[HIGH COURT OF AUSTRALIA.]

NAISMITH . . . . . APPELLANT;
DEFENDANT,

AND

McGOVERN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

H. C. OF A. 1953.

BRISBANE, *Aug.* 6;

SYDNEY, *Sept.* 11.

Williams, Webb, Kitto and Taylor JJ.

Income Tax (Cth.)—Prosecution—Recovery of pecuniary penalty—Right of defendant to discovery—Usual practice and procedure in civil cases—Suit as between subject and subject—Income Tax and Social Services Contribution Assessment Act 1936-1951 (*No.* 27 *of* 1936—*No.* 44 *of* 1951), *ss.* 222, 237—*Judiciary Act* 1903-1950 (*No.* 6 *of* 1903—*No.* 80 *of* 1950), *s.* 64

The defendant in an action instituted in accordance with the civil procedure of the High Court by the Commissioner of Taxation pursuant to Pt. VII. of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 is entitled to an order for discovery of documents against the commissioner.

Section 64 of the *Judiciary Act* 1903-1950 applies to such an action.

It is no answer to an application by one party to proceedings for an order for discovery that that party is for some reason immune from such an order.

Decision of the Supreme Court of Queensland (*Matthews* J.) reversed.

APPEAL from the Supreme Court of Queensland.

An action was commenced in the High Court by the Commissioner of Taxation, Patrick Silvester McGovern, under Pt. VII. of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951, against Herbert Arthur James Naismith as defendant for declarations that the defendant had been guilty of an offence under s. 230 (1) of the said Act in knowingly and wilfully understating his income in his return for the year ended 30th June 1951 and further or alternatively under s. 227 (1) of the said Act in making and delivering a return, namely the said return, false in certain particulars, and for an order for the payment of penalties in respect of the alleged offences.

The defendant served a notice on the plaintiff in accordance with O. 32, r. 9 of the High Court Rules, requiring him to make discovery on oath of the documents which were or had been in his possession or power relating to the matters in dispute in the action. The plaintiff refused to comply with the notice claiming that in proceedings of this kind, which though civil in form were penal in nature, discovery against the plaintiff at the suit of the defendant was inappropriate, as in such proceedings it had never been the practice to order discovery against the defendant at the suit of the plaintiff.

Thereupon the defendant applied by summons to a judge of the Supreme Court of Queensland exercising federal jurisdiction under s. 39 (2) of the *Judiciary Act* 1903-1950 for an order that the plaintiff comply with the notice. This summons was dismissed by *Matthews* J. who held that proceedings under ss. 227 and 230 of the said Act were criminal proceedings and that therefore discovery could not be ordered.

From that decision the defendant appealed to the High Court.

G. L. Hart Q.C. (with him *J. L. Kelly*), for the appellant. Under s. 237 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951, the defendant, subject to the discretion of the court, is entitled to discovery as of right. The commissioner may object to producing documents on the ground of public policy or on other grounds, but these objections should be set out in his affidavit. This action has been commenced and prosecuted in accordance with the High Court Rules, under which the defendant must plead strictly to the allegations made in the statement of claim. This does not take place in criminal proceedings. These are therefore, civil proceedings. [He referred to *Martin* v. *Treacher* (1); *R.* v. *Associated Northern Collieries* (2); *In re a Debtor* (3).] Whether the proceedings are criminal or civil, the procedure is laid down by s. 237 as the ordinary procedure in a civil case. Discovery is part of the usual practice and procedure of this court in a civil case. [He referred to *Craies* on *Statute Law*, 5th ed. (1952), p. 499; *Asiatic Petroleum Co. Ltd.* v. *Anglo-Persian Oil Co.* (4); *Jackson* v. *Butterworth* (5); *R.* v. *McStay* (6); *McGovern* v. *Hillman Tobacco Pty. Ltd.* (7); *Mallan* v. *Lee* (8); *Judiciary Act* 1903-1950, s. 64.]

(1) (1886) 16 Q.B.D. 507.
(2) (1910) 11 C.L.R. 738, at pp. 740, 747.
(3) (1910) 2 K.B. 59.
(4) (1916) 1 K.B. 822.
(5) (1946) V.L.R. 330, at p. 332.
(6) (1945) 7 A.T.D. 527.
(7) (1949) 4 A.I.T.R. 272, at p. 275.
(8) (1949) 80 C.L.R. 198.

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C. G. Wanstall, for the respondent. Ample particulars necessary to inform the defendant of the case he has to meet have been given. The Crown is not amenable under s. 237 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 to the "coercive power in relation to discovery". This is not claimed as a prerogative but on the construction of s. 237. That section replaces sections of the *Judiciary Act* 1903-1950 dealing with claims by and against the Crown. Those provisions of the *Judiciary Act* are displaced by Pt. VII. of this Act, which expresses a code so far as taxation prosecutions are concerned. Therefore s. 64 of the *Judiciary Act* does not apply. Furthermore, s. 237 displaces the rules made under the *Judiciary Act* and the usual practice and procedure of the Court in a civil case has to be read down to the extent of the rules expressed in cases like *Martin* v. *Treacher* (1) and *R.* v. *Associated Northern Collieries* (2). In a civil case, where a penalty is sought, the practice and procedure against the defendant is limited in that it affects the right of the plaintiff to obtain discovery. But discovery is mutual, and the rules make no provision for unilateral discovery. The usual practice and procedure of the court is a right of discovery which applies equally to both parties subject to the exception that where it is a penal action the right is stopped *in limine*. [He referred to *Re Société Les Affréteurs Réunis and Shipping Controller* (3); *Thomas* v. *The Queen* (4); *Griffin* v. *South Australia* (5); *George* v. *Federal Commissioner of Taxation* (6); *McEvoy* v. *Federal Commissioner of Taxation* (7).] In any event the court would exercise its discretion under the third limb of s. 237 and refuse discovery: *Mallan* v. *Lee* (8).

G. L. Hart Q.C., in reply, referred to *R.* v. *Associated Northern Collieries* (2) and to *The Commonwealth* v. *Miller* (9).

Cur. adv. vult.

Sept. 11. THE COURT delivered the following written judgment:—

This is an appeal by the defendant in an action brought by the plaintiff, the Commissioner of Taxation of the Commonwealth of Australia, under the provisions of Pt. VII. of the *Income Tax and Social Services Contribution Assessment Act* 1936-1951 for (1) a declaration that the defendant has been guilty of an offence under

(1) (1886) 16 Q.B.D. 507.
(2) (1910) 11 C.L.R. 738.
(3) (1921) 3 K.B. 1.
(4) (1874) L.R. 10 Q.B. 31.
(5) (1925) 36 C.L.R. 378.
(6) (1952) 86 C.L.R. 183, at pp. 207, 208.
(7) (1950) A.T.D. 206.
(8) (1949) 80 C.L.R. 198.
(9) (1910) 10 C.L.R. 742.

s. 230 (1) of that Act in that he was a person who in a return of his income for and in respect of the year 1st July 1950 to 30th June 1951, made, furnished and delivered by him to the plaintiff on or about 27th December 1951, did knowingly and wilfully understate the amount of his income and that he be convicted accordingly. (2) Further or alternatively a declaration that the defendant has been guilty of an offence under s. 227 (1) of that Act in that he made and delivered a return namely the said return which was false in certain particulars and that he be convicted accordingly. (3) An order that as penalty the defendant do pay (a) in respect of the offence under s. 230 (1) the sum of £500 and in addition the sum of £3,488 16s. 0d. being double the amount of tax that would have been avoided if the statements in the said return had been accepted as correct; and/or (b) in respect of the offence against s. 227 (1) the sum of £100 and in addition the sum of £12,384 being double the amount of tax that would have been avoided if the said return had been accepted as correct.

Part VII. of the Assessment Act consists of ss. 222 to 251 inclusive. Section 222 provides that: "In this Part, 'taxation prosecution' means a proceeding by the Crown for the recovery of a pecuniary penalty under this Act". Section 237 provides that: "Every taxation prosecution in the High Court of Australia or the Supreme Court of any State or Territory of the Commonwealth may be commenced prosecuted and proceeded with in accordance with any rules of practice established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge". There are in this Court no rules of practice established by the Court for Crown suits in revenue matters and the present proceeding is being prosecuted in accordance with the usual practice and procedure of the Court in civil cases. The defendant served a notice on the plaintiff in accordance with r. 9 of O. 32 of the High Court Rules requiring him to make discovery on oath of the documents which are or have been in his possession or power relating to the matter in question in the proceedings. The plaintiff refused to comply with the notice on the ground that discovery is not appropriate in proceedings under Pt. VII. of the Assessment Act. The Deputy Crown Solicitor said that such proceedings are for the recovery of penalties and, though they follow a civil form, partake of the nature of criminal proceedings, and in such proceedings discovery is not appropriate. He added that the proceedings were penal in their nature, though civil in form, and it has never been the practice to allow discovery

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or interrogatories in penal actions against the defendant, and accordingly it is inappropriate that discovery should, in such a case, be ordered against the plaintiff. The defendant then applied by summons for an order that the plaintiff should within seven days after the making of the order comply with the notice of discovery. The summons was heard by *Matthews* J., a judge of the Supreme Court of Queensland, exercising federal jurisdiction under s. 39 (2) of the *Judiciary Act* 1903-1950. His Honour held that proceedings under ss. 227 and 230 of the Assessment Act are criminal proceedings and that therefore discovery could not be ordered. Accordingly he ordered that the summons should be dismissed with costs. The appeal is an appeal by the defendant from that order under s. 39 (2) (*b*) of the *Judiciary Act*.

His Honour apparently relied on the rule which has prevailed since *Montague* (*Lord*) v. *Dudman* (1) that a bill of discovery lies to " aid the proceeding in some suit relating to a civil right in a court of common law, as an action ; but not to aid the prosecution of an indictment or information, or to aid the defence to it " (2). But his Honour did not refer to any authority. In *Robertson, Civil Proceedings by and against the Crown*, at p. 174 it is stated that informations for penalties are to be regarded rather as civil than as criminal proceedings. In *Attorney-General* v. *Freer* (3), *Graham* B. said : " I think that the Attorney-General is perfectly right when he says that these proceedings for penalties here, are although partly of a criminal nature, for many purposes to be considered as in the nature of civil actions " (4). In *R.* v. *McStay* (5) *Williams* J. said that proceedings under Pt. VII. are not strictly criminal proceedings, a view he adhered to in *McGovern* v. *Hillman Tobacco Pty. Ltd.* (6) where, after citing s. 237 of the Act, he said : " Accordingly, proceedings must, for many purposes, be considered as being in the nature of a civil action " (7). In *Jackson* v. *Butterworth* (8) *Fullagar* J., who was then a judge of the Supreme Court of Victoria, held that proceedings under Pt. VII. are civil rather than criminal in their nature, an opinion he adhered to in *Jackson* v. *Gromann* (9). The question was touched upon by the Full Court consisting of *Latham* C.J., *Dixon* J. (as he then was) and *McTiernan* J. in *Mallan* v. *Lee* (10) but nothing decisive was said. *Latham* C.J. expressed the view that the proceedings might assume a civil form or a

(1) (1751) 2 Ves. Sen. 396 [28 E.R. 253].
(2) (1751) 2 Ves. Sen., at p. 398 [28 E.R., at p. 254].
(3) (1822) 11 Price 183 [147 E.R. 441].
(4) (1822) 11 Price, at p. 197 [147 E.R., at p. 446].
(5) (1945) 7 A.T.D. 527, at p. 553.
(6) (1949) 4 A.I.T.R. 272.
(7) (1949) 4 A.I.T.R., at p. 275.
(8) (1946) V.L.R. 330.
(9) (1948) V.L.R. 408, at p. 411.
(10) (1949) 80 C.L.R. 198.

criminal form. He said: "If proceedings are instituted in a court of summary jurisdiction (as in the present case) there is nothing to distinguish the proceedings from any other proceedings for an offence. If proceedings were instituted in the Supreme Court or the High Court they might assume a civil form or, in accordance with the directions of the Judge, a form more nearly approaching to that of criminal proceedings" (1). *Dixon* J. did not discuss the question. *McTiernan* J. said (2) that it had been argued that the understating of income in breach of s. 230 could not be aided and abetted in the proper sense of the words because the understatement did not amount to the commission of a crime. He then said: "The argument is based upon other sections of the Act providing procedure which is more appropriate to civil than to criminal matters, for the prosecution of 'offences' against the Act. The authorities which have been cited in connection with this argument do not enable a clear conclusion to be reached that such procedural provisions alter the character which the words, 'guilty of an offence', naturally ascribe to the conduct of understating income in breach of s. 230. I think that the better test is to accept the legislative definition of the conduct: I should hold accordingly that it is an offence and is criminal" (3). We are here primarily concerned with the sections in Pt. VII. relating to the procedure laid down for the recovery of pecuniary penalties for offences and not with the nature of the offences themselves and nothing that was held in *Mallan* v. *Lee* (4) throws any doubt upon the remarks of *Williams* J. and *Fullagar* J. in the cases cited. The most that can be said is that the proceedings being for the recovery of penalties are of a penal nature. It is clear that the actual procedure by which an order for the recovery of a penalty is obtained in this Court is, in the absence of a special order, the civil procedure of this Court. This is expressly provided for by s. 237 of the Assessment Act. Discovery and the administration of interrogatories are part of the ordinary civil procedure of the Court. The practice is now regulated by O. 32 of the Rules of Court. Originally orders for discovery were not obtainable at common law, except to a limited extent, and a party to a common law action who desired general discovery had to proceed by bill in equity. But the Court of Equity would not make an order for discovery or for the administration of interrogatories in favour of the prosecutor whether the prosecutor was the Crown or a common informer or any other person where the proceeding was of such a nature

(1) (1949) 80 C.L.R., at p. 209.
(2) (1949) 80 C.L.R., at p. 217.
(3) (1949) 80 C.L.R., at pp. 217-218.
(4) (1949) 80 C.L.R. 198.

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that it might result in a penalty or forfeiture: "*nemo tenetur seipsum prodere*". When discovery and interrogatories were provided for under the rules made under the *Judicature Act* the same principle was applied. It was held that the orders were not intended to confer a right to discovery, *Hunnings* v. *Williamson* (1); or to administer interrogatories, *Martin* v. *Treacher* (2), where prior to the *Judicature Act* such orders were not obtainable. See also *Mexborough (Earl)* v. *Whitwood Urban District Council* (3); *Colne Valley Water Co.* v. *Watford & St. Albans Gas Co.* (4). The subject is discussed in the judgment of *Isaacs* J., as he then was, in *R.* v. *Associated Northern Collieries* (5). The proceedings there in question were brought under s. 13 (1) of the *Australian Industries Preservation Act* 1906-1910 which provided that proceedings for the recovery of pecuniary penalties for offences, other than certain offences, should be instituted in the High Court by way of civil action and should be tried before a justice of that Court without a jury. His Honour held that in a civil action for penalties, in the absence of statutory provision to the contrary, the plaintiff is not entitled to an order for discovery of documents against the defendant and that this rule applies equally both to actions by the Crown and actions by a common informer.

In the present proceedings, therefore, assuming these principles are applicable, the plaintiff could not obtain an order for discovery or for interrogatories against the defendant. The plaintiff has not sought such an order. He has in any event wide powers of obtaining information under ss. 263 and 264 of the Assessment Act. The plaintiff represents the Crown in right of the Commonwealth but in cases that fall within s. 64 of the *Judiciary Act* 1903-1950 the Crown in right of the Commonwealth is just as liable to give discovery or to answer interrogatories by an appropriate officer as a private litigant. *The Commonwealth* v. *Miller* (6); *R.* v. *Associated Northern Collieries* (5); *Heimann* v. *The Commonwealth* (7). Counsel for the plaintiff did not argue to the contrary. He contended, however, that Pt. VII. is in itself a complete code for regulating proceedings for the recovery of pecuniary penalties under the Assessment Act and that s. 64 of the *Judiciary Act* has no application to such proceedings. Consequently the Crown in right of the Commonwealth in proceedings under Pt. VII. can rely on its prerogative immunity from discovery or interrogatories.

(1) (1883) 10 Q.B.D. 459.
(2) (1886) 16 Q.B.D. 507.
(3) (1897) 2 Q.B. 111.
(4) (1948) 1 K.B. 500.
(5) (1910) 11 C.L.R. 738.
(6) (1910) 10 C.L.R. 742.
(7) (1935) 54 C.L.R. 126.

He also contended that it is implicit in O. 32 of the rules of this Court that the right to obtain discovery or administer interrogatories should be mutual so that, since the plaintiff cannot obtain an order for either discovery or interrogatories against the defendant in proceedings under Pt. VII. of the *Assessment Act* because of their penal nature, the defendant is equally debarred. We are unable to accept either of these contentions. Section 64 of the *Judiciary Act* provides that: "In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject". Section 2 of the *Judiciary Act* provides that: "'suit' includes any action or original proceeding between parties". Section 222 of the Assessment Act provides that taxation prosecutions are proceedings by the Crown for the recovery of pecuniary penalties under the Assessment Act. Such prosecutions are original proceedings in this Court. They proceed in accordance with the usual practice and procedure of the Court in civil cases. We can see no reason why s. 64 of the *Judiciary Act* should not apply to such proceedings. It is no answer to an application by one party to proceedings for an order for discovery or interrogatories that that party is for some reason immune from such an order. The Crown could always obtain an order when it was immune. The Court of Equity made an order for discovery or interrogatories in favour of the plaintiff, not a mutual order for the benefit of both parties: *Van Heythuysen, Equity Draftsman*, 2nd ed. (1828), pp. 483-514; *Skinner* v. *Commissioner for Railways* (1). The point raised in the second contention was rejected by Lord *Esher*, M.R. in *Martin* v. *Treacher* (2). He said, "It was suggested by the plaintiff's counsel that the defendant in such an action could interrogate the plaintiff, and that there ought not to be an inequality between them in this respect. I see no objection to the conclusion at which we have arrived on that ground, or that justice to the plaintiff requires it to be otherwise" (3). In our opinion, no valid objection has been raised to the making of an order for discovery in the present case. We only wish to add that the third limb of s. 237 of the *Assessment Act* gives a very wide discretion and under that limb the Court could make any procedural order either in favour of the plaintiff or the defendant to meet the special circumstances of any particular case.

(1) (1937) 37 S.R. (N.S.W.) 261, at pp. 263-264; 54 W.N. 108.

(2) (1886) 16 Q.B.D. 507.

(3) (1886) 16 Q.B.D., at p. 512.

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For these reasons we must allow the appeal with costs, set aside the order below, and in lieu thereof order the plaintiff to comply with the notice of discovery served on him by the defendant within twenty-eight days after the service of an office copy of this order upon the plaintiff. The plaintiff must pay the costs of the proceedings before *Matthews* J.

Appeal allowed with costs. Order below set aside. In lieu thereof order the plaintiff to comply with the notice of discovery served on him by the defendant within twenty-eight days after the service of an office copy of this order upon the plaintiff. The plaintiff to pay the costs of the proceedings before Matthews J.

Solicitor for the appellant, *R. R. Stephens.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

B. J. J.