Privy Council Appeal No. 118 *of* 1928.

Henry Greer Robinson - - - - - - *Appellant*

v.

The State of South Australia - - - - - *Respondents*

FROM

THE SUPREME COURT OF SOUTH AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH FEBRUARY, 1929.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD SHAW.
LORD CARSON.
LORD ATKIN.
SIR CHARLES SARGANT.

[*Delivered by* SIR CHARLES SARGANT.]

This appeal from the Supreme Court of South Australia, like the previous appeal from the High Court of Australia in *Welden* v. *Smith* [1924] A.C. 484, raises as a point of law the question whether the Government of South Australia can be made liable for loss caused by the negligence (if any) of its servants and agents in the execution of the duties of the Government under the Wheat Harvest Acts, 1915–17, of South Australia. On the previous appeal it was held that, as a matter of law, such a liability was capable of being established and enforced in the case of an owner who had delivered wheat to the Government and had signed an agreement in the form scheduled to the Act of 1915. The present appeal raises the further question whether, as a matter of law, a corresponding liability is capable of being established and enforced, not by the original owners, but by persons claiming from or under them as transferees and holders of certificates which are compendiously entitled "Government Certificates for Supple-

mentary Advances," or, at any rate, by such of the said transferees and holders as had obtained from the original owners express assignments in writing of the rights of such owners in respect of the wheat sold and delivered by them.

The portions of the statement of claim in the present action which are material to be stated are as follows. Paragraphs 2 and 3 stated that a large number of owners of wheat delivered their wheat, known as 1916–17 wheat, and referred to in the Wheat Harvest Acts by that term, to the Government of the State of South Australia for sale on their behalf respectively, and signed agreements in the form set out in the schedule to the Wheat Harvest Act, 1915; and that amongst the deliveries so made were the seven separate quantities of wheat which, with the names of the owners, the dates of delivery, and the denoting numbers of certificates therefor, were set out in a schedule to paragraph 3. Paragraphs 4, 5 and 6 stated the delivery by the Government to each owner of a certificate for payment of 2s. 6d. per bushel as for first advance on the wheat delivered, and also of a certificate entitled "Government Certificate for Supplementary Advances on Wheat, 1916-17, Harvest," such certificates being in the form fully set out in paragraph 5; and alleged an undertaking by the Government to market the wheat on behalf of the owners who delivered the same. Paragraph 7 of the statement of claim contained an averment, the precise language of which is important, namely,

> "The Certificates for Supplementary Advances described in paragraphs 4 and 5 hereof have from the time of their issue been and are, by the usage and custom of merchants, bankers, investors, and dealers, and the public and of the Government of South Australia, negotiable, so that upon endorsement and delivery by the owner of wheat named in each one of them and afterwards by delivery, all the rights of the owner of wheat named therein in respect and relation of and to the wheat name therein, and the proceeds thereof and the advances and payment to be made thereon, have passed and pass to the bearer thereof."

Paragraphs 8 and 9 contained allegations as to negligence on the part of the Government in the storage and keeping of the wheat delivered them. Paragraph 10 stated that each of the five certificates representing the first five quantities of wheat specified in the schedule to paragraph 3 had, before the commencement of the action, been duly endorsed, transferred and delivered, and that the plaintiff had purchased and acquired the same and was the transferee, owner and bearer thereof, and the holder in due course thereof, and entitled to all the rights and benefits represented thereby; and finally alleged (apparently as a legal consequence) that the plaintiff was entitled to all rights and benefits to which the owner of the wheat named therein would be entitled if he had continued to hold, bear and own the said certificates. Paragraphs 11 and 12 stated that many other persons were in the same position as the plaintiff as holders of certificates similar to those specified in paragraph 3, and that the aggregate of the returns for

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1916–17 wheat sold by the Government would be much less than they would have been but for the carelessness and negligence of the Government.

Paragraph 13 dealt separately with the last two of the seven quantities of wheat specified in the schedule to paragraph 3. and stated an assignment in writing of the 29th January, 1927 (being a few days before the date of the writ in the action), whereby William Gum, the original owner and vendor of those two quantities of wheat to the Government, transferred and assigned to the plaintiff absolutely as therein mentioned all the right, claim and interest of the assignor in the two certificates relating to the said last two quantities of wheat, and all moneys due or to become due to the assignor in respect of the wheat of the 1916–17 harvest mentioned in the said certificate, and also all the interest of the assignor in any claim which he had against the Government in respect of the said wheat, and in respect of anything done or omitted to be done by the said Government, its servants or agents in respect of the said wheat.

The defence of the Government raised as an objection in point of law, that the statement of claim disclosed no cause of action or any sufficient or lawful obligation on the part of the defendant to the plaintiff. It also contained a general traverse of the plaintiff's allegations as to negligence on the part of the defendant. The reply of the plaintiff, so far as material to be here stated, joined issue on the defence, and a rejoinder by the Government joined issue on the reply. In this state of the pleadings, by order made on the 27th April, 1927, it was ordered that the points of law raised by the defendant in the defence and rejoinder, and by the plaintiff in his reply, be set down for hearing at once. This hearing would have taken place before the Full Court, but it subsequently appeared that all the Judges, with the exception of Murray, C.J., had been concerned at one time or another in the action in question, or similar actions, while at the Bar; and therefore the questions were referred back in order that they might be taken by the Chief Justice. On this reference back judgment was given on the 17th February, 1928.

The points of law submitted to the Chief Justice were, as appears by his judgment, two in number, viz., (1) that the plaintiff had no cause of action by virtue of his being the mere holder or bearer of certificates for supplementary advances; and (2) that he had no cause of action as assignee of the rights of William Gum, inasmuch as he did not allege that he gave notice of the assignment to the defendant.

As regards the first point, the learned Chief Justice held that the point was settled so far as he was concerned by the judgment of the Full Court in *Bloch* v. *Smith* (1922), S.A.S.R. 95; and without giving further reasons decided the point in favour of the defendant. The second point was a new one, and as regards that the learned Chief Justice delivered a long and exhaustive

judgment, which in the result was also in favour of the defendant. From the judgment on both points so delivered the plaintiff subsequently obtained special leave to appeal direct to His Majesty in Council.

The first point is as has already been indicated, of greater importance than the second, as applying to and governing a much larger class of pending actions. The reasons for the judgment of *Bloch* v. *Smith* as delivered in the Supreme Court of South Australia are set out so far as material in an appendix to the record (pp. 9 to 14). But this judgment and its subsequent affirmation in the High Court of Australia, following the decision of that Court in *Welden* v. *Smith*, were both delivered before the decision of the High Court in *Welden* v. *Smith* had been reversed by this Board on appeal (*Welden* v. *Smith* [1924], A.C. 484). Accordingly, the reasoning in *Bloch* v. *Smith*, so far as applicable to this first point, has to be considered in relation to the judgment of this Board in *Welden* v. *Smith*. There is one further authority on this first point, namely, the decision of Murray, C.J. in *Wolrige* v. *The State of South Australia* (S.A.S.R. [1927] (1), a decision given some time after the decision of this Board in *Welden* v. *Smith*. There, as here, there came into question the right to sue of a transferee and bearer of certificates for surplus advances. And in that case the learned Chief Justice drew a distinction between an original owner of wheat with whom the Government had originally contracted, like the plaintiff in *Welden* v. *Smith* on the one hand, and a mere transferee and bearer of certificates with whom there was no such original contract; and decided that a plaintiff in the latter position had no right to sue for damages for negligence. The reasons of Murray, C.J. for this decision are also printed in the appendix to the record (pp. 15 to 24).

It appears, therefore, that although in form the present appeal is, as regards the first point, an appeal from the decision of Murray, C.J., in the present action, it is, in substance, an appeal from the decisions in *Bloch* v. *Smith* and *Wolrige* v. *The State of South Australia*, and more especially from the latter of the said two decisions.

In the course of the opening of the present appeal before their Lordships' Board, a difficulty arose from the language of paragraph 7 of the statement of claim, and to a slighter extent from the language of the last part of paragraph 10 thereof. For, read strictly and literally, this language amounted to an assertion that the assignees and holders for the time being of the certificates for supplementary advances had precisely the same rights against the Government of South Australia as the farmers with whom the original contracts were made. And on this strict and literal reading of the language, the plaintiff was placed in precisely the same position as towards the Government as that occupied by the plaintiff in *Welden* v. *Smith*, and was necessarily entitled to succeed on the first point of law. Such a result would, however, have been

quite foreign to the interest of the parties, and would have entirely defeated their desire to have the real point of law decided, both in this action and in the numerous other similar actions that are now pending. And, accordingly, by agreement in writing between the counsel for the parties, the following explanation was adopted of the meaning of paragraph 7, and so far as necessary of paragraph 10, namely:

> "That the certificate as between farmers and assigness and as between assignees, *inter se*, have been transferred on the footing that such transfer without more had the effect of transferring legal rights to the transferees but without any further definition of the extent of such legal rights than is to be inferred from the form and contents of the certificate and the terms of the statute and the form of the certificate as issued, and that the Government has always recognised the holders for the time being of the certificates as being persons entitled, *ipso facto*, by virtue of such holding to the receipt of the monies which the Government has in fact from time to time proclaimed under the certificate, no other money having in fact been paid in respect thereof. This course of dealing has continued for a sufficient time and in a sufficient number of cases to ripen into a commercial usage."

In these circumstances, for the purpose of determining the first point of law raised by the defence, it is of importance to consider the reasoning by which, in the former case of *Welden* v. *Smith*, this Board came to the conclusion that an original owner of wheat might enforce a liability for negligence against the Government of South Australia. This reasoning, as appearing in the judgment of the late Lord Chancellor, can be summarised as follows. First, the agreement signed by the owner involved an agreement or contractual obligation by the Government to receive, handle, and market his wheat, on his behalf, and to pay him a price dependent on the aggregate price for all the wheat handled and sold; secondly, this obligation implied a corresponding obligation on the part of the Government as mandatary to carry out their duties in a reasonable and prudent manner, having regard to the circumstances of the case; and thirdly, the Government should be regarded as the mandatary of all the owners and liable to each owner to deal carefully with the whole of the wheat. This last and most impotant link in the claim of reasoning is thus expressed in the judgment:

> "The Government, having undertaken to receive, handle, and market the wheat of all the owners concerned and to pay them a price dependent on the due handling and sale of all the wheat received, must be regarded as the mandatary of all the owners and bound by the ordinary obligation of reasonable care; and their Lordships see no reason why this obligation should not extend to the handling and marketing (including the storage) of all the wheat dealt with by the Government, so as to be enforceable by each owner interested in the total sales. Each owner who delivered his wheat to the Government for sale and signed the agreement thereby acquired an interest in all the wheat which was to be sold with his, and became entitled to have that wheat handled with reasonable care and prudence."

On the reasoning in this passage, it is clear that from the time of the signature of his agreement, the rights of each farmer or owner to have the whole mass or pool of wheat carefully handled and realised did not depend on, and were not measured by, the ownership of any wheat at all; for, as regards the whole of the rest of the mass or pool, he had never had any previous right or interest as owner, or otherwise. His whole original interest, as owner of his particular parcel, was converted into a fractional interest in the prospective proceeds of sale of the whole mass or pool of the wheat confided to the Government. This was obviously a completely new interest, and one as completely new in respect of his particular parcel of wheat as in respect of all the other parcels of wheat which, together with his, made up the total pool. Yet it was in respect of this new interest that it was held that the original owner might have a right of action against the Government for negligence resulting in a diminution of the price realised for the whole mass or pool of the wheat. And it would therefore appear that, although the delivery of a parcel of wheat no doubt formed the consideration for the contract in each case, the cause of action by each owner rested or depended not on any right of original ownership, but on the rights attaching to his new interest in the proceeds of the pool.

What, then, was the legal position when the original contracting owner cashed and receipted the Government certificate for the first advance of 2*s*. 6*d*. per bushel on his wheat, received his Government certificate for supplementary advances (which was the sole document of title representing his remaining interest in the transaction), and in the ordinary course of business transferred this certificate to a holder, whether purchaser or mortgagee? To answer this question it is important, in the first place, to examine the terms of the certificate itself.

On the face of this document there is a general heading, "South Australia Government Certificate for Supplementary Advances on Wheat, 1916–17 Harvest." There is then a certificate that the owner, having delivered to the Government a quantity of wheat, to be filled in according to facts in each case, and having received an advance of 2*s*. 6*d*. per bushel, is entitled to further advances as may from time to time be proclaimed payable. And there are provisions for showing on the face of the document certain allowances for possible "dockage" and for freight and handling charges that may have to be deducted from the second or third advance to become payable. On the back of the document there are four successive spaces for receipts or acknowledgments by the vendor or transferee in respect of payments to be made to him under the certificate. The sums to be inserted in the first three of these spaces are stated to be in respect of the second, third, and fourth advances per bushel (less a deduction from the second advance for dockage and from the third advance for freight and other charges); the sum to be inserted in the last of these spaces is stated to be for a "final

payment per bushel." The precise words as to this final payment are as follows :—

		£ s. d.
"Final payment of per bushel	.. ..	—
Received or credited to account of vendor or transferee of this certificate the sum of	..	—"

Much stress was laid by counsel for the respondents on the fact that on the back of the document the further advances to which title is shown are only such as might from time to time be proclaimed payable ; and it was insisted that a proclamation of a further or supplementary advance was a condition precedent to any claim for any further advance. However this may be as to any of the three advances on account provided for on the back of the document, the case appears to be quite different as regards the final payment ultimately provided for. As to mere interim payments on account, there seems nothing to prevent the Government from exercising a wide, and, indeed, almost unlimited, discretion within the bounds of good faith as to times and amounts. But the final payment is a very different matter, and one which is not indicated on the certificate as being, and indeed could hardly be, dependent on the discretion of the Government. This distinction is quite clearly marked by the form of agreement in the Schedule to the Wheat Harvest (1915–16) Act, 1915, where the authority given by the owner to handle and sell "with periodical settlements as circumstances may permit," is immediately followed by an agreement "to accept final settlement at such time as the said Government is able to close accounts." And these last words occur in the agreement that was, in fact, signed by the owner when he received his first advance of 2*s.* 6*d.* per bushel. In these circumstances it cannot be doubted that the "final payment . . . per bushel" which under the terms on the back of the Government Certificates for Supplementary Advances is to be "received or credited to account of vendor or transferee of this certificate," represents the whole residue (after allowing for proper deductions and interim advances) of the share of the proceeds of sale of the pooled wheat which is attributable to the wheat specified in the certificate as having been delivered by the original owner.

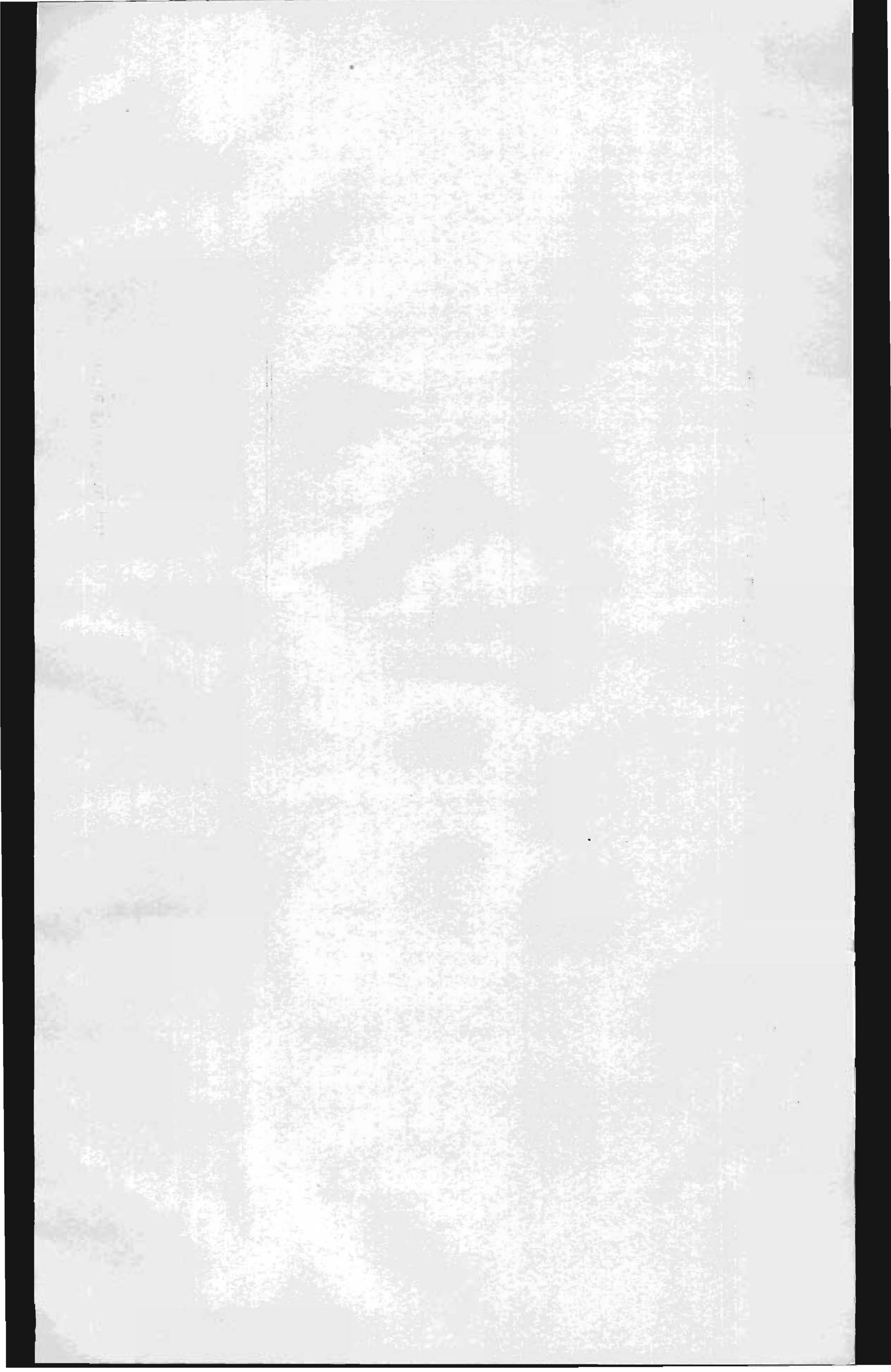
This being so, when in the plain language of the Certificate for Supplementary Advances the transferee and holder was substituted for the original owner as the person to receive all further interim advances and (the crucial point) the final payment in respect of his fractional interest in the proceeds of sale of the whole wheat, and when, as laid down in the last sentence of the passage quoted above from *Welden* v. *Smith*, the original owner by virtue of his acquisition of an interest in all the wheat "became entitled to have that wheat handled with reasonable care and prudence," it follows almost necessarily that the transferee and holder also acquired the right to complain of and sue for any diminution in his share of the proceeds of sale which was due to

any negligence on the part of the mandatory, the Government. The original owner's right to sue for negligence (if any) was not one detached from his fractional interest in the total proceeds of sale, but a right incidental to that interest. Indeed, the respondents did not venture to argue that after the transfer of a certificate the original owner had retained any right to sue. But unless this was so, the respondents' contention would involve the curious result that in the course of transfer of a certificate from the original owner to the new transferee and holder the amounts ultimately payable under the certificate were altered and lessened.

The true view of the matter is in their Lordships' opinion that presented by both learned counsel for the appellant, namely that the original owner had the single definite right to have his contract carried out so that the proper fractional share of the total proceeds of sale should be handed to him ; that incidental to this right to receive his share of the proceeds was a right to complain of their diminution by negligence; and that the transferee and holder of a certificate took the whole interest of the original owner in the proceeds, and also took as incidental to that interest the right to complain of their diminution.

In this view of the law the appellant, on proving negligence, will have a sustainable cause of action as the transferee and holder of each and every of the seven certificates specified in the thir paragraph of the statement of claim ; and it will not be necessary for him to rely with regard to the two certificates Nos. 3308 and 22,505 on the express assignments in writing from Wm. Gunn mentioned in paragraph 13 of the statement of claim. In these circumstances, their Lordships do not desire to express any opinion as to the effect of these assignments.

Their Lordships will humbly advise His Majesty that the order of the 17th February 1928 be reversed and that the point of law raised by paragraph 1 of the defence be determined in favour of the appellant. The respondents will pay the appellant his costs here and below.



In the Privy Council.

HENRY GREER ROBINSON

v

THE STATE OF SOUTH AUSTRALIA.

DELIVERED BY SIR CHARLES SARGANT.

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