1960

November 15.

THE STATE OF PUNJAB

v.

SODHI SUKHDEV SINGH

(B. P. SINHA, C. J., J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO and K. N. WANCHOO, JJ.)

Evidence — Production of documents — "Affairs of State", meaning of—Privileged documents—Scope of—Ministerial certificate, if and when conclusive—Collateral evidence to find nature of document—Court's power—Inspection of documents—Code of Civil Procedure (Act 5 of 1908), O. 11, rr. 14, 19(2), O. 14, r. 14—Indian Evidence Act, 1872 (1 of 1872), ss. 123, 162.

The respondent who was a District and Sessions Judge in the erstwhile State of Pepsu was removed from service on April 7, 1953 by an order passed by the President of India who was then in charge of the administration of the State. A representation made by the respondent on May 18, 1955, was considered by the Council of Ministers of the State as in the meantime the President's rule had come to an end, and its views were expressed in the form of a Resolution dated September 28, 1955; but before taking any action it invited the advice of the Public Service Commission. On receipt of the report of the Public Service Commission, the Council of Ministers considered the matter again on March 8, 1956, and its views were recorded in the minutes of the proceedings. On August 11, 1956, the representation made by the respondent was considered over again by the Council and a final conclusion was reached in respect of it. In accordance with the said conclusion an order was passed which was communicated to the respondent to the effect that he might be re-employed on some suitable post. On May 5, 1958, the respondent instituted a suit against the State of Punjab for a declaration that the removal of his service on April 7, 1953, was illegal, and filed an application under O. 14, r. 4, and O. 11, r. 14, of the Code of Civil Procedure for the production of certain documents, which included the proceedings of the Council of Ministers dated September 28, 1955, March 8, 1956, and August 11, 1956, and the report of the Public Service Commission. The State objected to the production of the said documents claiming privilege under s. 123 of the Indian Evidence Act, 1872, and the Chief Secretary of the State filed an affidavit giving reasons in support of the claim. The question was whether having regard to the true scope and effect of the provisions of ss. 123 and 162 of the Act the claim of privilege raised by the State was sustainable.

Held, that the documents dated September 28, 1955, March 8, 1956, and August 11, 1956, which embodied the minutes of

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the meetings of the Council of Ministers indicating the advice which the Council ultimately gave to the Rajpramukh, were expressly saved by Art. 163(3) of the Constitution of India and fell within the category of documents relating to "affairs of State" within the meaning of s. 123 of the Indian Evidence Act, 1872.

Accordingly, they were protected under s. 123, and as the head of the department, the Chief Secretary, did not give permission for their production, the Court cannot compel the State to produce them.

Held, further (Subba Rao, J., *dissenting*), that the report of the Public Service Commission being the advice tendered by it, was also protected under s. 123 of the Act.

Held, also (Kapur, J., *dissenting*), that the words "records relating to affairs of State" in s. 123 cannot be given a wide meaning so as to take in every document pertaining to the entire business of State, but should be confined only to such documents whose disclosure may cause injury to the public interest.

The second clause of s. 162 refers to the objections both as to the production and admissibility of the document and entitles the court to take other evidence in lieu of inspection of the document in dealing with a privilege claimed or an objection raised under s. 123, to determine the validity of the objections.

Case law reviewed.

Per Sinha, C. J., Gajendragadkar and Wanchoo, JJ.—Though under ss. 123 and 162 the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question, the matter being left for the authority concerned to decide, the Court is competent to hold a preliminary enquiry and determine the validity of the objection to its production and that necessarily involves an enquiry into the question as to whether the document relates to affairs of State under s. 123. Where s. 123 confers wide powers on the head of the department to claim privilege on the ground that the disclosure may cause injury to public interest, scrupulous care must be taken to avoid making a claim for such a privilege on the ground that the disclosure of the document may defeat the defence raised by the State. The apprehension that the disclosure may adversely affect the head of the department or the Minister in charge of the department or even the Government in power, or that it may provoke public criticism or censure in the Legislature, should not weigh in the mind of the head of the department and the sole test which should determine his decision is injury to public interest and nothing else.

The privilege under s. 123 should be claimed generally by the Minister in charge who is the political head of the department concerned; if not, the Secretary of the department should

make the claim, and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary, the Court may, in a proper case, require an affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are series of documents included in a file it should appear from the affidavit that each one of the documents, whose disclosure is objected to, has been duly considered by the authority concerned. The affidavit should also indicate briefly within permissible limits the reason why it is apprehended that their disclosure would lead to injury to public interest.

If the affidavit produced in support of the claim for privilege is found to be unsatisfactory a further affidavit may be called, and in a proper case the person making the affidavit whether he is a Minister or the Secretary should be summoned to face cross-examination on the relevant points.

The provisions of O. 11, r. 19(2), of the Code of Civil Procedure must be read subject to s. 162 of the Indian Evidence Act and where a privilege is claimed at the stage of inspection under O. 11, r. 19(2), of the Code, the Court is precluded from inspecting the privileged document in view of s. 162 of the Act.

Per Kapur, J.—The words of s. 123 of the Act are very wide and cover all classes of documents which may fall within the phrase "affairs of State", some noxious and others innocuous, and may even appear to be unduly restrictive of the rights of the litigant but if that is the law the sense of responsibility of the official concerned and his sense of fair play has to be trusted. Under that section discretion to produce or not to produce a document is given to the head of the department and the court has not the power to override the ministerial certificate against production.

The words "or take other evidence to enable it to determine on its admissibility" in s. 162 on their plain language do not apply to production and the taking of evidence must have reference to admissibility. The section does not entitle the court to take other evidence i.e., other than the document, to determine the nature of the document or the reasons impelling the head of the department to withhold the production of the document.

It is permissible for the Court to determine the collateral facts whether the official claiming the privilege is the person mentioned in s. 123, or to require him to file a proper affidavit or even to cross-examine him on such matters which do not fall within the enquiry as to the nature of the document or nature of the injury. He may also be cross-examined as to the existence of the practice of the department to keep documents of the class

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secret but beyond that the ministerial discretion should be accepted and it should neither be reviewed nor overruled.

Per Subba Rao, J.—(1) "Records relating to affairs of State" in s. 123 of the Act mean documents of State whose production would endanger the public interest; documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State, but in special circumstances they may partake of that character and it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer.

(2) Under no circumstances can a court inspect such a document or permit giving of secondary evidence of its contents.

(3) Under s. 162 the Court has overriding power to disallow a claim of privilege raised by the State, but in its discretion, the court will exercise its power only in exceptional circumstances when public interest demands. The said claim shall be made by an affidavit filed by the Minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. Ordinarily, the court shall accept the affidavit of a Minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the Minister and take other evidence to decide the question of privilege.

(4) The disclosure of the report of the Public Service Commission may expose the Government if the latter ignores a good advice, but such an exposure is certainly in public interest and in a conflict between the administration of justice and the claim of privilege by the State, the claim must be overruled.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 337 of 1960.

Appeal by special leave from the judgment and order dated January 19, 1960, of the Punjab High Court in Civil Revision No. 596 of 1959.

N. S. Bindra and *D. Gupta*, for the appellant.

Gopal Singh, for the respondent.

H. M. Seervai, Advocate-General for the State of Maharashtra and *R. H. Dhebar*, for the Intervener.

1960. November 15. The judgment of B. P. Sinha, C. J., P. B. Gajendragadkar, J. and K. N. Wanchoo, J. was delivered by P. B. Gajendragadkar, J. J. L. Kapur, J. and K. Subba Rao, J., delivered separate judgments.

GAJENDRAGADKAR, J.—This appeal raises for our decision a question of law of general importance under ss. 123 and 162 of the Indian Evidence Act, 1872, (hereafter called the Act). Originally the same point had been raised in another civil appeal before this Court, Civil Appeal No. 241 of 1955. The said appeal was the result of a dispute between Dowager Lady Dinbai Dinshaw Petit on the one hand and the Union of India and the State of Bombay on the other. Having regard to the importance of the point raised by the said appeal a Division Bench of this Court before whom it first came for hearing directed that it should be placed for disposal before a Constitution Bench, and accordingly it was placed before us. The appellant and the respondent in the present appeal then applied for permission to intervene because the same point arose for decision in this appeal as well; that is how this appeal was also placed before us to be heard after the Bombay appeal. After the Bombay appeal was heard for some days parties to the said appeal amicably settled their dispute and a decree by consent was passed. In the result the point of general importance raised by the said appeal fell to be considered in the present appeal; and so the appellant and the respondent in the said appeal asked for permission to intervene in the present appeal, and we directed that the arguments urged by Mr. Viswanatha Sastri and Mr. Seervai, for the appellant and the State of Bombay respectively, should be treated as arguments urged by interveners in the present appeal. Mr. Bindra, who appears for the appellant State of Punjab in the present appeal, and Mr. Gopal Singh who represents the respondent Sodhi Sukhdev Singh, have substantially adopted the arguments urged by Mr. Seervai and Mr. Sastri respectively and have also addressed us on the special facts in their appeal; that is how the point of law in regard to the scope and effect of ss. 123 and 162 of the Act has to be decided in the present appeal.

This appeal has been brought to this Court by special leave granted by this Court, and it arises from a suit filed by the respondent against the appellant on May 5, 1958. It appears that the respondent was

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a District and Sessions Judge in the erstwhile State of Pepsu. He was removed from service on April 7, 1953, by an order passed by the President of India who was then in charge of the administration of the said State. The respondent then made a representation on May 18, 1955. This representation was considered by the Council of Ministers of the said State on September 28, 1955, because in the meantime the President's rule had come to an end and the administration of Pepsu was entrusted to the Council of Ministers. The Council expressed its views in the form of a Resolution on the representation of the respondent; but before taking any action it invited the advice of the Public Service Commission. On receiving the said advice the Council again considered the said representation on March 8, 1956, and views on the merits of the representation were expressed by the Members of the Council. These were recorded in the minutes of the proceedings. Finally, on August 11, 1956, the representation was considered over again by the Council, and it reached a final conclusion in respect of it. In accordance with the said conclusion an order was passed which was communicated to the respondent. The order read thus: "Reference his representation dated the 18th May, 1955, against the order of his removal from service; the State Government have ordered that he may be re-employed on some suitable post".

After this order was communicated to him the respondent filed the present suit against the appellant and claimed a declaration, inter alia, that his removal from service on April 7, 1953, was illegal, void and inoperative and prayed for the recovery of Rs. 62,700-6-0 as arrears of his salary. The appellant disputed the respondent's claim on several grounds. Issues were accordingly framed by the trial judge on January 27, 1959. Meanwhile the respondent had filed an application under O. 14, r. 4 as well as O. 11, r. 14 of the Civil Procedure Code for the production of documents mentioned in the list annexed to the application. The trial court issued notice against the appellant for the production of the said documents.

In reply to the notice Mr. E. N. Mangat Rai, Chief Secretary of the appellant, made an affidavit claiming privilege under s. 123 of the Act in respect of certain documents whose production had been ordered, and gave reasons in support of the claim. On the same day Mr. Mangat Rai made another affidavit in which he gave reasons for claiming similar privilege in respect of certain other documents. The statements made in these affidavits were challenged by the respondent who submitted a counter affidavit. After the affidavits had thus been filed by the parties the trial court heard their arguments on the question of privilege, and on August 27, 1959, it upheld the claim of privilege made by the appellant for the production of some documents, and accepted the reasons given by Mr. Mangat Rai in support of the said claim of privilege.

The respondent then moved the High Court of Punjab under s. 115 of the Code of Civil Procedure and Art. 227 of the Constitution for the quashing of the said order. The petition for revision (C. R. 596 of 1959) first came up for decision before D. K. Mahajan, J., at Chandigarh. The learned judge took the view that the question raised by the petition was of considerable importance, and so he ordered that the papers should be placed before the learned Chief Justice to enable him to direct that the matter be decided by a larger Bench. Thereupon the petition was placed for decision before Dulat and Dua, JJ., who, after hearing the parties, reversed the order under revision in respect of four documents, and directed that the said documents be produced by the appellant. The appellant then applied to the High Court for a certificate under Art. 133 but its application was dismissed. It then came to this Court and applied for and obtained special leave to challenge the validity of the order passed by the Punjab High Court; and in the appeal the only question which has been urged before us is that having regard to the true scope and effect of the provisions of ss. 123 and 162 of the Act the High Court was in error in refusing to uphold the claim of

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privilege raised by the appellant in respect of the documents in question.

The question thus posed will naturally have to be answered on a fair and reasonable construction of the two statutory provisions of the Act. It has, however, been very strenuously urged before us by Mr. Seervai that before proceeding to construe the said provisions it is necessary that the Court should bear in mind the historical background of the said provisions. His argument is that ss. 123 and 162 as they were enacted in the Act in 1872 were intended to introduce in India the English Law in regard to what is commonly described as the Crown privilege in the same form in which it obtained in England at the material time; and so he has asked us to determine in the first instance what the true state of English Law was in or about 1872 A. D.

In order to decide this question three representative English decisions must be considered. In *Home* v. *Lord F. C. Bentinck* [1] the Court was dealing with a claim made by H who had sued the president of the enquiry for a libel alleged to be contained in the report made by him. It appears that H was a commissioned officer in the Army and the Commander-in-Chief of the said Army had directed an assemblage of commissioned military officers to hold an enquiry into the conduct of H. According to H the said report contained libellous matter, and so he had sued the president of the enquiry. At the trial H desired that the report submitted by the court of enquiry should be produced and this request was resisted by the defendant on the ground that the document in question was a privileged communication. This plea was upheld. Dallas, C. J., referred to the precedents relevant to the decision of the point, and observed that the basis of the said precedents was that the disclosure would cause danger to the public good. He then considered the nature of the enquiry which had been directed against H, and observed that in the course of the enquiry a number of persons may be called before the court and may give information as witnesses which they would not choose to

(1) (1820) 2 Brod. & B. 130 : 129 E. R. 907.

have disclosed; but, if the minutes of the court of enquiry are to be produced on an action brought by the party, they reveal the name of every witness and the evidence given by each. Not only this but they also reveal what has been said and done by each member of the existing court of enquiry; and, according to the learned judge, the reception of the said minutes would tend directly to disclose that which is not permitted to be disclosed; and so, independently of the character of the court the production of the report was privileged on the broad rule of public policy and convenience that matters like those covered by the report are secret in their nature and involve delicate enquiry and the names of persons who ought to stand protected.

The next decision to which our attention has been invited is *Smith* v. *The East India Company* (1). In that case the dispute with which the Court was concerned had arisen with respect to a commercial transaction in which the East India Company had been engaged with a third party; and privilege was claimed in regard to the correspondence which had been carried on by the defendant with the Board of Control. It was held that the said correspondence was, on the ground of public policy, a privileged communication, and so the Company were not bound to produce or set forth the contents of it in answer to a bill of discovery filed against them by the third party in relation to the transaction to which it referred. Lord Lyndhurst upheld the claim of privilege not because the correspondence purported to be confidential nor because it was official, but because of the effect of the provisions of c. 85 of Act 3 & 4 W. 4 on which the claim of privilege was founded. It was noticed that the Company had been prohibited from carrying on any commercial transactions except for the purpose of winding up their affairs or for the purposes of the Government of India; and it was held that the result of the relevant provisions, and particularly of s. 29 was that the Directors of the East India Company were required to make communication of all their

(1) (1841) 1 Ph. 50: 41 E.R. (Chancery) 550.

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acts, transactions and correspondence of every description to the Board of Control. That is why a claim for privilege in respect of the said correspondence was upheld. This decision shows that a claim for privilege could have been made even for correspondence which had reference to a commercial transaction in circumstances similar to those in that case.

The last decision on which considerable reliance has been placed by Mr. Seervai is the case of *Beatson* v. *Skene* (3). It may incidentally be pointed out that Chief Baron Pollock's observations in this judgment are frequently cited in judicial decisions where the question of privilege falls to be considered. In that case the plaintiff had been a general who commanded a corps of irregular troops during the war in Crimea. Complaint having been made about the insubordination of troops the corps was placed under the superior command of V. Thereupon the plaintiff resigned his command. V directed S to inspect and report upon the state of the corps, and referred S for information to the defendant who was a Civil Commissioner. The defendant, in a conversation with S, made a defamatory statement respecting the conduct of the plaintiff. The plaintiff brought an action against the defendant for slander. The defence set up against the plaintiff's claim was that what had passed between the defendant and S was a privileged communication. The jury had found a verdict for the defendant. A new trial was claimed by the plaintiff, inter alia, on the ground that the learned judge had declined to compel the production of certain documents. It appeared that the Secretary for War had been subpoenaed to produce certain letters written by the plaintiff to him and also the minutes of the court of enquiry as to the conduct of S in writing the letter to V. The plea for a new trial was rejected on the ground that the Court was of the opinion that the non-production of the said documents furnished no ground for a new trial. There was a difference of opinion among the members of the Court on the question as to whether Bramwell, J., was justified in upholding the claim of privilege Pollock,

(3) (1860) 5 H. & N. 838 : 157 E.R. 1415.

C. B., Bramwell, B., and Wilde, B., held that the claim for privilege was properly upheld, whereas Martin, B., took a contrary view.

Dealing with the claim made that the production of the documents would be injurious to the public service Pollock, C. B., observed that the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice, and he posed the question: How is this to be determined? Then Pollock, C. B., proceeded to observe that the question must be determined either by a presiding judge or by the responsible servant of the Crown in whose custody the paper is; and he remarked that the judge would be unable to determine it without ascertaining what the document is and why the publication of it would be injurious to public service—an enquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. He further held that "the administration of justice is only a part of the general conduct of the affairs of any State or nation, and we think is (with respect to the production or non-production of a State paper in a Court of Justice) subordinate to the general welfare of the community". Martin, B., however, was of the 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 its production notwithstanding the reluctance of the head of the department to produce it. It would thus be seen that according to the majority view the question as to whether any injury to public interest would be caused by the production of the document could not be determined by the Court, because such an enquiry would tend to defeat the very purpose for which privilege is claimed, whereas, according to the minority view it was for the Court to hold an enquiry and determine whether any injury would follow the production of the document.

Mr. Seervai contends that these decisions correctly represent the legal position in regard to the Crown privilege in England in the second half of the Nineteenth Century, and, according to him, when the

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Indian Evidence Act was drafted by Sir James Fitzjames Stephen he intended to make provisions in the Act which would correspond to the said position in the English Law. In other words, the argument is that ss. 123 and 162 are intended to lay down that, when a privilege is claimed by the State in the matter of production of State documents, the total question with regard to the said claim falls within the discretion of the head of the department concerned, and he has to decide in his discretion whether the document belongs to the privileged class and whether its production would cause injury to public interest. It is in the light of this background that Mr. Seervai wants us to construe the relevant sections of the Act.

In support of this argument Mr. Seervai has also referred us to the draft prepared by Sir James Fitzjames Stephen at the instance of Lord Coleridge for adoption by the English Parliament, and has relied on Art. 112 in the said draft. Art. 112 provides, *inter alia*, that no one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, unless the officer at the head of the department concerned permits him to do so. It also refers to some other matters with which we are not concerned. This part of Art. 112 as framed by Sir James Fitzjames Stephen seems to include the provisions of ss. 123 and 124 of the Act. It is significant that there is nothing in this Article which corresponds to s. 162 of the Act. Mr. Seervai concedes that the draft prepared by Sir James Fitzjames Stephen was not adopted by Parliament, and even now there is no statutory law of evidence in England; even so, he contends that the intention which Sir James Fitzjames Stephen had in drafting the relevent sections of the Indian Evidence Act must have been similar to his intention in drafting Art. 112, and that is another fact which we may bear in mind in construing the relevant sections of the Act. We ought, however, to add that though Mr. Seervai elaborately argued this part of his case he fairly conceded that recourse to extrinsic aid in interpreting a statutory provision would be justified only

within well recognised limits; and that primarily the effect of the statutory provisions must be judged on a fair and reasonable construction of the words used by the statute itself.

Let us now turn to s. 123. It reads thus:

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

This section refers to evidence derived from unpublished official records which have a relation to any affairs of State, and it provides that such evidence shall not be permitted to be given unless the head of the department concerned gives permission in that behalf. In other words, as a result of this section a document which is material and relevant is allowed to be withheld from the Court, and that undoubtedly constitutes a very serious departure from the ordinary rules of evidence. It is well known that in the administration of justice it is a principle of general application that both parties to the dispute must produce all the relevant and material evidence in their possession or their power which is necessary to prove their respective contentions; that is why the Act has prescribed elaborate rules to determine relevance and has evolved the doctrine of onus of proof. If the onus of proof of any issue is on a party and it fails to produce such evidence, s. 114 of the Act justifies the inference that the said evidence if produced would be against the interest of the person who withholds it. As a result of s. 123 no such inference can be drawn against the State if its privilege is upheld. That shows the nature and the extent of the departure from the ordinary rule which is authorised by s. 123.

The principle on which this departure can be and is justified is the principle of the overriding and paramount character of public interest. A valid claim for privilege made under s. 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and

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that, where a conflict arises between public interest and private interest, the latter must yield to the former. No doubt the litigant whose claim may not succeed as a result of the non-production of the relevant and material document may feel aggrieved by the result, and the Court, in reaching the said decision, may feel dissatisfied; but that will not affect the validity of the basic principle that public good and interest must override considerations of private good and private interest. Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of s. 123. Subject to this reservation the maxim *silus populi est supreme les* which means that regard for public welfare is the highest law is the basis of the provisions contained in s. 123. Though s. 123 does not expressly refer to injury to public interest that principle is obviously implicit in it and indeed is its sole foundation.

Whilst we are discussing the basic principle underlying the provisions of s. 123, it may be pertinent to enquire whether fair and fearless administration of justice itself is not a matter of high public importance. Fair administration of justice between a citizen and a citizen or between a citizen and the State is itself a matter of great public importance; much more so would the administration of justice as a whole be a matter of very high public importance; even so, on principle, if there is a real, not imaginary or fictitious, conflict between public interest and the interest of an individual in a pending case, it may reluctantly have to be conceded that the interest of the individual cannot prevail over the public interest. If social security and progress which are necessarily included in the concept of public good are the ideal then injury to the said ideal must on principle be avoided even at the cost of the interest of an individual involved in a particular case. That is why Courts are and ought to be vigilant in dealing with a claim of privilege made under s. 123.

If under s. 123 a dispute arises as to whether the

evidence in question is derived from unpublished official records that can be easily resolved; but what presents considerable difficulty is a dispute as to whether the evidence in question relates to any affairs of State. What are the affairs of State under s. 123? In the latter half of the Nineteenth Century affairs of State may have had a comparatively narrow content. Having regard to the notion about governmental functions and duties which then obtained, affairs of State would have meant matters of political or administrative character relating, for instance, to national defence, public peace and security and good neighbourly relations. Thus, if the contents of the documents were such that their disclosure would affect either the national defence or public security or good neighbourly relations they could claim the character of a document relating to affairs of State. There may be another class of documents which could claim the said privilege not by reason of their contents as such but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. In this class may legitimately be included notes and minutes made by the respective officers on the relevant files, opinions expressed, or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy. In the efficient administration of public affairs government may reasonably treat such a class of documents as confidential and urge that its disclosure should be prevented on the ground of possible injury to public interest. In other words, if the proper functioning of the public service would be impaired by the disclosure of any document or class of documents such document or such class of documents may also claim the status of documents relating to public affairs.

It may be that when the Act was passed the concept of governmental functions and their extent was limited, and so was the concept of the words "affairs of State" correspondingly limited; but, as is often

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said, words are not static vehicles of ideas or concepts. As the content of the ideas or concepts conveyed by respective words expands, so does the content of the words keep pace with the said expanding content of the ideas or concepts, and that naturally tends to widen the field of public interest which the section wants to protect. The inevitable consequence of the change in the concept of the functions of the State is that the State in pursuit of its welfare activities undertakes to an increasing extent activities which were formerly treated as purely commercial, and documents in relation to such commercial activities undertaken by the State in the pursuit of public policies of social welfare are also apt to claim the privilege of documents relating to the affairs of State. It is in respect of such documents that we reach the marginal line in the application of s. 123; and it is precisely in determining the claim for privilege for such border-line cases that difficulty arises.

It is, however, necessary to remember that where the Legislature has advisedly refrained from defining the expression "affairs of State" it would be inexpedient for judicial decisions to attempt to put the said expression into a strait jacket of a definition judicially evolved. The question as to whether any particular document or a class of documents answers the description must be determined in each case on the relevant facts and circumstances adduced before the Court. "Affairs of State", according to Mr. Seervai, are synonymous with public business and he contends that s. 123 provides for a general prohibition against the production of any document relating to public business unless permission for its production is given by the head of the department concerned. Mr. Seervai has argued that documents in regard to affairs of State constitute a genus under which there are two species of documents, one the disclosure of which will cause no injury to public interest, and the other the disclosure of which may cause injury to public interest. In the light of the consequence which may flow from their disclosure the two species of documents can be described as innocuous and noxious respectively. According to Mr. Seervai the effect of s. 123

is that there is a general prohibition against the production of all documents relating to public business subject to the exception that the head of the department can give permission for the production of such documents as are innocuous and not noxious. He contends that it is not possible to imagine that the section contemplates that the head of the department would give permission to produce a noxious document. It is on this interpretation of s. 123 that Mr. Seervai seeks to build up similarity between s. 123 and the English Law as it was understood in 1872. In other words, according to Mr. Seervai the jurisdiction of the Court in dealing with a claim of privilege under s. 123 is very limited and in most of the cases, if not all, the Court would have to accept the claim without effective scrutiny.

On the other hand it has been urged by Mr. Sastri that the expression "documents relating to any affairs of State" should receive a narrow construction; and it should be confined only to the class of noxious documents. Even in regard to this class the argument is that the Court should decide the character of the document and should not hesitate to enquire, incidentally if necessary, whether its disclosure would lead to injury to public interest. This contention seeks to make the jurisdiction of the Court wider and the field of discretion entrusted to the department correspondingly narrower.

It would thus be seen that on the point in controversy between the parties three views are possible. The first view is that it is the head of the department who decides to which class the document belongs; if he comes to the conclusion that the document is innocuous he will give permission to its production; if, however, he comes to the conclusion that the document is noxious he will withhold such permission; in any case the Court does not materially come into the picture. The other view is that it is for the Court to determine the character of the document, and if necessary enquire into the possible consequences of its disclosure; on this view the jurisdiction of the Court is very much wider. A third view which does not

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accept either of the two extreme positions would be that the Court can determine the character of the document, and if it comes to the conclusion that the document belongs to the noxious class it may leave it to the head of the department to decide whether its production should be permitted or not; for it is not the policy of s. 123 that in the case of every noxious document the head of the department must always withhold permission. In deciding the question as to which of these three views correctly represents the true legal position under the Act it would be necessary to examine s. 162. Let us therefore, turn to that section.

Section 162 reads thus:

"A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility."

The first clause of s. 162 requires that a witness summoned to produce a document must bring it to the Court and then raise an objection against either its production or its admissibility. It also authorises the Court, and indeed makes it its obligation, to decide the validity of either or both of the said objections. It is significant that the objections to the production or admissibility of evidence specified in s. 162 relate to all claims of privilege provided by the relevant sections of Chapter IX of Part III of the Act. Section 123 is only one of such privileges so that the jurisdiction given to the Court to decide the validity of the objections covers not only the objections raised under s. 123 but all other objections as well. Take for instance the privilege claimed under s. 124 of the Act which provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest

would suffer by the disclosure. It is clear, and indeed it is not disputed, that in dealing with an objection against the production of a document raised under s. 124 the Court would have first to determine whether the communication in question has been made in official confidence. If the answer to the said question is in the negative then the document has to be produced; if the said answer is in the affirmative then it is for the officer concerned to decide whether the document should be disclosed or not. This illustration brings out the character and the scope of the jurisdiction conferred on the Court dealing with an objection raised under s. 162.

The second clause of s. 162 in terms refers to the objection as to the admissibility of the document. It seems to us that this clause should be construed to refer to the objections both as to the production and the admissibility of documents; otherwise, in the absence of any limitation on its power the Court would be justified in exercising its authority under, and discharging its obligation imposed by, cl. 1 of s. 162 by inspecting the document while holding an enquiry into the validity of the objection raised against its production under s. 123, and that would be inconsistent with the material provision in cl. 2 of s. 162. That is why we hold that the second clause covers both kinds of objections. In other words, admissibility in the context refers both to production and admissibility. It may be added that "matters of State" referred to in the second clause are identical with "affairs of State" mentioned in s. 123.

Reading this clause on this assumption what is its effect? It empowers the Court to inspect the document while dealing with the objection; but this power cannot be exercised where the objection relates to a document having reference to matters of State and it is raised under s. 123. In such a case the Court is empowered to take other evidence to enable it to determine the validity of the objection. Mr. Seervai contends that the first part of cl. 2 which deals with the inspection of the document is confined to the objection relating to the production of the document,

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and on that basis he contends that since inspection is not permissible in regard to the document falling under s. 123 the Court can do nothing else but record its approval to, and uphold the validity of, the objection raised by the head of the department. In regard to the objection as to the admissibility of the said document, however, he concedes that the Court can take other evidence, if necessary, and then determine its validity. According to him, such evidence would be necessary and permissible when the objection to admissibility is based for instance on want of stamp or absence of registration. In our opinion, this construction though ingenious is not supportable on a plain and grammatical construction of the clause read as a whole; it breaks up the clause artificially which is plainly not justified by rules of grammar. We are satisfied that the Court can take other evidence in lieu of inspection of the document in dealing with a privilege claimed or an objection raised even under s. 123. If the privileged document cannot be inspected the Court may well take other collateral evidence to determine its character or class. In other words, the jurisdiction conferred on the Court to deal with the validity of an objection as to the production of a document conferred by the first clause is not illusory or nominal; it has to be exercised in cases of objections raised under s. 123 also by calling for evidence permissible in that behalf. It is perfectly true that in holding an enquiry into the validity of the objection under s. 123 the Court cannot permit any evidence about the contents of the document. If the document cannot be inspected its contents cannot indirectly be proved; but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of the objection.

This position would be clear if at this stage we consider the question as to how an objection against the production of document should be raised under s. 123. It is well settled and not disputed that the privilege should not be claimed under s. 123 because it is apprehended that the document if produced would defeat the defence raised by the State. Anxiety

to suppress a document may be natural in an individual litigant and so it is checked and kept under control by the provisions of s. 114 of the Act. Where, however, s. 123 confers wide powers on the head of the department to claim privilege on the ground that the disclosure may cause injury to public interest scrupulous care must be taken to avoid making a claim for such a privilege on the ground that the disclosure of the document may defeat the defence raised by the State. It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister in charge of the department, or even the government in power, has no relevance in making a claim for privilege under s. 123. The apprehension that the disclosure may adversely affect the head of the department or the department itself or the Minister or even the government, or that it may provoke public criticism or censure in the Legislature has also no relevance in the matter and should not weigh in the mind of the head of the department who makes the claim. The sole and the only test which should determine the decision of the head of the department is injury to public interest and nothing else. Since it is not unlikely that extraneous and collateral purposes may operate in the mind of the person claiming the privilege it is necessary to lay down certain rules in respect of the manner in which the privilege should be claimed. We think that in such cases the privilege should be claimed generally by the Minister in charge who is the political head of the department concerned; if not, the Secretary of the department who is the departmental head should make the claim; and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary the Court may, in a proper case, require an affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are a series of documents included in a file it should appear from the affidavit that each one of the documents, whose disclosure is objected to, has been

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duly considered by the authority concerned. The affidavit should also indicate briefly within permissible limits the reason why it is apprehended that their disclosure would lead to injury to public interest. This last requirement would be very important when privilege is claimed in regard to documents which prima facie suggest that they are documents of a commercial character having relation only to commercial activities of the State. If the document clearly falls within the category of privileged documents no serious dispute generally arises; it is only when Courts are dealing with marginal or border-line documents that difficulties are experienced in deciding whether the privilege should be upheld or not, and it is particularly in respect of such documents that it is expedient and desirable that the affidavit should give some indication about the reasons why it is apprehended that public interest may be injured by their disclosure.

It is conceded by Mr. Seervai that if the affidavit produced in support of the claim for privilege is found to be unsatisfactory a further affidavit may be called, and in a proper case the person making the affidavit whether he is a Minister or the Secretary should be summoned to face cross-examination on the relevant points. Mr. Seervai, however, contends that the object of such cross-examination must be limited to test the credibility of the witness and nothing more. We do not see why any such a limitation should be imposed on cross-examination in such a case. It would be open to the opponent to put such relevant and permissible questions as he may think of to help the Court in determining whether the document belongs to the privileged class or not. It is true that the scope of the enquiry in such a case is bound to be narrow and restricted; but the existence of the power in the Court to hold such an enquiry will itself act as a salutary check on the capricious exercise of the power conferred under s. 123; and as some of the decisions show the existence of this power is not merely a matter of theoretical abstraction (Vide for instance, *Ijjat Ali Talukdar* v. *Emperor* (1)).

(1) I.L.R. [1944] 1 Cal. 410.

Thus our conclusion is that reading ss. 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under s. 123 or not.

In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not. We are not impressed by Mr. Seervai's argument that the Act could not have intended that the head of the department would permit the production of a document which belongs to the noxious class. In our opinion, it is quite conceivable that even in regard to a document falling within the class of documents relating to affairs of State the head of the department may legitimately take the view that its disclosure would not cause injury to public interest. Take for instance the case of a document which came into existence quite some time before its production is called for in litigation; it is not unlikely that the head of the department may feel that though the character of the document may theoretically justify his refusing to permit its production, at the time when its production is claimed no public injury is likely to be caused. It is also possible that the head of the department may feel that the injury to public interest which the disclosure of the document may cause is minor or insignificant, indirect or remote; and having regard to the wider extent of the direct injury to the cause of justice which may result from its non-production he may

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decide to permit its production. In exercising his discretion under s. 123 in many cases the head of the department may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why we think it is not unreasonable to hold that s. 123 gives discretion to the head of the department to permit the production of a document even though its production may theoretically lead to some kind of injury to public interest. While construing ss. 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion.

In this connection it is necessary to add that the nature and scope of the enquiry which, in our opinion, it is competent to the Court to hold under s. 162 would remain substantially the same whether we accept the wider or the narrower interpretation of the expression "affairs of State". In the former case the Court will decide whether the document falls in the class of innocuous or noxious documents; if it finds that the document belongs to the innocuous class it will direct its production; if it finds that the document belongs to the noxious class it will leave it to the discretion of the head of the department whether to permit its production or not. Even on the narrow construction of the expression "affairs of State" the Court will determine its character in the first instance; if it holds that it does not fall within the noxious class which alone is included in the relevant expression on this view an order for its production will follow; if the finding is that it belongs to the noxious class the question about its production will be left to the discretion of the head of the department. We have already stated how three views are possible on this point. In our opinion, Mr. Seervai's contention which adopts one extreme position ignores the effect of s. 162, whereas the contrary position which is also extreme in character ignores the provisions of s. 123. The view

which we are disposed to take about the authority and jurisdiction of the Court in such matters is based on a harmonious construction of s. 123 and s. 162 read together; it recognises the power conferred on the Court by cl. (1) of s. 162, and also gives due effect to the discretion vested in the head of the department by s. 123.

It would thus be clear that in view of the provisions of s. 162 the position in India in regard to the Court's power and jurisdiction is different from the position under the English Law as it obtained in England in 1872. It may be true to say that in prohibiting the inspection of documents relating to matters of State the second clause of s. 162 is intended to repel the minority view of Baron Martin in the case of *Beatson* (1). Nevertheless the effect of the first clause of s. 162 clearly brings out the departure made by the Indian Law in one material particular, and that is the authority given to the Court to hold a preliminary enquiry into the character of the document. That is why we think that the arguments so elaborately and ingeniously built up by Mr. Seervai on the basis of the background of the Indian Evidence Act breaks down in the light of the provisions of s. 162. We may add that in substance and broadly stated the consensus of judicial opinion in this country is in favour of this conclusion. (Vide: e.g., *Kaliappa Udayan* v. *Emperor* (2); *R. M. D. Chamarbaugwala* v. *Y. R. Parpia* (3); *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux & Ors.* (4); *The Public Prosecutor, Andhra* v. *Venkata Narasayya* (5); and *Ijjat Ali Talukdar* v. *Emperor* (6)). Therefore we think it is unnecessary to refer to these decisions in detail or to examine the reasons given by them in support of the conclusion reached by them.

There are, however, two decisions which have struck a note of dissent, and so it is necessary to examine them. In *W. S. Irwin* v. *D. J. Reid* (7) it appears that the Court was incidentally dealing with

(1) (1860) 5 H. & N. 838; 157 E. R. 1415.
(2) A.I.R. 1937 Mad. 492.
(3) A I.R. 1950 Bom. 230.
(4) A.I.R. 1950 East Punjab 228.
(5) A.I.R. 1957 Andhra 486.
(6) I.L.R. [1944] 1 Cal. 410.
(7) (1921) I.L.R. 48 Cal. 304.

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the scope and effect of s. 123 of the Act. In that case the plaintiff was one of the members of the committee, known as the Champaran Agrarian Enquiry Committee, and as such member he had effected a settlement between the indigo planters and the tenants about the partial refund of tawan or remission of sarabeshi. The defendant Irwin wrote three letters to the members after the settlement which taken together would import that his consent to the settlement was obtained by misrepresentation and all facts were not disclosed to him. Thereupon Reid filed a suit claiming Rs. 50,000 as damages against Irwin for making the said defamatory statements which according to him greatly injured his credit and reputation and had brought him into public odium and contempt. It appears that at the trial an attempt was made to compel the production of the minutes of the committee. The said attempt failed because the Government of Bihar and Orissa claimed privilege under s. 123. In appeal it was urged that the privilege should not have been upheld, but the appellant's plea was not accepted by the Court. "The public officer concerned", observed Mookerjee, A. C. J., "and not the judge is to decide whether the evidence referred to shall be given or withheld. If any other view were taken the mischief intended to be avoided would take place as the judge could not determine the question without ascertaining the contents of the document, and such enquiry, if it did take place, must, for obvious reasons take place in public". In support of this decision the learned judge referred to some English decisions; amongst them was the case of *Beatson* v. *Skene* (1). It would be noticed that in making these incidental observations the Court has not considered the true effect of the provisions of s. 162. Indeed no reference was made to the said section and the matter does not appear to have been seriously argued and naturally, because the point was not directly raised for decision. In this connection we ought to point out that in a subsequent decision of the said High Court in *Ijjat Ali Talukdar's case* (2) a contrary view has been

(1) (1860) 5 H. & N. 838: 157 E.R. 1415. (2) I.L.R. [1944] 1 Cal. 410.

taken and it is the subsequent view which has prevailed in the Calcutta High Court thereafter.

In *Khawaja Nazir Ahmad* v. *The Crown* (1) the High Court of Judicature at Lahore has held that when a privilege is claimed under s. 123 the Court simply gives effect to the decision of the head of the department by adding its own command to it but the Court has no power to examine the document in order to verify the correctness of the allegations or the grounds on which the privilege is claimed. Abdur Rahman, J., who delivered the judgment of the Bench in that case, has considered the relevant Indian and English decisions, and has based his conclusion substantially on the judgment of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.* (2), to which we will presently refer. The learned judge appears to have construed s. 162 in the manner suggested by Mr. Seervai. In fact Mr. Seervai's argument was that the construction placed by Abdur Rahman, J. on s. 162 had not been considered by the other Indian decisions when they brushed aside his conclusion. "I feel convinced", said Abdur Rahman, J., "that the objection as to the production of the document, apart from its admissibility (for want of registration or contravening the rule as to when secondary evidence of a document can be admitted—if the document is merely a copy and not original) can only be decided by its inspection by the Court, followed, as it must necessarily have been, by an order of production, although not in the sense of its contents having been disclosed to the party summoning the document at any rate at that stage". We have already indicated our reasons for not accepting this artificial construction of the second clause in s. 162. This decision also has been dissented from by a Full Bench of the Lahore High Court in *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux & Ors.* (3) and the view taken by the Full Bench in that case prevails in the Punjab High Court ever since.

In the course of arguments before us a large number of English decisions have been cited by the learned

(1) (1945) I.L.R. 26 Lah. 219. (2) [1942] A.C. 624.
(3) A.I.R. 1950 East Punjab 228.

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counsel appearing for both the parties. Having regard to the fact that our decision ultimately rests, as it must, on the construction of the relevant provisions of the Act, we do not think it necessary to refer to all the cases to which our attention was drawn; we propose to confine ourselves to three decisions which have made a substantial contribution to the discussion of the problem, and which represent three distinct and different trends of judicial opinion on the point with which we are dealing.

The first case to which we would refer is the decision of the Privy Council in *Robinson* v. *State of South Australia* (1). In that case the appellant had brought an action in the Supreme Court of South Australia against the respondent State claiming damages for alleged negligence in the care of wheat placed in the control of the State under the Wheat Harvests Acts, 1915-17. Upon an order for discovery the respondent State, by an affidavit made by a civil servant, claimed privilege in respect of 1892 documents tied in three bundles, and stated to be State documents comprising communications between officers administering the department concerned. There was exhibited to the affidavit a minute by the responsible Minister stating, inter alia, that the disclosure of the documents would be contrary to the interests of the State and of the public. The claim for privilege had been upheld by the Australian Courts but it was rejected by the Privy Council which held that the minute was inadequate to support the claim; it was too vague in the circumstances of the case, and was not a statement on oath showing that the Minister had himself considered each of the documents, or indicating the nature of the suggested injury to the interests of the public. The Privy Council, therefore, directed that the Supreme Court of South Australia should exercise its power under O. 31, r. 14, sub-r. (2), to inspect the documents, because it thought that the said course was less likely to cause delay than an order for a further and better affidavit of documents. The litigation in that case had been preceded by another litigation, and on the

(1) [1931] A.C. 704.

facts thus disclosed the Privy Council was satisfied that the action in question was one of a large number which were then pending, and against which a similar relief was claimed, all being alike dependant for success upon the establishment of the same facts. That is how full discovery by the respondent had become "the immediately vital issue between the parties".

Dealing with the merits of the privilege the Privy Council cited with approval Taylor's observation that "the principle of the rule is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires"(1). Lord Blanesburgh, who delivered the judgment of the Board observed that "it cannot be assumed that documents relating to trading, commercial or contractual activities of the State can never be claimed to be protected under this head of privilege", but he added that "the cases in which this is so must, in view of the sole object of the privilege, and especially in time of peace, be rare indeed". Then he referred to the fact that in view of the increasing extension of State activities into the spheres of trading business and commerce, and of the claim of privilege in relation to the liabilities arising therefrom which were frequently put forward, it is necessary for the Courts to remember that while they must duly safeguard genuine public interests they must see to it that the scope of the admitted privilege is not, in such litigation, extended. The judgment then proceeds to add that in truth the fact that documents if produced might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security. Then the power of the Court to call for the production of documents for which privilege was claimed was examined in the light of previous decisions, and in the light of the provisions of O. 31, r. 14, sub-r. (2). "Where, as in the present case", it was observed, "the State is not only sued as defendant under the authority of statute, but is in the suit bound to give discovery, there seems little, if any,

(13) Taylor on "Evidence", s. 939.

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reason why the Court in relation to this privileged class of its documents should have any less power than it has to inspect any other privileged class of its documents, provided of course, that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist". The procedure which should be adopted in claiming the privilege was then considered, and it was held that the affidavit produced, which in its sweep covered no fewer than 1892 documents in number, was of the vaguest generality and as such unsatisfactory. The Privy Council then considered the question as to whether a further opportunity should be given to the State to make a better affidavit but it thought that it would be inexpedient to adopt such a course because it would involve further serious delay, "without, it may be, advancing any further the final solution to the question at issue". That is why the Supreme Court was asked to exercise its power under the relevant rule to inspect the documents and then decide whether the privilege should be upheld or not. It is significant that even when giving such a direction their Lordships took the precaution of adding that the judge, in giving his decision as to any document, will be careful to safeguard the interest of the State and will not, in any case of doubt, resolve the doubt against the State without further enquiry from the Minister. It only remains to add that so far as Australia is concerned it does not appear that there is any statutory provision corresponding to s. 162 of the Act, and so, even after this judgment was pronounced by the Privy Council, Courts in India have not given effect to the operative part of the order in regard to the inspection of the document by Courts having regard to the statutory prohibition imposed by s. 162 in that behalf.

This pronouncement of the Privy Council was subsequently criticised by the House of Lords in *Duncan & Anr.* v. *Cammell Laird & Co. Ltd.* (1). It appears that the submarine Thetis which had been built up by the respondents under contract with the Admiralty was undergoing her submergence tests in Liverpool Bay, and, while engaged in the operation of a

(1) [1942] A.C. 624.

trial drive, sank to the bottom owing to the flooding of her two foremost compartments and failed to return to the surface with the result that all who were in her, except four survivors were overwhelmed. This unfortunate accident gave rise to a large number of actions against the respondents for damages for negligence. Pending the trial of the said claims the plaintiffs wanted discovery of certain specified documents to which the defendants objected, and the objection of the defendants was supported by Mr. Alexander who was the First Lord of the Admiralty in his affidavit made in that behalf. The documents to the productien of which an objection was thus raised included (either in original or as a copy) the contract for the hull and machinery of the Thetis and other letters and reports. The Master before whom the objection was raised refused to order inspection. His decision was confirmed by Hilbery, J., sitting in Chambers, and the Court of Appeal unanimously confirmed the judge's order. The plaintiffs, however, were given leave to appeal to the House of Lords; that is how the matter reached the House of Lords.

Viscount Simon, L. C., who pronounced a composite judgment on behalf of himself and on behalf of Lord Thankerton, Lord Russel of Killowen and Lord Clauson, exhaustively considered the whole law on the subject of Crown Privilege; and in his speech he made the categorical statement that in his opinion the Privy Council was mistaken in regarding the Australian rule of procedure as having any application to the subject-matter and in ordering the inspection of the documents which were in question before the Privy Council. Viscount Simon began his speech with the consideration of the previous decisions of the House of Lords, and held that the matter in substance was concluded by previous authorities in favour of upholding the objections. He observed that the common law principle is well established that, where the Crown is a party to a suit, discovery of documents cannot be demanded from it as a matter of right, though in practice, for reasons of fairness and in the

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interests of justice, all proper disclosure and production would be made. As a result of the examination of the several decisions Viscount Simon deduced the principle which has to be applied in such cases in these words: "Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production". In this connection he stated that public interest may be damnified where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. Then he proceeded to examine the question as to whether when objection has been duly taken the judge should treat it as conclusive; and his answer was that an objection validly taken to production on the ground that this would be injurious to public interest is conclusive; but, of course, he proceeded to make pertinent observations for the guidance of those who are entrusted with the power to make a claim. It would be noticed that even this decision would not be of material assistance to us because, as we have repeatedly pointed out, our decision must ultimately rest on the relevant statutory provisions contained in the Indian Evidence Act; and so, the conclusion that a valid certificate issued by the Minister in charge is conclusive may not be strictly applicable to a claim for privilege similarly made by a Minister in charge in India. As we have already indicated, the preliminary enquiry contemplated by the first clause of s. 162 has to be held by the Court, and it is after the Court has found in favour of the character of the document pleaded by the State that the occasion arises for the head of the department to exercise his discretion conferred by s. 123. Incidentally, we may point out that Lord Thankerton and Lord Russel of Killowen, who were parties to this

decision, were also parties to the decision of the Privy Council in the case of *Robinson* (1).

In regard to the decisions in the cases of *Robinson* (1) and *Duncan* (2) respectively, it may be permissible to make one general observation. In both these cases the nature of the documents for which privilege was claimed, the time at which the dispute arose and the other surrounding circumstances were very unusual and special though in different ways, and so, as often happens, the shift in emphasis from one aspect of the same principle to another and the strong language used took colour from the nature of the special facts. Incidentally we may also add that the epilogue to the decision in *Robinson's case* (1) illustrates what untoward consequences may follow from an erroneous decision or a miscalculation as to the injury to public interest which may be caused by disclosure.*

Nearly five years after the judgment in *Duncan's case* (2) was pronounced, the Crown Proceedings Act (10 & 11 Geo. 6, c. 44) was passed in 1947, and the Crown Privilege recognised under the common law of England is now regulated by s. 28 of the said Act. Section 28 which deals with discovery provides in substance that subject to the rules of court in any civil proceedings there specified the Crown may be required by the Court to make discovery of documents and produce documents for inspection, and that in such proceedings the Crown may also be required to answer interrogatories. This legislative invasion of the Crown's prerogative is, however, subject to the proviso that the said section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to public interest. It would be noticed that s. 28 read with the proviso confers on the Courts specified by it powers which are much narrower than

(1) [1931] A.C. 704. (2) [1942] A.C. 624.

*For a graphic account of the aftermath of the enquiry held by the Supreme Court of South Australia, pursuant to the Privy Council's decision in *Robinsons's case* (1), see "Law and Orders" by Sir C. K. Allen, 2nd Ed., p. 374, foot-note 5a.

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those which are conferred on the Indian Courts under cl. 1 of s. 162 of the Act.

In the decision in *Duncan's case* (1) Viscount Simon had assumed that the law as laid down by the said decision was equally applicable to Scotland. This assumption has been seriously challenged by another decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board* (2). In that case Viscount Simonds has referred to a large number of earlier decisions dealing with the relevant law as it is administered in Scotland and commented on the decision in *Duncan's case* (1) by saying that the observations in the said case, in so far as they relate to the law of Scotland must be regarded as *obiter dicta*. "In the course of the present appeal", added Lord Simonds, "we have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been, and is now, in the law of Scotland an inherent power of the Court to override the Crown's objections to produce documents on the ground that it would injure the public interest to do so", though he added that "very rarely in recent times has this inherent right been exercised". Lord Radcliffe, who agreed with the conclusion of the House with some reluctance, has made strong comments on the plea of privilege which is raised on behalf of the Crown in such matters. Adverting to the contention that the public interest may be injured by the production of the document Lord Radcliffe observed that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. According to Lord Radcliffe it was not unreasonable to expect that the Court would be better qualified than the Minister to measure the importance of such principles in application to the particular case that is before it. It is on that assumption that the Scottish Law has reserved to the Courts the duty of making some assessment of the relative

(1) [1942] A.C. 624. (2) (1956) Scots Law Times Reports, 41.

claims of the different aspects of public interest where production of a document is objected to by the Crown. Then, in his characteristic style Lord Radcliffe has observed "I should think it a very great pity indeed if a power of this kind, a valuable power, came to be regarded as a mere ghost of theory having no practical substance, and the Courts abdicated by disuse in the twentieth century a right of control which their predecessors in the earlier centuries have been insistent to assert". The learned law Lord has also made some strong comment on the formula which has been evolved by Viscount Simon in *Duncan's case* (1), and had stated that the phrase "necessary for the proper functioning of the public service" is a familiar one, and I have a misgiving that it may become all too familiar in the future". The result of this decision appears to be that in Scotland, where the common law doctrine of the Crown Privilege is not strictly enforced, a privilege can be claimed by the Minister on grounds set forth by him in his affidavit. The certificate would be treated as very strong presumptive evidence of the claim made but the Court would nevertheless have inherent power to override the said certificate. It is unnecessary for us to consider the true nature and effect of this power because in India in this particular matter we are governed by the provisions of s. 162 which confer power on Courts to determine the validity of the objection raised under s. 123, and so there would be no occasion or justification to exercise any inherent power.

Though we do not propose to refer to the other decisions to which our attention was invited, we may incidentally observe that the decision in *Duncan's case* (1) has been followed by English Courts, but sometimes the learned judges have expressed a sense of dissatisfaction when they are called upon to decide an individual dispute in the absense of relevant and material documents. (Vide: *Ellis* v. *Home Office* (2)). Before we part with this topic we may also indicate that it appears that in the long history of reported judicial decisions only on three occasions the right to

(1) [1942] A.C. 624. (2) [1953] 2 All E. R. 149.

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inspect documents has been either theoretically asserted or actually execised in England. In *Hennessy* v. *Wright* (1), Field, J., observed that he would consider himself entitled to examine privately the documents to the production of which the Crown objected, and to endeavour by this means and that of questions addressed to the objector to ascertain whether the fear of injury to public service was the real motive in objecting. In point of fact, however, the learned Judge did not inspect the documents. From the judgment of the Court of Appeal in *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.* (2), it appears that Scrutton, J., had inspected the documents to the production of which an objection was raised. The learned judge has, however, added that having seen the documents he thought that the government may be right in the view that they ought not to be produced to others, and that he would not take the responsibility of ordering them to be produced against the wishes of the government. In *Spigelmann* v. *Hocker & Anr.* (3), Macnaghten, J., inspected the document to the production of which an objection was raised. The result of these decisions is that in England a valid certificate issued by the Minister in support of the privilege claimed is conclusive; while in Scotland, though it would normally be treated as such, Courts reserve to themselves an inherent right to revise or review the certificate in a proper case.

It now remains to consider whether the High Court was right in holding that the privilege claimed by the appellant in respect of the four documents in question was not justified, and that takes us to the consideration of the relevant facts in the present appeal. The documents of which discovery and inspection were claimed are thus described by the respondent:

(1) Original order passed by Pepsu Government on September 28, 1955, on the representation dated May 18, 1955, submitted by Sodhi Sukhdev Singh;

(2) Original order passed by the Pepsu Government

(1) (1888) 21 Q.B. 509. (2) [1916] 1 K.B. 822.
(3) (1933-34) 1 Times L.R. 87.

on March 8/9, 1956, reaffirming the decision passed on September 28, 1955, referred to above;

(3) Original order passed by the Pepsu Government in their cabinet Meeting dated August 11, 1956, revising their previous order on the representation of Sodhi Sukhdev Singh dated May 18, 1955; and

(4) Report of the Public Service Commission on the representation of Sodhi Sukhdev Singh dated May 18, 1955, after the Pepsu Government's decision on September 28, 1955.

In dealing with this question and in reversing the order passed by the trial court by which the privilege had been upheld, the High Court has purported to apply the definition of the expression "affairs of State" evolved by Khosla, J., as he then was, in the case of *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux & Ors.* (1): "It is, therefore, sufficiently clear", said the learned judge, "that the expression "affairs of State" as used in s. 123 has a restricted meaning, and on the weight of authority, both in England and in this country, I would define "affairs of State" as matters of a public nature in which the State is concerned, and the disclosure of which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations". It is this definition which was criticised by Mr. Seervai on the ground that it purported to describe the genus, namely, affairs of State, solely by reference to the characteristics of one of its species, namely, documents whose disclosure was likely to cause injury to public interest. Having adopted this definition the High Court proceeded to examine whether any injury would result from the disclosure of the documents, and came to the conclusion that it was difficult to sustain the plea that the production of the documents would lead to any of the injuries specified in the definition evolved by Khosla, J. On this ground the High Court allowed the contention of the respondent and directed the State to produce the documents in question.

We have already held that in dealing with the

(1) A.I.R. 1950 East Punjab 228.

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question of privilege raised under s. 123 it is not a part of the Court's jurisdiction to decide whether the disclosure of the given document would lead to any injury to public interest; that is a matter for the head of the department to consider aud decide. We have also held that the preliminary enquiry where the character of the documents falls to be considered is within the jurisdiction and competence of the Court, and we have indicated how within the narrow limits prescribed by the second clause of s. 162 such an enquiry should be conducted. In view of this conclusion we must hold that the High Court was in error in trying to enquire into the consequences of the disclosure; we may add that the decision of the High Court suffers from the additional infirmity that the said enquiry has been confined only to the specified classes of injury specified by Khosla, J., in his definition which cannot be treated as exhaustive. That being so, we think the appellant is justified in complaining against the validity of the decision of the High Court.

Let us then consider whether the documents in question do really fall within the category of documents relating to "affairs of State". Three of the documents the discovery of which the respondent claimed are described as original orders passed by the Pepsu Cabinet on the three respective dates. It is difficult to understand what was exactly meant by describing the said documents as original orders passed on those dates; but quite apart from it the very description of the documents clearly indicates that they are documents relating to the discussions that took place amongst the members of the Council of Ministers and the provisional conclusions reached by them in regard to the respondent's representation from time to time. Without knowing more about the contents of the said documents it is impossible to escape the conclusion that these documents would embody the minutes of the meetings of the Council of Ministers and would indicate the advice which the Council ultimately gave to the Rajpramukh. It is hardly necessary to recall that advice given by the

Cabinet to the Rajpramukh or the Governor is expressly saved by Art. 163, sub-art. (3), of the Constitution; and in the case of such advice no further question need to be considered. The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers. Indeed it is very difficult to imagine how advice thus tendered by the Public Service Commission can be excluded from the protection afforded by s. 123 of the Act. Mr. Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent. Until the final order is thus communicated to the respondent it would be open to the Council to consider the matter over and over again, and the fact that they reached provisional conclusions on two occasions in the past would not alter the character of the said conclusions. The said conclusions, provisional in character, are a part of the proceedings of the Council of Ministers and no more. The report received by the Council from the Public Service Commission carries on its face the character of a document the disclosure of which would lead to injury of public interest. It falls in that class of document which "on grounds of public interest must as a class be withheld from production". Therefore, in our opinion, the conclusion appears inescapable that the documents in question are protected under s. 123, and if the head of the department does not give permission for their production, the Court cannot compel the appellant to produce them. We should have

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stated that the two affidavits made by the Chief Secretary in support of the plea of the claim of privilege satisfied the requirements which we have laid down in our judgment, and no comment can be effectively made against them. The argument that in its pleadings the appellant accepted the description of the respondent that the document contained orders is hardly relevant or material. The affidavits show what these documents purport to be and that leads to the inference which irresistibly follows from the very description of the documents given by the respondent himself in his application by which he called for their production and inspection.

Before we part with this appeal we may incidentally refer to another point which was argued at some length before us by both the learned counsel for interveners. Mr. Viswanatha Sastri contended that the provisions of s. 162 can be invoked only where a witness has been summoned to produce a document and a privilege is claimed by him in respect of it. According to him the said provisions cannot be invoked where the Court is called upon to decide the validity of the claim of privilege at the stage of inspection of the documents. In other words, where the State is a party to the suit and an application for inspection of documents is made against it by its opponent, and a claim for privilege is put forward by the State, the Court is entitled under O. 11, r. 19, sub-s. (2), to inspect the documents for the purpose of deciding as to the validity of the claim of privilege. That is the clear provision of O. 11, r. 19, sub-r. (2), and the power conferred on the Court by the said provision is not subject to s. 162 of the Act. This position is seriously disputed by Mr. Seervai.

The procedural law in regard to discovery, production and inspection of documents is contained in O. 11, rr. 12, 21. It is true that O. 11, r. 19, sub-r. (2) provides that in dealing with a claim of privilege "it shall be lawful for the Court to inspect the document for the purpose of deciding the validity of the claim of privilege". The question is, what is the effect of this provision when it is considered along with s. 162 of the Act?

Before briefly indicating our conclusion on this point we may observe that this contention does not appear to have been raised in any judicial decisions to which our attention was drawn. Indeed it appears generally to have been assumed that in the matter of deciding a claim for privilege made by the State the provisions of s. 162 of the Act would apply whether the said claim is made at the earlier stage of inspection or later when evidence is formally tendered. That, however, is another matter.

It is true that s. 162 in terms refers to a witness who is summoned to produce a document and provides for the procedure which should be adopted and the powers which should be exercised in dealing with a privilege claimed by such a witness; but there is no doubt that the provisions of the Act are intended to apply to all judicial proceedings in or before any Court; that in terms is the result of s. 1 of the Act, and the proceedings before the Court under O. 11, r. 19, are judicial proceedings to which prima facie s. 162 would apply. Similarly, s. 4, sub-s. (1), of the Code of Civil Procedure provides, inter alia, that in the absence of any specific provisions to the contrary nothing in the Code shall be deemed to limit or otherwise affect any special or local law in force; that is to say, in the absence of any provisions to the contrary the Evidence Act would apply to all the proceedings governed by the Code. Besides, it would be very strange that a claim for privilege to which O. 11, r. 19, sub-r. (2), refers is allowed to be raised under s. 123 of the Act, whereas, the procedure prescribed by the Act in dealing with such a claim by s. 162 is inapplicable. If s. 123 of the Act applies and a claim for privilege can be raised under it, prima facie there is no reason why s. 162 should not likewise apply.

But apart from these general considerations the relevant scheme of the Code of Civil Procedure itself indicates that there is no substance in the argument raised by Mr. Sastri. Order 27 prescribes the procedure which has to be adopted where suits are filed by or against the government; a plaint or written statement proposed to be filed by the government has to be

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signed under r. 1 by such person as the government may by general or special order appoint in that behalf, which means that the government can only act through its agent duly appointed in that behalf. The Minister who is the political head of the department or the Secretary who is its administrative head is not the government; and so whenever the government sues or is sued and makes its pleadings it always acts through its duly authorised agents. The scheme of the relevant rules of O. 27 is consistent with this position.

Section 30 of the Code empowers the Court either on its own motion or on an application of a party to issue summonses to persons whose attendance is required either to give evidence or produce document, and to order that any fact may be proved by an affidavit. Order 4, r. 5, contemplates that, at the time of issuing the summons, the Court has to determine whether the summons should be for the settlement of issues only or for the final disposal of the suit; and the relevant form of the summons (No. 1 in First Schedule, Appendix B) shows that in the case of a suit against the government of a State a summons can be issued to compel the attendance of any witness and the production of any document. This shows that where the State is a party a summons may have to be issued to its appropriate officer calling upon him to produce the documents for inspection. The provisions of rr. 14, 15 and 16 of O. 11 show that affidavits have to be filed by the parties, and the filing of affidavits which is permitted by O. 19 is undoubtedly one mode of giving evidence. Order 16, r. 1, provides for the issue of a summons to persons whose attendance is required inter alia to produce documents; and r. 21 of the said order expressly provides that where any party to a suit is required to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as are applicable. Thus there can be little doubt that where a privilege is claimed at the stage of inspection and the Court is required to adjudicate upon its validity, the relevant provisions of the Act

under which the privilege is claimed as well as the provisions of s. 162 which deal with the manner in which the said privilege has to be considered are equally applicable; and if the Court is precluded from inspecting the privileged document under the second clause of s. 162 the said prohibition would apply as much to a privilege claimed by the State through its witness at the trial as a privilege similarly claimed by it at the stage of inspection. It is hardly necessary to point out that a contrary view would lead to this manifestly unreasonable result that at the stage of inspection the document can be inspected by the Court, but not at the subsequent stage of trial. In our opinion, the provisions of O. 11, r. 19, sub-r. (2), must, therefore, be read subject to s. 162 of the Act.

The result is that the appeal is allowed, the order passed by the High Court set aside and that of the trial court restored with costs throughout.

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KAPUR, J.—I have read the judgment prepared by my learned brother Gajendragadkar, J., and agree with the conclusion but in my opinion the Court cannot take other evidence in regard to the nature of document, for which privilege is claimed, and my reasons are these:

In India the law of privilege in regard to official documents is contained in s. 123 of the Indian Evidence Act which has to be read with s. 162 of that Act. The various kinds of privileges claimable under the Evidence Act are contained in Chapter IX, two sections amongst these are ss. 123 and 126, the former dealing with state privilege relating to "affairs of State" and the latter with communications with a legal adviser. In s. 123 the opening words are "no one shall be permitted....." and in the latter "no barrister etc., shall at any time be permitted.....". In the other sections dealing with privilege the opening words are "no person shall be compelled.....". This difference in language indicates that the legislature intended to place the privilege of the State in regard to official documents on a different footing than the other forms of privileges mentioned in the

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Act in so far as it put a ban on the court permitting any evidence of the kind mentioned in s. 123 from being given, so that if, unwittingly any evidence mentioned therein was sought to be given, the court would not permit it unless the other conditions were satisfied.

In s. 123 the provision is against the giving of evidence which is derived from unpublished official records relating to any affairs of State except when the head of the department concerned in his discretion gives permission for the evidence to be given. The important words are "derived", "unpublished" and "affairs of State". The word "derived" means coming out of the source and therefore refers to original as well as secondary evidence of documents whether oral or documentary. The words "unpublished official records" are not very difficult of interpretation and must depend upon the circumstances of each case. If the record is shown to have already been published, it ceases to be an unpublished record. But the difficulty arises as to the meaning of the words "affairs of State", because the ban is put on evidence derived from official documents relating to affairs of State. At the time when the Indian Evidence Act was enacted, affairs of State were confined to governmental or political activities of Government, but with the expanding of the activities of the State, which, because of the changed concept of the State, comprise also socio-economic, commercial and industrial activities the words "affairs of State" must necessarily have a much wider meaning than it originally had. But the language of the sections remains the same and so also the limitation on the giving of evidence derived from such documents and therefore what was considered to be within the discretion of the head of the department to disclose or not to disclose still remains within his discretion and merely because the scope of the words "affairs of State" had been extended, the extent of the discretion has not thereby decreased or become limited and the words "who shall give or withhold such permission as he thinks fit" indicate that the discretion to remove the ban vests in the head of the department and no one else.

The real difficulty arises in the interpretation of the words "affairs of State". What are they? How is the meaning of the words to be determined and by whom? When a claim is made by a proper authority in a proper form, is that conclusive of the nature of the document or has the court to proceed to determine the efficacy of the claim by taking other evidence as to its nature or the effect of its disclosure. It was contended that the decision, whether the document belongs to the category falling within the expression "affairs of State" or not has to be of the court and not of the official mentioned in the section. In a way that is correct because the conduct of the trial must always remain in the hands of the court but what is implied in the contention raised was that the court must first decide whether the document belongs to the class comprised in the expression "affairs of State" and then the official concerned may give or withhold his consent. It was also submitted that in order to enable the court to determine the validity of the claim of privilege the official concerned, when making the claim, may have to state the nature of the document or at least the nature of the injury to the public interests or to the efficient working of the public service, as the case may be, which the disclosure of the document or evidence derived therefrom would result in.

Section 162 of the Evidence Act was relied upon in support of the above contention. That section applies to all documents in regard to which claim of privilege of any kind may be claimable including that falling under s. 123 and therefore the language of s. 162 had necessarily to be wide. It has been described as not being clear by Bose, J., as he then was, in *Bhaiya Saheb* v. *Ram Nath Rampratap Bhadupote* (1). The section requires a witness summoned to produce a document to bring it to the court in spite of any objection which he may take to its production or to its admissibility and the court is empowered to decide both the questions. It is the next part which is relied upon in support of the contention that the court can

(1) I.L.R. [1940] Nag. 240, 247.

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take other evidence to decide both the questions of production and the question of admissibility. The words are "the court, if it sees fit may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility". It was argued that this part of the section empowered the court to take other evidence not only to decide the question of admissibility of the document but also its production. The language of this part of the section does not lend support to this contention because it gives discretion to the court to inspect the document or take other evidence to enable it to determine the admissibility of the document. The interposing of the words "unless it refers to matters of State", has reference to privilege under s. 123 and therefore it disentitles the court to inspect the document. The sequence envisaged by the section is that a witness summoned to produce a document is bound to bring it to the court. He may then take objection to its production under any of the sections, viz., 121 to 131 or he may object to its admissibility and both these objections have to be decided by the court. Then comes the second part of the section. If the document refers to "matters of State"—there is no distinction in the meaning of the word "matters" and "affairs of State"—then the court may not inspect the document, but if the document is not of that class, then the court can inspect it and if it finds any objection to the admissibility, it may take other evidence to determine its admissibility. To take a concrete case, if a document is produced which is compulsorily registerable and it is not so registered, it would not be admissible in evidence under s. 49 of the Registration Act, but evidence may be led as to its admissibility for certain purposes, e.g., s. 53 A of the Transfer of Property Act. If it refers to that class of documents then the second part of s. 162 becomes applicable, i.e., the court may inspect the document which will help it in deciding the question of privilege and admissibility. But if a claim is properly made by a proper official on the ground that it refers to matters of State, the court will stay its hands and refrain from inspecting it.

The words "or to take.....its admissibility" on their plain language do not apply to production and consequently the taking of evidence must have reference to the admissibility of the document.

All the High Courts in India are in accord that the court will not inspect the document if it relates to matters of State. If that is so it would be difficult to sustain the contention that it can decide the question whether the matter relates or does not relate to affairs of State. If the original cannot be inspected, no other evidence can be produced as to its contents. The effect of this prohibition is not only as if the document had been destroyed, but as if it never existed. If that is the position, then it becomes difficult to see how the question of its production can be decided by the court by taking other evidence or how the court can decide whether a particular document falls within the prohibition imposed by s. 123 of the Evidence Act. In this connection the words of Lord Kinnear in *The Lord Commissioner of the Admiralty* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (1) are quite apposite. It was there said:

"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 explanation required".

If the court cannot inspect the document, if no secondary evidence can be given as to its contents and if the necessary materials and the circumstances which would indicate the injury to the public interests or detriment to the proper functioning of the services cannot be before the court it cannot be in a position to decide whether the document relates to affairs of State or not and the logical conclusion would be that the court is debarred from overruling the discretion of the head of the department concerned, because the court cannot say whether the disclosure or non-disclosure would be detrimental or not. If, on the other

(1) (1909) S.C. 335, 343.

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hand, the contention is accepted that the court can decide by taking other evidence as to whether the document relates to the affairs of State then the discretion to ban its production by the head of the department must necessarily become illusory. If the court takes upon itself the task of deciding the nature of the document, then it will be taking upon itself the very grave duty of deciding a vital question as to what are the affairs of State without having the necessary material before it or without knowing the exigencies of the public service or the effect of the disclosure of the State secret or how far the disclosure will injure the public interests and it may thus unwittingly become the instrument of giving publicity to something which the head of the department considered injurious to the public interests, the law having given to the head of the department concerned to make this determination. No doubt the discretion is wide and covers all classes of documents which may fall within the phrase "affairs of State", some noxious and others innocuous and may even appear to be unduly restrictive of the rights of the litigant but if that is the law the sense of responsibility of the official concerned and his sense of fair play has to be trusted. The second part of s. 162 therefore cannot be said to permit the taking of other evidence, i.e., other than the document to determine the question of its production when it is of the category falling under s. 123. That part does not entitle the court to determine the nature of the document or the adequacy of the reasons which impelled the proper official to claim privilege. It would be relevant to quote the observations of Isaacs, J., in *Marconi's Wireless Telegraph Co.* v. *The Commonwealth* (1):

"I distinctly adverted to the necessary fact that the right of discovery given to the litigant for the furtherance of public justice must be subject to the still higher consideration of the general welfare that the order to make proper discovery does not destroy the privilege of public interest, and that the ground of public policy may intervene and prevent the injury to

(1) (1913) 16 C.L.R. 178, 201.

the community which coercive disclosure might produce. If that were not so, every gun in every fort and every safe in the Treasury would be open through the medium of the Court to the observation of any plaintiff of any nationality who could make a prima facie case of the infringement to which it was relevant. One of the authorities to which I referred in that connection was the judgment of Turner, L. J. in *Wadeer* v. *East India Co.*, 8 D.M. & G., 182 at p. 191 and that judgment is, I think, of great value in this case also".

It will be helpful to refer to the law on the subject in England as laid down in English cases because the basis of the Indian Law is the law of that country. The question of privilege has been described by Viscount Simon L. C., in *Duncan* v. *Cammell Laird & Co., Ltd.* (1) as a question of high constitutional importance because it involves a claim by the Executive Government to restrict the material which might otherwise be available for the court trying the case and this description was repeated by the House of Lords in the Scottish case *Corporation of Glasgow* v. *Central Land Board* (2). It may be the material which a party to the litigation may desire in its own interest and without which equal justice may be prejudiced. The question of privilege may not only arise in cases where the State is party to the suit but may equally arise where the contestants in a suit are private parties and whether as a party to the suit or not the State may decline to produce a document. In *Duncan's case* (1) the privilege of the crown, though it was described as not a happy expression, was upheld on the ground that the interest of the State must not be put in jeopardy by the production of a document which would injure it and which is also a principle to be observed in administering justice, "quite unconnected with the interests or claims of the particular parties in litigation and, indeed, is a rule upon which the Judge should, if necessary, insist even though no objection is taken at all." The sort of grounds to afford justification for withholding the documents were given by Viscount Simon as follows:—

(1) [1942] A.C. 624. (2) 1956 S.C. 1 (H.L.).

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"It would not be a good ground that, if they were produced the consequences might involve the department or the government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister or the department does not want to have the document produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified e.g. where disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

Thus the documents, which are protected from production, are those the production of which would be prejudicial to the public interests or those which belong to that class which as a matter of practice, are kept secret for the proper maintenance of the efficient working of the public service.

Objection has been taken to the authority of this rule enunciated by Viscount Simon L. C., on the ground that it is in serious conflict with another principle that the proper administration of justice is also a matter of public interest, i. e., "*fiat justitia ruat caelum*" but as was said by Viscount Simonds in *Glasgow Corporation* v. *Central Land Board* (1), "The paramountcy of the public interest has been recognized and preserved". This principle, which was reenunciated by Viscount Simon, L. C., had been the law of England for over a century before *Duncan's case* (2). In *Earl* v. *Vass* (3) it was held that public officers are not entitled or compellable to produce written communications made by them officially relative to the character and conduct of a party applying

(1) 1956 S.C. 1 (H.L.). (2) [1942] A.C. 624.

(3) (1822) 1 Sh. Sc. App. 229.

for a public office when the production is demanded in an action for damages against the writer. Lord Eldon, L. C., at p. 230 observed:—

"I apprehend, in all cases in which it has been held, upon the principle of public policy, that you shall not be compellable to give evidence of, or produce such instruments—that is, wherever it is held you are not on grounds of public policy, to produce them—you cannot produce them and that it is the duty of the judge to say you shall not produce them....."

Lord Eldon referred with approval to the decision in *Home* v. *Lord William Bentinck* (1) which was of the year 1820. The principle there laid down was that production of instruments and papers must be shut out if it was against public policy. At p. 919 the learned Chief Justice said:—

"It seems therefore that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience that these matters, secret in their nature, and involving delicate enquiry and the names of persons, stand protected".

The injury to public service was recognized in *Beatson* v. *Skene* (2) where Pollock, C. B., said:

"It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the papers; 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. The administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of Justice) subordinate to the general welfare of the community. If indeed, the head of the

(1) (1820) 2 Brod. & B. 130: 129 E.R. 907.
(2) (1860) 5 H. & N. 838: 157 E.R. 1415.

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department does not attend personally to say that the production will be injurious but sends the documents to be produced or not as the Judge may think proper, or as was the case in *Dickson* v. *The Earl of Wilton* beford Lord Campbell (reported in Foster and Finlason's N. P. Rep., p. 425), where a subordinate was sent with the document with instructions to object but nothing more, the case may be different."

Martin B. did not entirely agree with the view of the other three learned Barons and he was of the opinion that if the document could be produced without prejudice to public service he ought to compel its production notwithstanding the reluctance of the head of the department to produce it. It was pointed out by Pollock, C. B., that this might apply to extreme cases and "extreme cases throw little light on the practical rules of life".

In *Smith* v. *East India Company* (1) which related to a commercial transaction as to the liability to pay freight a similar privilege was upheld. It was argued that communications between officials and communications between Directors and Board of Control were official correspondence and were privileged. On appeal the Lord Chancellor held that in order that superintendence and control should be exercised effectively and for the benefit of the public it was necessary that unreserved communication should take place between the East India Company and the Board of Control.

In *Homer* v. *Ashford* (2) which was of the year 1825, Best, C. J., said:—

"The first object of the law is to promote public interest; the second to preserve the rights of individuals".

In this connection it may not be out of place to recall the striking language of Knight Bruce, V. C., quoted at p. 401 of *Macintosh* v. *Dun* (3) in the judgment of Lord Macnaughten:—

"Truth like other good things, may be loved unwisely—may be pursued too keenly—may cost too

(1) (1841) 1 Ph. 50: 41 E.R. 550.

(2) (1825) 3 Bing. 322; 130 E.R. 537, 539. (3) (1908) A. C. 390.

much". And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great to pay for truth itself." Thus the law as stated in these old English cases shows that what was injurious to the public interest or prejudicial to the proper functioning of the public services was not to be disclosed and if the objection was based on these grounds it must prevail. As to who was to determine this, the judge or the official, Pollock C. B. decided in favour of the official because the enquiry could not be held in private and if it was held in public the mischief would have been done. *Beatson* v. *Skene* (1).

It was with this background of the state of the English law that Sir James Fitzjames Stephen drafted the law of evidence which was enacted into the Indian Evidence Act (Act 1 of 1872).

Scrutton, J., in *Asiatic Petroleum Company Ltd.* v. *Anglo-Persian Oil Company Ltd.* (2) which was a case between private parties inspected the document to the production of which objection was taken, and having seen it he said that he would not take the responsibility of ordering it to be produced against the wishes of the Government. When the matter was taken in appeal, Swinfen Eady, L. J., was of the opinion that the rule was not confined to documents of political or administrative character. The foundation of the rule was that the information cannot be disclosed without injury to the public interest and not that the document was confidential or official, and that if the production would be injurious to the public service, the general public interest must be considered paramount to the individual interest of the suitor. This was a document which was written by the defendants, who owned a pipeline from Persia to their refinery in the Persian Gulf, to their agents in Persia which contained confidential information from the Board of Admiralty.

The Scottish cases have also upheld the privilege of the Crown in regard to production although it has

(1) (1860) 5 H. & N. 838; 157 E.R. 1415. (2) [1916] 1 K. B. 822.

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been stated that the inherent power of the court to itself see the document and to override but not to review the certificate of the official of the department concerned has always existed in Scottish courts. In *Duncan's case* (1) Viscount Simon, L. C., quoted with approval the observation of Lord Dunedin, the Lord President in the *Lord Commissioners of the Admiralty* v. *The Aberdeen Steam Trawling & Fishing Co., Ltd.* (2). That was a case where a Government department objected to the production of the document on the ground that the production would be prejudicial to public services and it was held that the view of the government department was final and the court will refuse production even in action in which the Government department was a party. The objection there was taken on an affidavit. At p. 340, the Lord President (Dunedin) said:—

"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".

And Lord Kinnear agreed with Lord Dunedin and at p. 343 said:—

"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

(1) [1942] A.C. 624. (2) (1909) S.C. 335, 343.

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."

In a later Scottish case *Henderson* v. *M'Gown* (1) where in a suit between private parties income-tax returns were sought to be produced, the court held that it had the power, in the exercise of its discretion, to order production of documents in the custody of a public department in spite of its objection but in the circumstances it did not order production as it was unnecessary. Lord Johnston said at p. 826:—

"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 should 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

(1) (1916) S.C. 821.

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communications made to them being treated as confidential. This also is the public interest."

The latest Scottish case relied upon is a decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board* (1). In that case privilege was claimed by the Central Land Board on the ground that its production would adversely affect the public interests. The question for decision was whether Scottish courts were bound to give effect to the certificate of the Secretary of State or whether the court had an inherent jurisdiction not to review the certificate but to override it. The House of Lords was of the opinion that *Duncan's case* (2) did not affect the Law of Scotland and the Scottish courts possessed the inherent power to override the objections of the Minister and it did not exclude the court from making an order of production but in that case the power was not exercised. Viscount Simonds, L. C., said at p. 10 that *Duncan's case* (2) had settled that according to the Law of England an objection validly taken to production of documents on the ground that this would be injurious to the public interest is conclusive but to cite the case of *Lords Commissioners of the Admiralty* (3) as authoritative without regard to the earlier cases and the later case of *Henderson* v. *M'Gown* (4) must give an imperfect view of the law of Scotland. But even in Scotland the power had been rarely, very rarely, exercised by the courts; its exercise had been refused even where the result had been the prejudice of the private individual and the paramountcy of the public interest had been recognised and preserved. (p. 11). Lord Normand observed that for a 100 years the uniform track of authority asserted the inherent power of the court to disregard the crown's objection but the power had been seldom exercised; only the courts had emphatically said that it must be used with the greatest caution and only in special circumstances. In this connection Lord Normand said at p. 16:—

"It was also a firmly established rule that the courts could not dispute the certificate and that the

(1) 1956 S.C. 1 (H.L.).
(2) [1942] A.C. 624.
(3) (1909) S.C. 335, 343.
(4) (1916) S.C. 821.

question whether production would be contrary to public interest was for minister or the department concerned."

Lord Radcliffe in his speech said that *Duncan's case* (1) ought not to be treated as a decision which affected the law of Scotland. Dealing with the case before the court and the power reserved to the court to overrule the crown objection he said at p. 18:—

"I do not understand that the existence of the power involves that in Scotland, any more than in England, it is open to the court to dispute with the minister his view that production would be contrary to the public interest is well founded or to arrive at a view, contradictory of his that production would not in fact be at all injurious to that interest. If weight is given to the argument that the Minister in forming his view may have before him a range of considerations that is not open to the Court and that he is not under any obligation to set out these considerations in public, I think that it must follow that the Minister's view must be accepted by the Court as incapable of being displaced in by its own opinion". The view expressed in *Admiralty Commissioners* v. *Aberdeen*(2) was dissented from.

After referring to another aspect of public interest that impartial justice should be done in the courts of law, not least between citizen and Crown, the Lord Normand observed:

"If in the past the power to disregard the objection has hardly ever been exercised, that has been due, I think, to a very proper respect for the Crown's position and to a confidence that objections of this nature would not be advanced, or at any rate persisted in, unless the case was one in which production would involve material injury to the public welfare".

Thus, as was said by Lord Normand, there is a difference between the law of England and the law of Scotland on an important constitutional question. But in practice the difference was little as the exercise of the inherent power by the Scottish Courts had been rare.

(1) [1942] A.C. 624. (2) (1909) S.C. 335, 343.

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As the Privy Council judgment in *Robinson's case* (1) was from Australia it will be useful to refer to two Australian cases :—

In *Marconi's Wireless Telegraph Company Limited* v. *The Commonwealth* (2) where inspection was claimed of wireless telegraphic apparatus, Isaacs, J., in his minority judgment at p. 205 enunciated the following propositions which are relevant for the purpose of the present case :—

"(1) The rule of exclusion of State secrets applies, necessarily without distinction to the facts, documents and other objects. This was admitted by Mr. Irvine, and is established by such cases as *R. v. Watson* 2 Stark, 116 at p. 148; *R. v. Hardy* 24 St. Tri. 199, at col. 753; *R. v. Watson* 32 St. Tri. 1, at cols. 100-101.

(2) The rule proceeds on the same grounds whether the parties called on to produce the documents, &c., are or are not parties to the suit, that is, on the grounds of the prejudice to the public interests, which production would occasion (per Turner, L. J. in *Wadeer's case* S. D. M. & G., 1882; *Admiralty Commissioners* v. *Aberdeen Trawling Co.* (1909) Sess. Ca., 335.

(3) The right to protection depends upon the "character" of the documents, &c. (ib.).

(4) If the documents, &c., are prima facie private, as where they are in private hands then in the absence of Ministerial claim for protection, the Court, in case of objection by the private defendant on the ground of public policy, will ascertain their character that is, whether they are really governmental and, if they are, the next succeeding paragraph applies: *Smith* v. *East India Company* I Ph. 50.

(5) If the documents, &c., are of a political that is, a governmental "character", then even in the absence of any Ministerial claim for protection, it is the duty of the Court, on objection by private person holding them, to ascertain whether public prejudice will or may ensue from production, and, if it appears that public policy requires confidence between the objector and the Government, they are presumed

(1) [1931] A.C. 704. (2) (1913) 16 C.L.R. 178, 201.

prima facie to be confidential: *Smith* v. *East India Company* I Ph. 50 and per Wills, J. in *Hennessy* v. *Wright* 21 Q.B.D. 509, 518-519.

(6) If either by proof or undisplaced presumption confidence is required, then it is a rule of law, not of discretion, that the documents shall be excluded: *Marks* v. *Beyfus* 25 Q.B.D. 494 at pp. 498-500; *Stace* v *Griffith* L.R. 2 P. C., 420 at p. 428.

(7) If the documents, &c., are in fact "State documents", that is, "in possession of a government department", and the Minister having custody of them assures the Court that public prejudice will or may ensue from production, that, in the absence of what are called extreme cases and are practically negligible, is conclusive evidence of their character, that is, that they are confidential public documents, and that such prejudice will or may ensue, and the Court must act upon it: *Stace* v. *Griffith* L.R. 2 P.C. 420 at p. 428; *Beatson* v. *Skene* 5 H. & N. 838; *The Bellerophon* 44 L. J. Adm. 5; *Hughes* v. *Vargas* 9 R. 661; Halsbury's Laws of England, Vol. XI, p. 85; Taylor on Evidence, 10th ed., pp. 673, 674; Powell on Evidence, 9th ed., p. 273. Conclusiveness in such a case is not unique. Even a private claim for privilege in an ordinary affidavit of documents is (with certain exceptions immaterial here), taken as conclusive with respect even to the grounds stated for claiming privilege; See Halsbury's Laws of England, Vol. XI, p. 61 and *Morris* v. *Edwards* 15 App. Cas. 309."

The learned Judge dealing with the matter of privilege in public interest and the principles based on prevention of injury to the community observed at p. 203:

"Such a doctrine is inherent in all systems of law; for the first requirement of every organised society is to live, and so far as possible to live securely, and the next is to live with the greatest advantage to the community at large; and to these essentials the strict administration of justice in particular cases amongst members must yield."

Thus the principle is that private inconvenience must yield to public interest; in other words *Fiat justitia*

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ruat coelum is not always the right of a suitor because the proper maxim applicable is *salus populi suprema est lex* which transcends all other considerations. The majority of the Court in that case had held that there was nothing to warrant the conjecture that the inspection could disclose anything that could reasonably be called secret in any sense of the word. The matter was taken to the Privy Council but special leave to appeal was refused. The Lord Chancellor there said:—(See *Griffins case*, 36 C.L.R. 378, 386)

"Of course the Minister's statement or certificate must be conclusive on a particular document. How can it be otherwise?..... If the Minister certifies quite specifically, his certificate is to be taken as conclusive. The ground on which special leave to appeal was refused in that case appears to have been that, having regard to the form of the order, which carefully limited the right of inspection and reserved liberty to apply, it was not a convenient case in which to raise a great question of principle."

In *Griffin* v. *The State of South Australia* (1) objection to the production for inspection of documents was upheld on the ground that the statement of the Attorney General for the State that their production for inspection would be prejudicial to the public interest is conclusive. That was a case in which inspection of documents was sought in an action brought in the High Court of Australia by the plaintiff against the State of South Australia to recover damages for negligent storage of wheat. Knox, C. J., in the course of his judgment referred to the observations of the Lord Chancellor in *Marconi's case* (2) which have been quoted above. Isaacs, J., reiterated his previous opinion. Starke, J., was doubtful and he was of the opinion that there was no reason why the courts should not use the power confided in them for discovery. If some real doubt was established as to the accuracy of the Minister's statement there was no reason for refusing the power in a proper case particularly when the commercial activities of the Government were becoming more and more extensive and

(1) (1925) 36 C.L.R. 378. (2) (1913) 16 C.L.R. 178, 201.

the sphere of political and administrative action correspondingly wider. He was also of the opinion that the courts should be able to fully protect the public interests and do nothing to imperil them. The learned Judge in that particular case was not fully satisfied with the affidavit of the Minister.

The matter of privilege in Australia was taken to the Privy Council in *Robinson* v. *State of South Australia* (1). This case arose out of an action similar to *Griffin's case* (2) and a similar privilege was claimed. The Privy Council was of the opinion that the Minister's minute was inadequate to support the claim of privilege but it had not been lost by the inefficiency of the form in which it was claimed and the matter was a proper one for the court to exercise its power of inspection for which privilege was sought in order to determine whether their production will be prejudicial to public interest or to the efficient working of the public services.

Lord Blanesburgh said at p. 714:—

"As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production: See *Asiatic Petroleum Co.* v. *Anglo-Persian Oil* (1916) 1 K. B. 822, 829-830 and *Smith* v. *East India Co.* 1 Ph. 50."

and at p. 715 it was observed:—

"It must not be assumed from these observations of the Lord Justice that documents relating to the trading, commercial or contractual activities of a State can never be claimed to be protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be "some plain overruling principles of public interest concerned which cannot be disregarded"."

(1) [1931] A.C. 704. (2) (1925) 36 C.L.R. 378.

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After referring to various cases that have been set out above the Privy Council was of the opinion that the court was entitled to prescribe in any particular case the manner in which the claim of privilege should be made. It may accept unsworn testimony of the Minister in one case but in another where the circumstances seems to be to so require call for an affidavit from him. It may be that objection merely on ground of public policy may not be sufficient but it ought to appear that the mind of a responsible Minister had been brought to bear on the question of expediency in the public interest of giving or refusing the information asked for. This would be a guarantee that the opinion of the Minister which the court is asked to accept is one which has not been expressed inadvisedly or as a matter of mere departmental routine but is one put forward with the solemnity necessarily attaching to the sworn statements and that the privilege could not be asserted in relation to documents the contents of which had already been published. In that particular case the Minister had merely stated that he had considered this mass of documents and not that he had read them and considered each one of them. Lord Blanesburgh said at p. 722:—

"In view specially of the fact that the documents are primarily commercial documents he should have condescended upon some explanation of the particular and far from obvious danger or detriment to which the State would be exposed by their production. Above all, and especially in view of the last paragraph of the minute, the claim was one which should have been put forward under the sanction of an oath by some responsible Minister or State official."

Continuing it was observed that there may be some among the scheduled documents to which privilege may be genuinely attached and to give inspection of which without more would destroy the protection of the privilege and therefore it would or might be contrary to public interest to deprive the State of opportunity of regularising its claim to protection. The Board would have given this advice had it not been for the fact that it would have involved serious delay

without advancing further the final solution of the question. The case was therefore remitted to the Supreme Court with a direction that it was a proper one for the exercise by that court of the power of inspecting documents. The Privy Council was careful to add that the Judge in giving his decision as to any document would safeguard the interests of the State and would not resolve the doubt against the State without further enquiring from the Minister. In that case also the paramountcy of the consideration of public interest was recognized but as the privilege was not properly claimed and the document related to commercial activities of the State and it would have involved unnecessary prolongation of the action the Privy Council remitted the case for the court to exercise its power of inspection under the Rules and Orders of the court but with the further direction of safeguarding the interest of the State.

In *Duncan* v. *Cammell Laird & Co.* (1), the Court of Appeal held that the affidavit of the First Lord of Admiralty was conclusive if it stated that such production would be contrary to public interest, and the order for production was therefore refused. Du Parcq, L. J., pointed out that the Privy Council case (Robinson's case (2)) was not the final word on the subject in regard to production. The House of Lords in appeal did not agree with the judgment of the Privy Council and it is significant that two of the seven Law Lords in the House of Lords were parties to the Privy Council judgment. The House of Lords held that the affidavit of the Minister was conclusive and that inspection of a document by a court in private would be communicating with one party to the exclusion of the other and it accepted the principle that if it was prejudicial to the public interests or the document belonged to that class of documents which are kept secret for the proper functioning of the public services the production of the document would be refused. It was recognized in that case that it is the Judge who is in control of the trial and not the executive but the proper ruling for the judge to give

(1) [1942] A.C. 624. (2) [1931] A.C. 704.

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would be that an objection validly taken to the production on the ground of its being injurious to public interest is conclusive.

The English cases which were decided after the pronouncement of the House of Lords in *Duncan's case* (1) naturally followed the decision of the House of Lords. In *Ellis* v. *Home Office* (2) where a prisoner who had been attacked in jail by another prisoner who was a mental case asked for certain reports and privilege was claimed, the privilege was upheld but it was said that although it was essential that Government department should be entitled to claim privilege against disclosure of documents on the ground of public interest the ambit of privileges should be carefully scrutinized and each document should be examined. It may be mentioned that in that case Devlin, J., felt grave concern about the claim of this privilege because the result was that documents were to be treated as destroyed and no secondary evidence could be led and this concern of the trial judge was shared by the Court of Appeal. In *Broome* v. *Broome* (3) which was a defended suit for divorce, the wife wanted certain documents of the Soldiers', Sailors' and Airmen's Families Association but the Secretary of State issued a certificate in which he stated that the production would not be in public interest. It was held that Crown privilege from disclosure attached to all documents irrespective of where they originated or in whose custody they reposed provided that they had emanated from or came into the possession of some servant of the Crown.

In *Auton* v. *Rayner & Ors.* (4) it was pointed out at page 572 that the sole concern of the Minister was whether the interests of the State in the sphere for which he was responsible would be affected and therefore the documents or evidence should be withheld from the court. It was added that the Minister should accept and recognize that the proper administration of justice would be impeded or may be unattainable if any document or any evidence was withheld. In that case an action was brought against the

(1) [1942] A.C. 624.
(2) [1953] 2 All E.R. 149.
(3) [1955] 1 All E.R. 201
(4) [1958] 3 All E.R. 566.

defendants, one of whom was a Police Officer, charging them with conspiracy to injure and defraud him, false imprisonment and malicious prosecution. The documents required by the plaintiff were reports made by the Police Officer to his superior officers and the communication which passed between the Metropolitan Police Force and other police force and the Secretary of State swore an affidavit indicating that the document should be withheld from production and that he had formed an impartial judgment that in the public interest and for the proper functioning of the public services the document should be withheld. The Court of Appeal held that the determination of the Secretary of State ought reasonably to be accepted and that the affidavit was, in the circumstances, conclusive.

The law in England may thus be summed up :—

(1) That a document need not be produced for inspection either on discovery or at the trial when objection is taken by the Minister that disclosure of the document would be contrary to public policy or detrimental to public interest or services. This privilege attaches irrespective of where the document originates or in whose custody it is provided it emanated from or came into possession of some servant of the crown;

(2) the privilege can be claimed or waived by the authority of the Minister or the head of the department;

(3) secondary evidence may not be given of a document for which privilege is established;

(4) official correspondence *per se* is not privileged on the ground of its being confidential or official nor is it a valid ground that production would involve the Government in criticism or expose want of efficiency in the administration or open up claims to compensation but the ground for privilege is that the production would be detrimental to the interest of the public or interfere with the efficient working of the public service or it belongs to class of documents which it is the practice of the department to keep secret;

(5) the minister's objection may be conveyed by a letter or by the official who attends at a trial but

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the court may require an affidavit by or the attendance of the Minister;

(6) before a privilege is claimed it is desirable that each document should be examined by the department concerned and inspection permitted of all documents which cannot harm the public interest;

(7) if a minister claims privilege the court will accept his statement and ought not to examine the document to see if the objection is well founded;

(8) public interest must not be put in jeopardy by the production of a document which could injure it and the court should, if necessary, prohibit the production even though no objection has been taken by the Government department.

It may be pointed out that the privilege was expressly reserved when by the Civil Proceedings Act, 1947, the Crown was made liable to give discovery in civil proceedings.

It is no doubt true and it must be recognized that the administration of public justice is also a part of public interest but as was pointed out by Viscount Simon L. C. in *Duncan's case* (1) the interest of the State is the interest of the citizen and if the former suffers the interest of the litigant also suffers and therefore public interest transcends the individual interest of a citizen. In *Duncan's case* (1) it was emphasised that the Minister in deciding whether it was his duty to object should bear in mind the considerations which justify withholding production, i.e., the public interest would otherwise be damnified, i.e., the disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. And that is the safeguard which both in England and India the law seems to have found sufficient for the protection of an individual's rights. Even in Scotland where the inherent right of the courts to override official discretion has been recognized the occasions for the exercise of that power have indeed been rare and even in the

(1) [1942] A.C. 624.

latest case *Glasgow Corporation* v. *Land Board* (1) that position was reiterated.

Although the concensus of opinion in India is that under the second part of s. 162 the court will not inspect the document if it relates to matters of State yet there is a track of decision which has taken the view that it is not for the head of the department claiming the privilege but for the court to decide whether the document falls within the category mentioned in s. 123. But in some other cases a different view has been taken. A reference to cases which fall on both sides of the line will be helpful.

In *Irwin* v. *Reid* (2) Mukherjea, A. C. J., held that the language of s. 123 showed that the court cannot be invited to discuss the nature of the document and the public official concerned and not the court is to decide whether the evidence referred to shall be given or withheld. "If any other view were taken, the mischief intended to be averted would take place, as the judge could not determine the question without ascertaining the contents of the document, and such inquiry, if it did take place must, for obvious reasons, take place in public: *Beatson* v. *Skene* (3), *Hennessy* v. *Wright* (4), *Jehangir* v. *Secretary of State* (5). The result practically is, that if the objection is raised by a proper authority the court cannot compel disclosure by primary or by secondary evidence."

The Lahore High Court in *Khawja Nazir Ahmad* v. *Emperor* (6) held that the head of the department who is in possession of the documents is the sole judge of the fact whether the documents should be protected from production on the ground of their being related to affairs of State and therefore though the decision would be that of the court, it would have to rule in favour of the privilege claimed by the head of the department. It was also held that the interests of the State must not be put in jeopardy by production of documents which would injure them and that was a principle to be observed in administering justice and

(1) (1956) S.C. 1 (H. L.)
(2) (1921) I.L.R. 48 Cal. 304.
(3) (1860) 5 H. & N. 838; 157 E.R. 1415.
(4) (1888) 21 Q.B.D. 509.
(5) (1903) 6 Bom. L.R. 131, 160.
(6) I.L.R. [1945] Lah. 219.

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indeed a rule on which the judge should insist even though no objection is taken at all. In that case there were certain confidential files of the Special Enquiry Agency containing notes, correspondence etc., relating to the case and containing a record of statements of various persons and a proper affidavit had been filed by the head of the department stating that the production would be injurious to public interests. Abdul Rahman, J., said "I feel convinced in my mind that the objection as to its production apart from its admissibility (e.g., for want of registration or contravening the rule as to when secondary evidence of a document can be admitted—if the document is merely a copy and not original) can only be decided by its inspection by the Court followed as it must necessarily have been by an order for its production, although not in the sense of its contents having been disclosed to the party summoning the document at any rate at that stage. If the Court is debarred under the statute from inspecting it, I cannot see how the objection as to its production can otherwise be decided". In *I. M. Lal* v. *Secretary of State* (1) this privilege was upheld. In that case it was held that s. 162 divided the privilege of documents into two categories. At p. 212 Abdul Rashid, J. (as he then was) observed :—

"The Court can inspect documents for the purpose of deciding the question of privilege only if those documents do not refer to matters of State. In other words an exception is made in respect of documents that refer to matters of State. Such documents cannot be inspected by the Court while all other documents for which privilege is claimed are open to inspection by the Court for the purpose of deciding the validity of the objection regarding privilege."

The Bombay High Court in *re Mantubhai Mehta* (2) in construing ss. 123, 124 and 162 has held that the officer summoned to produce the document is bound to bring it and if he takes objection to its production it is for the court to decide whether the objection is well founded or not but the court is not entitled to inspect it. This track of reasoning suffers from the

(1) A.I.R. 1944 Lah. 209. (2) I.L.R. [1945] Bom. 122.

same difficulty that has been pointed out that without looking at the document and taking into consideration the wide words of s. 123 it becomes difficult to hold that the court can decide as to whether the document relates to "affairs of State" and whether it should or should not be produced. In that Bombay judgment the learned Judge referred to the observations of Viscount Simon, L.C., in *Duncan's case* (1). Besides the learned Judge also referred to s. 124 the effect of which is not the same as of s. 123 of the Evidence Act. Bhagwati J. (as a Judge of the Bombay High Court) in *R.M.D. Chamarbaghwala* v. *Y. R. Parpia* (2) held that the court cannot inspect the document in order to determine whether they are unpublished official records relating to any affairs of State, but its jurisdiction to determine is not taken away by s. 162 and it is for the court to decide the question of production by taking all the circumstances into consideration barring inspection of the document. The learned Judge mainly referred to *Robinson's case* (3) and it appears that the learned Judge was not satisfied as to the documents being unpublished but the criterion he laid down was that only such documents are privileged which relate to affairs of State and the disclosure of which would be detrimental to public interest. The question really is the same as to who is to decide whether it is "matters" of "affairs of State".

The Calcutta High Court in a later judgment in *Ijjat Ali Talukdar* v. *Emperor* (4) took a contrary view different from its older view and held that the court is to decide whether conditions precedent to ss. 123 & 124 have been established. That was a case under the Excise Act and the Excise Commissioner was called upon to produce certain documents. The Commissioner claimed privilege under s. 123 on the ground that the files contained unpublished official records relating to affairs of State and Das J., as he then was, was of the opinion that the occasion for claiming privilege under s. 123 arose when it was sought to give evidence derived from unpublished official records

(1) [1942] A.C. 624.
(2) A.I.R. 1950 Bom. 230.
(3) [1931] A.C. 704.
(4) I.L.R. [1944] 1 Cal. 410.

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relating to any public affairs which was a condition precedent. He then referred to s. 124 of the Evidence Act. The second part of s. 162 provided the method or means to enable the court to decide the question, namely, by inspecting the document or by taking other evidence. Although the court was disentitled from inspecting the document, the duty of deciding the question was still on the court. At p. 419 the learned Judge observed:—

"In case of documents relating to affairs of State it may be difficult for the Court to decide the question, yet it need not be necessarily impossible for the Court to do it. Ordinarily no difficulty will arise, because heads of departments or public officers are not expected to act capriciously and ordinarily the Court will accept their statement. If necessary, the Court will require the officer to claim the privilege in the manner indicated in the Judgment of Lord Blanesburgh in the Australian case. If, however, the Court finds that an over-zealous officer is capriciously putting forward a claim of privilege, the Court will decide, as best as it can, by the means available to it, whether the claim is well founded."

As has already been said above the second part does not afford the means or methods to the Court to decide the question of privilege. The only method is inspection and that is denied to the court in cases falling under s. 123.

The second case which is on the other side of the line is the judgment of Bose J., as he then was, in *Bhaiya Saheb* v. *Ramnath Rampratap Bhadupote* (1). In that case the learned Judge was of the opinion that the insertion of the words "unless it refers to matters of State" in the middle of the paragraph seemed to indicate that the court might not inspect the document in respect of which the privilege was claimed until it had opportunity of determining upon its admissibility and for that purpose it could take other evidence which meant evidence other than the document produced. This line of reasoning is similar to that adopted in *Ijjat Ali's* (2) case.

(1) I.L.R. [1940] Nag. 240, 247. (2) I.L.R. [1944] 1 Cal. 410.

The Andhra Pradesh High Court in *Public Prosecutor, Andhra* v. *Damera Venkata Narsayya* (1) was of the opinion that when an objection under s. 123 is taken the court has no power to inspect the document but may take other evidence for the purpose of deciding the objection and if it comes to the conclusion that the evidence will be derived from the unpublished records relating to the affairs of the State the objection will have to be upheld and it will be left to the head of the department to give or withhold the permission and the criterion for the head of the department was whether or not the disclosure would cause injury to public interest and he was the sole judge of the matter with which the court cannot interfere. This case does not support the contention of the respondent.

The Patna High Court in *Lakhuram Hariram* v. *The Union of India* (2) held that the head of the department must first examine the document and he may then raise an objection but he is not absolved from the obligation of appearing in court and satisfying the court that the objection taken is valid and the court may require him to give an affidavit or further questions may be put in regard to the validity of the claim but the court is not entitled to inspect the document.

A. P. Srivastava, J., in *Tilka & Ors.* v. *State* (3) held that under s. 162 of the Evidence Act the court may inspect a document unless it relates to affairs of State and in such a case it will have to take other evidence relating to the nature of the document.

The words of s. 123 are very wide; and the discretion to produce or not to produce a document is given to the head of the department and the court is prohibited from permitting any evidence to be given which is derived from any unpublished documents relating to affairs of State. Section 162 does not give the power to the court to call for other evidence which will indicate the nature of the document or which will

(1) I.L.R. [1957] And. Prad. 174. (2) A.I.R. 1960 Pat. 192.
(3) A.I.R. 1960 All. 543.

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have any reference to the reasons impelling the head of the department to withhold the document or documents. In the very nature of things when the original cannot be looked at and no secondary evidence is allowable the court will only be groping in the dark in regard to the nature of the document or the evidence. The correct way of looking at the Indian statute, therefore, is to interpret in the manner which is in accord with the English law, i.e., the court has not the power to override ministerial certificate against production.

It is permissible for the court to determine the collateral facts whether the official claiming the privilege is the person mentioned in s. 123, or to require him to file proper affidavit or even to cross-examine him on such matters which do not fall within the enquiry as to the nature of the document or nature of the injury but he may be cross-examined as to the existence of the practice of the department to keep documents of the class secret but beyond that ministerial discretion should be accepted and it should neither be reviewed nor overruled.

For these reasons I concur in the decision that this appeal must be allowed.

Subba Rao J.

SUBBA RAO, J.—I have perused the judgments prepared by my learned brethren, Kapur and Gajendragadkar, JJ. I agree with them in maintaining the claim of privilege in regard to the three items described as "original orders" passed by the PEPSU Government, but regret my inability to agree with them in regard to the report of the Service Commission.

This appeal raises the question of the scope and content of the law of privilege attached to affairs of State and the procedure to be followed for ascertaining it. The facts are fully stated in the said judgments and I need not restate them; but I would prefer to give my own reasons for my conclusion.

It would be convenient at the outset to clear the ground. The arguments at the Bar have covered a wide field, but we are not concerned here with the law of privilege pertaining to the field of discovery and inspection of documents. We are called upon only to decide its

scope during the trial of a suit when a witness, who is summoned to produce a document, claims privilege on the ground that the document relates to affairs of State. I should not be understood to have expressed any opinion on the difficult question whether when the defendant is a State, the Court is not entitled to inspect the documents under O. XI, rule 19(2), Code of Civil Procedure.

The question falls to be considered on a true construction of two of the provisions of the Indian Evidence Act, 1872 (hereinafter called the Act), namely, ss. 123 and 162. They read:

Section 123: "No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

Section 162: "A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code (45 of 1869)."

The relevant parts of the foregoing sections may be summarized thus: Section 123 prohibits the giving of any evidence derived from unpublished official records relating to affairs of State except with the permission of the officer at the head of the department; while s. 162 enjoins on a witness summoned to produce a document to bring it to Court and empowers

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the Court to decide on the validity of any objection raised in respect of its production or admissibility. The argument of the Advocate-General is that the words "affairs of State" mean "the business of State", and, therefore, evidence derived from any unpublished official document relating to that business cannot be given as evidence except with the permission of the head of the department concerned, and that the Court under s. 162 of the Act must automatically accept the affidavit filed by the head of the department claiming such a privilege. Learned counsel for the respondent, on the other hand, defines the words "affairs of State" only to take in documents whose production would be against public interest, confines the power of the head of a department to permit or withhold the user of such a document in evidence, and sustains the Court's power to decide the question of privilege in respect of such a document on relevant materials without inspecting the document.

The crucial words in s. 123 are, "unpublished official records relating to any affairs of State". Under that section no one shall be permitted to give any evidence derived from such records except with the permission of the officer at the head of the department concerned. The words "affairs of State" have not been defined. Though in s. 123 the words used are "affairs of State", in s. 162 the words used are "matters of State". There does not appear to be any practical difference between the two sets of words. In Shorter Oxford Dictionary, III edition (1956), "matter" has been defined as "a thing, affair, concern" and "affairs of State" as "public business". These Dictionary meanings do not help to decide the content of the said words. The content of the said words, therefore, can be gathered only from the history of the provision. It has been acknowledged generally, with some exceptions, that the Indian Evidence Act was intended to and did in fact consolidate the English Law of Evidence. It has also often been stated with justification that Sir James Stephen has attempted to crystallize the principles contained in Taylor's work into substantive propositions. In case of doubt or

ambiguity over the interpretation of any of the sections of the Evidence Act we can with profit look to the relevant English common law for ascertaining their true meaning. In English common law the words "affairs of State" do not appear. The basis of the doctrine of Crown privilege is the injury to the public interests. The Judicial Committee in *Robinson* v. *State of South Australia* (1) says at p. 714,

"The principle of the rule is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires." The House of Lords in *Duncan* v. *Cammell Laird & Co.* (2) restated the same idea when it observed that the State should not withhold the production of documents except in cases where the public interest would otherwise be damnified.

The earlier decisions of the English courts indicate that the Crown privilege was sustained only in regard to documents pertaining to matters of administration, defence, and foreign relations whose disclosure would be against the public interest: see *Home* v. *Lord F. C. Bentinck* (3), *Smith* v. *The East India Company* (4) and *Beatson* v. *Skene* (5).

The decisions of the High Courts in India over a long period of time consistently gave the same meaning to the said words. It may also be stated that in and about the time when the Evidence Act was passed, the concept of a welfare State had not evolved in India and as such the words "affairs of State" could not have been, at that time, intended to take in the commercial or the welfare activities of the State. But when the words are elastic there is no reason why they should not be so construed as to include such activities also, provided the condition of public injury is also satisfied. It is, therefore, clear that the words "affairs of State" have acquired a secondary meaning, namely, those matters of State whose disclosure would cause injury to the public interest.

(1) [1931] A.C. 704.
(2) [1942] A.C. 624.
(3) (1820) 2 Brod. & B. 130: 129 E.R. 907.
(4) (1841) 1 Ph. 50; 41 E.R. (Chancery) 550.
(5) (1860) 5 H. &. N. 838.

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The learned Advocate-General contends that this construction, if accepted, would give a meaning to the provisions of s. 123 of the Act which would be contrary to its tenor. He classifies documents relating to "affairs of State" into noxious and innocuous documents, and contends that documents, whose disclosure would affect the public interest, are noxious documents and that if the records which relate to the affairs of State mean only noxious documents, the said construction would bring out a result directly opposite to that contemplated by the section. When the section intends to prohibit the disclosure of noxious documents, the argument proceeds, the construction enables their disclosure if the head of the department permits it. Shortly stated, his contention is that the expression "affairs of State", that is, business of State, is the genus and the document, the disclosure of which is against the public interest, is the species, and that the head of the department is only empowered to permit the disclosure of documents falling outside the said species. This argument is apparently logical and rather attractive, but it is an oversimplification of the problem and is based upon a disregard of the legislative history and the long track of decisions of this country. If accepted, it enlarges the scope of the said privilege to such an extent that in effect and substance the control of the admissibility of documents shifts from the Court to the State or its subordinate officers, for every document relating to the business of State would be a privileged document unless the head of the department in his discretion permits the giving of evidence derived therefrom. Nor can I accept the construction that an absolute privilege is attached to every noxious document, i.e., to every State document the disclosure of which may cause injury to the public interest. This is giving too narrow a meaning to the words "public interest". If the non-disclosure of a particular State document is in public interest, the impartial and uneven dispensation of justice by Courts is also in public interest. They are indeed two aspects of public interest. There is no conflict or dichotomy between the two. In particular

circumstances one aspect may be paramount and in a different set of circumstances the other may be given precedence. In the last analysis, it is the question of balancing of the two aspects having regard to the circumstances of a particular case. The head of a department may as well permit the disclosure of a document even if ordinarily its disclosure affects public interest, if in his opinion the counter-balancing circumstances are in favour of disclosure rather than non-disclosure. I cannot, therefore, give a wide meaning to the words "records relating to affairs of State" so as to take in every unpublished document pertaining to the entire business of State, but confine them only to such of the documents whose disclosure would be injurious to public interest.

The next question is, who is empowered to decide the said question whether a particular document relates to affairs of State ?—whether it is the Court or the State. That is found in s. 162 of the Act. The learned Advocate-General contends that the first part of s. 162 makes a distinction between the production of a document and the admissibility of a document and that the first limb of the second part of the section provides for the production of a document and the second limb for its admissibility. He illustrates his argument thus: privilege may be raised in respect of production of a document on the ground that it pertains to matters of State, or on the ground that it is inadmissible for want of registration, deficiency of stamp, or similar other defects. The first clause of the second part of s. 162, the argument proceeds, enables the Court to inspect a document when the objection is to its production unless the document refers to a matter of State, and the second clause thereof empowers the Court to take evidence only when the objection is not to its production but to its admissibility. If this contention be accepted, it will lead to an anomaly, for grammatically construed the two limbs of the second part can be applied only to the question of admissibility and in that event, on the hypothesis suggested by the learned counsel, the Court will be entitled to look into a document even if it relates to a

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matter of State if the objection is only to its production and not to its admissibility. The more reasonable construction of the section is to give a wider meaning to the word "admissibility" so as to comprehend both production as well as admissibility, for the question of admissibility arises only after the document is produced and a party seeks to get it admitted in evidence. In this view, the second part of s. 162 can only mean that when an objection is raised either to the production or to the admissibility of a document, a Court can inspect the document and if it thinks necessary other evidence may be taken to decide on the objection raised. By the express terms of the section the Court is precluded from inspecting a document if it refers to matters of State. But in other respects the jurisdiction of the Court to decide on the objection raised is not different from that it possesses in respect of other privileged documents.

If so understood there cannot be any ambiguity in the scope of s. 162 of the Act. It says in express terms that when an objection is raised to the production of a document or to its admissibility, the validity of any such objection shall be decided by the court. The second part of the section states the material on the basis of which such an objection can be decided. It can either inspect the document or take other evidence to enable it to decide the validity of any objection raised. The only limitation in the case of a document referring to matters of State is that the court cannot inspect it. It is implicit in the limitation that in the case of documents pertaining to matters of State the court is precluded not only from inspecting the documents but also from permitting parties to adduce secondary evidence of their contents. "The other evidence" must necessarily be *de hors* the contents of the documents.

Even in England there is no divergence of view on the question who has to decide, when an objection to the production of a document is raised on the ground of privilege, the validity of the objection. In *Robinson's case* (1), the Judicial Committee observed at p. 716 thus:

(1) [1931] A.C. 704.

"The result of the discussion has been..... where in effect he concludes that the Court has in those cases always had in reserve the power to inquire into the nature of the documents for which protection is sought, and to require some indication of the nature of the injury to the State which would follow its production. The existence of such a power is in no way out of harmony with the reason for the privilege provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege, where it exists, is designed to guard against."

The House of Lords in *Duncan's case* (1), also recognized this power though it whittled down its scope by holding that the judge had to accept automatically the affidavit filed by a minister. Viscount Simon, L. C., states at p. 642 as follows:

"Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge.....It is the judge who is in control of the trial, not the executive, but the proper ruling for the judge to give is as above expressed."

On the other hand, in Scotland the inherent right of courts to override official discretion is recognized. The House of Lords in *Glasgow Corporation* v. *Land Board* (2) gave a clear exposition of the law of that country. Viscount Simonds derives the principle of the court's power from the fact that the fair administration of justice between subject and subject and the Crown is a public interest of higher order and the protection is the care of the courts. Lord Radcliffe finds it on the doctrine that the interest of the Government for which the minister should speak with authority does not exhaust the public interest, for another aspect of that interest is seen in the need that impartial justice should be done in courts of law. These judgments of the high authority also recognized the fact that it is the court that has to decide an objection

(1) [1942] A.C. 624. (2) (1956) S.C. (H.L.) 1.

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raised by the State on the ground of privilege. There is a strong current of Indian decisions taking the same view: see *Khawja Nazir Ahmad* v. *Emperor* (1), *re Mantubhai Mehta* (2), *R. M. D. Chamarbaugwala* v. *Y. R. Parpia* (3), *Lijat Ali Talukdar* v. *Emperor* (4), *Bhaiya Saheb* v. *Ramnath Rampratap Bhadupote* (5), *Public Prosecutor, Andhra* v. *Damera Venkata Narasayya* (6), *Lakhuram Hariram* v. *The Union of India* (7), *Tilka* v. *State* (8). In a few cases a different view is expressed. It may, therefore, be stated without contradiction that the preponderance of authority is in favour of a court deciding the question of State privilege.

Some objections are raised in decided cases in England and restated in *Duncan's case* (9) against conferring such a power on courts. Apart from the fact that the statute expressly confers such a power, there are no merits in the objections raised. The objections are: (i) the judges are not well qualified to appreciate the highly technical matters which may arise with regard to some kinds of State secrets; (ii) if a judge is allowed to decide on evidence the question of privilege, it may prejudice a fair trial; and (iii) it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other. The objections raised have no substance. The first objection, if accepted, disqualifies a judge from deciding complicated technical questions that arise before him. A judge is trained to look at things objectively and can certainly decide, without inspecting the documents on the material supplied whether the production of a document will affect the public interest having regard to the circumstances of each case. Nor are there any merits in the second objection. In the words of Sir C. K. Allen, a judge worthy of his office can put out of his mind all issues except those which are raised and decided by the forensic process. It is common place that a judge is trained to decide a case only on

(1) I.L.R. [1945] Lah. 219.
(2) I.L.R. [1945] Bom. 122.
(3) A.I.R. 1950 Bom. 230.
(4) I.L.R. [1944] 1 Cal. 410.
(5) I.L.R. [1940] Nag. 240.
(6) I.L.R. [1957] A.P. 174.
(7) A.I.R. 1960 Pat. 192.
(8) A.I.R. 1960 All. 543.
(9) [1942] A.C. 624.

the admissible evidence actually adduced before him and not on any extraneous considerations. The third objection also has no basis in fact. So long as a judge takes care to rule out any question on the contents of a document in respect whereof privilege is claimed, he can certainly decide the question in the presence of both the parties. The objections have, therefore, no substance. On the other hand, there is every reason why the duty to decide on the question of State privilege must be left to a judge and not to the State. That is the reason why the legislature rightly conferred that power on the court. A judge is as much a part of a department of the State as an executive officer. But unlike the executive officer, a judge is trained to decide cases objectively not only between individuals *inter se* but also between the State and individuals. He can, therefore, be trusted to decide impartially on the question whether the production of a document in a case will affect the public interest. State documents in a secretariat, I presume, will be looked into by many officers dealing with the said documents, sometimes from the lowest to the highest in the department. It would be unrealistic to suggest that the disclosure of a State document to any one of those officers would not affect the public interest whereas the decision of its character by a judge would do so. It is, therefore, the duty of the court, whenever an objection is raised on the ground of State privilege to decide on relevant evidence whether the document relates to affairs of State.

Even if the wide construction of the words "affairs of State", namely, business of State, be accepted, the result will not be different. The section says that no one shall be permitted to give any evidence derived from unpublished official records relating to affairs of State, except with the permission of the officer at the head of the department concerned. The expression "affairs of State" in its ordinary significance is of the widest amplitude and will mean the entire business of State. It takes in the routine day-to-day administration and also highly confidential acts involving defence and foreign relations, and also in modern times

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the multifarious activities of a welfare State. The object of the section is simply to prohibit the use of undisclosed documents of State in evidence by persons who in the course of their duties deal with or look into those documents, without the permission of the officer at the head of the department concerned. The words used in the section "as he thinks fit" confer an absolute discretion on the head of the department to give or withhold such permission. The section does not lay down that the head of the department concerned should refuse permission only if the disclosure injures public interests, though ordinarily he may refuse permission on such matters affecting the State. One can visualize a situation when the officer in exercise of his absolute discretion refuses to give permission for the use of not only noxious documents but even of innocuous ones. The only limitation on his power is his reason and experience. The absolute discretion is capable of giving rise to mistake or even conscious abuse. The section does not really involve any doctrine of State privilege but is only a rule of commonsense and propriety. If the officer gives permission, there is an end of the matter; but, if he refuses, the party affected may take out necessary summons to the State Government to produce the document. The State Government may depute one of its officers to produce the document in court. Then only the occasion for raising the question of privilege arises and s. 162 governs that situation. An overriding power in express terms is conferred on a court under s. 162 of the Act to decide finally on the validity of the objection raised on the ground of privilege. The court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure, or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. This conclusion flows from the fact that in the first part of s. 162 of the Act there is no limitation on the scope of the court's decision, though in the second part the

mode of enquiry is hedged in by conditions. In England, in the absence of a provision or a rule of common law similar to that of s. 162, there was room for conflict of views on the scope of the court's power. On the other hand, in Scotland the common law corresponding to s. 162 was invoked and the House of Lords recognized the inherent power of the Court to reject a claim of Privilege if the Court comes to a conclusion that the paramount interest of the administration of justice demands or compels such a disclosure. Section 162 of the Act in terms confers a similar power on courts and though it may have to be used with circumspection, it is a real and effective power. There is no conflict between s. 123 and s. 162 of the Act: the former confers a power on a head of a department to withhold permission from the standpoint of State administration, whereas s. 162 recognizes the overriding power of a court in the interest of higher public interest to overrule the objection of privilege.

The next point is, what is the procedure to be followed by a judge for deciding on the said objection? When an officer of the State is summoned as a witness to produce a document, if the State seeks to take a plea of privilege then it is the duty of the minister in charge of the department concerned to file an affidavit at the first instance. The affidavit so filed shall *ex facie* show that the minister concerned has read and considered each of the documents in respect of which the privilege is claimed. It shall also contain the general nature of the document and the particular danger to which the State would be exposed by its production. If the court is not satisfied with the contents of the affidavit, to enable it to decide whether the document in question refers to the affairs of State, it can summon the minister to appear as a witness. In effect and substance the said procedure has been suggested in *Robinson's case* (1) at p. 722. The same procedure is also indicated in *Duncan's case* (2) at p. 638. In the second case above referred, Viscount Simon L.C. says at p. 638 thus:

(1) [1931] A.C. 704. (2) [1942] A.C. 624.

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"If the question arises on subpoena at the hearing it is not uncommon in modern practice for the minister's objection to be conveyed to the court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that if the court is not satisfied by this method, it can request the minister's personal attendance."

It may be suggested that this procedure may cause some inconvenience to the minister concerned. But if one realizes that every act of the exercise of the right of privilege detracts from the fair disposal of a case before the court and that the administration of justice is also part of the general conduct of the affairs of any State and that its impartiality and purity are as important as any other public interests, one will also appreciate that the requirement of the personal attendance of a minister, if necessary, to support his affidavit would be to a large extent a guarantee against unjust objections that may otherwise be raised. It is suggested that an affidavit of the head of a department, such as the Secretary, would do as well as that of a minister, but there is an essential distinction between a Secretary and a minister: the former may be frequently tempted to take the opposite view, particularly in cases where a claim against the State seems to him to be harsh or unfair, while the latter, being the political head subject to parliamentary control, may be expected, if he carefully scrutinizes a particular document, not to take such objection which obstructs the cause of justice unless absolutely necessary. I would, therefore, hold that the affidavit which states that a particular document relates to affairs of State must be sworn to only by a minister in charge of the department wherefrom the document or documents are summoned.

The next point is, what are the well established rules which help the court to decide whether a particular document pertains to affairs of State or not? The following relevant rules may be extracted from

the decision of the Judicial Committee in *Robinson's case* (1): (1) the privilege is a narrow one most sparingly to be exercised; (2) the principle of the rule is concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires; (3) as the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character; (4) its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production; (5) even in the case of documents relating to the trading, commercial or contractual activities of a State, it is conceivable that there may be some plain overruling principle of public interest concerned which cannot be disregarded; though in times of peace such cases must be very rare. The House of Lords in *Duncan's case* (2) has laid down the following negative and positive tests for deciding the question of privilege of the State. The negative tests are: (1) it is not a sufficient ground that the documents are State documents or official or marked confidential; (2) it would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere; (3) neither would it be good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims of compensation. The positive test is, where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. The last test has given rise to mild but definite protests within the limits of judicial propriety by the learned judges who

(1) [1931] A.C. 704. (2) [1942] A.C. 624.

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had the occasion to deal with the question of privilege and to vehement protests from jurists. Sir C. K. Allen, in his book "Law and Orders" (2nd edition), has observed at p. 384 thus:

"Everybody is agreed that public security and foreign relations are necessary heads of privilege. Both are wide in scope, and it is doubtful whether any other 'head' needs to be specified.....It would be of great advantage if statute could put an end to the pernicious doctrine that privilege can be claimed for classes of documents."

The argument of the learned Advocate-General is based upon an apprehension, which in my view is unfounded, that the court may always refuse the affidavit of a minister and insist on his personal attendance. The unpublished documents relating to defence, foreign relations and other documents of great public importance rarely come before municipal courts. Occasionally documents of day-to-day administration of the State may be relevant evidence, but very often documents pertaining to mercantile or welfare activities of the State would be summoned to establish a particular claim. In the case of documents of undoubted public importance, when the minister swears to an affidavit that in his discretion their production is against public interest, it may reasonably be expected that the judge would accept the statement. But the real difficulty is in the case of other documents, where the interests of private individuals and the State come into conflict, the judge should be in a position to examine the minister and others to ascertain by evidence collateral to the contents of the documents whether the assertion of the minister is justified.

The aforesaid discussion yields the following propositions: (1) under s. 162 of the Evidence Act the court has the overriding power to disallow a claim of privilege raised by the State in respect of an unpublished document pertaining to matters of State; but in its discretion, the court will exercise its power only in exceptional circumstances when public interest demands, that is, when the public interest served by the

disclosure clearly outweighs that served by the non-disclosure. One of such instances is where the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. (2) The said claim shall be made by an affidavit filed by the minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. (3) Ordinarily the court shall accept the affidavit of a minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the minister and take other evidence to decide the question of privilege. (4) Under no circumstances can a court inspect such a document or permit giving of secondary evidence of its contents. (5) Subject to the overriding power of the court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State: (a) "records relating to affairs of State" mean documents of State whose production would endanger the public interest; (b) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State; (c) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State; but in special circumstances they may partake of that character; (d) in cases of documents mentioned in (c) supra, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer.

Bearing the aforesaid principles in mind, I shall construe the nature of the documents in respect of which privilege is claimed in the present appeal. The so called order of the PEPSU Government is really the minutes recorded in the course of cabinet discussions. Under Art. 163(3) of the Constitution, the question

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whether any, and if so what, advice was tendered by ministers to the Governor shall not be inquired into in any court. In view of the constitutional protection, and the reason underlying such protection, I hold that in the present case the district court was right in sustaining the claim of privilege in regard to the said document.

In regard to the report of the Service Commission, on the assumption that it is a relevant document, I cannot see how public interest suffers by its disclosure. Service Commission is a statutory body constituted with definite powers conferred on it under the Constitution. Under Art. 320(3)(c) of the Constitution the State Public Service Commission shall be consulted on all disciplinary matters affecting a person serving under the Government of a State. This is one of the constitutional protections conferred on public servants. I cannot visualize how public interest would suffer if the report submitted by the Service Commission to the Government is disclosed, and how the disclosure of such a report prevents the Service Commission from expressing its views on any other case in future passes my comprehension. It may expose the Government if it ignores a good advice; but such an exposure is certainly in public interest. The Constitution does not put a seal of secrecy on the document; nor, in my view, public interest demands such secrecy. In a conflict between the administration of justice and the claim of privilege by the State, I have no hesitation to overrule the claim of privilege.

Before closing, I must notice one fact. In this case, the Chief Secretary filed an affidavit. But, in my view, the minister should have done it. The respondent did not object to this either in the district court or in the High Court. In the circumstances, I would not reject the claim of privilege on the basis of this procedural defect.

In the result, I would allow the appeal in respect of the minutes of the cabinet and dismiss it in other respects. As the parties have succeeded and failed in part, I direct them to bear their own costs throughout.

BY COURT: In accordance with the opinion of the majority, this appeal is allowed, the order passed by the High Court is set aside and that of the trial court restored with costs throughout.

Appeal allowed.