

the applicant was a statutory small tenant. The statute being, as I think, clear and free from ambiguity, I am not concerned with the inconvenience which counsel suggested might flow from this construction of the statute, nor do I need to consider whether it is or is not in harmony with a passage in the opinion of the Lord President in a case which raised an entirely different question.

The Court answered question 1 in the affirmative, question 2 in the negative, question 3 (b) in the affirmative, and question 4 in the negative.

Counsel for the Appellant—Macmillan, K.C.—Dykes. Agent—J. Gibson Strachan, Solicitor.

Counsel for the Respondent—Christie—Garrett. Agents—Warden & Grant, S.S.C.

Wednesday, June 28.

FIRST DIVISION.

[Lord Hunter, Ordinary.]

HENDERSON v. M'GOWN AND ANOTHER.

Process—Proof—Diligence for Recovery of Documents—Income Tax Returns in Custody of Commissioners of Inland Revenue.

In an action of damages for slander the pursuer, who had been in partnership with the two defenders, alleged that they had stated that he while in partnership with them had fraudulently debited the co-partnership with a number of charges with which it did not properly fall to be debited. The defenders pled *veritas*, and lodged a specification of documents calling for, *inter alia*, the income tax returns made by the pursuer while such partner relating to the partnership business. The Commissioners of Inland Revenue objected to diligence being granted on the ground that production of such documents would not be in the public interest. The pursuer also objected on the ground that if the Court had a discretion to order production in exceptional cases this was not an exceptional case in respect that no purpose could be served by granting diligence, the defenders having full information *abunde*. *Held*, after consultation with the Second Division, (1) that the Court had a discretion to order production, but (2) (*rev.* Lord Hunter) that the circumstances were not such as to call for the exercise of the discretion.

In an action by John Ralston Henderson, wine and spirit merchant, Elderslie Bar, Yoker, *pursuer*, against Andrew M'Gown and Dugald Cameron, both wine and spirit merchants, Clydebank, *defenders*, concluding for £5000 damages for slander, the defenders lodged a specification of documents, including, *inter alia*, certain income tax returns, and moved for a commission and diligence for the recovery thereof.

The seventh article of the *specification* was in the following terms—"7. All income tax returns made by the pursuer so far as bearing upon the Elderslie Bar during the . . . period [from 15th May 1905 to 24th September 1913], and all income tax assessment notices and receipts for income tax received by the pursuer during the said . . . period."

The relevant *facts* and *averments* appear from the opinion of the Lord Ordinary (HUNTER), who on 10th June 1916 granted diligence, *inter alia*, for the recovery of the documents in the seventh article, and granted leave to reclaim.

Opinion.—"This is an action of slander brought by a gentleman who was formerly in partnership with the two defenders. The slander is to the effect that the pursuer when he was a partner made deliberately false statements with reference to the returns that he had received from the business during the subsistence of the co-partnership. There was a reference, under which an award was given, and the award was set aside, but that has not any material bearing upon the present matter.

"The defenders plead *veritas*—that is to say, they allege that the pursuer deliberately falsified statements with reference to the business. In the record they make averments to this effect—"The pursuer has made a return to the surveyor of taxes showing, for income tax purposes, the trading account and profit and loss account of the business carried on at the Elderslie Bar for the year from April 1913 to April 1914. In the said trading account he sets forth that for the said period the gross profit was £247, 14s. 5d., and the shop drawings were £6942, 18s. 11d. The said gross profit represents 35.6 per cent. of the said shop drawings. These defenders believe and aver that the pursuer has made returns to the surveyor of taxes showing, for income tax purposes, the trading account and profit and loss account of the said business for the year 1914/1915; and they further believe and aver that the gross profits declared in the said returns represent over 36 per cent. of the shop drawings, as therein declared."

"It is now sought to recover by way of diligence the returns which were made by the pursuer to the surveyor of taxes. So far as I know a diligence on those lines has never been granted by the Court. The Court have allowed receipts for income tax to be recovered. The defenders have been in communication with the income tax authorities, who, although they are not represented here, have intimated that they object to the production of the documents. In their original communication they had adopted the ordinary departmental position, namely, that it was against the public interest that the documents should be produced. On further communication with them they have modified that position to this extent that it appears that they are influenced largely by the circumstance that they regard these returns as confidential.

"The question as to whether a Court of law ought to ordain the production of

income tax returns came before Lord Pearson for consideration in the case of *Shaw v. Kay*, 1914, 12 S.L.T. 495. There the income tax authorities appeared, and after hearing them Lord Pearson refused an order for the recovery of the documents. In that case Lord Pearson said—'Private convenience must give way to public interest; and the Courts have been accustomed to give almost conclusive effect to a representation by a Department of State on such a matter. They have, it is true, usually qualified their decisions by intimating that a case might occur in which they might exercise their discretionary power to compel recovery. It is difficult to figure so exceptional a case beforehand; but at all events I do not think we have it here.'

"The opinion I have formed as regards this case is that we have such an exceptional case here, and I am prepared therefore to grant a diligence for the recovery of the returns. The pursuer and the defenders were partners in the same business, and the returns were not private returns in the sense in which the returns of a third party would have been private. I am told now that the pursuer exercised an option which he had and which gave him the business at a date prior at all events to some of these returns; but at the time that this record was closed, and at the time the statements that are said to be slanderous were made, there was at all events an interest in the defenders in connection with the returns which were made. That I think puts the case in an exceptional position, and I do not think, so far as the public interest is concerned, that there is any greater reason for not allowing these returns to be recovered than there is for not allowing income tax receipts to be recovered.

"I shall therefore grant the diligence. As this is the first time so far as I know that the Court has taken the step I am now taking, I shall grant leave to reclaim."

The pursuer reclaimed.

At the hearing in the Inner House the Commissioners of Inland Revenue appeared, and argued—They had certified that it was contrary to the public interest that the income tax returns should be produced. When such a statement was made by a responsible department of the Government, the Court was bound by it, and had no alternative but to refuse to grant a diligence—*Earl and Others v. Vass*, 1822, 1 Shaw's Appeals 229, per Lord Chancellor Eldon at p. 230; *Dunlop v. Scottish North-Eastern Railway Company*, 1866, 1 S.L.R. 102; *Tierney v. Ballingal & Son*, (1896), 23 R. 512, 33 S.L.R. 379; *Brown's Trustees v. Inland Revenue*, 1897, 35 S.L.R. 340; *Forrest v. Macgregor*, 1913, 1 S.L.T. 372; *Shaw v. Kay*, 1904, 12 S.L.T. 495; *Admiralty v. Aberdeen Steam Trawling and Fishing Company, Limited*, 1909 S.C. 335, per Lord President (Dunedin) at p. 340, Lord M'Laren at p. 342, and Lord Kinnear at p. 343, 46 S.L.R. 254. The same rule applied to documents in the Lord Advocate's department—*Arthur v. Lindsay*, 1895, 22 R. 417, 32

S.L.R. 334; *Sheridan v. Peel*, 1907 S.C. 577, 44 S.L.R. 406. The English rule was to the same effect—*Beatson v. Skene*, 1860, 29 L.J. Ex. 430, 5 H. & N. 838, per Pollock, C.B., at p. 853; *Hughes v. Vargas*, 1893, 9 The Reports 661; *in re Joseph Hargreaves, Limited*, [1900] 1 Ch. 347, per Lindsay, M.R., at p. 352; *Asiatic Petrol Company, Limited v. Anglo-Persian Oil Company, Limited*, 1916, 114 L.T. 645. This would apply to one seeking to recover his own income tax return, and *a fortiori* to a partner seeking to recover the returns of a copartner in connection with the partnership. The receipts were in a different position, for they were not in the hands of a public department. Further, the income tax officials were bound by an oath of secrecy. Diligence should be refused.

Argued for the pursuer (reclaimer)—The seventh article of the specification, so far as relating to income tax returns, was unnecessary, and diligence should not be granted, for the question in issue was did the pursuer honestly account for the profits? The defenders had allowed to them recovery of all the documents necessary to check the pursuer's returns. They had all the books, vouchers, and income tax returns. If the Court had a discretion to order production of income tax returns in exceptional cases, this was not such an exceptional case as to warrant exercise of that discretion, for the defenders would suffer no prejudice if the returns were not produced.

Argued for the defenders (respondents)—Production of the documents called for was relevant to the issue, for the defenders stated that the profits of the business markedly decreased after the pursuer entered it, and markedly increased after he left it. The cases cited were distinguished, because in none of them was a party who was entitled to see the documents called for, calling for their production. The Court had a discretion to order production—*Hargreaves (cit.)*, per Lindsay, M.R., at p. 352, and Vaughan Williams, L.J., at p. 352; *Hughes v. Vargas (cit.)*; *Dowgray v. Gilmour*, 1907 S.C. 715, per Lord President (Dunedin) at p. 720, 44 S.L.R. 559. Here the objection was frivolous, for the call was in substance a call by an individual to see his own returns. Further, it was the duty of the Commissioners of Inland Revenue to apply their minds to the question of whether the production of the particular document would prejudice the public interest, and they had not done so here, but contended that in all cases production of such documents was contrary to the public interest. The Lord Ordinary was right.

At advising (after consultation with the Judges of the Second Division)—

LORD PRESIDENT—In this case the Lord Ordinary granted diligence for the recovery of documents in terms of a specification, part of the 7th article of which runs as follows—"The income tax returns made by the pursuer, so far as bearing on the Elderslie Bar," during the period from 15th May 1905 to 30th October 1915, and the circumstances under which this call was made by the defenders, are succinctly stated thus in a

letter from the defenders' agents to the Solicitor of Inland Revenue—"The pursuer and defenders . . . were partners carrying on business at the Elderslie Bar, Yoker, down to 24th September 1913, and the pursuer managed the business on behalf of the partnership. In his capacity of managing partner he made the returns to the Inland Revenue for the partnership, and these returns are amongst the documents which our clients . . . wish to recover." The recovery of these documents was opposed by the Solicitor-General, who appeared before us on behalf of the Government Department concerned, on the ground that the public interest would be thereby prejudiced. His contention was that this plea, being stated, must be given effect to by this Court, that we had no option, that it was final and decisive. I am of a contrary opinion. I consider this Court has power, and will on occasion and at their discretion exercise that power, to order the production of any document, even although the public department concerned states the plea of public interest as an objection to the recovery. Undeniably, certain expressions to be found in some of the opinions in the case of *The Admiralty v. Aberdeen Steam Trawling and Fishing Company*, 1909 S.C. 335, 46 S.L.R. 254, lend countenance to the Solicitor-General's contention, but although the learned Judges in that case did not find it necessary to reassert the inherent power of this Court to order the recovery of a document, I cannot think that they intended to alter the law as it had been previously laid down and was generally understood, or to part with an inherent right in this Court which each of those Judges had on prior occasions expressly recognised. The true meaning and effect of the decision was that when the objection is stated by the Government Department this Court will not consider whether the objection is well founded or not; this Court will not consider the merits of that question, but will grant or refuse the diligence at their discretion. Nothing could be plainer, I think, than the expression of Lord Kinnear upon this question where he says—"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." The law, as I understand it, was explicitly laid down by Lord President Dunedin in the case of *Sheridan v. Peel*, 1907 S.C. 577, 44 S.L.R. 406, where he says that "It is quite clear that where documents sought to be recovered are in the custody of the Lord Advocate or of the Crown officials, the only proper course is to intimate to the Lord Advocate. He may then consent to produce the documents, or refuse to produce them on grounds of public interest. If he refuses to produce them the Court can be asked to ordain him to do so." Nothing can be clearer than that statement of the law, and it is worthy of note that it was concurred

in by all the Judges who delivered opinions in the case of the Admiralty.

I may refer further to the case of *Arthur v. Lindsay*, 1895, 22 R. 417, 32 S.L.R. 334, where Lord M'Laren said—"No doubt the Court has always maintained its power to make such an order in cases of emergency," and it is quite clear that Lord Kinnear, if sitting alone, would have regarded the case as one of those exceptional cases in which, although the Government Department pled public interest, he would have exercised his discretion by overruling that plea and pronouncing an order for the recovery of the documents. Now, no distinction can, I think, be drawn in this matter between one Government Department and another. There is no room for such a distinction. There is no indication in any of the cases that the Court would draw any distinction between one department and another. Indeed Lord President Dunedin observed in the *Admiralty* case (*cit.*)—"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 being therefore, as I think, clear that this Court has an inherent power to order the production of any document at its discretion, even when a Government Department pleads public interest, the question emerges, ought we to exercise that discretion in the present case? I think we ought not, for this does not appear to me to be an exceptional case, or, indeed, so strong a case as has been presented to this Court on several former occasions. So far as I can judge it is not material to the defenders' case that these documents should be recovered. I do not think, as far as I am able to judge, that they will suffer any serious prejudice by the failure to recover them. Accordingly, differing from the Lord Ordinary in this regard, I am of opinion that we ought to exercise our discretion by sustaining the Crown's plea and refusing the recovery of the documents, on the ground that public interest will thereby be prejudiced.

Had this plea not been stated I must, for my own part, say that I should certainly not have been disposed to interfere with the discretion exercised by the Lord Ordinary when he granted the diligence.

I propose to your Lordships, therefore, that we should grant the diligence in terms of the specification, striking out the documents to which I have referred from the seventh article.

I ought to add that we have consulted the Judges of the Second Division, and that they share the views which I have endeavoured to express.

LORD JOHNSTON—[who had not heard the discussion]—I was not present when this case was heard on Saturday, but I was present yesterday at the consultation with the Judges of the other Division, and I entirely concur with what has fallen from your Lordship in the chair. I happen to have been the Lord Ordinary in the case of *The Admiralty v. Aberdeen Steam Trawling and Fishing Company*, 1909 S.C. 335, 46

S.L.R. 254, to which we were referred, and I think that too much was attempted to be made of the passage quoted from Lord Dunedin's opinion, viz.—“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.” That is not to say that the Court never can and never will overrule such a statement, but merely that it would be a very strong step, and therefore a step for which the Court would require very grave justification. The Admiralty and the War Office are charged with the duty of providing for the safety of the realm, and if either say that the production of a document in their hands would be prejudicial to the public interest I think that we would naturally implicitly accept the statement. But there are distinctions between public departments. The interest of such a department as the Inland Revenue is that the public should be able to rely on all returns to them and communications made to them being treated as confidential. This also is in the public interest. But a cast-iron rule that no such document is to be demanded might work grave injustice. I think that we are entitled to expect that the responsible official has considered the particular document, and not merely that the department is acting upon a mere general office rule, and that there may always be circumstances in which the Court would in the circumstances be justified in requiring production even against the opinion of the department. This is just such a case. The document or documents called for are the returns of income tax made by one partner out of three who are interested in that income. The other two want to see the document or documents. They are really just as much the documents of the defenders who seek to recover them as they are the documents of the pursuer who made them. It is manifest that the withholding of the documents in such circumstances might create grave injustice and the production do no possible public harm. If the documents had been thought by the Court really necessary for the defenders' case I can have no doubt that the Court would properly require their production. But I understand your Lordships to consider that the documents which are in question are not really necessary to the defenders' case, and that for that reason your Lordships do not think it proper to go further in the matter.

LORD MACKENZIE—My opinion is that this Court has inherent power to order production of the documents in question. I do not think that this is such a case that the Court ought to exercise this power.

LORD SKERRINGTON concurred.

The Court disallowed the call for income tax returns.

Counsel for the Pursuer—Dean of Faculty (Clyde, K.C.)—Macquisten. Agents—Bruce & Stoddart, S.S.C.

Counsel for the Defenders—Sandeman, K.C.—MacRobert. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Compearing Havers, the Commissioners of Inland Revenue—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Thursday, June 29.

FIRST DIVISION.

ROSE'S TRUSTEES v. ROSE AND OTHERS.

Succession—Election—Approbate and Reprobate—Testamentary Provisions “in Full” of Legitim.

A testatrix made certain testamentary provisions in favour of her son which were declared to be “as in full of all legitim, portion-natural, bairns' part of gear, or others whatsoever which he could ask or demand by and through my decease in any manner of way.” Held in a Court of Seven Judges (*diss.* Lord Salvesen) that the son by electing to take legitim had surrendered all right to take under the will.

Dicta in Macfarlane's Trustees v. Oliver, 1882, 9 R. 1138, 19 S.L.R. 850, approved.

Gray's Trustees v. Gray, 1907 S.C. 54, 44 S.L.R. 39, and *Nixon's Trustees v. Kane*, 1915 S.C. 496, 52 S.L.R. 375, overruled.

Succession—Election—Equitable Compensation—Effect of Election on Rights of Other Beneficiaries Accepting Testamentary Provisions.

A testatrix divided the residue of her estate into four parts; two parts were bequeathed in liferent to her son, and after his death in liferent to his daughter, and in fee to the issue of the daughter, whom failing to certain other relatives of the testatrix; another part was bequeathed in liferent to the son's daughter and in fee to her issue, whom failing in liferent to her father, and in fee to the same relatives of the testatrix; the remaining part was bequeathed in liferent to the son's son and in fee to his issue, whom failing in liferent to his father and in fee to the same relatives of the testatrix. The son by electing to take legitim surrendered all interest under the trust. Held that equitable compensation fell to be made to all the beneficiaries whose interests were prejudiced by the son's election, and that the son's election had not the effect of opening immediately to his daughter the liferent to which she was entitled in succession to him, but that her right thereto was dependent on his death and her survivorship.

Dr William Allen and another, testamentary trustees of the late Mrs Maria Le Berge Laurie or Rose, who died on 25th April