

mitted to inquire and report. The case having been set down for trial at the winter sittings, the defender applied for a diligence to recover this report. He submitted that as the report had been made to a committee of the county council, and not in the regular course of the procurator-fiscal's public duties, the objection of injury to the public service did not arise.

He further submitted that where, as here, it was essential to justice being done that a document should be recovered, the Court would be slow to refuse a diligence on the ground of possible injury to the public service, and referred to the following cases—*Stiven v. Dunbar*, 1727, M. 7905; *Henderson v. Robertson*, January 30, 1853, 15 D. 292. Counsel for the Lord Advocate admitted that the report had not been made to the Crown Office, and explained that the Crown officials had not had time to ascertain the particular circumstances in which it had been made, but objected to the diligence being granted on the ground that the production of the report might be prejudicial to the public service.

The Court granted the diligence, but directed the commissioner to seal up the Procurator-Fiscal's report and to transmit the same to the clerk to the process to lie *in retentis* and await the orders of Court.

Counsel for the Pursuer—Abel. Agents Gill & Pringle, W.S.

Counsel for the Defender—N. J. D. Kennedy. Agents—Macpherson & Mackay, W.S.

Counsel for the Lord Advocate—Strachan.

Thursday, December 22.

FIRST DIVISION.

JOHNSTON v. CALEDONIAN RAILWAY COMPANY.

Proof—Diligence—Action of Damages for Personal Injuries—Defenders' Right to Recover Pursuer's Business Books and Income-Tax Receipts.

In an action of damages raised in October 1890 for personal injuries alleged to have been sustained on 8th June 1890 through the defenders' fault, in which the pursuer averred that his business had suffered owing to his inability to attend to it in consequence of these injuries, the defenders moved for a diligence to recover the pursuer's business books and income-tax receipts from 1st January 1890 onwards. The Court granted the diligence.

Case of *Craig v. North British Railway Company*, July 3rd 1888, 15 R. 808, commented upon.

James Johnston, horse and cattle dealer, Lochburn, Maryhill, brought an action in

the Sheriff Court at Glasgow against the Caledonian Railway Company for £3000, as damages for personal injuries sustained by him upon 8th June 1892 owing, as alleged, to their fault.

He averred that he was carried home and during seven weeks was unable to move in bed, and for weeks thereafter was only able to go about the house. . . . " (Cond. 6) Whilst he was confined to bed, the pursuer was unable to take any supervision of his business, which fell into great confusion, and he suffered much pecuniary loss in consequence; and since he got up, the weakened state of his health and constitution has debarred him from giving that careful and energetic attention to his business which it requires, and which he was formerly able to render. In particular, he has sustained great loss through being unable to go on with the sale of a large stud of horses which he had when the accident happened, and which he was then about to expose to public sale, the beginning of the summer being the proper season for such a sale, and he has had to keep the horses until now. He has also lost much profit which he would have earned on certain valuable entire horses which he had at the time of the accident."

The case was removed to the Court of Session for jury trial. Before the trial the defenders asked for a diligence to recover "(1) the business books of the pursuer, including his cash books, ledgers, bank books, memorandum and day books, stock books and stock sale books, for the period from 1st January 1890 to the present date, that excerpts may be taken therefrom showing or tending to show the profits of the pursuer's business during that period. . . . (3) The receipts for income-tax paid by the pursuer for the years 1890-91, 1891-92, and 1892-93, and the notice of assessment for the year 1892-93."

On the ground that some difference in practice existed as to granting such a diligence, the Lord Ordinary (KINCAIRNEY) reported the case to the First Division.

It was argued for the applicants—The pursuer had put his business affairs in issue, and the defenders must be put in a position to ascertain his real loss, if any, by comparing one year with another. The books for the time the pursuer was confined to the house were quite insufficient. There was no answer to this motion based upon principle. The only authority against it was the case of *Craig v. North British Railway Company*, July 3rd 1888, 15 R. 808. But that case was unsatisfactory, was a surprise to the profession, and after all only decided that the time there specified—viz., four years, was too long. The motion here made to recover the books and income-tax receipts for three years was fair and reasonable.

Argued for pursuer—No general rule could be laid down but to ask to see the books for three years was in the words of Lord Young in *Craig's* case "an altogether unreasonable demand." In that case only Lord Rutherford Clark referred particularly to the income-tax receipts, and he expressed

an opinion adverse to their being produced at all. The objection to producing them was twofold:—(1) it would encourage inquiries of an inquisitorial nature, and (2) their production would be misleading, because they showed lump sums and not merely what the pursuer paid upon the profits of his trade. The period for which the books must be produced should be greatly curtailed and the motion with regard to the income-tax receipts refused altogether.

At advising—

LORD PRESIDENT—I think that the defenders are entitled to these recoveries.

They require a certain latitude in point of time in order to ascertain the average income of the pursuer; and I do not see very well how, without going back for a certain period—sufficiently long to overcome incidental variations—they are to be able to know what the worth of the pursuer's business, taking one year with another, really is. I confess I think three years is not an excessive demand on this point.

The pursuer, as Lord Rutherford Clark observed in the case referred to, puts his business in issue, and having said that he has suffered loss to his business, it is directly relevant to the question to ascertain what the profits were, taking one year with another, in his business. The jury will see what loss has been sustained by comparing one state of matters with another.

As regards the income-tax receipts, I confess I think that the defenders are entitled to them, and for the same reason. The income-tax receipts are available of course merely in so far as they show the profits on the business, but production of these documents cannot I think be said to be an invasion of the private affairs of the pursuer, who comes seeking damages for loss to his business.

It only remains that I should say that I do not think the case of *Craig* is a decision adverse to this view. That case doubtless differed from the present. The application in that case was to recover income-tax receipts for four years, and, so far as I can gather, the judgment of the Court was merely pronounced on that request in the aggregate. Certainly there is nothing in the opinions of the Judges which shows that their Lordships considered either the books or the income-tax receipts to be irrelevant to the matter which was to be tried, or unfit documents to be recovered.

I am therefore for granting the application.

LORD ADAM—I agree. There seems to have been some difference in practice in this matter. In my experience I always granted similar applications.

LORD M'LAREN—I also concur. I agree in thinking that the case of *Craig* is not an adverse authority to the decision we are giving. As I read that case, the Court merely refused the motion as put before

them, leaving it open to the applicant to come with a specification limited to a shorter period of time.

My experience, like that of Lord Adam, has been that recoveries of this kind have been frequently made and used in trials of actions for damages. I think there can be no doubt that where a pursuer claims compensation upon the footing of loss of profits it must be open to the defender, against whose estate the claim is made, to offer evidence in cross to that which the pursuer will no doubt put before the jury regarding the extent of his profits. That consideration, I think, covers not only the business books—I mean such books as are sufficient for ascertaining the amount of his profits—but also covers the case of income-tax receipts, because it seems to me that even if the receipts for income-tax showed a less amount of profit than the books it would be his profit during the year that must be considered.

If there be discrepancy the jury might draw from the discrepancy that this business was of a more or less precarious character, and that the profits actually shown in a year could not always be maintained.

LORD KINNEAR—I concur with your Lordships, and I only desire to add that in allowing the recovery of the income-tax receipts we are of course not deciding how far and under what circumstances they could be direct evidence of the amount of profits earned by the person who has paid income-tax on those terms.

The pursuer himself will be put into the witness-box and examined as to his profits, and it will be in reference to his examination that the receipts will be available.

The Court directed the Lord Ordinary to grant the diligence.

Counsel for Applicants—Graham Murray, Q.C. — Salvesen. Agent — John Rhind, S.S.C.

Counsel for Pursuer—Comrie Thomson—A. S. D. Thomson. Agent—M. J. Brown, S.S.C.

Friday, December 23.

FIRST DIVISION.

[Lord Low, Ordinary.]

MACBRAYNE (OWNER OF "THE ISLAY") v. PATIENCE.

Ship—Collision—Reparation—Liability of Pilot—Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. 149), sec. 138.

The 138th section of the Clyde Navigation Consolidation Act of 1858 provides that a pilot "shall be answerable for any wilful or culpable neglect or mismanagement."

Held that the liability of a pilot under this section was the same as at common law.