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empowering the transit of stock. We have not been referred to any Ordinance or Act of South Australia providing for such a right, unless it can be said, which I doubt, that sec. 43 of the *Impounding Act* No. 8 Vict. of 1858 conferred the right. However this may be, this Act was repealed in 1920 and with it the right (if any) given by that Act.

As the appellant has not succeeded in showing by any enabling provision that the right claimed existed at the date of the trespass, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Ingleby & Wallman.*

Solicitors for the respondent, *McLachlan, Reed & Griffiths.*

B. L.

Cons *Commonwealth v Northern Land Council* (1991) 103 ALR 267

[HIGH COURT OF AUSTRALIA.]

GRIFFIN . . . . . PLAINTIFF;

AGAINST

THE STATE OF SOUTH AUSTRALIA . . DEFENDANT.

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MELBOURNE, *June* 1; *Oct.* 12-14, 29.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Practice—High Court—Discovery—Inspection of documents—Action in High Court to which State is party—State papers—Claim of privilege—Opinion of Minister—Conclusiveness—Inspection by Court—Rules of the High Court 1911, *Part I., Order XXIX., r.* 17.

Held, by *Knox* C.J., *Isaacs, Higgins* and *Rich* JJ., that where, in an action in the High Court to which a State is a party, the State objects to produce for inspection documents which are in fact State papers, the rule is that a statement by the Attorney-General for that State that their production for inspection would be prejudicial to the public interests is conclusive and an answer to an application for an order for inspection.

Marconi's Wireless Telegraph Co. v. *Commonwealth* [*No.* 2], (1913) 16 C.L.R. 178, on that point followed.

Held, also, by *Knox* C.J., *Isaacs*, *Higgins* and *Rich* JJ. (*Starke* J. dissenting), that in the particular case there were no special circumstances which would justify the Court in departing from the rule and exercising the power conferred by Order XXIX., r. 17, of Part I. of the *Rules of the High Court* to inspect the documents for the purpose of deciding as to the validity of the objection.

CASE REFERRED.

An action was brought in the High Court by Hurtle Griffin, a resident of Victoria, against the State of South Australia, in effect to recover damages for the negligent storage of wheat delivered by the plaintiff to the defendant pursuant to the *Wheat Harvest Acts* 1915-1916 (S.A.). On the application of the plaintiff an order for discovery of documents by the defendant was made by *Poole* A.C.J. By the order the discovery was limited to reports of inspectors employed by the defendant relating to the wheat of the 1916-1917 harvest; correspondence between the defendant (including documents connected with the Wheat Scheme and the Wheat Harvest Board) and such inspectors in respect of such wheat; correspondence between the defendant and its agents relating either to the condition or to the care of the wheat stacks of the 1916-1917 harvest; correspondence between the defendant and its agents relating to the reconditioning or the cost of reconditioning wheat of the 1916-1917 harvest which was reconditioned; correspondence between the defendant and its agents relating to the forwarding of such wheat; records of the quantities of the wheat of the 1916-1917 harvest received and stored at each stack and the quantities of wheat delivered from each stack; and minutes of the Wheat Advisory Committee. The chairman of the Wheat Harvest Board, on behalf of the defendant, made an affidavit stating that the defendant had in its possession certain documents relating to the matters in question in the action, as limited in the order for discovery, and that the defendant objected to produce for inspection certain of those documents. The objection and the grounds thereof and the other material facts are fully stated in the judgments hereunder.

On a summons by the plaintiff for an order that the defendant do give inspection of the documents production of which was

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objected to, *Poole* A.C.J. directed that the questions arising upon the summons be argued before the Full Court of the High Court.

Owen Dixon K.C. and *Norman*, for the plaintiff. The documents which the respondent objects to produce being of the character described in the affidavit of documents are not State papers. They came into existence in the course of a business carried on by the respondent as trustee for the appellant and a number of other persons, and they relate only to that business (see *Welden* v. *Smith* (1)), and have nothing in common with what are ordinarily known as State papers. There is no decision that the Court in all cases will give conclusive effect to the opinion of the Minister, but if the Minister has after a proper consideration made a distinct statement that the documents are State papers and expressed a definite opinion that in the public interests they should not be disclosed, the Court would not go further without some positive evidence of mistake or misconception by the Minister of his duty (see *Hennessy* v. *Wright* (2) ; *Henderson* v. *M'Gown* (3) ; *Marconi's Wireless Telegraph Co.* v. *Commonwealth* [*No.* 2] (4) ; *Hughes* v. *Vargas* (5) ; *Beatson* v. *Skene* (6)).

[STARKE J. referred to *Kain* v. *Farrer* (7).

[ISAACS J. referred to *In re La Société les Affréteurs Réunis and Shipping Controller* (8).

[RICH J. referred to *Williams* v. *Star Newspaper Co.* (9).]

The facts here are such as to suggest that the Minister has misconceived his duty, and the Court should exercise the power conferred by r. 17 of Order XXIX. of Part I. of the *Rules of the High Court* to examine the documents for itself in order to determine whether the objection to inspection is properly taken (*Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (10)). The Court has a discretion in all cases where a claim is made for privilege against discovery of documents, and will not apply the principle in respect

(1) (1924) A.C. 484, at p. 492 ; 34 C.L.R. 29, at p. 34.
(2) (1888) 21 Q.B.D. 509, at pp. 512, 517.
(3) (1916) S.C. 821.
(4) (1913) 16 C.L.R. 178.
(5) (1893) 9 R. 661 ; 9 T.L.R. 471, 551.
(6) (1860) 5 H. & N. 838.
(7) (1877) 37 L.T. 469.
(8) (1921) 3 K.B. 1.
(9) (1908) 24 T.L.R. 297.
(10) (1916) 1 K.B. 822, at p. 826.

of papers compiled in the course of trading activities of the Government (*Rajah of Coorg* v. *East India Co.* (1); *Wadeer* v. *East India Co.* (2); *Queensland Pine Co.* v. *Commonwealth* (3); *Barrett* v. *Minister for Railways* (4); *Williamson* v. *Freer* (5); *Tomline* v. *Tyler* (6); *In re Smith* (7)). The principle does not apply to documents in which the party claiming inspection has a proprietary interest (*Wright & Co.* v. *Mills* (8)), nor to documents already made public. In the High Court the position of a Minister of a State is not nearly as strong as that of a Minister of the Commonwealth, for the rule as to the protection of State papers is founded on the view that in some matters the Courts should defer to the executive departments of the State of which the Courts are the judicial representatives. Here the State on behalf of which the protection is sought is a political entity subordinate to that of which the High Court represents the judicial authority.

[STARKE J. referred to *Spitzel* v. *Beckx* (9).]

In that case the Judge by consent inspected the document. Apart from any distinction between Commonwealth and State, the rule of law does not go beyond this: that prima facie the statement of a Minister is to be accepted, but the prima facie effect of his statement may be rebutted by satisfactory evidence that he has misconceived or misapprehended what it is that he should point his declaration to, or has in some way gone wrong in the statement he has made. Here there is evidence that the Minister has included in the claim for protection documents which cannot be secret and some which have been published. [Counsel also referred to *In re Joseph Hargreaves Ltd.* (10).]

Cleland K.C. (with him *Ligertwood*), for the defendant. It being stated on oath that the documents are State papers, the Minister's opinion that the disclosure of the documents would be contrary to the public interests is conclusive. The Minister's statement is conclusive both as to the nature of the documents and as to their

(1) (1856) 25 L.J. Ch. 345.
(2) (1856) 8 DeG. M. & G. 182.
(3) (1920) S.R. (Q.) 121.
(4) (1902) 21 N.Z.L.R. 511.
(5) (1874) L.R. 9 C.P. 393.
(6) (1880) 44 L.T. 187.
(7) (1881) 7 L.R. Ir. 286.
(8) (1890) 62 L.T. 558.
(9) (1890) 16 V.L.R. 661; 12 A.L.T. 58.
(10) (1900) 1 Ch. 347.

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disclosure being contrary to the public interests (*Beatson* v. *Skene* (1); *Marconi's Wireless Telegraph Co.* v. *Commonwealth* [*No.* 2] (2)). The commercial character of the transaction does not affect the matter (*M. Isaacs & Sons Ltd.* v. *Cook* (3)).

Owen Dixon K.C., in reply.

Cur. adv. vult.

Oct. 29.

The following written judgments were delivered :—

KNOX C.J. The applicant, the plaintiff in the action, seeks an order that the defendant should give inspection of the documents referred to in the first part of the first schedule to the affidavit of documents sworn in the action, and permit copies to be taken of such documents. The application was made in the first instance to *Poole* A.C.J. of South Australia, and by him referred to this Court under sec. 18 of the *Judiciary Act*. The documents, inspection of which is sought, are described in the affidavit of discovery as documents tied up in certain bundles and numbered as therein specified, and minutes contained in a book marked G.

The objection to inspection of these documents is stated in an affidavit supplementing the original affidavit of documents, as follows :—" 3. The documents set forth in the first part of the first schedule of my said affidavit are State documents and consist of communications relating to State matters in and connected with a department of the Government of the State of South Australia made by officers of State to other officers of State in the course of their official duty and in the course of official communications between them on matters of public business and relating solely to the official administration of the said department. 4. I have since the said 3rd day of March 1925 again caused such documents to be submitted to the Honourable William Joseph Denny the Minister in charge of the said department and he has directed me that the disclosure of the said documents is contrary to public policy and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said

(1) (1860) 5 H. & N. 838.
(2) (1913) 16 C.L.R., at pp. 185, 190, 202, 205, 206.
(3) (1925) 41 T.L.R. 647.

documents and has directed me not to produce or disclose the said documents or the said minute book to any person or persons. The memorandum now produced to me marked with the letter A contains a minute sent to me by the said Minister relating to the said documents. I am well acquainted with the handwriting of the said Minister and the signature 'W. J. Denny' to the said minute is the signature of the said the Honourable William Joseph Denny. 5. The defendant therefore objects to produce or disclose the said documents."

The memorandum referred to is in the words following:— "Memorandum to the Chairman of the Wheat Harvest Board.— I have considered the documents referred to in the first part of the first schedule to your affidavit sworn the 3rd day of March and filed in the action *Griffin* v. *State of South Australia*, No. 4 of 1924, in the High Court of Australia, such documents being the documents tied up in a bundle marked (a) and numbered 1-440 inclusive, and documents tied up in two bundles, one marked b(1) numbered 1-1041 inclusive and the other marked b(2) numbered 1-411 inclusive, and the minutes contained in a book therein marked G. The said documents are State documents and are communications relating to a department of the Government of the State of South Australia, passing between the officers of the said department relating to the affairs of such department of State and made by officers of State to other officers of State in the course of their official duty. I direct you that the disclosure of the said documents (including the said minute book) is contrary to public policy and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said documents, and I direct you not to produce or disclose the said documents or the said minute book to any person or persons. The above direction is not based in any way upon the pecuniary or commercial interests of the said department or of the State of South Australia or of the plaintiff or upon any desire to defeat the plaintiff's claim in the action, but solely upon and in the interests of the public welfare and the public service.—W. J. Denny, Attorney-General and Minister controlling the Wheat Scheme.—1st Aug. 1925."

Mr. *Dixon* for the applicant contended that the facts deposed to

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in the affidavits filed on behalf of the applicant showed that the Attorney-General of South Australia must have misdirected his mind, or misapprehended the criterion to be applied, in arriving at a conclusion on the questions whether the disclosure of the documents was contrary to public policy, and whether the interests of the State and of the public service and the public interest would be prejudiced by such disclosure; and asked that the Court should, in exercise of the power conferred by Order XXIX., r. 17, inspect the documents for the purpose of deciding as to the validity of the objection. Mr. *Cleland* for the respondent argued that the claim of privilege made, supported as it was by the memorandum of the Attorney-General, was conclusive, and that the Court was not entitled to inspect the documents or to investigate the question whether the views expressed by the Attorney-General, as to the nature of the documents or as to the effect of disclosing them, were or were not well founded. The documents in question in this case are admittedly in the custody or possession of a responsible servant of the Crown, that is, of the Government of South Australia. It is sworn that they are "State documents and consist of communications relating to State matters in and connected with a department of the Government of the State of South Australia made by officers of State to other officers of State in the course of their official duty and in the course of official communications between them on matters of public business and relating solely to the official administration of the said department." For the applicant it is said that they consist of reports of inspectors employed by the State of South Australia relating to the wheat of the 1916-1917 harvest, correspondence between the State of South Australia or the Wheat Harvest Board and such inspectors in respect of the said wheat, and minutes of the Wheat Advisory Committee.

It appears that the control of the Wheat Scheme was in the hands of the Wheat Harvest Board, a Board appointed by the Government of South Australia with the Minister of Agriculture as chairman. The Wheat Advisory Committee appears to have been constituted about September 1917 for the purpose of carrying out part of the duties of the Wheat Harvest Board. Both the Board and the Committee were appointed to assist in the performance of the

duties imposed on the Government of South Australia and the Minister by the Wheat Harvest Acts. In the circumstances I think it is clear that the documents in question relate to the administration by the Government of South Australia of duties and powers conferred by a statute on the Government or on a responsible Minister, and are therefore within the class referred to in the books as "State papers" or "State documents." In my opinion, the rule as to documents of this class is correctly stated in *Taylor on Evidence*, 11th ed., par. 947, as follows: "The Minister to whose department a document belongs, or the head of the department in whose custody it is, is the exclusive judge as to whether such document is or is not protected from production on grounds of State policy, and if he claims such protection the Court will not go behind the claim, or inquire whether the document be or be not one which can properly be the subject of such a claim." In *Beatson* v. *Skene* (1) *Pollock* C.B. said:—"We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice; and the question then arises, how is this to be determined? 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—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. 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; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it." In my opinion, this statement of the rule relating to the production of State documents stands unaffected by any of the later decisions to which we were referred. It is conceivable, as *Pollock* C.B. said in the

(1) (1860) 5 H. & N., at p. 853.

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case cited, that extreme cases might arise in which the Court might think proper to disregard or modify the rule; but, so far as I am aware, no such case has yet arisen. It is true that in *Marconi's Wireless Telegraph Co.* v. *Commonwealth* [*No.* 2] (1) an order was made for the inspection of apparatus belonging to the Commonwealth notwithstanding a statement by the Postmaster-General that such inspection would be prejudicial to the public interest, but the opinions expressed by the majority of the Court recognize the existence of the rule in its application to State documents (see per *Griffith* C.J. (2) and *Barton* J. (3)) in cases in which the Court is satisfied that the document in question is within that class. In the present case the real contest, as I understand the argument, is not whether the documents in question are within the class of State documents, but whether, assuming them to be within that class, the statement of the Attorney-General that their production would be prejudicial to the public interests is conclusive.

In the *Marconi Case* (1) an application to the Judicial Committee for special leave to appeal from the order for inspection was refused, but in the course of the argument on that application the Lord Chancellor said :—" Of course the Minister's statement or certificate must be conclusive on a particular document. How can it be otherwise ? . . . If the Minister certifies quite specifically, his certificate is to be taken as conclusive." The ground on which special leave to appeal was refused in that case appears to have been that, having regard to the form of the order, which carefully limited the right of inspection and reserved liberty to apply, it was not a convenient case in which to raise a great question of principle.

For these reasons I am of opinion that the application should be dismissed.

ISAACS J. In my opinion the summons of 23rd March 1925 for inspection should be dismissed.

The real problem we have to solve is as to the true relation of the special rule of public policy when privilege against production of documents is claimed by the Crown on the ground of danger to

(1) (1913) 16 C.L.R. 178. (2) (1913) 16 C.L.R., at p. 185.
(3) (1913) 16 C.L.R., at pp. 190-193.

public interests, to the general function of the Court to do justice in the particular case by exploring all ordinary channels of evidence. That resolves itself into the question: Will the Court investigate the truth of the claim when duly made by the appropriate Minister of the Crown, or—setting aside conjectural exceptions—will it merely inquire whether the claim is deliberately and explicitly made?

The plaintiff's contention is that, as the Court's general function is the administration of justice, the first alternative is the law, qualified only by the discretion of the Court as to how far the pursuit is to be carried. For this he relies first on the reasoning of *Griffith* C.J. and *Barton* J. in the *Marconi Case* (1), and particularly on the passage where the late Chief Justice said (2):—"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." He also relies on the dicta in the Scottish case of *Henderson* v. *M'Gown* (3) to practically the same effect. The defendant State relied on my formulation of the relevant propositions of law, particularly number 7 (*Marconi Case* (4)), as representing the law of England on the matter. An application to the Privy Council for leave to appeal against the decision was refused on 4th July 1913 by Lord *Haldane* L.C., Lord *Dunedin* and Lord *Atkinson*. I have had the opportunity of perusing the transcribed shorthand notes of that application. Carefully considering what was there said, I believe I am justified in adhering to the formulation I made. The leave, after some argument for the petitioner, was refused on the ground stated by the Lord Chancellor as follows:—"We are all of opinion that this is not a convenient case in which to raise a great question of principle, and we do not see our way to grant leave to appeal. The matter has been before the High Court, and this is not a case in which to grant leave." Mr. *Danckwerts*: "Your Lordships will not allow me to elaborate my argument?" The Lord Chancellor: "No, on these materials we are not going into this question." As I read the observations made

(1) (1913) 16 C.L.R. 178.
(2) (1913) 16 C.L.R., at p. 186.
(3) (1916) S.C. 821.
(4) (1913) 16 C.L.R., at p. 206.

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during the argument, their Lordships thought that, whatever might be said of the principle contained in the reasons, the actual order made was provisional only and sufficiently provided against disclosure of any State secret. As to things the disclosure of which would be injurious, the Lord Chancellor observed: "The order is carefully guarded and there is liberty to apply as to those." If I may venture to say so, that seems tantamount to saying there had so far been no definite order for production but the Court had reserved that for future consideration should it ever become necessary. On the other hand there were very clear observations as to the principle itself. The Lord Chancellor at one stage said:—"It is true that here a Minister of the Crown can certify it is in his opinion prejudicial that a document should be produced. It is a privilege he ought to exercise most sparingly, and a privilege which is sometimes very loosely used by persons engaged in cases on behalf of the Crown, and I think the Court ought to have it most distinctly from the Minister that he certifies as a definite fact that it is not in the public interest that it should be produced." Disengaging, for brevity's sake, various other observations of the Lord Chancellor, but not, I think, in any way altering their meaning, Lord *Haldane* said:—"It cannot be that the Crown is entitled to say 'We will have no discovery at all because we happen to be the Crown and it is not expedient'"; and again: "It is true that a Minister of the Crown has the privilege of certifying that in his opinion it is prejudicial to the State to produce documents, but there must be some limit." Again: "Of course the Minister's statement or certificate must be conclusive on a particular document. How can it be otherwise on a particular document? But when an objection is taken to the whole field of the case, as is practically the case here—" Again: "In order to apply the analogy of *Beatson* v. *Skene* (1), you must certify to something specific"; and a little later his Lordship added:—"And if the Minister certifies quite specifically, his certificate is to be taken as conclusive. I am speaking of what I myself have experienced when I acted for a department of the State."

It therefore appears to me quite plainly that there is no weakening

(1) (1860) 5 H. & N. 838.

of the decisions that enounce with no uncertain sound the clear privilege of the Crown to prevent what it conceives to be the public danger of producing its "State documents" and on what Lord *Haldane* calls the "analogy" of *Beatson* v. *Skene* (1). The case of *Henderson* v. *M'Gown* (2) is, I need scarcely say, the decision of a Court entitled to our deep respect. But, in the first place, the decision reversed the order of the Lord Ordinary who had granted a diligence to produce the documents. The Lord President (Lord *Strathclyde*) and other learned Lords of Session certainly made observations tending to support in some measure the contention of the plaintiff here. With all deference I am unable to adopt them as the law of Australia.

I entirely accept the case of *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* (3), which I cited in the *Marconi Case* (4). (That case, decided in 1908, is reported also in the *Scottish Law Reporter* (5).) It is, in my opinion, a case of high importance and authority. The Admiralty Commissioners sued the Company for damages to a cruiser arising from collision. The defenders applied for production of letters, memoranda, and reports by the officers of the injured cruiser to the Admiralty regarding the collision. Privilege was claimed. The Lord Ordinary (*Johnston*) ordered the documents "to be produced under seal for the consideration of the Court." The Lord Ordinary, in a note, gave his reasons for this direction as follows:—"Until I saw the documents I could not tell how far they were *de recenti*, or how far their production might disclose matters not directly bearing on the collision, and which it was in the interests of the public service should not be disclosed. Where the Lords of the Admiralty appear as pursuers in an action for collision I think that they must treat their opponents as ordinary litigants would have to do, and cannot assume the position of being the judges of what they will produce and what they will refuse. I think that it is for the Court to be satisfied that the production of any particular document would be injurious to the public service, as containing official secrets or service code words, signals,

(1) (1860) 5 H. & N. 838.
(2) (1916) S.C. 821.
(3) (1909) S.C. 335.
(4) (1913) 16 C.L.R. 178.
(5) (1908) 46 S.L.R. 254.

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&c." The appeal came before Lord President *Dunedin* and Lords *McLaren*, *Kinnear* and *Pearson*. The Court unanimously allowed the appeal. The judgments of Lord *Dunedin* and Lord *Kinnear* were, if I may say so, especially clear. Lord *Dunedin* said (1): —" The Lord Ordinary granted the diligence, but added the words 'to be produced under seal for the consideration of the Court.' That is to say, his Lordship holds first of all that the documents must be produced, and second, that the plea of confidentiality does not apply absolutely, but that it will be for the Court to say whether the disclosure of the matters therein would be so detrimental to the public service as to justify the non-production of the documents. Against the Lord Ordinary's interlocutor a reclaiming note has by leave been taken, and the case has been argued before us as one of considerable general importance." The Lord President first dealt with the matter as if it were between private litigants, and held that, if the matter were to be determined on that basis, production would be ordered. "But then," said the Lord President, "comes the question of confidentiality"—by which expression Lord *Dunedin* obviously intends the protection of public interests. He says:— "I am unable to see any difference between this case and the various cases which we have determined in other matters with which the Lord Advocate is concerned. It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service, it is a very strong step indeed for the Court to overrule that statement by the department. The Lord Ordinary has thought that it is better that he should determine the question. I do not there agree with him, because the question of whether the publication of a document is or is not detrimental to the public service depends so much upon the various points of view from which it may be regarded, and I do not think that the Court is in possession of these various points of view. In other words, I think that, sitting as Judges without other assistance, we might think that something was innocuous, which the better informed officials of the public department might think was noxious. Hence I think the question is really one for the department, and not for your Lordships."

(1) (1908) 46 S.L.R., at p. 256.

That, to my mind, quite definitely decides that the consideration of public interest overrides that of private interests even when those interests are in train of decision by a Court of justice. Nay more, Lord *Dunedin* proceeds to deal with the argument that it was not equitable to permit the Admiralty to sue for damages and yet withhold production of documents. He repels that argument in these words, which may be not unimportant later on (1):—"I do not think that the Admiralty should be put to the dilemma of either giving up their just rights, as they conceive them, of suing a party for damages sustained, or else of being obliged to do something that they think inconsistent with the public interest. And also I should like to say this, that the mere refusing of reports in such a case is not an unmixed benefit to the Admiralty. If the case goes to trial, and they still think fit not to make the report available, it seems to me that there will probably be a very good jury point to be made as to the keeping back of the report, and that point may be just as useful to the other party as any point that could be made on the report if it were produced. But that is a question entirely for the decision of the Admiralty and their officers." Lord *McLaren* agreed. He stated (1) that he was strongly of the same mind on the question of confidentiality. He went on to say:—"The interest of the public in maintaining the confidentiality of official documents is recognized by our constitution. For example, when papers are called for by Parliament, the department is always understood to have the right to keep back documents the publication of which might be injurious to the public service, and I doubt whether it would be possible to find an instance where Parliament has insisted on the production of papers which the Minister responsible for the department has declared could not be produced without injury to the public interest. That is a sort of authority which may very well regulate the practice of Courts of law, and I think we must give to the Admiralty in stating this plea the credit of having regard to the public interest, not only with regard to this case, but with regard to similar cases if reports were called for in a Court of law. As regards the course suggested by the Lord Ordinary, I may say that I should not desire to be put into the position of judging

(1) (1908) 46 S.L.R., at p. 257.

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regarding the confidential character of such documents, because there are considerations which the public department are much better acquainted with than we can possibly be, such as the desirability that the captain in command of a vessel should express his opinions freely without the restraint that would be imposed upon him if he knew that his report was liable to be published. There are also matters of discipline and order with which we are unacquainted, and which may enter into this question. As the Admiralty has objected on public grounds to the recovery of these documents, my opinion is that this is an objection which we ought to sustain." Lord *Kinnear* first agreed with Lord *Dunedin* as to the first point, namely, the basis of private litigation. Lord *Kinnear* then went on to say (1):—" The real question for decision in this case is rather, whether assuming the report to be of such a kind that the defenders might have called for it if this had been a litigation between two private parties, the Admiralty is not entitled to say that it ought not to be produced because they hold that it would be detrimental to the public to produce it. I agree that we cannot take out of the hands of the department the decision of what is or what is not detrimental to the public service. There are only two possible courses. We must either say that it is a good ground of objection, or we must overrule it altogether. I do not think that we should decide whether it would be detrimental to the public service or not; and I agree with what both your Lordships have said as to the position of the Court in reference to that question. We do not know the conditions under which the production of the document would or would not be injurious to the public service. I think it is not improbable that even if an officer of the department were examined as a witness we should not get further forward, because the same reasons which induced the department to say that the report itself ought not to be produced might be thought to preclude the department from giving the explanations required. A department of Government, to which the exigencies of the public service are known, as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself, and therefore I agree we ought not to grant

(1) (1908) 46 S.L.R., at p. 258.

the diligence." Lord *Pearson* agreed, and said: "I am afraid, however, that the public interest, of which the department alone can judge, is paramount; and that it rests with the department and their advisers to allow only such use of the documents as they deem to be consistent with the public interest." The Court recalled the interlocutor of the Lord Ordinary.

The *Admiralty Case* (1) is a clear-cut decision, and it entirely covers this case. It is in exact line with what I have always understood to be the principle of the English cases, and, if right, is destructive of the principle urged on behalf of the plaintiff—even the modified view that the Court should inspect the documents and judge for itself. It was evidently this case to which Mr. *Danckwerts* referred when in the Marconi application to the Privy Council he said "in Scotland it has been laid down (Lord *Dunedin* was a party to one case) that the Court cannot examine into the question at all." There were cited to us in argument some obiter observations of *Field* J. in *Hennessy* v. *Wright* (2) as to private examination of documents. But they are hardly in harmony with the definite decisions. In any case, they are directed to ascertaining motive and bona fides, rather than to discovering the State secret. I do not see how the passage quoted can be sustained. A word may be said as to the *Asiatic Petroleum Co.'s Case* (3). The general principles elsewhere laid down are maintained (4). The inspection by *Scrutton* J. (5) does not appear to have been done *in adversum*, and therefore that is no precedent for the course desired here.

The central truth of the matter is that, as *Swinfen Eady* L.J. said in the *Asiatic Petroleum Co.'s Case* (6), "the general public interest must be considered paramount to the individual interest of the suitor." I have to some extent dealt with that and its application in the *Marconi Case* (7). I adhere to what I there said and would only add a very few words since the effectuation of private rights was pressed upon us as the primary and governing consideration. That naturally is an essential proposition to arrive at the conclusion that the Court can in any measure investigate the *truth* of the claim for privilege.

(1) (1908) 46 S.L.R. 254.
(2) (1888) 21 Q.B.D., at p. 515.
(3) (1916) 1 K.B. 822.
(4) (1916) 1 K.B., at pp. 829, 830.
(5) (1916) 1 K.B., at p. 826.
(6) (1916) 1 K.B., at p. 830.
(7) (1913) 16 C.L.R., at pp. 203, 204.

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If (which is barely conceivable) there should ever be so transparent a claim by a Minister of the Crown for privilege that the Court without seeking evidence or weighing it can perceive *ex facie* the impossibility of public prejudice, the Court may well for such an extreme possibility reserve an extreme power. That, however, represents the character of the extreme cases, practically negligible, to which I referred in the *Marconi Case* (1).

It should be stated that it was urged on behalf of the plaintiff that the extreme power should be exerted here. It was said that certain relevant documents, reports and letters had already been divulged and this fact entirely dislodged the claim for protection. Without detracting in the least from the force of the principle above stated, I may observe that the fallacy of that contention in point of fact is patent. Assuming the relevancy of the documents referred to, how is it shown they are in the contested schedule? The suggestion was this: They are relevant, therefore they ought to be included somewhere in the affidavit of documents; they are not elsewhere, consequently they are in the relevant schedule. But suppose we concede for the moment that the documents ought to be included, how does it appear they are? If they ought to be included and ought to be disclosed, then it follows they ought to be in some other schedule. The hypothesis might support an application for a further and better affidavit, but it cannot support an application to inspect, not only the suggested documents, but all others genuinely privileged from disclosure.

Once, however, it is admitted that public interest applies and is paramount, then, whatever the consequence to private interests, the relevant public interest must be protected to the full. The Country does not create Courts, any more than it creates any other institution, to injure the whole body corporate for the sake of any individual. In *Homer* v. *Ashford* (2) *Best* C.J. said: "The first object of the law is to promote the public interest; the second to preserve the rights of individuals." The plaintiff's argument simply reverses this order. In the same region of the law, though in a less important chapter, the preservation of private confidence, *Knight Bruce* V.C. thought, and the Privy Council speaking by

(1) (1913) 16 C.L.R. 178.

(2) (1825) 3 Bing. 322, at p. 326.

Lord *Macnaghten* have agreed with him, that disclosure may be "too great a price to pay for truth itself," and Lord *Macnaghten* adds "at least for the good of society in general" (*Macintosh* v. *Dun* (1)).

HIGGINS J. I concur in the opinion that this application ought to be refused; but I desire to define carefully the position as it appears to me.

The chairman of the South Australian Wheat Harvest Board has, in pursuance of an order for discovery of documents, sworn that the defendant has in its possession or power the documents relating to the matters in question in the action [there is no question as to relevancy] which are set forth in the first, second, third and fourth parts of the first schedule to his affidavit. But as to the documents set forth in the first part of the first schedule the chairman swears (par. 3) that he objects to produce them "on the ground that they are State documents and that they consist of communications relating to a department of the Government of the State of South Australia passing between the officers of the said department relating to the affairs of such department of State and made by officers of State to other officers of State in the course of their official duty. I have caused the said documents to be submitted to the Honourable William Joseph Denny the Minister in charge of the said department and he has directed me to object to produce the same on the ground that their disclosure is contrary to public policy and that the interests of the State and of the public service and the public interest will be prejudiced by the production thereof."

The application made by the plaintiff is for leave to inspect and copy these documents. The first part of the said schedule describes the documents as tied up in a bundle (a) and numbered as stated, and tied up in two bundles, b(1) and b(2), and numbered as stated. What the plaintiff really wants to inspect and copy is a number of reports from inspectors in the service of the Wheat Board as to stacks of wheat in the control of agents of the Wheat Board. It is sworn that some at least of the reports were fully and voluntarily disclosed by the Government before a Royal Commission appointed to investigate the affairs of the Wheat Harvest Scheme, that the

(1) (1908) A.C. 390, at p. 401.

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Commission sat publicly and that the reports of the evidence before the Commission, including reports from the inspectors, were widely published. The statement of the Minister that to produce for inspection would be prejudicial to the interests of the public service, the State and the public is conclusive: it is for the Minister to decide as to the production being prejudicial—not for this Court (*Beatson* v. *Skene* (1); *Stace* v. *Griffith* (2); *Hughes* v. *Vargas* (3); *Hennessy* v. *Wright* (4)). The fact that some of the documents were produced before the Royal Commission does not estop the Minister from objecting to publicity now, even as to such of the documents as were produced. The case of *Hennessy* v. *Wright* shows that, as the cases stand at present, there is no need for the Minister in person to make an affidavit. It was held by the majority of this Court (*Griffith* C.J. and *Barton* J.) in *Marconi's Wireless Telephone Co.* v. *Commonwealth* [*No.* 2] (5), in an application, in an action for infringement of a patent, for inspection of apparatus, that the Court is bound to inquire into the facts so far as to ascertain what is the nature of the State secret alleged by the Minister. But here, in an action for negligently keeping wheat stacks entrusted to the Government the nature of the secret communications is known—they are communications from inspectors of the department to the department as to the wheat stacks. We are bound by the decision of the majority in the *Marconi Case*. Leave to appeal was refused by the Judicial Committee of the Privy Council. We have been shown a copy of the notes of the application, and it appears that their Lordships were much influenced by the want of finality in the order, leaving it open to the defendant to apply if there were any abuse of the privilege. There is nothing in the present case of any exceptional character such as would justify us in making further inquiry before giving effect to the statement of the Minister.

RICH J. This is an application for leave to inspect and copy certain documents referred to in an affidavit sworn pursuant to an order for discovery in an action in which the plaintiff is claiming compensation from the Government of South Australia.

(1) (1860) 5 H. & N. 838.
(2) (1869) L.R. 2 P.C. 420.
(3) (1893) 9 R. 661.
(4) (1888) 21 Q.B.D. 509.
(5) (1913) 16 C.L.R. 178.

The objection to this application has already been set out at length. It is founded on the fact that the documents in question are State documents and that their disclosure would be contrary to public policy and prejudicial to the interest of the State and to the public service and public interest. The statement of the Minister is specific as to the nature, character or class of the documents in question and as to the fact of prejudice which would arise from production. The question, then, is whether his statement is conclusive.

The principal cases dealing with this matter, apart from the *Marconi Case* [*No.* 2] (1), are collected in *Robertson's Civil Proceedings by and against the Crown*, at p. 606, and the result is stated to be that "when the head of the department has decided, it is not for the Judge to say whether the production of any particular document is injurious to the public service or not." In *Williams* v. *Star Newspaper Co.* (2) reference is made to *Latter* v. *Goolden* (unreported), where Lord *Esher* said: "[The cases cited] seem to me clearly to show that when the head of a public department says it would be contrary to the public interest to produce a document which is in his possession in virtue of his position as head of the department, it is for him to say so."

Exceptional cases may arise where the claim is obviously futile and the Minister has misconceived the case and taken a mistaken view as to what documents are relevant, or the claim relates to some trade secret (cf. *Marconi Case* [*No.* 2] (1)). But the case under consideration falls within the category of those cited and, in my opinion, the Minister's statement is conclusive.

STARKE J. The right of the plaintiff to discovery in this action was established by the decision in *Griffin* v. *State of South Australia* (3). Order XXIX. of the Rules of this Court regulates the practice in relation to discovery. Among other rules is r. 17, which provides: "When, on an application for an order for inspection, objection is made to the production of any documents, either on the ground of privilege or on any other ground, the Court or a Justice may inspect the document for the purpose of deciding as

(1) (1913) 16 C.L.R. 178. (2) (1908) 24 T.L.R. 297.
(3) (1924) 35 C.L.R. 200.

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to the validity of the objection." That rule applies as much to a State as to any other litigant in this Court. The State of South Australia has made an affidavit of documents, but, as to some of the documents discovered, it objects to produce them "on the ground that they are State documents and that they consist of communications relating to State matters in and connected with a department of the Government of the State of South Australia made by officers of State to other officers of State in the course of their official duty and in the course of official communications between them on matters of public business and relating solely to the official administration of the said department." And the Attorney-General for the State of South Australia has directed the deponent who made the affidavit of discovery to state that the disclosure of the said documents is contrary to public policy, and that the interests of the State and the public service and the public welfare will be prejudiced by the production of the said documents, and has directed the deponent not to produce the documents to any person or persons. Further, the Attorney-General has, in a memorandum placed before the Court, stated that "the above direction is not based in any way upon the pecuniary or commercial interests of the said department or of the State of South Australia or of the plaintiff or upon any desire to defeat the plaintiff's claim in the action, but solely upon and in the interests of the public welfare and the public service." Notwithstanding this objection, the plaintiff has issued a summons claiming that the defendant do give inspection of the documents referred to in the objection, and the questions arising upon this summons were referred for argument to this Court. Upon this argument the learned counsel for the plaintiff particularly asked the Court to exercise the power of inspection contained in r. 17 above referred to.

It is undoubtedly true that the Courts will not compel the production in evidence or the discovery of documents, whether State documents of an official or administrative character or other documents, the publication whereof would be injurious to the public interest (*Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.* (1)). Accordingly, in the present case, the documents sought

(1) (1916) 1 K.B. 822.

to be inspected are prima facie protected from discovery. But the State of South Australia goes further and claims that the Minister is the exclusive judge of whether the documents are or are not protected from production on the ground of public policy. The other view, insisted upon by the plaintiff, is well put in *Wills on Evidence*, 2nd ed., p. 292: "On the question whether a given case comes within the rule, that is to say, whether the publication of documents sought to be disclosed would be prejudicial to public interests it is the general rule that the Courts defer to the opinion duly expressed by those entitled to speak for the department concerned; the head of the department having duly asserted the privilege on the ground that the publication of the document would be prejudicial to the public interest, the Court will accept and act on his statement; it is only in case of manifest error on the part of the public officer or when the matter is submitted by the department itself to the judgment of the Court, that the Court will act on its own opinion." Or, to adapt a statement of Viscount *Haldane* L.C. in another connection, the Court would only act in opposition to the Minister's statement if "the Court were practically certain that the Minister had misconceived the position, and would, if he had conceived it properly and had acted upon a proper view of the law, have disclosed the documents" which he claims to protect (*British Association of Glass Bottle Manufacturers* v. *Nettleford* (1)). I have looked at all the cases collected in the *English and Empire Digest* (tit. "Discovery," pp. 166-169; tit. "Evidence," pp. 392-394), and the most authoritative appear to me to support the view suggested by Mr. *Wills*. In *Beatson* v. *Skene* (2), which states the rule in the sense most favourable to the State of South Australia, *Pollock* C.B. still reserves extreme cases which might perhaps arise where the matter would be so clear that the Judge might well ask for the document in spite of some official scruples as to producing it. The remarks of *Field* J. in *Hennessy* v. *Wright* (3) are in favour of the suggestion made by Mr. *Wills*. And the opinions delivered in *Hughes* v. *Vargas* (4) clearly support it. Thus Lord *Esher* (5)

(1) (1912) A.C. 709, at p. 714.
(2) (1860) 5 H. & N. 838; 29 L.J. Ex. 430.
(3) (1888) 21 Q.B.D., at p. 515.
(4) (1893) 9 R. 661.
(5) (1893) 9 R., at p. 665.

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says that the Judge is bound to give effect to the objection "*unless he can see clearly that it could not be to the detriment of the public service.*" And see *Bowen* L.J. (1) and *Kay* L.J. (2), where, speaking of *Beatson* v. *Skene* (3), he says "that case goes on to say that 'there may be cases which so clearly show that there is no ground for taking an objection of that kind, that the Court may overrule the reluctance of the head of the department to produce the document and compel him to produce it, notwithstanding his objection.'" *Henderson* v. *M'Gown* (4) contains even stronger expressions; see also *Queensland Pine Co.* v. *Commonwealth* (5). *Marconi's Case* (6) strikes me as decisive in this Court of the matter now under discussion. There the question was the inspection of wireless stations used for both defence and commercial purposes. The Minister had informed the Court that he was of opinion that it would be prejudicial to the public interest and the welfare of the Commonwealth to allow any inspection of the stations or the plant and apparatus therein, and that the objection was not based on the pecuniary or commercial interests of the Government, but solely upon the interests of the public welfare and the naval and military defence of the Commonwealth. According to *Griffith* C.J., with whom *Barton* J. agreed, the claim was examinable, and the Court could not, without abdicating its duty, refuse to examine it; and a limited order for inspection was made. The Judicial Committee did not think the case was one in which they should advise His Majesty to grant special leave to appeal. The observations of their Lordships during argument throw no light, I think, upon their reasons for this advice; but in this Court we ought to abide by the principle of the case, and not attempt fine and untenable distinctions. It supports to the full the proposition upon which Mr. *Dixon* rested his argument, which was substantially that stated by Mr. *Wills*. Cases such as *Williams* v. *Star Newspaper Co.* (7) and *Latter* v. *Goolden* there referred to and *Admiralty Commissioners* v. *Aberdeen &c. Co.* (8) are instances, apparently, in which the Courts accepted and acted upon the statement of the Minister and

(1) (1893) 9 R., at p. 667.
(2) (1893) 9 R., at p. 668.
(3) (1860) 5 H. & N. 838.
(4) (1916) S.C. 821.
(5) (1920) S.R. (Q.) 121.
(6) (1913) 16 C.L.R. 178.
(7) (1908) 24 T.L.R. 297.
(8) (1909) S.C. 335.

in which there was no reason to consider or question its accuracy. Moreover, this is not the case of production of documents upon a trial but of production for inspection under a discovery order, which is subject in this action to the express provisions of Order XXIX., r. 17.

An objection to inspection on the ground of public interest is based upon higher grounds than the objections made by parties to discovery and inspection of documents on the grounds of irrelevancy and privilege. As a general rule, however, the party's oath in his affidavit of documents in the latter class of cases is conclusive and can only be controverted from the affidavit itself or from documents mentioned in the affidavit or from admissions of the party making the affidavit. Now that the Constitution and the laws made thereunder have permitted actions against the Commonwealth and the States and imposed upon them the duty of discovering documents relevant to such actions, there is no reason for excepting them from the ordinary principles relating to discovery. Unless an objection to produce or allow an inspection of documents on the ground of detriment to the public interest is absolute and finally concluded by the statement of the Minister, why should not the Courts act upon somewhat similar principles as to the conclusiveness of the Minister's statement as they would in the case of a party's oath in any other affidavit of documents? The Courts would not allow the Minister's statement to be controverted otherwise than by his own admissions or by documents discovered by him clearly establishing that, through some inadvertence, he had misconceived the position. A fortiori, why should not the Courts use the power confided to them by Order XXIX., r. 17, if some real doubt were established as to the accuracy of the Minister's statement? No good reason suggests itself to me for refusing to exert those powers in a proper case, whether the objection to production and inspection of documents be on the ground of public interest or on any other ground. The commercial activities of Australian Governments are becoming more and more extensive and the sphere of political and administrative action correspondingly wider (cf. *M. Isaacs & Sons Ltd.* v. *Cook* (1)). May not this be a good

(1) (1925) 41 T.L.R. 647.

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reason for submitting the Australian Governments to the jurisdiction of the Courts, and imposing upon them the duty of making discovery and inspection of documents according to the ordinary rules of law and practice?

Turning now to the facts of the case, my opinion is that the Court would be well advised to use its power to inspect the documents the publication of which the Minister claims would be detrimental to the public interest. The documents could be examined privately (see *Hennessy* v. *Wright* (1)). No one has suggested that the interests of the public are such that a Judge ought not to see the documents; and, if such an allegation be ever made, the Courts would, without doubt, fully protect the public interests and do nothing to imperil them. Now, in the present case, the Government was the mandatary of all the owners who delivered wheat to it, and was not merely exercising administrative powers conferred upon it by the Wheat Harvest Acts (*Welden* v. *Smith* (2)). Further, the Government has produced correspondence between the Harvest Board and several firms of grain merchants who were apparently charged with the receiving, stacking, storing and protecting of the wheat delivered to the Government by the owners pursuant to the Wheat Harvest Acts. This correspondence refers to reports of the Board's inspectors upon the state and condition of the wheat stacks in the care of these merchants, and generally sets forth the defects that had been observed. None of these reports have been produced for inspection, and all are obviously covered by the objection that their production and inspection would be prejudicial to the public interest. In the face of the relationship of the Government to the owners of the wheat delivered to it, and the correspondence which the Government has produced, the Minister's statement is, to me, quite inexplicable. I am not prepared at present to say that the statement is wrong, but I strongly suspect that he has misconceived the position, and, if the matter rested with me, I should exercise the powers conferred upon the Court by Order XXIX., r. 17, and inspect the documents.

Some affidavits were filed on this summons by the plaintiff setting forth that these documents related solely to the care, condition

(1) (1888) 21 Q.B.D., at p. 515. (2) (1924) A.C. 484; 34 C.L.R. 29.

and management of the wheat stacks and contained no information of a political nature. But I disregard these statements and consider them to be wholly inadmissible. Again, it was sought to show, by means of affidavits, that various documents relating to the state and condition of the wheat stacks were produced and publicly read before a Royal Commission appointed to inquire into and report upon the acquisition and disposal of wheat by or on behalf of the Government of South Australia since 1st November 1915, and all matters connected with the South Australian Wheat Scheme and all matters connected with the workings of the said scheme, and the conduct of all persons or any persons connected with any of the matters hereinbefore mentioned. Yet it is said that none of these documents have been produced, and must be covered by the objection raised by the Minister to the production of the documents set forth in the affidavit of discovery. Mr. *Cleland* assured the Court that they were not included in those in respect of which the Minister claimed protection. But in any case I regard these affidavits as wholly inadmissible. Even if the documents had been included in the bundles of papers in respect of which the Minister claims protection, still a party cannot be allowed to controvert the Minister's statement in the manner attempted by these affidavits. But, for the reasons already stated, I am unable to concur in the judgment of the Court wholly refusing the summons dated 23rd March 1925 for the inspection of documents mentioned therein.

Application dismissed with costs.

Solicitors for the plaintiff, *Wadey, Norman & Waterhouse*, Adelaide, by *Davies & Campbell.*

Solicitors for the defendant, *Baker, McEwin, Ligertwood & Millhouse*, Adelaide, by *Whiting & Byrne.*

B. L.