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*Practice—Production of Documents—Privilege—Affairs of State—Affidavit—  
Sufficiency—Order xxxi., rr. 12, 13, 14.*

May 17;  
June 11.

An action for libel was brought by the governor of a colony, the alleged libel consisting in a statement made by the defendant in a newspaper that the plaintiff, as governor, had sent to the Secretary of State for the Colonies garbled accounts of certain proceedings in the colonial assembly. The defendant pleaded that the statement was true. On an application for discovery by the defendant the plaintiff in his affidavit specified certain documents to the production of which he objected, as follows: "I have in my custody, but acquired and held by me in my capacity of Her Majesty's Governor of M. and subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of copies of various dispatches, reports, and other communications, with the enclosures referred to therein, which passed either between Her Majesty's Secretary of State for the Colonies and myself as such governor as aforesaid, or between the Royal Commissioner appointed by Her Majesty to inquire into the affairs of M. and myself as such governor as aforesaid, or between the said Royal Commissioner and the said Secretary of State. The attention of the said Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents, and to object to their production in these proceedings on the ground of the interest of the state and of the public service. In consequence of those instructions and of the rules and regulations of Her Majesty's Colonial Service I am unable to produce the said documents, and I object to produce them on the ground aforesaid." No affidavit or statement was made on behalf of the Secretary of State in support of the objection.

*Held*, that it sufficiently appeared that the documents in question were privileged from discovery, and that the application must be refused.

*Beatson v. Skene* (5 H. & N. 832) discussed.

APPLICATION by the defendant for discovery referred to the Court by Denman, J. The nature of the documents and the grounds of the plaintiff's objection to the production of them are stated in the head-note and in the judgments of the Court.

*Lumley Smith, Q.C.* (*W. Graham* with him), for the defendant. From the description of the documents given by the plaintiff in his affidavit it may be inferred that their contents are relevant to the issues raised. A mere statement by the plaintiff that the Colonial Secretary has directed him not to disclose them "on the ground of the interest of the state and the public service" cannot render the documents privileged from discovery. Where privilege is meant to be claimed on this ground at the trial either the head of the department or his deputy appears to claim it, or the

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Attorney-General is instructed to do so. The same considerations apply to discovery before the trial.

*Lockwood, Q.C.*, and *Cagney*, for the plaintiff. Accepting, as the Court is bound to do, the statements contained in the affidavit as accurate, the documents are not in "the possession or power" of the plaintiff within the meaning of Order xxxi., r. 14. They are state papers, and as such are the property of the Crown or of the Colonial Secretary. This would clearly be so if they were originals, and the rule must be the same as regards copies. In any case the plaintiff has only a joint possession of the documents with the Colonial Secretary, and he cannot therefore be required to produce them : *Kearsley v. Phillips*. (1)

The plaintiff has used the only means in his power at this stage of the case of informing the Court that the Colonial Secretary has prohibited the production of the documents. At the trial the Colonial Secretary can be called as a witness. On an application for discovery he cannot be compelled to make an affidavit.

There is a series of decisions which establishes that it is the duty of the Courts to refuse discovery of documents which are ascertained to be state papers and as such privileged from inspection : *The Bellerophon* (2); *Rajah of Coorg v. East India Company* (3); *Smith v. East India Company* (4); *Home v. Bentinck* (5); *M'Elveney v. Connellan*. (6)

*Lumley Smith, Q.C.*, in reply. According to *Beatson v. Skene* (7) a personal statement made in Court at the trial by the head of the department that the documents cannot be produced without prejudice to the public service is essential. It is implied in *Kain v. Farrer* (8) that the same rule applies to interlocutory proceedings. There being no affidavit by the Colonial Secretary the defendant is entitled to an order for inspection.

*Cur. adv. vult.*

June 11. FIELD, J. This is an application by the defendant for discovery in an action brought by the Governor of Mauritius

(1) 10 Q. B. D. 36, 465.

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

(3) 25 L. J. (Ch.) 345.

(4) 1 Phill. 50.

(5) 2 B. & B. 130.

(6) 17 Ir. C. L. R. 55.

(7) 5 H. & N. 838.

(8) 37 L. T. (N.S.) 469

against the publisher of the *Times* newspaper for libel. It seems that in Mauritius, as elsewhere, there are rival political parties the members of which express their views in the popular assembly, and these views the plaintiff as governor is bound to report to the Colonial Secretary. The alleged libel consists in a statement made in the newspaper that the plaintiff "edited" his reports thus made so as to convey to the Colonial Secretary an erroneous impression of the state of public opinion in the colony. The defendant pleads that this statement is true. The plaintiff does not claim that the reports which are said to have been "edited" are privileged from discovery, but he claims that certain other documents are so. Of these documents his affidavit gives the following description: "I have also in my custody (he perhaps purposely does not say 'possession'), but acquired and held by me in my capacity of Her Majesty's Governor of Mauritius, and subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of documents numbered 1 to 8, both inclusive, and tied up in a bundle marked A and initialled by me. Such documents consist of copies of various dispatches, reports, and other communications, with the enclosures referred to therein, which passed either between Her Majesty's Secretary of State for the Colonies and myself as such governor as aforesaid, or between the Royal Commissioner appointed by Her Majesty in the year 1886 to inquire into the affairs of the Mauritius and myself as such governor as aforesaid, or between the said Royal Commissioner and the said Secretary of State. The attention of the said Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents, and to object to their production in these proceedings on the ground of the interest of the state and of the public service. In consequence of these instructions, and of the rules and regulations of Her Majesty's Colonial Service (1), I am unable to produce the said documents, and I object to produce them on the ground aforesaid." These statements the Court accepts as true.

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It was argued for the plaintiff that *Kearsley v. Phillips* (2)

(1) A copy of these was produced, judgments of the Court.  
but they are not referred to in the (2) 10 Q. B. D. 36, 465.

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applies. There a Divisional Court and the Court of Appeal refused to compel the production of deeds which appeared to be the joint property of the defendant and a person not a party to the action. But here it is not, and I suppose could not be, alleged that these copies are the joint property of the plaintiff and the Colonial Secretary. In *Pope v. Curl* (1), in which Lord Hardwicke restrained Curl, the printer, from publishing letters written by the poet Pope, the property in the letters was treated as being in the poet as their writer. History shews that the executors of statesmen have raised questions as to the property in state papers. I believe it was formerly the practice for the head of a department, on his retirement, to take away even originals, but that this has been altered, and that he now has copies prepared, as the plaintiff in this case appears to have done, for his protection. However, as there is no suggestion of a joint property in the copies, *Kearsley v. Phillips* (2) plainly does not apply.

A more important question remains. Accepting the other statements in the affidavit as to the circumstances under which the copies were prepared and the action taken by the Colonial Secretary as true, are the copies privileged? There are two aspects of this question. First, the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in the discharge of their duty to the Crown were liable to be made public in a court of justice at the instance of any suitor who thought proper to say "fiat justitia ruat cælum," an order for discovery might involve the country in a war. Secondly, the publication of a state document may be injurious to servants of the Crown as individuals. There would be an end of all freedom in their official communications, if they knew that any suitor, that, as in this case, any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice. Other exceptions allowed by the law to the absolute right of the suitor to discovery, the privilege

(1) 2 Atk. 342.

(2) 10 Q. B. D. 36, 465.

of the communications which pass between a solicitor and his client, or that of those made by an informer to a revenue officer, may be explained in a similar manner.

As regards state documents, the law is well stated in *Smith v. East India Company* (1) and *Home v. Bentinck*. (2) In *Smith v. East India Company* (1) it was held in Chancery that the Company was not bound to produce in answer to a bill of discovery a correspondence between the directors of the Company and the Board of Control, the state department to which the directors were responsible. The case turned to some extent on an Act of Parliament, and Lord Lyndhurst said: "It is quite obvious that public policy requires, and, looking to the Act of Parliament, it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious that if at the suit of a particular individual these communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within the class of official communications which are privileged, inasmuch as they cannot be subject to be communicated without infringing the policy of the Act of Parliament and without injury to the public interest." The only difference between that case and the present is, that here a servant of the Crown, who is himself a party to the communications, is plaintiff. But a servant of the Crown ought not to be placed at a disadvantage in comparison with other subjects, and the plaintiff will be placed at a serious disadvantage if, because he is a servant of the Crown, he cannot defend his honour without the seal of secrecy being removed from his official communications. In *Home v. Bentinck* (2) there is an admirable exposition of the same principle by Dallas, C.J. That was an action for libel, brought by an officer in the army against the president of a commission appointed by the Commander-in-Chief to report as to his conduct in relation to a speculation. The libel was said to

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be contained in the report. The minutes were brought into court by the military secretary to the Commander-in-Chief, the official having the custody of such documents. Abbott, C.J., refused to allow them to be read. A bill of exceptions to his ruling was tendered, and there was a long argument. The Court held the ruling of Abbott, C.J., right "on the broad principle of state policy and public convenience, and upon the principle of all the cases cited." Now the copies in question are described as copies of communications which have passed between the Colonial Secretary and the governor of a colony, or between one or other of these high officials and a Royal Commissioner appointed to investigate the affairs of the colony. These communications are state documents of the same class as those in the cases cited, and therefore the copies are also state documents and are *primâ facie* as such privileged from production.

It is, however, argued that the copies are not privileged because there has been no sufficient claim of privilege by the Colonial Secretary. It is said that, as at *nisi prius*, it would be according to practice that the Colonial Secretary or his authorized representative should appear to state that he objects to the production of the documents, so here on a summons for discovery, a personal affidavit by the Secretary of State or his deputy is essential, and that there being no such affidavit the plaintiff is entitled to inspection. The principal case relied on in support of this contention is *Beatson v. Skene*. (1) That was an action for slander brought by a general who had served in the Crimea. There was a question as to the minutes of a military inquiry and other documents at the War Office. The Secretary for War attended at *nisi prius* and objected to the production of the papers as prejudicial to the public service, and Bramwell, B., declined to compel their production, basing his refusal solely on the ground of the statement made in court by the Secretary for War. This ruling was considered by the Court of Exchequer on an application for a new trial, with the result that Pollock, C.B., and Wilde, B., agreed with Bramwell, B., Martin, B., dissenting. Pollock, C.B., says, in giving the judgment of the Court: "It is manifest that the question must be determined either by the presiding judge or by

(1) 5 H. & N. 833.

the responsible servant of the Crown in whose custody the paper is. It appears to the majority of the Court (i.e., Pollock, C.B., and Bramwell and Wilde, BB.) that the question 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. My brother Martin is of opinion that, whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel the production, notwithstanding the reluctance of the heads of the department." As regards the question thus raised, I desire to say, while disclaiming all intention of dictating to the judge who may try this case, that I do not feel the difficulty which appears to have weighed with the majority of the Court, and that, should the head of a department take such an objection before me at *nisi prius*, I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavour, by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was his real motive in objecting. It is clear, however, that this decision has no bearing on the present case. The judgment refers not to a summons for discovery, at which the head of the department does not and need not attend either personally or by deputy, and as regards which neither he nor anyone on his behalf is under any obligation to make an affidavit, but to a proceeding at *nisi prius* at which the head of the department has both appeared and objected.

I think, however, that there is authority for refusing production of these copies at this stage of the case, apart from any intervention of the Colonial Secretary. In *Anderson v. Hamilton* (1) Lord Ellenborough at *nisi prius* refused to admit in evidence a correspondence between the Colonial Secretary and the governor of a colony, although the Colonial Secretary was present and raised no objection. In *Home v. Bentinck* (2) Dallas, C.J., treats this as the right course for the presiding judge to adopt under such circumstances. In neither of the cases in

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which the East India Company was concerned, neither in *Smith v. East India Company* (1), nor in *Rajah of Coorg v. East India Company* (2), where the production of similar documents was refused, in the one case by Lord Lyndhurst, in the other case by Knight Bruce, L.J., was there any affidavit on behalf of the Board of Control. In *The Bellerophon* (3), where the point arose with reference to a report made to the Lords of the Admiralty by a captain in the navy, an affidavit was made on behalf of the Lords of the Admiralty, but I do not gather that the existence of this affidavit was the ground of the refusal of the Court to order the production of the report. In *McElveney v. Connellan* (4), where the question was as to the liability to production of a report made by the Inspector-General of Prisons in Ireland to the Lord Lieutenant, the point was raised both on a summons for discovery and at the trial, and the judges of the Irish Court held that on both occasions production was properly refused on the ground of the public interest. At the trial the Attorney-General for Ireland appeared and objected on behalf of the Lord Lieutenant, but on the summons discovery was refused though there was not any affidavit by or on behalf of the Lord Lieutenant before the Court. For these reasons I am of opinion that discovery of these documents ought not to be granted at this stage of the case. I say nothing as to what course should be taken at the trial. The order must, therefore, be refused.

WILLS, J. The plaintiff in this case sues the defendant for libel, the substance of the libel being that the plaintiff, as Governor of the Mauritius, "edited" reports of speeches by various members of the council of Mauritius, which he sent home to the Secretary of State as the speeches spoken by the persons to whom they were attributed. The defendant justifies. The plaintiff was called upon for an affidavit of documents. He sets out and offers to produce for inspection copies of what I may call the incriminated dispatches and speeches, but besides them he admits the possession of (inter alia) a bundle of papers numbered 1 to 8, and sufficiently identified, which he says are "copies of

(1) 1 Phill. 50.

(2) 25 L. J. (Ch.) 345.

(3) 44 L. J. (Adm.) 5.

(4) 17 Ir. C. L. R. 55.

various dispatches, reports, and other communications which passed either between the Colonial Secretary and himself in his capacity as Governor of the Mauritius, or between the Royal Commissioner appointed by Her Majesty in 1886 to inquire into the affairs of the Mauritius and himself as governor of the colony, or between the said Commissioner and the Colonial Secretary." He adds, "that the attention of the Colonial Secretary has been directed to the nature and dates of the documents, and that the Colonial Secretary has directed him not to produce or disclose them, and to object to their production on the ground of the interest of the state and of the public service."

The plaintiff objects on these grounds to their production, and the question is whether, under these circumstances, an order ought to be made for their inspection.

Had the Secretary of State himself made affidavit that, in his opinion, the production of the documents would be injurious to the public service, the question would, I think, in the absence of special circumstances, have been completely governed by authority: see *Beatson v. Skene* (1); *The Bellerophon* (2); *Smith v. East India Co.* (3); *Rajah of Coorg v. East India Co.* (4) The case was before us a short time ago upon an application for a further affidavit of documents, and we then pointed out that the objection had in many reported cases been taken in this fashion, and in this way the plaintiff's attention was pointedly called to the fact that such materials would leave the Court in no doubt as to the proper action to take. The plaintiff, however, is not furnished with any such materials. Whether he is unable or unwilling to avail himself of the suggestion I do not know. It is argued on his behalf that he has complied with what is necessary in this respect by the portion of his affidavit which says that he is directed by the Secretary of State not to produce the documents. I am of opinion, however, that if the case be one in which the Court ought to require the assurance of the Secretary of State that production would be prejudicial to the public interests, the plaintiff's affidavit falls far short of what is necessary. The statement that the attention of the Secretary of State has

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(1) 5 H. &amp; N. 838.

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

(3) 1 Phill. 50.

(4) 8 De G. M. &amp; G. 182.

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been directed to the nature and dates of the documents is far too vague. If this kind of assurance be necessary at all, I think it ought to appear that the Secretary of State has seen and considered the documents, and has formed a real judgment as to the propriety of their being produced, something going much beyond the fact that his attention has been called, presumably by the plaintiff himself, "to their nature and dates." In such a case there should, in my opinion, be a statement on oath, either by the Secretary of State himself, or by some person duly commissioned by him to make on his behalf such a statement, that the matter has been considered by the Secretary of State, and that he assures the Court in one of these ways that the production would in his opinion be prejudicial to the public service. A statement in court on his behalf by the Attorney-General has sometimes been accepted as equivalent to the oath of the Secretary of State, a point upon which I express no opinion. But, in my judgment, if the Secretary of State's assurance be necessary in order to protect the documents from inspection, a mere statement, such as is contained in the plaintiff's affidavit, is quite insufficient—a proposition for which, I think, that *Kain v. Farrer* (1) is an authority—and I think that under such circumstances the assurance should be given in some fashion less open to exception than by the affidavit of one of the parties to the action in which discovery is sought. I do not mean to lay down as a matter of law that such a method of proving the objection of the head of the department can in no case and under no circumstances be accepted. Artificial rules upon matters of evidence are better avoided as far as is possible. I only wish to say that to me, in the present case, which presents no exceptional circumstances to justify it, this method of establishing the fact relied upon is not such as I should be prepared to act upon.

The question therefore arises whether, in the absence of objection by the responsible minister of the Crown, it is the duty of the judge on an application for discovery to prevent the disclosure of the contents of such documents as those now in question, viz. dispatches on matters connected with the public service passing between the governor of a colony and the Secre-

(1) 37 L. T. (N.S.) 469.

tary of State. A document of this character is undoubtedly in the nature of a state paper. *Primâ facie*, and if it is what it professes to be, it is called into existence simply for the service of the state, and it may be expected to relate not to mere matters of business and routine, but to matters of government and policy, and to be in its nature private and confidential. There are, undoubtedly, many matters in respect of which it is the duty of the judge, quite apart from objection taken, to prevent disclosures of a class which it would be undesirable in the public interests to permit. If a police officer, for example, were asked in court from what source he got his information in respect of an offence, it would, I apprehend, as a general rule, be the duty of the judge to direct him not to answer the question, since the mere possibility of having such information disclosed would operate as a powerful check upon persons disposed to give information in respect of such matters.

In my opinion the present case is covered by authority. In *Anderson v. Hamilton* (1), in an action against the Governor of Heligoland for false imprisonment, a correspondence between Lord Liverpool and the defendant was produced by the Under Secretary of State. He made no objection on behalf of the Government to the production of the letters; but, notwithstanding that fact, and whilst calling attention to it, Lord Ellenborough declined to allow "secrets of state to be taken out of the hands of Her Majesty's confidential servants." This was in the year 1816. In *Home v. Bentinck* (2) an action was brought against an officer who had been directed by the Commander-in-Chief to hold an inquiry touching the conduct of the plaintiff, an officer in the army, for alleged libels contained in the report of that inquiry. The case was tried in 1819 before Abbott, C.J. The report was produced by Sir H. Torrens, the military secretary to the Commander-in-Chief, and no objection was raised by him or on behalf of the Commander-in-Chief to its production, but, upon objection by the defendant's counsel, the Chief Justice rejected it on the ground now under discussion. A bill of exceptions was tendered and the case was argued before the Court of Exchequer Chamber. The question was not whether the defendant was entitled to

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protection from the consequences of publishing a libel on the ground that it was a privileged communication, but whether the judge was right in excluding it altogether at the trial. "The question," said Dallas, C.J., in delivering the judgment of the Court, "is whether if Sir Henry Torrens under a mistake had been disposed," to produce the report, "it would not have been the bounden duty of the learned judge before whom the case was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence," and the ruling of the learned Lord Chief Justice was upheld "on the broad ground of state policy and public convenience." In *McElveney v. Connellan* (1) the Irish Court declined on the same grounds, and on an application for discovery, to order production of a report of the Inspector General of Prisons to the Lord Lieutenant, although there was no evidence before it of objection on the part of the Lord Lieutenant. This decision was referred to with approval by Sir Joseph Napier in *Stace v. Griffith* (2), decided in 1869, and in that case, both in the course of the argument and in delivering the judgment of the Privy Council, Lord Chelmsford refers to *Anderson v. Hamilton* (3) as laying down the correct rule as to the admissibility of public documents, and that official letters are not receivable in evidence. "It was absolutely necessary," said Lord Chelmsford, "before any evidence of the contents of this letter was admitted, that the judge should determine that it was not an official communication." In 1873, in *Dawkins v. Lord Rokeby* (4), an action for libel was brought against the defendant for statements made to the Commander-in-Chief in the report of a court of inquiry upon the conduct of an officer, the contents of the documents in question were stated to the jury, whereupon Blackburn, J., directed a verdict for the defendant on the ground that such proceedings were absolutely privileged, even if the statements they contained were wilfully false and malicious. A bill of exceptions was tendered, and the case was heard by the Court of Exchequer Chamber in 1873. It was held

(1) 17 Ir. C. L. 55 (186).

(2) Law Rep. 2 P. C. 420, 425.

(3) 2 B. & B. 156, n.

(4) Law Rep. 8 Q. B. 255.

by that Court, on the authority of *Home v. Bentinck* (1), that the proceedings in question were inadmissible in evidence. "We cannot doubt," said the learned Lord Chief Baron, "that if the attention of the judge who tried this cause had been called to this decision, although the parties had admitted the evidence, he would have felt it, in the language of Dallas, C.J., "his bounden duty to have interposed and prevented the admission of such evidence."

I think the above cases abundantly shew that no sound distinction can be drawn between the duty of the judge when objection is taken by the responsible officer of the Crown, or by the party, or when, no objection being taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought.

With one exception, the cases cited arose with reference to evidence sought to be introduced upon the trial. It is obvious that whatever difference may exist between the case of evidence asked for or tendered at the trial and that of an application for discovery or inspection, is altogether in favour of a refusal to order discovery in the earlier stages of the case. I should be reluctant to say anything which could interfere with the discretion of the judge at nisi prius, or to treat it as impossible for circumstances to arise which might justify a judge at the trial in deciding that a particular document of the class under consideration ought to be produced. At the trial, in most cases, the document is only to be got at by subpœnaing the head of the department of state concerned with it. It has happened, and may happen again, that, instead of stating that in his opinion it ought in the interest of the public service to be withheld, he submits that very question to the Court. The responsible officer of state being subpœnaed has, at all events, the opportunity of considering the question and taking the objection, and the judge at the trial has a much better opportunity of judging whether production ought to be ordered or allowed than the Court can have upon an application at the present stage of the action, when, unless production be refused, mischief might be done behind the back and without the knowledge of the officer of state, who, to put it at the lowest, would certainly have a right

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(1) 2 B. &amp; B. 130, at p. 162.

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to state his objections to production, a right which, in all but exceptional cases, would be pretty certain to secure the protection claimed. The question whether or not in the public interest production of the document should not be allowed is so far a matter of state rather than of legal decision, that it is within the undoubted competence of the responsible minister of the Crown by taking the proper steps to interfere and raise an objection to which every tribunal would be certain, to say the least, to pay respectful attention; and we must be careful in dealing with an interlocutory application like the present to see that a right which has been established for great purposes of public welfare, and which, with one exception presently to be noticed, has been uniformly respected at nisi prius for a great number of years, is not frustrated by an order for discovery.

The only cases which can be cited as establishing anything like a conflict of authority upon this important question are *Dickson v. Lord Wilton* (1) and *Kain v. Farrer*. (2)

In *Dickson v. Lord Wilton* (1) Lord Campbell compelled a clerk in the War Office, who attended upon a subpœna addressed to the Commander-in-Chief, to produce letters written by the commanding officer of a regiment to his superior officer touching matters connected with the discipline of the regiment, in spite of his statement that he was directed by the head of the department to refuse to produce them. In *Beatson v. Skene* (3) the Court of Exchequer, after holding that the proceedings of a military court of inquiry to the production of which objection was taken by the Secretary for War, could not in the circumstances of that case be produced, went on to refer to *Dickson v. Lord Wilton* (1) and to observe that if the documents were produced without objection, or with a mere submission to the judge as to whether they should be produced or not, "the case might be different." In *Dawkins v. Lord Rokeby* (4) it was said by the Court of Exchequer Chamber that *Dickson v. Lord Wilton* (5) was in conflict with a mass of authorities, and must be considered as overruled. In *Kain v. Farrer* (2) an action against the Secretary of the Board of Trade for acts done by the Board of Trade, privilege was

(1) 1 F. &amp; F. 419.

(3) 5 H. &amp; N. 838, 854.

(2) 37 L. T. (N.S.) 469.

(4) Law Rep. 8 Q. B. 255, at p. 273.

(5) 1 F. &amp; F. 419.

claimed for certain documents on the ground that the defendant objected on the ground of public policy to produce them. It was held that the affidavit was insufficient, and production was ordered. If that case is in conflict with the numerous authorities above cited, and it seems to me difficult entirely to reconcile it with them, it is clear that they must prevail, and that *Kain v. Farrer* (1) cannot be supported.

It was argued on behalf of the plaintiff that the application was in any case premature, and that at this stage an order for discovery could not be made, although the documents might be liable to be disclosed at the trial; and it has undoubtedly happened that in many reported cases the objection has been taken at the trial, and not at an application for discovery, which, as regards the Courts of Common Law, is a modern proceeding. In my opinion, however, there are reasons, which I have already pointed out, for refusing discovery which may possibly not apply at the trial; and whilst I should be sorry to limit unnecessarily the right to see documents at the only stage of the case at which, very often, they are of any practical value, on the other hand it must not be forgotten that to order production may render of no avail the right of the Crown, which exists in the public interest, to object in the proper manner to publicity being given to the documents.

The plaintiff sought to exclude the documents in question on the ground that they do not belong to him, but to the Secretary of State. If this be anything but another way of putting the proposition already dealt with, I do not accede to it. The copies to which the matter now in hand relates are, as far as I can see, subject to the duty upon him not to disclose them, the plaintiff's own, and *Kearsley v. Phillips* (2) and similar decisions, to which a large part of the arguments for the plaintiff was addressed, appear to me to have nothing to do with this case, which is not one of joint ownership or custody at all, nor depending upon any considerations applicable to such cases. In my opinion the order asked for must be refused.

*Order refused.*

Solicitors for the plaintiff: *C. & S. Harrison & Co.*

Solicitors for the defendant: *Soames, Edwards, & Jones.*

(1) 37 L. T. (N.S.) 469.

(2) 10 Q. B. D. 36, 465.