter used in a

(1) 5 H. & N., 838.

(2) 44 L.J., Adm., 5.

(3) 9 R., 661.

(4) (1900) 1 Ch., 347, at p. 352.

(5) 12 App. Cas., 643.

Government office, or of a locomotive used on Government works, it would be idle to suggest that the mode of construction or working of such an instrument could be a State secret.

At this point appeal was made to the assumed ignorance of the Bench, who, it was said, are not experts in wireless telegraphy. The imperfections of Judges, who are not exempt from human limitations, do not justify them in refusing to make use of such knowledge as they have, or to make any relevant inquiry into facts necessary for the exercise of their jurisdiction.

The question then arises as to the limits of the preliminary inquiry into the nature of the alleged State secret, for which purpose it is necessary to ask what are the facts sought to be ascertained.

In the present case the facts sought to be ascertained are: (1) whether in the actual operation of the apparatus of which a description has been made public, the electrical current in a part of the apparatus called the exciting circuit is in fact, as opposed to *à priori* theory, continuous or oscillating; and, (2) whether the mechanical parts of the one invention are substantially an equivalent of corresponding parts of the other. Mr. *Starke* was pressed to suggest some way in which the disclosure of such facts could be prejudicial to the public interest, or how they can be called a State secret. All that he could suggest was that the maximum capacity of the whole apparatus in actual use might be disclosed by looking at it, that is to say, that the range of the installation might be disclosed, and that the inspectors might discover the wave-lengths which the apparatus is capable of generating, and also those which are or would be used for naval or military purposes.

But it is now common knowledge that the capacity of such an installation, as distinct from its method of working, depends, *inter alia*, upon the quantity of power actually used, and that the wave-lengths generated and used in wireless telegraphy vary from a few hundred metres to many thousands. We are told that by the Berne Convention, mentioned in the affidavits, the use of waves of certain lengths is agreed to be reserved for State, as distinguished from commercial, purposes. The plaintiffs only ask to see the apparatus in use while generating the wave-

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lengths used for commercial purposes. It is plain that such a disclosure cannot afford any information as to the lengths actually used or intended to be used for naval or military purposes. In my opinion, there is nothing in either suggestion to warrant even a conjecture that the inspection could disclose anything that can reasonably be called a secret in any sense of the word. If there are upon the apparatus any marks or indications which would show what wave-lengths are used or intended to be used for naval or military purposes (which seems highly improbable), the inspection need not extend to them.

Moreover, what purports to be, and is by sec. 36 of the *Patents Act* required to be, "a full description of the invention and the manner in which it is to be performed" has already been published.

Even applying the analogy of State documents, it can hardly be contended that the privilege could be claimed for a copy of a document which has already been made public.

For these reasons I think that the claim of privilege has been made under a misapprehension and must be rejected.

The other ground of opposition is that a *prima facie* case of infringement is not made by the plaintiffs. On the two prior occasions on which the matter came before the Court this objection was not suggested. Without referring in detail to the evidence, or to the admissions made by counsel in argument, I am content to say that I think that a *prima facie* case has been made out.

I think, therefore, that an order for inspection should be made.

Some discussion took place as to the form of the order, and I suggested restrictions which would have the effect of preventing the disclosure of any special methods of manipulation which might increase the efficiency of the apparatus in working, but the suggestion was not accepted by the defendants.

In my opinion, an order should be made in the following form:—

This Court doth order that Ernest Thomas Fisk and one other fit person to be appointed by the plaintiffs, subject to the approval of a Justice in Chambers if the parties differ as to his fitness, be at liberty, at such times and as often as shall be reasonable and

requisite on giving three days' notice to the defendants, to enter into some one or more of the defendants' wireless telegraphic stations at Melbourne, Hobart, Sydney and Brisbane, where the process or mode of working described in the specifications mentioned in the affidavits of John Graeme Balsillie, sworn 14th October 1912, can be seen at work, and to inspect and examine there the whole of the apparatus used in such working except such marks or indications (if any) as may disclose the wavelengths used or intended to be used in the transmission of messages relating to naval or military matters (which marks or indications the defendants are to be at liberty to seal up or otherwise conceal from view): And that on such inspection the defendants do, by some duly qualified person or persons, put such apparatus to regular work by transmitting and receiving messages between two of such stations in the mode commonly used by the defendants for transmitting commercial messages in such reasonable manner as may be required by the said Ernest Thomas Fisk: And subject as aforesaid that the plaintiffs or their representatives be at liberty on such inspection to make all such drawings or plans of such apparatus, and to take all such photographs thereof, both while working and while not working, and to conduct all such experiments, as they may reasonably require: And that simultaneously with the transmission of messages from one of such stations for the purposes of such inspection, two other fit persons, to be appointed by the plaintiffs, subject to the like approval, be at liberty to enter the station to which such messages shall be transmitted, and to make the like examination, drawings, plans and experiments, and take the like photographs. And it is further ordered that if any question shall arise between the parties as to the reasonableness of anything proposed to be done by the plaintiffs or their representatives under this order, the matter shall be referred to a Justice in Chambers for decision. And the parties are to be at liberty to apply to a Justice in Chambers as they may be advised. And this Court doth further order that the costs of the application for inspection, including those of the reference to the Full Court, be the plaintiffs' costs in the action.

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BARTON J. On the question whether the plaintiff company has made out that which would be a *prima facie* case of infringement if the litigation were between subject and subject, I have nothing to add. I think a *prima facie* case has been made. It is true that the defence gives evidence in rebuttal of it, but denial is not a sufficient ground for refusing the order, which does not depend on the balance of testimony. Indeed, the only way of ascertaining the fact is by an inspection: See *Bennitt v. Whitehouse* (1). The result of an inspection would be to determine whether that which is *prima facie* an infringement is one in fact. It is plain that an inspection is essential for the purpose of enabling the plaintiff company to prove its case, in the sense of the distinction between *prima facie* evidence and proof which might overcome a rebuttal of such evidence. Having regard to secs. 56 and 64 of the *Judiciary Act*, it is clear that the rights of these parties are the same, as nearly as possible, as in a suit between subject and subject, and they include the right of the plaintiff company to discovery: *The Commonwealth v. Miller* (2).

But objection is taken on the ground that the Crown is not compellable either to produce a document or any other thing, or to allow an inspection of any property or appliance which belongs to it, where a Minister or other public official assures the Court that the production or inspection is against the public interest.

That the reason of the rule is not confined to documents is, in my opinion, clear, though the cases decided have nearly all been those of documents.

The doctrine is fully stated and well illustrated in *Taylor on Evidence*, 10th ed., secs. 939 to 947 inclusive, pp. 667-674. After dealing in previous sections with the protection from disclosure of communications between husband and wife, legal advisers and their clients, and knowledge gained judicially or professionally by Judges, arbitrators and counsel, the learned author proceeds (sec. 939): "The *fourth kind* of cases, in which evidence is excluded from motives of policy, comprises *secrets of State*, or matters which concern the administration, either of penal justice,

(1) 28 Beav., 119.

(2) 10 C.L.R., 742.

or of government, and the disclosure of which would be prejudicial to the public interest. The principle of the rule of exclusion is in both cases concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires. The protection to State Papers afforded by this principle extends, it is almost needless to say, to applications for discovery, and there are many instances of such applications": *Hennessy v. Wright* (1). In sec. 947 he continues:—"On grounds of public policy, too, official transactions between the *heads of the departments of Government and their subordinate officers*; and communications relating to State matters made by one officer of State to another in the course of his official duty, are treated as secrets of State, and are absolutely privileged Until recently, there existed, however, no instance of a document being held protected from production unless it contained a communication made *by* one officer of State to another officer of State in the course of official communication between them on a matter of public business. But the Court of Appeal have recently held that a communication which it can see is to be one *to* a Government department is also protected from production as being a State secret if a Minister, or the head of a department, sees fit to claim such protection for it, and this even though he gives reasons for the claim which are founded on grounds of convenience rather than of State policy." In a note we are told that "In *In re Joseph Hargreaves Ltd.* (2), the question arose whether privilege could be claimed for inland revenue returns in the possession of the Board of Inland Revenue. *Wright J.* at the hearing refused to order production on the ground that the application before him being under sec. 115 of the *Companies Act* 1862 he had a discretion as to making an order for production. The Court of Appeal refused to interfere with his discretion, but guarded themselves from deciding whether production could or could not be enforced." Reference to the Report shows this to be an accurate description of the case. No doubt, if the Court sees that a document is of the character by reason of which the privilege arises, it will admit the claim to protection, and will allow the Minister or head of the depart-

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(1) 57 L.J. Q.B., 594.

(2) (1900) 1 Ch., 347.

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ment having the custody of the paper to determine in each case whether production or inspection would be injurious to the public service; for that authority is the better judge of matters of public policy. But it is one thing to say that a State Paper, for example, will be held by the Court to be privileged, and quite another thing to say that the Court will admit every claim of privilege that a department of State may make, without considering whether the document for which the claim is made is really a State Paper or not. Yet the position taken up by the defendants amounts to an assertion of the latter proposition. In the case last cited *Lindley* M.R. said (1): "I do not intend to say what is the limit of the power of the Court (*if there is a limit*) to order the production of *such documents as these*." (The italics are mine.) *Vaughan Williams* L.J. said (1):—"It is not, as I understand, denied that communications made to the Board of Inland Revenue are documents which come within the rule which enables the heads of Government departments to object on their own responsibility to their production. At all events, if this were disputed, it seems to me that there is ample authority that such a contention would be ill-founded." Plainly, the learned Lord Justice was speaking only of documents of a definite class. In the preliminary consideration whether a document belongs to the class, production is, of course, not necessary: it is sufficient that there be such a description as will enable the Court to see whether it comes within the class. As *Taylor* points out, "the principle of the rule of exclusion is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires." To use another phrase of his, the rule applies to communications which the Court "can see" to be of the class for which protection can be claimed "if a Minister, or the head of the department, sees fit to claim such protection for it," and the case may be such that the Court, even where no responsible officer has made the claim, will itself intervene to forbid production. But it would be idle to contend that the Court will ever take such a step unless it has first seen that the document is of the kind for which protection may be claimed. Neither will it, in my judgment, accede to the claim of protection

(1) (1900) 1 Ch., 347, at p. 352.

unless the nature of the document is clear. In *Home v. Bentinck* (1), the Court (*Abbott C.J.*) had at the trial refused to allow the reading of the minutes of a commission appointed by the Commander-in-Chief to report on conduct of the plaintiff, who was suing the President of the Commission for libel. The minutes were brought into Court by the military secretary to the Commander-in-Chief, the proper custodian. The ruling of *Abbott C.J.* was sustained on a bill of exceptions. Clearly it was because the Court had ascertained for itself the class to which the documents belonged that it refused to allow the reading. It could not have refused otherwise, seeing that the document was relevant to the issue. In *Smith v. East India Co.* (2), the production of communications between the directors of the East India Company and the Board of Control, the State department to which they were responsible, was refused by Lord *Lyndhurst L.C.*, who said (3):—"I think, therefore, that these communications come within that class of official communications which are privileged," &c. In the case of *Beatson v. Skene* (4), an action by a military officer for slander, the question was as to the minutes of a Court of Inquiry held under the auspices of the War Office, to investigate charges made by a fellow-officer against the plaintiff, and also as to some letters written by the plaintiff to the Minister for War. Of course, the nature of the papers was ascertained by the Judge at the trial (whose action was upheld) before he held them to be within the privileged class, and declined to compel their production. In this case it was explicitly held that it is for the "responsible servant of the Crown in whose custody the paper is" to determine whether the production of a State Paper would be injurious to the public service. But before that question arises for determination the Court must be able to see that it is a State Paper. I might go on to analyze other cases, such as *The Bellerophon* (5), *Wadeer v. East India Co.* (6), and *Hughes v. Vargas* (7); but it is only necessary to say that in these also it is apparent that it is for the Court first to see whether the document or thing is of the class which is the

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(1) 2 Brod. & B., 130.

(2) 1 Ph., 50.

(3) 1 Ph. 50, at p. 55.

(4) 5 H. & N., 838.

(5) 44 L.J. Adm., 5.

(6) 30 L.J. Ch., 226.

(7) 9 R., 661; 9 T.L.R. 551.

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subject of the rule, and, if it finds that it is, then to refuse production or inspection if the responsible officer who is the custodian determines that such publicity would be injurious to the public interest. A few words, however, may be given to the case of *Hennessy v. Wright* (1), in which elaborate judgments were delivered by *Field* and *Wills* JJ. again upholding the principle in a case in which the Governor of the Mauritius sued the publisher of *The Times* for libel. On an application for discovery by the defendant, it appeared to the Court of Queen's Bench that the documents were copies of communications which passed between the Secretary of State for the Colonies and the plaintiff as Governor, and between one or the other of them and a Royal Commissioner appointed to inquire into the affairs of the Mauritius. The Court held that discovery must be refused, it sufficiently appearing that the documents were privileged. There the Court determined the question of the public welfare for itself, unless the plaintiff's own affidavit is to be taken as a determination on that point by a party. No affidavit or statement was made on behalf of the Secretary of State in support of the objection, and it was left for the Court to say that the documents were of the class the subject of the rule, and that their production would be against the public interest. They did so, stating the rule in the broadest terms. *Field* J., in referring to *Beatson v. Skene* (2), said (3): "I do not feel the difficulty which appears to have weighed with the majority of the Court, and . . . should the head of a department take such an objection before me at *nisi prius*, I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavour, by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was his real motive in objecting." I do not think that this passage has been the subject of judicial criticism. In the present case no question is raised as to the *bona fides* of the objection.

It is clear, in my opinion, that it is for the Court to say whether the document is within the class to which the rule of

(1) 21 Q.B.D., 509.

(2) 5 H. & N., 838.

(3) 21 Q.B.D., 509, at p. 515.

public welfare may be applied. Where that which is in question is not a document, the preliminary question will often be much easier. For instance, a battleship or a fortress does not leave much room for doubt that the privilege applies to it. On the other hand, a government dredge, or a chaff-cutter on a government farm, would have to be rather convincingly demonstrated as the fit subject of such a claim, before the Court would say that it is one of the subjects in respect of which the claim could be made.

Then is the wireless apparatus of which inspection is sought, of itself in the class? If it is not, the Minister cannot, by anything he or his permanent secretary may say in an affidavit, bring it within that class. I am disposed to think that the apparatus is not shown to be within the class. It is the subject of a patent of which the complete specification is before us. Its construction, purpose and uses are to be taken to have been shown in that document. It is not easy to see the need of secrecy since it was published. The Chief Justice has stated, in terms which I cannot command, the matters which the inspection of the appliance in operation, for commercial purposes only, is expected to disclose to the technical expert. It is scarcely suggested that such matters as these are in the category of secrets of State. But counsel for the defendants says that the radius of a station, which depends on the method in which the two circuits are adjusted, the one with the other, will be disclosed, and that the secrets between Governments as to wave-lengths may become known. But the plaintiff company are not seeking to ascertain the capacity of the installation in respect of the wave-lengths possible to it. They only desire to see its operation for commercial purposes, which, it appears, does not involve the disclosure of a capacity beyond that used for such purposes. If the State secret is, as alleged, the power at which the installation is worked, and the wave-length within its capacity used by arrangement for naval and military purposes, then there is no necessity that the order should involve the disclosure or use of that degree of power or of the wave-lengths used for such purposes. The plaintiff company is satisfied to see the appliance at work for commercial

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purposes, not *involving* the generation of the wave-lengths the subject of naval and military or other State purposes.

In my opinion inspection should be granted, but in a form which will fully protect the defendant Commonwealth, and the form proposed by the Chief Justice appears to me to meet the requirements of justice.

ISAACS J. When this question came originally before the Court in 1912, I expressed the opinion that the objection taken by the Crown on the ground of public policy presented an insuperable obstacle to the plaintiffs' application. A short statement of the order of events is necessary to understand the meaning of the successive affidavits, and, indeed, the whole position now. At the time of the first application there had been no Crown patent applied for, and, consequently, no specification had been made public. The apparatus complained of had up to that time, as to all material portions of its structure, arrangement and manipulation, been kept a complete departmental secret, except, perhaps, so far as might be conjectured on the occasion referred to in Mr. Fisk's affidavit. In these circumstances, I was then unable to see any valid answer to the claim to preserve that secret. During the discussion on that occasion some expressions fell from the Bench with regard to what was called the commercial aspect of the Post and Telegraph Department, and to the desirability of negating any wish on the part of the Government to obstruct the plaintiffs in this action, as influencing the Commonwealth objection to permit inspection.

In this connection it should be stated that the first claim for protection was ambiguously worded, being limited, as stated in Oxenham's affidavit of 29th March 1912, par. 3, to "the present stage of the action." The plaintiffs then contended that had reference merely to the stage of the action as an objection to production, and not to the system as being a State secret; and on the other hand, the defendants said it was intended to mean that Mr. Balsillie's invention was about to be patented, and, consequently, unless secrecy were directed under the Act, sec. 96 and following sections, the specifications would then be published, and whatever they were found to contain would be available to

everyone; but at that stage of the action it was impossible to say how much of the system in actual use would eventually be so disclosed, and how much preserved as confidential, and therefore at that stage complete protection from disclosure was claimed.

It was further suggested on the part of the defendants that when the specifications were seen the plaintiffs might be satisfied that there was no infringement, or, on the other hand, might be contented with the information the specifications would afford. The matter was accordingly adjourned. At a later date, June 1912, a further affidavit of Mr. Oxenham was filed by which, in par. 3, a complete and unqualified claim for protection was made, and in par. 4 a further assurance was given which has since been repeated in a later affidavit, and will be presently mentioned. The patent has since been applied for; the plaintiffs, it has been stated, intend to object to the grant, and, in the meantime, now upon a fresh and independent summons renew their application for inspection of the apparatus. If granted, then by sec. 98 of the Act it must be delivered to the Minister for Defence.

The objection as raised finally in the latest affidavit of Justinian Oxenham, secretary of the Postmaster-General's Department, sworn 18th December 1912, who states that the affidavit is made under the direction of the Postmaster-General of the Commonwealth, appears in paragraph 3, in which the deponent says that the Postmaster-General has directed him to inform the Court that the Minister is of opinion that it would be prejudicial to the public interest and welfare of the Commonwealth to allow any inspection of the wireless telegraphy stations, or the plant and apparatus contained therein. That claim, made after the publication of all the information that the Government thought proper to make public, is unlimited. Then paragraph 4, as a further assurance, states:—"The Postmaster-General has directed me to inform the Court that his opinion is not based upon the pecuniary or commercial interests of the Postal Department of the Commonwealth of Australia, or upon any desire to defeat the plaintiffs' claim in this action, but solely in the interests of the public welfare and the naval and military defence of the Commonwealth."

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Counsel for the Commonwealth upon the present argument informed us that this paragraph 4 was inserted in deference to the expressions to which I have already referred, and claimed that, apart from that paragraph, the right of resisting the claim for inspection was fully established. It will be seen that to some extent the position is now altered from that which presented itself on the former occasion. Whatever is contained in the specification is necessarily public in accordance with the provisions of the *Patents Act*.

But, in addition to the distinct oath of Mr. Balsillie that the plaintiffs' invention is not made use of, the case of both sides is that there is much more contained or involved in the apparatus actually in use, and as used by the department, than is disclosed in the specifications. The plaintiffs, said their learned counsel, decline to accept the description in the specification as accurate, and rely upon the affidavit of Fisk to establish, at all events *primâ facie*, that the true working is not disclosed, and that the operation of the departmental instrument could not be effective in the way described, nor unless some elements of construction or adjustment of a quite different character, and in fact invading the plaintiffs' patent, were introduced. In short, the plaintiffs' present application rests, in substance, upon the foundation that it is *the machine as actually used* that is complained of, *not the machine as described in the specification*; that the plaintiffs refuse to give credence to the specification as correctly representing the existing machine as operated, and therefore demand inspection and examination to ascertain its real structure, capacity and method of working.

I do not see any difference between the apparatus actually used and any similar apparatus which another person has patented, or which has never been patented at all. Learned counsel for the defendants, on the other hand, pressed by the Court to state some possible reason which the Court could accept as valid, explained that although what the specification declares to be the essential mode of construction and the governing ideas that form the basis of the invention, constitute enough to distinguish it from that of the plaintiffs, yet that there are, quite consistently with the patent itself, as an invention, sufficiently elastic limits of power, dimen-

sions, reactance, arrangement, and adjustments to allow of special public precautions in connection with wireless telegraph communications, for privacy generally, and for the maintenance of mutual secret understandings between the Admiralty and the Commonwealth; and these precautions it is desirable for defence and for general governmental purposes to withhold from disclosure. He stated that the arrangements and adjustments of the circuits affected the radius over which any particular station works, that the wave-lengths employed in wireless telegraphy are so regulated that ordinary commercial messages are restricted to comparatively short waves—that is, up to about 600 metres long—the longer waves from about 600 to 1,600 or 1,800 metres, being reserved for Admiralty purposes alone. But still, he said, there is nothing to prevent the Admiralty from using any waves, long or short, and, as between Governments, there is no restriction.

It is well known that waves up to nearly four times 1,800 metres can be and are used in wireless telegraphy; and counsel for the defendants stated that inspection by the plaintiffs would necessarily expose to a skilled wireless expert all the materials and factors for discovering the extreme radius of effective operation of these machines, and the area within which ships can be, and are, communicated with; that it would be impossible by covering any portion to conceal that radius or area; that the portions of the apparatus which would convey the information or the means of arriving at it are not separable from the rest without complete reconstruction; and thus the military and naval precautions of the Commonwealth, as well for itself as in relation to the Empire, would, in case of any inspection by an expert, be necessarily and seriously affected. On these representations it is clear that covering up any particular part would have no more effect than covering up one number in a known regular series, or covering up the first letter on a card of the alphabet.

It is evident also that unless the whole machine and the secrets it contains have been what *Stirling J.*, in *Goldstone v. Williams, Deacon & Co.* (1), calls “effectually made public,” whatever privilege originally existed still continues, and according to the Minister’s affidavit and the instances stated by Mr. *Starke* it cer-

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(1) (1899) 1 Ch., 47, at p. 53.

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tainly has not been effectually published. And it is important, I think, to point out that sec. 96, which enables the Minister to direct secrecy, does so both as to "the invention," and as to "the manner in which it is to be worked." If secrecy may be preserved as to the contents of the specification, not less, I apprehend, may it be maintained as to the manner of working which is deliberately omitted from that document.

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I may add that even if the specification fell short of the requirements of the patent law in not stating all it should state, the penalty would not be further disclosure of the instrument but, perhaps, invalidity of the patent.

Counsel for the Commonwealth was careful to state that he was by no means to be taken as limiting the Minister's reasons and objection, which though advanced on the formal authority of the Postmaster-General as the administrator of the department operating the apparatus, yet were supported by the whole Cabinet, including the Minister of Defence. He offered an affidavit as to this, if desired, but the statement was, of course, accepted. The explanation detailed by counsel was, he said, an endeavour on his part, aided by Balsillie, without any communication with the Minister, and without knowing whether the Minister had any further or other reasons, to comply with the request of the Court to suggest reasons at least plausible; and he observed that he doubted whether he was really justified in making even that endeavour or in stating so much, but he expressly guarded himself against restricting the effect of the Minister's objection. It is obvious that the Minister's claim covers as well the shorter wave-lengths as the longer ones, and that nothing that Mr. *Starke* said can be taken to limit that claim.

Mr. *Starke* also contended broadly that the affidavit of Mr. Oxenham representing the Minister, was in itself conclusive; and this was his main argument; though, he added, if further explanation indicating possible reasons were to be required, the reasons he gave should, at all events, satisfy the Court. Up to this point I have referred to what I may term the arguments specially applicable to the Crown, and raising the question of public policy.

There were further objections raised by the defendants—as want of *prima facie* case, and exclusion of the plaintiffs' own officers from the inspection if ordered, and discretion. These are objections which would apply also in the case of a private defendant, and if the first objection be valid become immaterial. I would observe that the *prima facie* case is at best very thin, and I am not at all sure that, if I felt called upon to decide on that, I would consider the plaintiffs had gone beyond suspicion, or that enough had been shown to establish, even *prima facie*, that in operating the Commonwealth's apparatus there was any tuning of circuits in each station, as distinguished from the syntony between stations; and, particularly, that there was such circuit-tuning with a view to cumulative effect of wave trains. But I have come to a clear conclusion that the primary objection is a complete answer in law to the application; and, in addition, the nature and circumstances of that objection would lead me, having regard to the meagreness of the plaintiffs' proofs, to refuse the inspection as a matter of discretion, for the order is not one of course. In view of that, and as the construction and meaning of both the plaintiffs' and the defendants' specifications may at the trial affect the final result, I abstain from entering further upon a consideration of a highly technical branch of the case, and confine my observations to its public aspect.

The claim to inspection is made under Order XLIII., r. 1, which is really identical with Order L., r. 3, of the English Rules of Court. Discovery under the Rules of Court, as Lord Selborne L.C. said in *Lyell v. Kennedy* (1), is not *in principle* more extensive than it formerly was in the Court of Chancery (though no doubt its application is wider), and privileged matters were there always excepted: *Wigram on Discovery*, pp. 79 *et seq.*

The case of *The Commonwealth v. Miller* (2) decides that discovery is a "right" within sec. 64 of the *Judiciary Act* 1903.

Inspection there may be required in this action "as nearly as possible" the same as in a suit between subject and subject. But in *Miller's Case* (2) I distinctly adverted to the necessary fact that the right of discovery given to the litigant for the furtherance of public justice must be subject to the still higher con-

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(1) 8 App. Cas., 217, at p. 223.

(2) 10 C.L.R., 742.

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sideration of the general welfare, that the order to make proper discovery does not destroy the privilege of public interest, and that the ground of public policy may intervene and prevent the injury to the community which coercive disclosure might produce. If that were not so, every gun in every fort and every safe in the Treasury would be open through the medium of this Court to the observation of any plaintiff of any nationality who could make a *prima facie* case of infringement to which it was relevant. One of the authorities to which I referred in that connection was the judgment of *Turner L.J.* in *Wadeer v. East India Co.* (1), and that judgment is, I think, of great value in this case also.

The Crown's right to rely upon the privilege of public policy was fully and properly admitted in the present argument—the only contest on this branch of the case, apart from Mr. *Starke's* appeal to the Court's discretion, being as to whether the Crown had satisfied the burden of establishing it. Mr. *Irvine* contended that it had not: his main argument was that the Minister's objection was insufficient because it was not shown that the apparatus fell within the "class" of objects for which the privilege can be claimed.

How the "class" is constituted, he did not say; nor have I heard any formula which would cover it, and yet be consistent with the preservation of the principle, except that relied on for the Crown.

Were it not for the contrary opinion expressed by my learned brethren, I should have thought *Beatson v. Skene* (2) definitely settled the matter against the plaintiffs, and that their arguments would have been sufficiently met by a short quotation from the judgment in that case, since approved. But, as it is, a distinction is raised which, with the greatest possible deference, seems to me based on a misapprehension, and so calculated to undermine the rule in a most important branch of the law touching the relative functions of the Executive and the Judiciary, in both Commonwealth and States, that I feel bound to examine the foundations of the rule itself, and some of the decisions founded upon it.

Courts in administering justice between private suitors, or

(1) 8 D.M. & G., 182, at p. 191.

(2) 5 H. & N., 838.

even between private suitors and the Crown—see, for instance, *Admiralty Commissioners v. Aberdeen Trawling Co.* (1), cited in *Halsbury's Laws of England*, vol. XI, p. 85, note (b), and *Wadeer's Case* (2)—have always recognized as paramount to the claim for redress of individual wrongs the public welfare and safety of the nation. And where that welfare might be imperilled by disclosure of a “State secret,” as it is called, of whatever nature, and in whatsoever form it may be found, whether in a document, in the recollection of a conversation, in an act done or in a material object of any kind—no Court, as I understand the law, ever suffers itself to be the means of injuring the body politic by forcing a disclosure of that State secret. It is, as Lord *Ellenborough* in *R. v. Watson* (3) described it, “a secret of government, and you have no right to inquire into it.”

The common law, according to well established authorities, recognizes “public policy” as a ground upon which certain classes of evidence are excluded, because however relevant that evidence might be, its admission would, on the whole, do more harm to society at large, or sometimes to third parties, than it would do good to the individual litigants. Such a doctrine is inherent in all systems of law; for the first requirement of every organized society is to live, and so far as possible to live securely, and the next is to live with the greatest advantage to the community at large; and to these essentials the strict administration of justice in particular cases amongst members must yield. As *Field J.*, in *Hennessy v. Wright* (4), pointed out, it is not always the right of a suitor to say, “*Fiat justitia ruat cælum.*” Therefore, not as any doctrine *dehors* the law or supplanting it, or as absolving any person, King or subject, from obeying it, but as an integral part of the law itself, there is a principle applicable to certain special well-marked occasions—of which the present case is an example—a principle dictated by necessity, and to the extent of that necessity paramount to the rules ordinarily prevailing. The principle is that in such cases private inconvenience must yield to the public interests. Some of the occasions are recognized by the common law, others are created by Statutes, but the present

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(1) (1909) Sess. Ca., 335.
(2) 8 D.M. & G., 182.

(3) 32 St. Tri., 1, at col. 101.
(4) 21 Q.B.D., 509, at p. 512.

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depends entirely upon the common law. *Buller J.*, in *Governor &c. of Cast Plate Manufacturers v. Meredith* (1), gives some common law instances, in which the preservation and defence of the Kingdom are involved, and there he says individuals may suffer certain damage, and yet have no right of action against the person who caused it. "This," says the learned Judge, "is one of those cases to which the maxim applies, *salus populi suprema est lex*." Of course, that is no warrant for extending the maxim to cases beyond those recognized by law as governed by it. See also *Greenleaf on Evidence*, 11th ed., p. 347, where the public safety is accepted as the principle of exclusion.

It is safe to say that as the rule is founded on the highest principles of public welfare, no proposition can possibly be true if its tendency is to destroy or impair the rule. In *Best on Evidence*, 9th ed., at p. 479, the matters excluded on grounds of public policy are divided into four classes, *political, judicial, professional and social*.

We have here to deal only with a *political* matter, and the question really is, whether the political branch of the government is entitled to guard wholly, effectively, and in its complete integrity, a political secret with which it has been entrusted, and with it the national security and welfare which, to that extent, are in its exclusive charge; or whether it is bound to impart some portion of it, be it merely its "nature" as it is called, to this Court, in order that the Court may determine whether sufficient has been disclosed to justify retention of the remainder.

If it is so bound, and if the determination of that question is a condition preliminary to any privilege at all, it necessarily follows that the Minister's statement on that point is not conclusive, and he may be contradicted and the deponent to the affidavit cross-examined up to that point—because so far there is *ex hypothesi* no privilege,—and if so, every member of the Government may be examined. There is no halting place if the plaintiffs' view is correct, between accepting the Minister's assurance and the right of the most searching investigation.

And so I have phrased the problem plainly, because I can see no other reality in the contention of the plaintiffs.

(1) 4 T.R., 794, at p. 797.

Consequences of this, as applied to documents that pass between nations, or to military or naval inventions, or even to instruments used in telegraphy or kindred arts, will at once present themselves to the mind.

That is all, of course, on the supposition that the requisite description of the "nature" or "class" of the object sought to be inspected goes beyond what is demonstrated here beyond controversy. And that supposition is a necessary part of the plaintiffs' contention. No one, of course, would maintain that if a non-sensical claim for protection were set up for a departmental paper weight, feather duster or coal scuttle, the Court would be compelled to lend itself to a manifest absurdity. But we must assume a Minister to be as incapable of advancing a preposterous claim as a Court is of submitting to it.

Laying aside impossible cases, no tangible reason has been given why a Minister's statement is not to be implicitly accepted, or why this wireless apparatus owned and operated by the Post and Telegraph Department in the ordinary course of Commonwealth business is in any different legal position, or in any different "class," for the purpose of discovery, from a gun of position or a torpedo, or a Treasury safe, or steel plates for the Commonwealth note issue, or any other instrument of the civil, or naval and military administration.

I shall endeavour to state succinctly the law so far as material to the present case.

1. The rule of exclusion of State secrets applies, necessarily, without distinction to facts, documents and other objects. This was admitted by Mr. *Irvine*, and is established by such cases as *R. v. Watson* (1); *R. v. Hardy* (2); and *R. v. Watson* (3).

2. The rule proceeds on the same ground, whether the parties called on to produce the documents, &c., are or are not parties to the suit, that is, on the ground of the prejudice to the public interests, which production would occasion (*per Turner L.J.* in *Wadeer's Case* (4); *Admiralty Commissioners v. Aberdeen Trawling Co.* (5).

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(1) 2 Stark, 116, at p. 148.

(2) 24 St. Tri., 199, at col. 753.

(3) 32 St. Tri., 1, at cols. 100-101.

(4) 8 D.M. & G., 182.

(5) (1909) Sess. Ca., 335.

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3. The right to protection depends upon the "character" of the documents, &c. (*ib.*).

4. If the documents, &c., are *primâ facie* private, as where they are in private hands, then in the absence of Ministerial claim for protection, the Court, in case of objection by the private defendant on the ground of public policy, will ascertain their character, that is, whether they are really governmental; and, if they are, the next succeeding paragraph applies: *Smith v. East India Co.* (1).

5. If the documents, &c., are of a political, that is, a governmental "character," then, even in the absence of any Ministerial claim for protection, it is the duty of the Court, on objection by the private person holding them, to ascertain whether public prejudice will or may ensue from production, and, if it appears that public policy requires confidence between the objector and the Government, they are privileged. In some cases at least, they are presumed *primâ facie* to be confidential: *Smith v. East India Co.* (1), and *per Wills J. in Hennessy v. Wright* (2).

6. If either by proof or undisplaced presumption confidence is required, then it is a rule of *law*, not of discretion, that the documents shall be excluded: *Marks v. Beyfus* (3); *Stace v. Griffith* (4).

7. If the documents, &c., are in fact "State documents," that is, "in possession of a government department," and the Minister having custody of them assures the Court that public prejudice will or may ensue from production, that, in the absence of what are called extreme cases and are practically negligible, is *conclusive evidence* of their character, that is, that they are confidential public documents, and that such prejudice will or may ensue, and the Court must act upon it: *Stace v. Griffith* (4); *Beatson v. Skene* (5); *The Bellerophon* (6); *Hughes v. Vargas* (7); *Halsbury's Laws of England*, vol. XI., p. 85; *Taylor on Evidence*, 10th ed., pp. 673, 674; *Powell on Evidence*, 9th ed., p. 273. Conclusiveness in such a case is not unique. Even a private claim for privilege in an ordinary affidavit of documents

(1) 1 Ph., 50.

(2) 21 Q.B.D., 509, at pp. 518-519.

(3) 25 Q.B.D., 494, at pp. 498-500.

(4) L.R. 2 P.C., 420, at p. 428.

(5) 5 H. & N., 838.

(6) 44 L.J. Adm., 5.

(7) 9 R., 661.

is (with certain exceptions immaterial here) taken as conclusive with respect even to the grounds stated for claiming privilege: See *Halsbury's Laws of England*, vol. XI, p. 61, and *Morris v. Edwards* (1). I would observe further that, as was pointed out by *Vaughan Williams* and *Romer LJJ.* in *In re Joseph Hargreaves Ltd.* (2), this question cannot be determined by what would be done with regard to a private person subpoenaed as a witness. I now proceed first to apply the fifth paragraph, that is, as if there were no Ministerial claim for protection; for this, I think, will clear the position and prevent confusion between inferences from cases where there was such a claim and where there was not, and this is, I fear, the source of the confusion in the present case.

In Australia both postal and telegraph services have always been State services, and the Federal Constitution in sec. 69 refers to "Posts, telegraphs and telephones" as one of the "departments of the public service," on the same level as the immediately succeeding department, "Naval and military defence." The observations of the learned Chief Justice, in *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employés Association* (3), with reference to the constitutional recognition of governmental functions in connection with railways, are equally applicable to telegraphs

"Commercial" differentiation, if sustainable at all, applies quite as strongly to the postal branch as to the telegraph branch.

Carrying a letter for a merchant differs only in immaterial respects from transmitting his telegram. Yet, since Lord *Mansfield's* judgment in *Whitfield v. Lord Le Despencer* (4), no one has suggested that the Post Office was a commercial undertaking.

In *Bainbridge v. Postmaster-General* (5) the Court of Appeal held that the defendant was not trading in respect of the telegraphs, notwithstanding the very strong words of the Statutes transferring that branch to him and substituting him for the

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(1) 15 App. Cas., 309.

(2) (1900) 1 Ch., 347, at p. 353.

(3) 4 C.L.R., 488, at p. 539.

(4) 2 Cowp., 754.

(5) (1906) 1 K.B., 178.

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previous private telegraph companies. As a government department the two branches were held to be analogous, and Lord *Mansfield's* words were quoted and applied by Lord *Collins* (then Master of the Rolls).

Wireless telegraphy in Australia has been made a monopoly of Government by Act No. 8 of 1905, and severe penalties for contravention are enacted; and so to me it is obvious that, apart altogether from defence questions, and were it simply to guard against invasion of wireless telegraphic monopoly, and, perhaps, interception or other interference, public policy requires that the Government shall, as Lord *Lyndhurst* in effect, in *Smith v. East India Co.* (1), says, be free from the impediments and necessary caution and reserve which liability to production would involve.

These considerations, which are on the face of the matter, establish the legal position of the department as non-commercial but purely governmental, and the consequent potent, and, as I think, decisive fact, that the Commonwealth wireless telegraph stations, and the instruments there by which messages are sent and received by the public officials under the Postmaster-General in the ordinary course of their duty, are adjuncts of a government department and portion of the necessary means by which its public functions are performed.

If the same apparatus were on a Commonwealth ship of war it would be neither more nor less an instrument of Government than where it is. That establishes what *Turner L.J.* in *Wadeer's Case* (2) calls their "character."

If, therefore, no Ministerial claim for exclusion had been made, but merely an objection raised at the bar, the Court would, in my opinion, be bound by the rule of law, and not of discretion, to refuse the inspection asked for.

But the actual position is stronger for the Crown—the question being whether the assurance of the Minister in any but an impossible case is to be regarded as conclusive evidence, or whether the Court can go behind it.

In my opinion it is conclusive, and for the reasons so clearly stated by the learned Chief Baron in *Beatson v. Skene* (3). Those

(1) 1 Ph., 50.

(2) 8 D.M. & G., 182.

(3) 5 H. & N., 838.

reasons I shall refer to because my learned brethren do not consider the words go so far as I think they do. There the learned Judge refers to the production of a "State paper," and that is all he thinks necessary to indicate its character.

Now, when that "State paper," or, as here, a "State wireless instrument," is sought to be produced, and its official character is unquestioned, the plaintiffs' contention is, as I have already said, the Court must still in some way and to some extent satisfy itself by some further inquiry, that the object is within a privileged class, I suppose by reason of its being of a nature that may require concealment, before it can accept the Minister's assurance as to public prejudice.

Now, as to whether any given State paper is a privileged document the learned Judge said (1):—"It is manifest it must be determined either by the presiding Judge, or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining *what the document was*, and *why the publication of it would be injurious to the public service*."

I stop there for an instant, to draw attention to the two things italicized by me, which, says the learned Chief Baron, have to be determined, viz., (1) *what the document is*, in other words, its "nature," or "class," or "character," so as to be a possible source of prejudice; and (2) *the fact of prejudice*. There, as to the inquiry into both those questions, which are both included in the one question whether production would be injurious, the learned Judge says (1) it is "an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against."

The learned Chief Baron, so far, evidently thought the State should not even run the risk of injury which such a public inquiry in Court would entail, and so he proceeds to his final conclusion as follows (1):—"It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper."

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(1) 5 H. & N.. 838, at p. 853.

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Substitute "apparatus" for "document," and it will be at once seen that the judgment is wholly incompatible with the doctrine urged for the plaintiffs, and leaves no room for the division of documents or other public instruments of executive government for which the executive branch itself claims protection into two natures, the one possibly privileged, and the other necessarily unprivileged, which it is the Court's function in any particular case, notwithstanding the Ministerial assurance, to ascertain by the ordinary process of evidence. Then in *Hughes v. Vargas* (1), Lord *Esher* M.R. confirms the Chief Baron's rule and re-states the law in words which evidence his understanding of it; he says (1):—"It is not for the Judge to decide whether the production of a document would be detrimental to the public service, but if the document is a State document, that is belonging to a State office," (that is how I take the Master of the Rolls to define its character in respect of its production being possibly injurious), "and is in the hands of a public department of State, if the head of that department takes the objection that it would be contrary to the public welfare to produce the document in Court, the Judge must act upon that." When the learned Master of the Rolls says "the Judge must act upon that," he means on the whole of that. The learned Master of the Rolls, a little further on, says (2) that the Judge must give effect to the objection "unless he can see clearly that it could not be to the detriment of the public service," evidently meaning the "extreme cases" of *Beatson v. Skene* (3). *Bowen* L.J. reaffirms that decision and reserves the "extreme cases" though acknowledging that they throw little light on the matter because heads of departments in these days can be trusted—a truth as firmly fixed in Australia as in England. The circumstances stated by Mr. *Starke* courteously, but quite unnecessarily in point of law as I regard the matter, are so probable and in part so obvious from the acquaintance which even a Court may be supposed to have with the subject matter, that they support in detail the conclusion of fact, a conclusion which as I have said the Court is virtually bound to accept on the statement of the Minister.

(1) 9 R., 661, at p. 664.

(2) 9 R., 661, at p. 665.

(3) 5 H. & N., 833, at p. 854.

There is no reason appearing in this case, much less any overwhelming reason, for disregarding the claim of the responsible Minister. I pass by the suggestion that it was not *bonâ fide* as unexaminable in such a case for the same reasons as apply to the fact of prejudice, and I ought to add, as the contention was stated both on the former and on the present occasion, that, if the suggestion were examinable, there appears not the least foundation for it. But not only does no fact or probability appear to displace the claim, but, on the contrary, wireless telegraphy, a science of say a quarter of a century and still far from conquered, presents so many possibilities of discovery and of practical expedients with which even the plaintiffs' experts are yet unfamiliar that it would be absurd to say the Court is in a position to declare the claim for protection frivolous, futile, impossible or mistaken.

The absence of any statement in any text writer or judicial utterance supporting the plaintiffs' view, is most significant in view of the grounds of the opinion of *Turner L.J.* in *Wadeer's Case* (1) already quoted, and of the fact that since the English *Patents Act 1883*, a Crown officer may be sued in, and defend on behalf of the Crown, an action by a patentee for infringement. See *Frost on Patents*, 4th ed., vol. II., p. 194.

In my opinion this motion should be refused.

Order in the form set out at the foot of the judgment of Griffith C.J. (suprà, p. 188.)

Solicitors, for the plaintiffs, *Blake & Riggall*.

Solicitor, for the defendants, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

(1) 8 D.M. & G., 182.

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