Privy Council Appeal No. 47 *of* 1930.

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 19TH MAY, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.
LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD BLANESBURGH.]

There is now in Australia a concourse of claimants seeking to establish against the State of South Australia a liability to them individually for the alleged negligence of its servants and agents in the execution of the duties of Government under the Wheat Harvest Acts, 1915–17.

Under these Acts a Wheat Marketing Scheme was established, the substance of which was that all growers in South Australia had to deliver their wheat to the Government, which assumed the duty of accepting and marketing it and distributing the net proceeds among the growers or their assigns in proportion to the quantities of wheat delivered. In the case of *Welden* v. *Smith* [1924], A.C. 484, it was contended by the State that the Wheat Harvest Acts involved on behalf of Government political rather than trading operations and responsibilities. But that contention was not accepted by this Board, which adopted the view that the State was, under these Acts, in effect, carrying

on the business of marketing and selling the wheat of those who supplied it, and that Government at the suit of wheat growers who delivered wheat under the scheme could be held liable for proved negligence in the performance of the duties so assumed by it. It has also been determined by this Board, on the hearing of a preliminary point of law in the present action ([1929], A.C. 469), that that liability extends to a claimant with a derivative title only: that is to say, to one like the present plaintiff-appellant, who is merely an assignee of the rights of divers wheat growers under the scheme. In this action the appellant's claim in that character is to establish the liability of the respondent State for loss of wheat of the 1916–17 harvest by exposure to water and to the ravages of mice while in its custody or that of its agents for the purposes of the Wheat Marketing Scheme, all on the footing that such loss was attributable to negligence on the part of such agents. The preliminary question having been decided in his favour it remains for the appellant to quantify his loss and to establish, if he can, as a matter of fact, that such loss was due to negligence for which the respondent State is responsible.

The action is one of a large number now pending, claiming similar relief against the State, all being alike dependent for success upon the establishment of the same facts. In no action, however, has any attempt yet been made to establish these facts. The two earlier actions, *Welden* v. *Smith*, already referred to, and *Griffen* v. *The State of South Australia*, have both been discontinued. The present appellant gives the reason. The facts are mainly in possession of the respondent State actually responsible for the working of the scheme. Without the assistance, unobtained in either action, of complete discovery from the respondent the establishment of the necessary facts by either plaintiff was not practicable.

The appellant, indeed, as the result of this experience now avows that no action brought to establish the liability of the State in this matter stands any real chance of success unless, like any other litigant under alleged liability in respect of trading operations, the State can be required to make full discovery of all documents in its possession or power relative to the matters in controversy. Full discovery by the respondent has, in other words, now become the immediately vital issue between the parties. The recognition by both sides of its importance is a more than sufficient explanation of the persistent attempts on the part of the different plaintiffs to obtain such discovery and for the equally determined resolve on the part of the State to withhold it.

In relation to this question of discovery some account of the two earlier actions will not, here, be out of place. In *Welden* v. *Smith*, commenced in 1921, the defendant was a nominee of the respondent State, sued on its behalf in its Supreme Court, pursuant to Ordnance No. 6 of 1853. The preliminary judgment of the

Board therein has already been referred to. At a later stage of the action the plaintiff accepted the position that in a suit so framed no discovery at all was obtainable from the defendant, and as none was offered by Government the plaintiff for lack of sufficient evidence of his own to support it, eventually discontinued the action altogether.

In 1924 the second action, *Griffen* v. *The State of South Australia*, was commenced, this time in the High Court of Australia. It was brought against the respondent State in its own name pursuant to sections 58 and 64 of the Judiciary Act. In that action the State, the actual defendant, raised the contention that there again it could not be ordered to make any discovery to the plaintiff. But that contention was rejected by the High Court of Australia (35 C.L.R. 200), and the respondent State was directed to make discovery, by an order special in form and in terms identical with that now under review. In compliance with that order the State filed an affidavit by which privilege was claimed for certain of the documents scheduled to it, and on an application by the plaintiff for production of these documents the State's claim of privilege in respect of them was upheld by a majority of the High Court, and was given effect to by its order of the 29th October, 1925. The documents for which privilege was thus successfully set up included, as the then plaintiff believed, documents vital to the establishment of his case. These withheld, proof of the necessary facts again became impracticable, and Griffen's action, like *Welden* v. *Smith*, was discontinued before trial.

The plaintiff Welden, and the plaintiff Griffen, were each of them original owners of wheat. It was desired on behalf of the general body of claimants to test the question, whether the State's liability to owners, already established in *Welden* v. *Smith*, extended to, and could be enforced by, a plaintiff with a derivative title only. Hence the present action, commenced on the 2nd February, 1927, in the Supreme Court of South Australia, in which, as already stated, the liability of the respondent State to the appellant suing under such a title has been established.

But the action was brought for the further purpose of having it determined therein by the final decision of His Majesty in Council whether the claim of privilege upheld in Griffen's action was really justifiable, and such is the question involved in the present appeal, which, while in effect an appeal from the majority decision of the High Court of Australia in Griffen's action is, in form, an appeal from an order of the Supreme Court of South Australia, made in this suit on the 26th November, 1929, by which, in terms identical with the order in Griffen's action, that Court, without argument, has again sustained the respondent's claim of privilege. The claim, thus twice upheld, is made in respect of a large number of documents, said to be State documents, the disclosure of which, it is alleged,

would be contrary to public policy and the interests of the State. The real question now to be settled is whether this claim, without any qualification whatever, is one which in all the circumstances of this case ought to have been, as it has been, accepted.

The vital importance to the plaintiff of the question has already been made apparent. It will be found to be hardly less important to those who, whether in South Australia, or elsewhere, find themselves engaged in litigation with Governments in respect of what as between individuals, would be ordinary mercantile transactions. That State documents are frequently absolutely privileged from production was, of course, not disputed by the appellant, nor was the supreme duty of the Court to protect the privilege where it exists in any way canvassed. The effort of learned counsel for the appellant was to define the limits of the protection and to show that it did not, at least *in hoc statu*, extend completely to shield the documents now in question. It will be found convenient as an introduction to a closer examination of the facts and circumstances of the present case to make some inquiry as to the character and quality of the privilege itself and as to the attitude of the Court with reference to it when its possible existence in relation to documents comes under judicial notice.

And, first of all, it is, their Lordships think, now recognised that the privilege is a narrow one, most sparingly to be exercised. "The principle of the rule," Taylor points out in his work on Evidence, section 939, "is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."

It is perhaps matter for surprise that the cases illustrating the limitations upon a rule so circumscribed are not more numerous. But their Lordships cannot doubt that the explanation is to be found in the judgment of Rigby L.J., in *A.G.* v. *Newcastle-upon-Tyne Corporation* [1897], 2 Q.B., 395, where, himself an ex-law officer, he says: "I know that there has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain over-ruling principle of public interest concerned which cannot be disregarded."

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., Lid.* v. *Anglo-Persian Oil Company* [1916], 1 K.B. 822, 829, 830, *Smith* v. *East India Company*, 1 Ph. 50.

A contrast, very apposite in the present case, between State documents which are readily within the rule and other documents of the same State which, presumably, are outside it, is drawn in the case of *Wadeer* v. *East India Company*, 8 D.M. and G. 182, so frequently cited from another angle. Lord Justice Turner, in the course of his judgment there, says, at p. 189 :—

> "My learned brother has already read . . . the passages contained in the answers with reference to the nature of the documents now sought to be protected. It is sufficient to say that they are stated . . . to be political communications which, in fulfilment of the public political duties of the East India Company and of their several Governments in India have passed between them and their Governments respectively solely with a view to the good government of India and to the performance of a public duty. The question which has been suggested in the argument as to contracts between the East India Company and any railway subscribers with reference to the formation of a railway has nothing to do with a question relating to the public government of India and the performance of the public duty of the Company. To such a question it is unnecessary to refer because it is perfectly distinguishable from that before the Court."

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 connexion with the production of such documents there may be "some plain over-ruling principle of public interest concerned which cannot be disregarded." But 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, and the distinction drawn by the Lord Justice remains instructive and illuminating. 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 liabilities arising therefrom now apparently freely put forward, his observations stand on record to remind the Courts, 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. Particularly must it be remembered in this connexion that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such "plain over-riding principle of public interest" as to justify any claim of privilege. The zealous champion of Crown rights may frequently be tempted to take the opposite view, particularly in cases where the claim against the Crown seems to him to be harsh or unfair. But such an opposite view is without justification. In truth the fact that the 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. As was pointed out by Lord Buckmaster in delivering the judgment of this Board in *Esquimalt* v. *Wilson* [1920], A.C. 358, 366, Baron Atkyns's often cited observa-

tions in *Pawlett* v. *Attorney-General*, Hardres, 465, are based upon general principles :—

> " The party ought in this case," said Baron Atkyns there, to be relieved against the King, because " the King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him."

The power of the Court to call for the production of documents for which this privilege is claimed and to determine the validity of the claim for itself was much discussed in argument. The result of the discussion has been, as their Lordships think, to confirm the view of Griffiths C.J., in *Marconi's Wireless Telegraph Company* v. *The Commonwealth*, 16 C.L.R. 178, where in effect he concludes that the Court has in these cases always had in reserve the power to enquire into the nature of the document 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.

In the time of *Beatson* v. *Skene* [1860], 5 H. & N. 838, any examination of a document would apparently have had to take place in public, and the mischief resulting from such publicity is the reason given by the Chief Baron for his acceptance there of the Minister's word without making it. The conclusive result of the Minister's statement is, however, emphasized by Lord Dunedin in *Admiralty Commissioners* v. *Aberdeen Fishing Company*, 1909, S.C. 335. The existence of the power, nevertheless, is affirmed and its exercise encouraged in the later Scotch case of *Henderson* v. *M'Gown*, 1916, S.C. 821, and is confirmed, not only by judicial pronouncement, but by widespread practice, and, may it not be added, by the reason of the thing ? Lindley M.R., for example, in *Joseph Hargreaves, Ltd.* [1900], 1 Ch. 347, was not prepared to set any limit to the power of the Court to call for production of a document for which this privilege is claimed. The propriety of Field J.'s own practice in the matter, as described by him in *Hennessy* v. *Wright*, at 21 Q.B.D. 509, has, *pace* the observations upon it of Isaacs J., in Griffen's case, not been challenged, and, hitherto, it has usually been in cases where the State was not itself a party litigant that the difficulty has been suggested. Where, as in the present case, 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, 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. But to

this matter their Lordships will return at a later stage of this judgment.

Upon one further general question the result of the authorities is, their Lordships think, not doubtful. The Court is entitled to prescribe in any particular case the manner in which the claim of privilege shall be made if the claim is to be allowed. It may, in one case, if thus advised, accept the unsworn statement of a responsible Minister. It may, in another case where the circumstances seem so to require, call for an affidavit from him. The Court did so in *Kain* v. *Farrer*, 37, L.T. 469, holding that it was not enough there to state in a mere formal affidavit that discovery was objected to on the ground of public policy, but that it ought to appear that the mind of a responsible Minister had been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for, and Lord Coleridge insisted on an affidavit being produced from the President of the Board of Trade himself. In the present case their Lordships are not required to make upon this subject any pronouncement as to the proper practice in cases in which the Crown is not a party litigant and not liable to give discovery. The Board is concerned now only with a case where the State is party litigant and bound to give discovery. In such a case it seems to their Lordships clear that this particular privilege should normally like any other, be claimed under the sanction of an oath, the oath being that of a responsible Minister of State whose mind has been directed to the question. Their Lordships, in saying this, do not of course mean to suggest that this requirement has come to be called for as a protection against imposition. Nothing of the sort. But it is required as a guarantee that the statement and opinion of the Minister, which the Court is asked to accept, is one that has not been expressed inadvisedly or lightly or as a matter of mere departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement. Lastly, the privilege the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published.

Their Lordships, with these general considerations in mind, may now proceed to a consideration of the claim of privilege actually set up here, reviewing at the same time the circumstances in which it has been put forward.

The order for discovery in the action was made on the 29th July, 1929. It required the respondent State to discover on oath the documents which were, or had been, in its possession or power relating to any matters in question in the action; limited, however, to documents falling within sixteen particular descriptions specified. The order, which in its terms is identical with that in Griffen's action, has the appearance of being, and doubtless was, an arranged one made upon the footing that documents of the sixteen specified descriptions were, or had been, in the possession of the State, and limiting the discovery

to them so as to relieve the State of the impossible burden in transactions so vast of an order for discovery in the usual comprehensive form.

Six of the sixteen sets of documents so particularized are the following :—

" (1) Reports of Inspectors employed by the defendant relating to the wheat of the 1916–17 harvest.

" (2) Correspondence between the defendant, including the Wheat Scheme and Wheat Harvest Board, and such inspectors in respect of the said wheat.

" (7) Minutes of the Wheat Advisory Committee.

" (12) Correspondence between the manager of the Wheat Scheme and W. W. Hutton.

" (13) Letters from Clarence Goode, then Minister of Agriculture, to Messrs. F. A. Verco, E. A. Badcock, W. M. Alford, C. J. Smith and G. G. Nicholls, written in or about June, 1917.

" (15) Letters from one David Kelly to the manager of the Wheat Harvest Board, written in or about the month of February, 1917.

The affidavit of documents in obedience to that order was sworn on the 6th November, 1929, by one William Lyle Shegog, described as the civil servant in charge on behalf of the Minister administering the Wheat Harvest Acts, 1915–16, of the documents referred to in the order. The Wheat Harvest Board itself, as the affidavit states, had by that time been disbanded. The affidavit then discloses in the second part of its first schedule a vast collection of documents by descriptions corresponding with the remaining ten classes specified in the order for discovery, but making no reference whatever to any of the six classes just particularised. These documents are accounted for in the affidavit only, if at all, by documents included and referred to in the first part of the schedule as follows :—

" Documents tied up in three bundles, the first marked A and numbered 1–440 inclusive ; the second marked B (1), and numbered 1–1041 inclusive, and the third marked B (2) and numbered 1–411 inclusive. A letter marked C.

" Minutes contained in a book marked ' G '."

No description of these documents is, it will be seen, there given, but Mr. Shegog, in the body of the affidavit, states, with reference to them, that they are :—

" State documents and consist of communications relating to a Department of the Government of the State of South Australia passing between the officers of the said Department relating to the affairs of such Department of State, and made by officers of State to other officers of State in the course of their official duty and in the course of official communications between them on matters of public business and relating solely to the official administration of the said Department. I have caused the said Documents to be submitted to the Honourable Herman Homburg, the Minister in charge of the said Department, and he has directed me to object to produce the same,"

by a minute which Mr. Shegog exhibits to his affidavit.

That minute, a document of the first importance in the case, is in the following terms :—

"*Re Robinson* v. *State of South Australia, Supreme Court, Action No.* 50 *of* 1927.

"I have considered the documents in your custody relating to the affairs of the South Australian Wheat Harvest Board, such documents being the documents tied up in three bundles, the first marked A and numbered 1 to 440 inclusive, the second marked B (1) and numbered 1 to 1,041 inclusive, and the third marked B (2) and numbered 1 to 411 inclusive; a letter marked C, and minutes contained in a book marked G.

"The said documents are State documents and are communications relating to a department of the Government of the State of South Australia passing between the officers of the said department relating to the affairs of such Department of State and made by officers of State to other officers of State in the course of their official duty. I direct you that the disclosure of the said documents (including the said minute book) is contrary to public policy, and that the interests of the State and of the public service and the public interest will be prejudiced by the production of the said documents, and I direct you not to produce or disclose the said documents or the said minute book to any person or persons.

"The above direction is not based in any way upon the pecuniary or commercial interests of the said department or of the State of South Australia or of the plaintiff, or upon any desire to defeat the plaintiff's claim in the said action, but solely upon and in the interests of the public welfare and the public service."

"Dated the 25th day of October, 1929.

"H. HOMBURG,
Attorney-General and Minister for Wheat."

Now with reference to this minute it must be noticed first, that it is in terms almost identical, and in its effect, quite identical, with the minute dated the 1st August, 1925, made for the purpose of Griffen's action by the then Minister, Mr. W. J. Denny; that the documents described by each Minister in terms of the vaguest generality are no fewer than 1,894 in number; and that each Minister has "considered" them—a word which may mean anything or nothing in relation to such a mass of papers. The Minister, it will be seen, does not by the memorandum commit himself in terms to the statement that the ground on which the direction is given by him represents his own conviction or belief, while the last paragraph indicates in no uncertain terms that while the Minister's direction is not based upon any such grounds the pecuniary and commercial interests of his department and the State of South Australia and of the plaintiff may be affected by the withholding of the documents, and the plaintiff's claim be thereby defeated.

Now their Lordships cannot refrain from expressing surprise that the complete insufficiency of this claim for protection as so made, has not been matter of judicial observation, either in Griffen's action or in this. To their minds, as a claim for such protection this minute is entirely inadequate. If it may be assumed that it includes the documents particularised as above stated, and not elsewhere referred to in the affidavit, it should have dealt with these documents specifically and not under a vague and as applied, at all events, to some of them, a most inapt description. It should have appeared that the Minister had not

merely " considered " this mass of documents, but that he had read and considered each of them. 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. Their Lordships do not hesitate to say that both in Griffen's action and in this the claim of privilege as actually put forward should have been rejected as entirely inadequate.

But the privilege has not, in their Lordships' judgment, been lost merely by the insufficiency of the form in which it has been claimed. It is quite possible that there may be amongst the scheduled documents some, at least, to which the privilege genuinely attaches, and to throw open these documents to the inspection of the plaintiff, without more, would destroy the protection of the privilege. Therefore it would or might be contrary to the public interest to deprive the respondent State of a further opportunity of regularizing its claim to protection, by producing as its next step, an affidavit of the description already indicated.

And that the respondent State should now be given that opportunity would, on proper terms as to costs, have been their Lordships advice had it not been that such a course would necessarily involve further serious delay, without, it may be, advancing any further the final solution of the question at issue. There is, moreover, another course open which, in the circumstances, seems to their Lordships to be in every way preferable, namely, to remit the case to the Supreme Court of South Australia with a direction that it is a proper one for the exercise by that Court of its power of itself inspecting the documents for which privilege is set up in order to see whether the claim is justified.

Their Lordships have already given reasons for their conclusion that the Court is possessed of such a power. In the case of the Supreme Court, under the South Australian Rules of Court Order 31, Rule 14, Sub-rule 2, the power is conferred in terms express. The order which is in the same form as Order 31, Rule 19A (2) of the Rules of the English Supreme Court is to the effect that where on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim. Their Lordships see no reason why the particular privilege now in question should be excluded from the connotation of the word as there used. They see no reason why in South Australia any more than in England the word should be construed in a narrow sense—and as to England see *Ehrmann* v. *Ehrmann* [1896], 2 Ch. 826. Documents in respect of which such privilege was claimed were inspected by Scrutton J.

in *Asiatic Petroleum Coy. Ltd.* v. *Anglo-Persian Oil Coy.* [1916] 1 K.B. 822—it has been suggested that the inspection was there made by consent, but their Lordships find no warrant in the report for that conclusion. There is a precedent for it in Queensland to which their Lordships will later refer, and with reference to the whole matter they are much impressed by the observations of Starke J. in his dissenting judgment in *Griffin's* case 36 C.L.R. 378, in the course of which at p. 402, he says, speaking of the papers now again in question, " No one has suggested that the interests of the public are such that a Judge ought not to see the documents."

But the exercise of the power in the present case is especially appropriate seeing that the documents have come into existence with reference to the commercial activities of the State, and that they are the documents of a Department of State which has now been disbanded, and their Lordships recall the passage already cited from the judgment of Turner L.J. in *Wadeer* v. *East India Company* 8 D. M. & G. 182 and the speech of Lord Shaw of Dunfermline in *Food Controller* v. *Cork* [1923] A.C. 647, 668.

In these circumstances it only remains to consider whether the circumstances here are such that the power should now be exercised. Their Lordships feel satisfied that its exercise is called for. They need only in justification refer, out of all the documents, to the Reports of the Inspectors under the Scheme, the first documents specified in the order for discovery. These reports have not been discovered by the respondent. If they are not excluded from the affidavit altogether they are included amongst the documents for which privilege is claimed. It cannot be doubted that they were at one time in the possession of the respondent State, that they remain in its custody or power cannot, their Lordships think, be open to serious question when regard is had to the references made to them in documents which are disclosed, and to the letter of the 5th July, 1924, from the solicitors for the nominal defendant in *Welden* v. *Smith*—being the solicitors for the State in this action to the solicitors for the plaintiff in that action, being the solicitors for the appellant. The letter is to be found in the record at p. 29, and seems to their Lordships, unexplained, to be conclusive on this point. Now these reports are not only relevant to the issue between the parties: they are vital to the plaintiff's case. With reference to them Starke J. says in his judgment already quoted from again at p. 402 :—

> " None of these reports have been produced for inspection and all are obviously covered by the objection that their production and inspection would be prejudicial to the public interest. In the face of the relationship of the Government to the owners of the wheat delivered to it, and the correspondence which the Government has produced the Minister's statement is to me quite inexplicable. I am not prepared to say that the statement is wrong but I strongly suspect that he has misconceived the position."

That also is the present state of mind of their Lordships, and it appears to them that with regard to all the documents the real position will best be ascertained by the exercise by the Court of the powers conferred upon it by the Order, already stated.

There is for this course what seems to the Board to be in principle a satisfactory precedent in Queensland in the case of the *Queensland Pine Company, Limited*, v. *The Commonwealth of Australia* [1920] St. R.Q. 121 where, notwithstanding a certificate from the Minister of State of the Commonwealth claiming protection for documents on this occasion in terms direct and unambiguous, the learned Judge at the trial inspected them, and having done so expressed the opinion that the facts discoverable by inspection would not be detrimental or prejudicial to the public welfare, and he ordered that inspection of all the documents should be given to the plaintiff. The jurisdiction was there exercised at the trial: their Lordships see no reason why it should not, equally safely, be exercised on interlocutory application. Their Lordships need hardly add 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 inquiry from the Minister.

Their Lordships accordingly will humbly advise His Majesty to discharge the order appealed from and to remit the case to the Supreme Court of South Australia with a direction that it is one proper for the exercise of the Court's power of inspecting the documents for which privilege is claimed in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any justifiable sense.

The appellant will have the costs of this appeal. The costs below of both parties will be costs in the action.

In the Privy Council.

HENRY GREER ROBINSON

v.

THE STATE OF SOUTH AUSTRALIA.

DELIVERED BY LORD BLANESBURGH.

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