

Friday, December 18.

FIRST DIVISION.

[Lord Johnston, Ordinary.]

THE ADMIRALTY v. THE ABERDEEN  
STEAM TRAWLING AND FISHING  
COMPANY, LIMITED.

*Process—Public Policy—Diligence—Confidentiality—Objection by Public Department to Recovery of Documents as being Prejudicial to the Public Service.*

When a public department objects to the production of documents on the ground that the production of such documents would be prejudicial to the public service, the Court will not grant diligence for their recovery, even when the public department is pursuer in the action.

*Process—Proof—Evidence—Diligence for Recovery of Documents which are not Evidence—Competency.*

In an action between private parties diligence will be granted to recover a *de recenti* report by the master of a ship to the owners, but such report is not evidence against the owners.

*Scott v. Portsoy Harbour Company, 1900, 8 S.L.T. 38, approved.*

*The "Solway," 1885, L.R., 10 P.D. 137, disapproved.*

*Livingstone v. Dinwoodie, June 28, 1860, 22 D. 1333*—"All that was decided in that case was that the Court would not grant diligence for the recovery of documents in the possession of persons who had no interest whatever in the case, and had nothing to do with it except that they might probably be called as witnesses"—*per* Lord Kinnear.

The Commissioners for executing the office of Lord High Admiral of the United Kingdom raised an action against the Aberdeen Steam Trawling and Fishing Company, Limited, the registered owners of the steam trawler "Stratherrick" of Aberdeen, in which they sought payment of £1356, 11s. 10d., being the damage, as was alleged, caused to the pursuers' third class cruiser "Topaze" in a collision with the "Stratherrick." The defenders lodged a specification and moved for a commission and diligence for the recovery of the documents there mentioned, including, *inter alia*, "2. All letters, memoranda, reports or other communications written by the Commodore, Navigating-Lieutenant, and Engineer of the 'Topaze,' or one or other of them, and addressed to the pursuers or anyone on their behalf, containing reports of the collision mentioned on record, and of the manœuvres of the 'Topaze' immediately before the said collision, and written shortly after the date of the said collision."

The following affidavit was produced relative to the above article 2—"I, Sir Charles Inigo Thomas, K.C.B., of the Admiralty, Whitehall, London, make oath and say as follows:—1. I am Secretary to the Lords Commissioners of the Admir-

alty, and I have read what purports to be a copy of the specification, as altered by the Court, of documents for the defenders in this cause. 2. When any collision, not being a trivial matter, occurs between one of His Majesty's ships and any other ship or vessel, it is the duty of the officer in charge of His Majesty's said ship to report such collision to his senior officer or commander-in-chief, accompanying his said report if necessary by other reports from his subordinates, and of such senior officer or commander-in-chief to forward the same, with or without remarks as he may think fit, to the Lords Commissioners of the Admiralty. 3. Such reports are designed solely for the information of the reporting officers, naval superiors, and the Lords Commissioners of the Admiralty, and are in the nature of confidential communications. It will be prejudicial to the public service to allow such reports to become liable to inspection by litigants in any proceedings at law touching the matters therein reported. 4. There are no letters, memoranda, reports, or other communications such as mentioned in paragraph 2 of the specification referred to, save reports of the nature mentioned in the preceding paragraph hereof; and I object on behalf of the Lords Commissioners of the Admiralty, and by their authority, to the reports in question or copies thereof being produced as required by the said specification, or being inspected by, or the contents or purport thereof, whether in whole or in part, disclosed to the defenders, or anyone on their behalf. . . ."

On 12th November 1908 the Lord Ordinary (JOHNSTON) pronounced this interlocutor—"Grants diligence at the instance of the defenders for citing havers for recovery of the documents and others in the specification, and commission to Mr John W. More, advocate, Edinburgh, to take the oaths and examinations of the havers and receive their exhibits, to be reported *quam primum*."

The Lord Ordinary, however, added to the above article 2 the words "to be produced under seal for the consideration of the Court."

On 17th November 1908 the Lord Ordinary, on the motion of the pursuers, granted leave to reclaim against the interlocutor of 12th November 1908.

*Note.*—"When the specification was moved before me objection was taken on behalf of the Lords of the Admiralty to any production under article 2 in the interests of the public service. Had the case been one between private parties I should have said that the defenders were entitled just as much to any *de recenti* report of the collision by the officers of the ship as to the ship log. But as a public department was concerned, to meet the views of the Admiralty I had the words 'to be produced under seal for the consideration of the Court' added to the article. 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, &c. As the pursuers have asked leave to reclaim, regarding the matter as one of principle, I think it quite proper to grant leave, but to make my previous interlocutor intelligible it is right that I add this note."

The pursuers reclaimed, and argued—The Admiralty objected to any document of the class specified in article 2 being produced. When a public department objected to the production of documents on the ground that their production would be prejudicial to the public service, the Court, though no doubt in the last resort the judge of confidentiality and public expediency—*Sheridan v. Peel*, 1907 S.C. 577, 44 S.L.R. 406—ought not to grant diligence for their production—*The "Bellerophon,"* 1894, 44 L.J. (Adm.) 5; *Hastings v. Chalmers*, December 16, 1890, 18 R. 244, 28 S.L.R. 207; *Arthur v. Lindsay*, March 8, 1895, 22 R. 417, 32 S.L.R. 334; *Stuart v. The Great North of Scotland Railway Company*, July 9, 1896, 23 R. 1005, 33 S.L.R. 730. The fact that the Admiralty were pursuers in the action made no difference—*Hennessy v. Wright*, 1888, 21 Q.B.D. 509. The affidavit of the Secretary of the Admiralty was sufficient. (2) Even assuming that the Admiralty were in no better position than a private party the diligence ought not to be allowed. The practice in the Outer House of allowing diligence for the recovery of the master's report to the owners when written shortly after the date of the collision rested on the somewhat slender foundation of "*The Solway*," 1885, 10 P.D. 137, which proceeded on the assumption that such reports were in the same position as the log, which was undoubtedly recoverable. But they were not in the same position, for the log was made evidence by the Merchant Shipping Act. There was no provision which made such reports evidence, and accordingly diligence should not be granted for their recovery—*Livingstone v. Dinwoodie*, June 28, 1860, 22 D. 1333; *Sturrock v. Greig*, November 23, 1849, 12 D. 166.

Argued for the defenders and respondents—There was no case in which the Admiralty, being pursuers, had been allowed to refuse to produce documents on the bare statement that "such" documents were confidential, and that their recovery would be prejudicial to the public interest. In cases of collision the reports made by the master to the owner were recoverable—*Williams & Bruce on Admiralty Practice* 3rd ed., p. 420, note (o); *Marsden on Collisions*, 5th ed., p. 289, and cases there cited, viz., *The "Midlothian,"* 1851, 15 Jur. 806; *The "Manchester,"* 1839, 1 W. Rob. 62; *The*

*"Actæon,"* 1853, 1 Sp. 176; *The "Europa,"* 1849, 13 Jur. 856; *The "Solway,"* 1885, 10 P.D. 137—and that had not been disputed in Scotland or England since the case of *The "Solway,"* 1885, 10 P.D. 137, which had been followed in the Outer House in *The "Talisman" v. The "Tyne,"* May 28, 1896, 4 S.L.T. 63; *Burnyeat v. The City Line, Limited*, February 17, 1897, 4 S.L.T. 284; *Scott and Others v. Portsoy Harbour Company*, 1900, 8 S.L.T. 38. To hold such reports confidential and not recoverable would make a different practice in Scotland to that existing in England, and would change the existing practice in Scotland. Letters from servants to their master relating to matters in dispute could be recovered—*Tannet, Walker & Company v. Hannay & Sons*, July 18, 1873, 11 Macph. 931, 10 S.L.R. 642. If it were prejudicial to the public service to bring out the facts of the case, then the Admiralty must abstain from bringing the action; but once having elected to bring the action, they could not demand to be put in a better position than the ordinary litigant. They were not in so strong a position as had they been defenders in the action, but in any case an affidavit by the Secretary to the Lords Commissioners was not sufficient; it should have been made by the First Lord himself, as head of the Department—*Beatson v. Skene*, 1860, 29 L.J., Ex. 430; *Kain v. Farrer*, 1877, 37 L.T. (N.S.) 469, referred to with approval in *Hennessy v. Wright* (*cit. sup.*), *Williams & Bruce on Admiralty Practice*, 3rd ed., p. 415, note (n). In any case there should have been a more specific statement indicating why the particular reports in question were confidential, and their production prejudicial to the public service, and not merely objecting in general to the production of such reports. In *The "Bellerophon"* (*cit. sup.*) the action was between private parties.

At advising—

LORD PRESIDENT—There was a collision between one of His Majesty's vessels and the steam trawler "*Stratherrick*," belonging to the Aberdeen Steam Trawling and Fishing Company, Limited, and the Commissioners of His Majesty's Admiralty raised an action against that company concluding for a sum of £1300 odds in name of damages for injury done to one of His Majesty's ships. The record in that action was made up in ordinary form, and the defenders moved for diligence. One of the items which they asked in the diligence was in these terms—"All letters, reports, memoranda, or other communications written by the commodore," &c., "containing reports of the collision mentioned on record, and of the manœuvres of the '*Topaze*' immediately before the said collision, and written shortly after the date of the said collision." The Secretary of the Admiralty has made an affidavit, in which, after setting forth that he is Secretary to the Lords Commissioners to the Admiralty and has read the specification, he proceeds as follows—"When any collision, not being a trivial matter, occurs between one of His Majesty's

ships and any other ship or vessel, it is the duty of the officer in charge of His Majesty's said ship to report such collision to his senior officer or commander-in-chief, accompanying his said report if necessary by other reports from his own subordinates, and of such senior officer or commander-in-chief to forward the same, with or without remarks as he may think fit, to the Lords Commissioners of the Admiralty. Such reports are designed solely for the information of the reporting officer's naval superiors and the Lords Commissioners of the Admiralty, and are in the nature of confidential communications. It will be prejudicial to the public service to allow such reports to become liable to inspection by litigants in any proceedings at law touching the matters therein reported."

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.

I think that, first of all, it is necessary to consider what would be the case as between private litigants, and then to go on to the question of confidentiality raised here. We were referred by the learned counsel for the defenders to the case of *The "Solway,"* 10 Prob. Div., p. 137, which the learned counsel told us has ruled English practice in this matter. The head-note of that case is—"A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated; but the opinion of the master in such a letter is not evidence." The judgment is one of Sir James Hannen's. The letter in question was a letter from the master of the "Solway" to his owners giving certain facts relating to the loss of the goods for which the owners were being sued. Sir James Hannen says—"It seems to me that this case comes within a leading rule of the law of evidence, for it is clear that the log of a vessel is admissible in evidence by the other side to show what entries have been made by the agent of the owners of the vessel on which the log is kept. This letter comes within the same rule." The Lord Ordinary in this case seems to take the same view, because he says—"Had the case been one between private parties I should have said that the defenders were entitled just as much to any *de recenti* report of the collision by the officers of the ship as to the ship log."

Now, with those opinions I cannot agree. In the first place, I think both Sir James Hannen and the Lord Ordinary forgot that the log is made evidence by statute. There is an express provision in the Merchant

Shipping Act which makes the log evidence, and accordingly so far as the log is concerned that ends the matter. But I cannot see how a report by the captain to his owners can ever be evidence against the owners. Other cases are quoted in the English books, but they all seem to me to be of a different character. These are cases where statements made by the captain at the moment of the collision were held to be proveable in evidence. That one can understand, because they are part of the *res gestæ*; but to hold that the report of a captain to his owners is evidence against the owners seems to me contrary to one of the best known rules of evidence. Why should it be? The captain in that report to his owners may conceivably put in things that are not true in order to screen himself. Why should that be evidence against the owners? I have made some inquiries in the matter, and although it is no part of my business to go further into it, I have a serious doubt whether the doctrine of Sir James Hannen in the "*Solway*" case represents the law of England. At any rate it is not the law of Scotland. But, then the question of whether this report is evidence is quite distinct from the question whether it is not a document for the recovery of which the Court may fairly be asked to grant diligence. We were informed as to the practice of the Outer House in later times as regards this, and in particular a judgment of Lord Low was quoted to us in which I entirely agree. I think the practice which has grown up of allowing reports in these circumstances to be recovered in the case of collisions is a right one, and I think that the distinction taken by Lord Low in the case quoted is also a proper one, namely, that while reports written shortly after the collision may be recovered, you cannot recover anything that passed between the owners and any of their servants *post litem motam*—I do not mean merely after the summons has been raised, but after it is apparent that there is going to be a litigious contention between the parties. Accordingly I think if this were a case between private parties we should undoubtedly give diligence for the recovery of this report.

But then comes the question of confidentiality. 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.

Two other topics I must just mention. In the first place, it was urged that here the affidavit was not that of the chief officer of the Department. I do not think that objection will do. I think that the Secretary to the Lords Commissioners of the Admiralty is entitled to be taken by your Lordships' Court as representing the Lords Commissioners of the Admiralty, and that it would be mere trifling to insist that we should have an affidavit under the hand of the First Lord himself. The other topic is this—it was argued that although the plea of confidentiality might be quite equitably allowed in cases where the documents were asked at the instance of third parties—and, no doubt, most of the cases, if not all of them, that have been decided in connection with the Lord Advocate's Department fall within that category—yet the rule ought to be different where the party pleading privilege is the party who himself first comes into Court, as here, where the Admiralty are suing. That again seems to me to make no real difference, for 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.

On the whole matter, therefore, I am of opinion that this diligence, so far as this article is concerned, should be refused.

LORD M'LAREN—I agree that before we come to the question of privilege it is necessary to consider whether a report to his owners by the officer in command of one of the vessels that collided is a document which in the ordinary course of practice might be asked for. Now I am not satisfied that in a case between private parties there is any decision or any rule that would preclude the Court from granting a diligence to recover from the owners of the ship a report made at the time of the collision when all the circumstances were fresh in the recollection of the master or officer in command. Such a report would, of course, be very useful to cross-examining counsel for the purpose of refreshing the memory of the master as to

the events of the day, and furnishing points upon which he might be called upon to give explanations in his evidence. I would wish to add this, that while as regards decisions affecting the merits of the case the Court would desire if possible that the decisions should be consistent with those that have been given in parallel cases in England, that rule does not apply with nearly the same force when the decisions are on mere points of practice. One reason for that is that no one can say that persons entering into contracts do so in reliance on rules of practice. Another reason is that a decision on a point of form may be given without a full perception of the convenience or inconvenience resulting from settling the point one way or the other. We have reason to believe—I think, indeed, that it is admitted by counsel on both sides—that for many years it has been the practice of the Lords Ordinary in the Outer House to grant diligences for the recovery of reports of the nature in question. I think their Lordships' practice is perfectly right, and it would be a great misfortune if judges were not free to consider the element of convenience in regard to such questions.

But while I agree with your Lordship in the chair on that point, I am, at the same time, strongly of the same mind with regard to the plea of confidentiality. The interest of the public in maintaining the confidentiality of official documents is recognised 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 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—I agree with your Lordship in the chair as to the first point. I think that if this were a question between private litigants we ought to grant diligence for the recovery of a report of the kind described, made by the master of the ship to his owners, subject always to the condition that it must have been made directly after the accident. I entirely agree with what your Lordship has said as to the decision of Lord Low in the Outer House, and other decisions of the same kind. They appear to me to be perfectly in accordance with right practice; and I have the less hesitation in saying so because they are not inconsistent with any previous decision of this Court. In my opinion they are entirely consistent with the decision in *Livingstone v. Dinwoodie*, which is undoubtedly a judgment of great authority, pronounced, after consultation between both Divisions of the Court, for the purpose of determining what the Judges then thought a question of importance. All that was decided in that case was that the Court would not grant diligence for the recovery of documents in the possession of persons who had no interest whatever in the case and had nothing to do with it except that they might probably be called as witnesses. That is clearly not an authority which would be applicable in the case of a report made *de recenti* by the master of a ship to his owners, the owners being pursuers or defenders of an action in Court. I think, further, that such diligence should be allowed even although the report could not, according to our rules of law, be made evidence of the facts contained in it, and I agree with your Lordship in the chair that it would not be evidence of such facts. The case of the "*Solway*," which was cited to us as an authority to the contrary, is the decision of a very eminent judge, and is on that account of great authority, but it is not binding upon us and has reference only to English practice, and therefore I cannot say that it shakes my opinion as to the true rule of the law of Scotland.

It was necessary to dispose of these points, because they were strenuously argued, but 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 the diligence.

LORD PEARSON—I have no doubt that, according to our practice, the documents which are here called for are such as would be recoverable in an action between ordinary litigants to the limited effect defined by your Lordship. But where the documents are in the hands of a Government Department, and are of the nature of reports by the subordinate officers to their superiors, it is open to the Department to object to their production on the ground of public policy. The objection is not confined to the case where the litigation is between private persons, one of whom desires to have the documents in aid of his case. It would certainly, as I think, apply also to a case in which the Department of Government was called into Court as defender. The specialty of this case is, that the action being raised by the Department themselves as pursuers, they seek to prevent the defenders from recovering and using documents which, according to our rules of evidence, they would be entitled to recover in the ordinary case. 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. I agree in thinking that the course taken by the Lord Ordinary in ordering the documents to be produced under seal for the consideration of the Court is inexpedient.

The Court recalled the interlocutor of the Lord Ordinary of 12th November 1908 reclaimed against, in so far as it granted commission and diligence to recover documents and others falling under article 2 of the specification as allowed by the Lord Ordinary, deleted said article from the specification and *quoad ultra* adhered, and remitted to the Lord Ordinary to proceed as accords.

Counsel for the Pursuers (Reclaimers)  
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