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ANDERSON v. EGAN.

O'Connor J.

Second question answered in negative except as to amount above £1000. Costs of both parties in the Supreme Court and on appeal to be paid out of the estate exclusive of the £1000 protected. Administrator's costs to have priority. Costs already paid to be repaid.

Solicitors for appellant, *Speed & Durston.*
Solicitors for respondent, *Northmore, Lukin & Hale.*

[HIGH COURT OF AUSTRALIA.]

S. A. JOSEPH AND RICKARD LTD. . . APPELLANTS; PLAINTIFFS,

AND

LINDLEY AND OTHERS . . . . RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 27, 28, 29.

Griffith C.J., Barton and O'Connor JJ.

Principal and agent—Representative committee of combine—Liability to account—Delegation with assent of principals—Intention of parties.

Practice—Verdict for plaintiff by consent—Verdict set aside where upon documents and admitted facts defendant entitled to judgment.

A number of persons formed a combine for the purpose of controlling the local market for imported maize, and agreed to be bound by certain rules. A committee was appointed to carry out the executive and financial work of the combine in connection with the sale and disposal of the maize and the distribution of the proceeds of sales amongst the members, and to act practically as directors of the combine. The members bound themselves by agreement with the committee to complete a contract of sale to the committee of the amount of maize which they respectively undertook to supply, and to deliver the maize at the order of the committee to the various purchasers. By

one of the rules the committee were required to delegate the executive and financial work to some firm to be approved by them, and in pursuance of this a certain firm, with the knowledge and consent of the members at a general meeting, entered into an agreement with the committee to take over all financial responsibility imposed upon the committee by the rules, to carry out all the administrative work of the combine, to render a complete statement to members upon final completion, to issue all orders to purchasers, to collect and receive all payments from buyers, and to hold the proceeds in trust until distributed, and to distribute all moneys due to members in accordance with the rules. The objects of the combine having been completed, the appellants, who were members of the combine, brought an action against the committee to recover the balance due to them out of the proceeds of the sales of their maize.

Held, that the intention of the parties, as shown by the terms of the agreement made between the members of the combine and the committee, was that all the pecuniary liabilities originally imposed upon the committee were to be transferred to the firm to whom the authority of the committee was delegated, and that when that firm, with the knowledge and consent of the members, and in the terms of the agreement approved by them, accepted financial responsibility, the liability of the committee to account for the proceeds of the sales came to an end.

Grain's Case, 1 Ch. D., 307, at p. 315, and *Harman's Case*, 1 Ch. D., 326, applied.

Where a party to an action, after evidence has been taken, consents to an adverse verdict, with leave reserved to move to have the verdict set aside and judgment entered for him, all disputed questions of fact must be taken as found against him, and the verdict must stand unless it appears from admitted facts and from documentary evidence as to which there is no dispute, that he is incontrovertibly entitled to judgment.

Decision of the Supreme Court, May 30th, 1905, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The following statement of the facts is taken from the judgment of *Griffith* C.J.

In 1903 a number of persons, amongst whom were the appellants and the respondents, agreed together to form a maize combine, that is, an association for the purpose of providing for the control of the local market for large quantities of maize to be imported, and for the sale of the maize on a common account, so that the various members of the combine should receive an average price for the quantity they contributed to the common stock. For the purpose of carrying out that object certain rules

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were drawn up called the rules of the combine. By these rules, as originally drawn up on the 15th July, 1903, it was provided, amongst other things, that a committee should be appointed to manage the affairs of the combine. The duties of the committee were, speaking generally, to fix the selling price of the maize, to determine all questions that might arise between the members as to the quality of the maize supplied by them, and to make all necessary arrangements for the sale and disposal of the maize and for the distribution of the proceeds of the sales amongst the members. The committee were also to appoint a secretary of the combine, and to open a trust account in a bank, into which all moneys received on account of sales were to be paid. Rule 18 provided that all cheques drawn upon this fund should be signed by two members of the committee, and countersigned by the secretary.

At that time, therefore, it was contemplated that the committee should act practically as directors of the combine, and should have all the moneys of the combine entirely under their control.

On 22nd July, however, these rules were amended by providing, amongst other things, a rule which stood as rule 30. That rule was in these words: "The committee may, subject to the confirmation of a general meeting, delegate the executive and financial work to any firm or firms on terms to be arranged by the committee, but the remuneration must not exceed one per cent. (1%) on the total proceeds of the maize, less the duty, under the control of the combine. In the event of the executive and financial work being delegated to any firm or firms, then rules 11, 17, and 18 shall be deemed null and void, and in rule 14 the word committee shall be deemed to be substituted for the word secretary." On 27th July the rules were again altered, and the provision in rule 30 that "the committee may . . . delegate" was amended so as to read "the committee shall . . . delegate"; so that the provision then was: "The committee shall, subject to the confirmation of a general meeting, delegate the executive and financial work to any firm or firms, on terms to be arranged by the committee."

Another material circumstance was that a formal agreement

was signed on 22nd July, the same day as that on which it was provided that this delegation of authority might be made by the committee, and therefore some time before the adoption of the rule which made that delegation imperative. That agreement was in these terms: "In consideration of a combination being formed to control shipments of maize, we the undersigned hereby agree and bind ourselves severally to complete (when called upon to do so) a contract of sale to the committee about to be formed for the amount of the maize respectively set opposite our names, in terms of the attached form of sale initialled by John Russell for purposes of identification. And we further agree to conform to the rules adopted by the members, and to any further rules subsequently adopted in general meeting of members." The form of agreement referred to was:

"I agree to sell to . . . all the maize as follows: . . .

"For the price per bushel that the said . . . may realise for all the maize amounting to about . . . bushels, now under their control after deducting all expenses and allowances to be made by them as already agreed.

"And I agree to deliver any or all of such maize to the order of the said . . . as they (or he) may require after it shall have been sold by them. Payment to be made to me as soon as practicable after the sale.

"The said . . . or the survivors of them their or his assigns may have the benefit of or enforce this agreement.

"We confirm this agreement."

Accordingly the appellants on 29th July, after the rule had been altered, signed an agreement in that form as to about 800 tons of maize. After the rules were altered negotiations were entered into with various firms with a view to delegating the work in accordance with the altered rule 30, and on 3rd August a general meeting of the members of the combine, as it was called, was held, at which a draft agreement with W. & A. McArthur, Ltd., was submitted to the meeting, the representatives of the appellants being present. A motion was put and carried that the agreement as read be accepted for the administrative work of the combine to be carried out by the firm mentioned. In accordance with that resolution the agreement was signed and the

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work handed over to W. & A. McArthur Ltd. The agreement, so far as is material, was as follows:—

"ARGENTINE MAIZE COMBINE.

"Terms of agreement for the working of same between Messrs. W. & A. McArthur Ltd. and the committee of the said combine.

"The said firm of W. & A. McArthur Ltd. agree to undertake the administrative work required under the scheme adopted by the said combine. The said administrative work to include all clerical work and bookkeeping necessary for the successful working of the said combine, and the rendering of a complete statement to members of the said combine upon final completion.

"The said W. & A. McArthur Ltd. agree to hold in trust all the contracts of sale made by members of the combine, to issue all orders to purchasers, to collect and receive all payment from buyers, to be held in trust until distributed, and to distribute all moneys due to members or in accordance with the said rules of the said combine.

"The said W. & A. McArthur Ltd. further agree to accept all financial responsibilities imposed by the said rules of the said combine."

Later, the objects of the combine having come to an end, the appellants, who had in the meantime gone into voluntary liquidation, claimed the proceeds of the sale of their maize according to the price fixed by the committee. They claimed it first from the committee, who are the respondents in this appeal, and the respondents referred them, in effect, to W. & A. McArthur Ltd. That firm, when the appellants made their claim for the balance of proceeds due to them, claimed to be entitled to a set-off in respect of other transactions between the appellants and themselves. The appellants therefore renewed their claim against the committee, and brought an action against them for the recovery of £637 odd, which represented the balance due to them after certain admitted payments.

The declaration contained special counts upon a contract by the respondents to account for the proceeds of the sales, as agents of the appellants, and an indebitatus count for money had and received, &c. The respondents pleaded denying the contract alleged, and setting up in effect a rescission of that contract, and

that other persons, *i.e.*, W. & A. McArthur Ltd., had undertaken the liabilities originally undertaken by the respondents, and that the appellants had accepted the liability of that firm in substitution for that of the respondents.

At the trial, with the assent of counsel for the respondents, a verdict was directed for the appellants for the amount claimed, leave being reserved to the respondents to move the Full Court to set aside the verdict and have a verdict entered for them.

The Full Court, on 30th May, 1905, on the motion of the respondents, set aside the verdict, and directed a verdict to be entered for them.

From this decision the present appeal was brought.

Dr. Cullen K.C. (with him *A .G. M. Pitt*), for the appellants. A verdict having been found for the appellants, all questions of fact must be taken to have been found in their favour. Assuming that there were facts to go to the jury, it cannot now be contended that the verdict was unreasonable, and on no other ground can it be set aside. The respondents, by consenting to the verdict, must be taken to have abandoned all questions of fact in favour of the appellants: *National Fire and Marine Insurance Co. of New Zealand* v. *Australian Joint Stock Bank* (1); *Daniel* v. *Metropolitan Railway Co.* (2). The question was whether the liability of W. & A. McArthur Ltd. had been accepted by the appellants in substitution for that of the committee. That was a question of fact for the jury, and the onus was on the respondents to establish it. They cannot succeed now unless they can show that the whole question was one of the construction of documents as to which there was no dispute, or of admitted facts. The question turned not only upon the construction of documents but also upon extrinsic evidence as to the conduct of the parties. It could not therefore have been taken from the jury.

But on the documents themselves it does not appear that the committee were freed of all liability. They still retained important functions. The agreement for delegating the work cannot be construed as a release of the committee simply because the appellants consented to it. The maize was really sold to the committee,

(1) 11 N.S.W. L.R., 466. (2) L.R. 5 H.L., 45.

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and each member was entitled to have the price of it paid him by them. The committee had no power to transfer their liability to others. They made others liable as well as themselves with the consent of the appellants, but there is no evidence that anything further was ever agreed to by the members. Delegation does not necessarily imply a cessation of liability on the part of the person who delegates: *Huth* v. *Clarke* (1). The agreement for delegating the work was made with the committee only; it was not an agreement of agency with the members directly, in substitution for the original agreement between the members and the committee. Even if the documents are capable of that construction, they are not conclusive on the point, and cannot be looked at except in the light of the conduct of the parties. The contract on which the respondents rely must therefore be an implied contract, based on inference from facts and documents, and on that the finding of the jury is conclusive.

Gordon K.C. (with him *Garland*), for the respondents. At the trial there were no disputed facts, and all the documents were before the Court. His Honor, on the admitted facts, directed a verdict for the plaintiffs, stating that his rulings were to be considered formal. It was clearly therefore a matter of law, not of fact. Even on the evidence as to conduct of the parties, the only possible inference is that the appellants treated the delegation as a substitution of W. & A. McArthur Ltd. for the committee as far as the liability to account for the proceeds was concerned. But, looking at the documents alone, the only possible construction is that the arrangement made with W. & A. McArthur Ltd. put an end to the liability of the committee to account to the members. The committee were compelled to make the delegation. The arrangement with W. & A. McArthur Ltd. was in substance an agreement with the members of the combine. The delegates became agents of the combine, not of the committee. Privity of contract was immediately established, and, so far as responsibility for the proceeds of sales was concerned, the committee dropped out altogether. Otherwise it could not be said that they had "handed it over," as the rules required them to do. The

(1) 25 Q.B.D., 391.

acceptance of all financial responsibility by the delegates, with the assent of the principals, is sufficient to discharge the original agents. [He referred to *Story on Agency*, p. 201; *Anson on Contracts*, 5th ed., p. 347; and *De Bussche* v. *Alt* (1)]. It cannot be contended that the committee may be sued for money which they had no power to receive. The duties which the committee retained were such as they could conveniently perform without retaining the functions transferred to W. & A. McArthur Ltd.; their retention of them is not inconsistent with the cessation of financial responsibility. There was no sale of the maize to the committee in the ordinary sense. The gist of the contract was to bind the members of the combine to carry out sales made by the committee. The appellants have not made any claim upon a contract of sale. They sue upon an alleged undertaking by the committee to sell for them, and account for the proceeds, the ordinary claim for an account from agents. The respondents' answer is that the committee were only the agents of the appellants for certain specified purposes, and that, by the consent of the appellants, other persons have become clothed with the responsibility of carrying out certain of those purposes, including the receipt of and accounting for proceeds of sales, and that to that extent the respondents are divested of their original responsibility, and cannot be sued. *National Fire and Marine Insurance Co. of New Zealand* v. *Australian Joint Stock Bank* (2), is not in point, because in that case there were disputed questions of fact, whereas here there are none. On the plaintiffs' own evidence and the documents, the jury should have been directed, as a matter of law, to find a verdict for the defendants.

Dr. Cullen in reply. The respondents cannot rely upon oral evidence to help out their construction of the documents. They must support their pleas by the documents alone. [He referred to *Morrell* v. *Frith* (3), and *Moore* v. *Garwood* (4)]. If it is necessary to go outside the documents in order to discover the intention of the parties, the question becomes one for the jury, and, there being a verdict, it will not be disturbed unless un-

(1) 8 Ch. D., 286, at p. 310.
(2) 11 N.S.W. L.R., 466.
(3) 3 M. & W., 402.
(4) 4 Exch., 681, at p. 684.

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reasonable. There is here no single document establishing a contract, but there are various documents which require oral evidence to connect them, and there is also evidence that the parties did not treat W. & A. McArthur Ltd. as the only persons liable to the combine, but looked to the committee to see that the duties imposed upon them, and which they had delegated, were properly carried out. [He referred to *Powell & Thomas* v. *Evan Jones & Co.* (1).

Nov. 29.

GRIFFITH C.J. For the purposes of this appeal this action may be regarded as an action by principals against their agents for not accounting to them for the proceeds of property of the principals sold by the agents; and the defence as a plea that the agents were discharged from that obligation to account by the principals accepting, voluntarily or otherwise, the liability of other persons in substitution for the original liability of the agents.

The question arises in this way. [His Honor then stated the facts, as already set out, and proceeded.] The question is whether under these circumstances, the appellants are entitled to sue the members of the committee, or whether their right of action is against W. & A. McArthur Ltd.

If all the parties concerned were solvent, it may be that no difficulty would ever have arisen, but, as things stand at present, it appears that W. & A. McArthur Ltd. have a claim against the appellants in respect of which they claim to be entitled to a set off. And, as the appellants are in voluntary liquidation, and the liquidator is making a claim against the committee, it is not necessary to decide whether there is a right of set-off or not, or whether the claim of W. & A. McArthur Ltd. could be made the subject of set-off in an action of this kind or not. The only question for our consideration is whether the appellants are entitled to recover against the respondents.

Now, the facts are all either in writing or recorded in written documents about which there is no dispute. At the trial, with the assent of counsel for the respondents, a verdict was directed for the plaintiffs, the appellants, leave being reserved to the defendants to move the Court to set aside the verdict and enter

(1) (1905) 1 K.B., 11.

a verdict for them. It is clear that, under these circumstances, the respondents cannot have judgment entered for them, unless it appears from the documents and the admitted facts that they are incontrovertibly entitled to judgment. So far, therefore, as there are any controverted matters of fact, or evidence of such facts which might have been left to the jury, they must, for the purposes of this inquiry, be altogether disregarded. The respondents can only call to their aid the admitted facts.

It appears to me that the question is almost entirely one of construction of documents. The case may be described in almost the same words as were used by *James* L.J. in *Grain's case* (1), a case against an insurance company, a case of so-called novation. He said: "They were an unincorporated body of persons, but although they were in point of law and in point of fact not absolutely a corporation, it is quite clear, as between all the parties to these deeds of settlement, it was their intention to make themselves for all practical purposes as like a corporation as in the then state of law was possible to be done by a mere contract. It was intended that they should not be a partnership of the particular individuals existing at that time, but that they should be a body of persons with continuous and perpetual succession (until dissolved according to the terms of the constitution of their own body) as between themselves, and as between them and all persons having dealings and transactions with them. The same principle was the basis of all the arrangements. Nobody effecting a policy of insurance with such a society as this ever intended to be left, or ever thought he was left, or that his executors would be left after his death, to the necessity of bringing an action against the survivors of the individuals who happened to constitute the particular body of persons on the day on which his policy was signed. The intention was that it should be a bargain with a *quasi* corporation, and a liability against the *quasi* corporation and against the persons who at the time when the policy ripened into a *debitum* would be the persons to provide for it." I refer to that case to show that the general intention of the parties to a transaction of this kind is to be regarded. Now, from one point of view, although the parties

(1) 1 Ch. D., 307, at p. 320.

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treated this arrangement as a contract of sale made with the committee, on the other hand it was plainly intended to be to a great extent a contract of agency, by which each member entrusted the committee with the work of selling the maize on their undertaking to account to the members for the proceeds. The question must be regarded according to the intention of the parties as revealed by the whole of the documents. So far as the notion of sale appears in the contract, that does not appear to me very important. If there were a contract of sale and no more, there would clearly be implied an obligation on the part of the purchasers to pay the price. But that is no reason why an agreement should not be made between the vendor and purchaser as to the sources to which the vendor shall look for payment. And, if the vendor chooses to stipulate that he will look, not to the purchaser, but to the purchaser's agent for the proceeds of the sale, there is no objection to such an agreement. If a man sells goods to another on the terms that the purchaser shall not pay for them till he has sold them, the purchaser to sell them through an agent appointed with the approval of the vendor, and the latter to look to the agent for the money, he cannot bring an action for the price against the purchaser.

That may or may not be the present case. It is necessary therefore to regard the case from another point of view, that of agency. As a general rule, no doubt, in contracts of agency the maxim *delegatus non potest delegare* applies. As was stated by *Thesiger* L.J. in *Bussche* v. *Alt* (1), the maxim "applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and

(1) 8 Ch. D., 286, at p. 310, 311.

where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a 'sub-agent' or 'substitute' (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute, and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself." He then goes on to say that the law is accurately stated in *Story on Agency*, p. 201, in the passage referred to by Mr. Gordon. Of course, he was dealing there with the methods by which an authority to sell may be delegated. If the original document creating the agency creates at the same time a power in the agent to appoint a sub-agent, the maxim has no application. The first step, therefore, is to consider the document in which the respondents were constituted the agents of the appellants. By that document they were not only authorized, but were required, to delegate certain of their duties as agents, and this delegation was carried out with the approval of the principals. What then is to be inferred from this, as to the position in which the principals would be with regard to their agents? The consequences of the delegation were to be that the committee should no longer have the handling of the money arising from the sales. It was to be taken out of their hands and given over to the control of the sub-agents. Was it intended by

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this that there should be a power in the committee to create privity of contract between the principals and the sub-agents, and, if it was so intended, was it also the intention of the parties to the arrangement that the delegates should be liable directly to the principals? It is not, however, necessary to say that this would be inferred from these facts alone. For by the terms of the agreement made between the respondents and W. & A. McArthur Ltd., with the approval of the members of the combine, this was expressly provided. The contract, so far as is material, was as follows: [His Honor read the material portion of the contract, as already set out; and proceeded:] W. & A. McArthur Ltd. therefore undertake, by this agreement, that they will receive the moneys arising from the sales, and hold them in trust instead of the original agents, the committee, and that they instead of the committee will distribute them in the proper proportions amongst the members. They further agree to accept all the financial responsibilities imposed by the rules of the combine. In my opinion, on the proper construction of that contract, W. & A. McArthur Ltd. entered into a direct agreement with the members of the combine that they would discharge the duties which the committee had originally undertaken to discharge, including that of accounting for the money to the members of the combine. I think, therefore, that the appellants could have sued W. & A. McArthur Ltd. for the money.

It is contended, however, by Dr. Cullen, that though this may be so, still it does not follow that the original right of action against the committee is destroyed. That is a matter of construction. What is the intention of the parties? Is it that the committee should be deprived of all control of the money, and yet should remain responsible to the members for its due distribution, that they should guarantee the payment of it? That seems to me quite inconsistent with the fact that they were not merely authorized but required to hand over their duties, and that they did so with the sanction of the members. When therefore the members of the combine required the committee to delegate the responsibilities to some one else selected by them, surely it must be taken *primâ facie* that it was not intended that the committee should nevertheless guarantee the perform-

ance of the duties imposed upon the delegates, having been deprived of the means of protecting themselves. There is another case, *Harman's Case* (1), in which a provision very similar to the agreement in this case had to be construed. An insurance company had been formed and registered under the name of the Anglo-Australian &c., Company, and afterwards resolutions were passed by the company for the amalgamation of the company with another, upon the terms of a deed afterwards made. By that deed it was witnessed that, as from the 19th April, 1858, the company and its business should be transferred to and united and amalgamated with the British Provident Society, upon the following terms:—First, that the business and property, effects, liabilities and engagements of the company and its policies and grants of annuities should be transferred to and undertaken by the British Provident Society, and it should not be necessary to endorse the policies or grants of the company by or on behalf of the British Provident Society, or to issue new policies or grants. Then followed other provisions dealing with the various changes necessitated by the transfer. The question arose whether the effect of the arrangement was not only to transfer liability to the new company, but also to discharge the liability of the old company which had originally undertaken it. Lord *Cairns* L.C. said (2), after referring to the agreement: Now to this agreement Mr. Harman was a party, and his policy is among those enumerated in the schedule. Therefore, incorporating the schedule with the agreement, it amounts to this, that there is an agreement to which in substance Mr. Harman is a party, or at all events by which he is bound, that the particular policy issued to him by the Anglo-Australian Company is transferred to and is and shall be undertaken by the British Provident Society, and that it shall not be necessary for his safety that it should be endorsed, or that a new policy should be granted, but that he may have it endorsed or have a new policy granted, if he is so minded.

"I think it cannot admit of any reasonable doubt that, if you read the provision as to this particular specific policy into the general words of the deed, this is an agreement to which no

(1) 1 Ch. D., 326.

(2) 1 Ch. D., 326, at p. 331.

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meaning can be given, unless it means that the burthen which up to that time lay upon the shoulders of the Anglo-Australian Company is shifted from them, and placed for the future entirely and solely upon the British Provident Society, and in this arrangement Mr. Harman is a concurring party." "And," he adds, "any other agreement would have been simply absurd. It would have been absurd and incredible to suppose that the shareholders in the Anglo-Australian Company were to be transferred to and become shareholders in the British Provident Society, with all these transferred liabilities taken over, and yet that they were at the same time to remain liable for exactly the same amount of money in the old company, and that the old company was to continue for the purpose of enforcing any such liability. A provision is indeed found inserted at the end of the deed, that it is to continue a company, but that it is only for the benefit of the British Provident Society, namely, for the purpose of realizing the assets which were to be transferred to the British Provident Society." So in the present case the committee continued in existence for the purposes specified in the deed, and in order to perform the various things stipulated for in the deed. In *Grain's Case* (1), it was pointed out that the real question was the construction of documents, and not strictly a question of novation of contract. The conclusion at which I have arrived after consideration of all these documents is that, by the agreement made between the members of the combine and the committee, to which, when drawn up, all the parties agreed, all the pecuniary liabilities were to be transferred to W. & A. McArthur Ltd., and that when they accepted that the liability of the committee was discharged. That appears on the face of the documents.

I think therefore that the respondents have established that they were discharged from any pecuniary liability to which they were originally subject, and that the judgment of the Supreme Court was right and should be affirmed.

BARTON J. I am of the same opinion, and I agree entirely with the Chief Justice in the reasons which he has given for his judgment.

(1) 1 Ch. D., 307.

O'CONNOR J. I also am of the same opinion. If the construction of the documents depended on any question of fact, I agree with Dr. Cullen, that the verdict of the jury would have to be taken in his favour. But the question is one not of fact, but entirely of construction of documents. The principal document is the agreement between W. & A. McArthur Ltd. and the committee of the combine, adopted on the 3rd August. There is no doubt that at one time there had existed the liability on the part of the committee to the combine, which it is now sought to impose on them by this action. But the sole question for us is whether that liability has not been removed by the agreement to which I have referred.

That depends on the view which we take of the agreement, in connection with the other documents which regulate the rights of the parties to the combine. The agreement with W. & A. McArthur Ltd. provides for their taking over all the administrative work in connection with the operations of the combine. But it specifically mentions certain work in the 3rd paragraph: "The said Messrs. W. & A. McArthur Ltd. agree to hold in trust all the contracts of sale made by members of the combine, to issue all orders to purchasers, to collect and receive all payment from buyers, to be held in trust until distributed and to distribute all moneys due to members or in accordance with the said rules of the said combine." They agree in that paragraph directly to account, or, to put it shortly, to carry out the distribution of the moneys of the combine. Then there follows this paragraph: "The said W. & A. McArthur Ltd. also agree to accept all financial responsibilities imposed by the said rules of the said combine." Now, we are dealing only with financial responsibilities of the combine to its members. The only such responsibilities are selling the maize supplied by the members, and the distribution of its proceeds upon a certain principle. The committee of the combine have agreed to carry out these duties, and in order to give some appreciable meaning to the words of the agreement with W. & A. McArthur Ltd., an addition must be made to their literal meaning, as urged on behalf of the respondents, namely, that all the responsibilities incurred to the members of the combine by the committee are by the agreement taken over by

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W. & A. McArthur Ltd. who are thereby to that extent substituted for the committee. Having regard, therefore, to what the original agreement with the combine was, I find it very difficult to give any meaning to this agreement, except this, that W. & A. McArthur Ltd. take over, not only the responsibility for the distribution, but also the legal responsibility of standing in the place of the committee with regard to all the members of the combine. That construction appears to me the only reasonable one that can be given to the document, having regard to the nature and purposes of the combine itself, and the position of the committee in its affairs. The combine was an association for the temporary purposes declared at the beginning of the first contract. They were thus stated: "In consideration of a combine being formed to control shipments of maize." The method by which the members proposed to ensure this object was by making it the basis of the agreement that every member should undertake to complete a contract of sale of the maize to the committee. The object was not merely to transfer the property, as in ordinary cases of sale, but to ensure that the combine should have the control of the maize of each member by having in its hands a contract which vested in the combine the property in the maize. It was for that purpose only that the contract was made. And if we look at the other rules of the combine this object becomes more plain, as it is apparent that the combine was merely a co-operative agency for selling the maize of the combine, the distribution of proceeds being made on the principle that each member should get back a share of the whole amount, proportionate to the quantity of maize which he had supplied. The duty of the committee was apparently to fix the selling price and make certain deductions on account of selling expenses. The function of the committee was thus to stand between the combine as a whole and its individual members in the sale of maize and distribution of its proceeds. It is quite evident that the committee soon found that it was necessary to place the management of the financial operations in the hands of some large business firm.

As was pointed out by my learned brother the Chief Justice, the effect of rule 30, as amended, is to take away from the committee any possible opportunity of protecting themselves in

regard to the payments which had to be made to the members of the combine. For, though they retained control over the selling price of the maize, they had not any power to receive the proceeds of the sales. It would seem very hard on them that the contract should be construed in such a way as to keep them still liable to see to the payment of the members after they have given up control of the fund out of which the payments are to be made. I think that, if we have regard to the whole scope and purpose of the combine, and the position of the committee in connection with the agreement made with W. & A. McArthur Ltd., providing as it does that all the duties formerly carried out by the committee should in future be carried out by W. & A. McArthur Ltd., and if we remember that under the agreement all the financial responsibilities are to be taken over by that firm, and that the appellants themselves are parties to this arrangement, it seems very difficult to hold that the appellants did not consent that all these responsibilities should be handed over to W. & A. McArthur Ltd., whether by novation or by reason of the creation of privity of contract between the principals and sub-agents. On this view the case of *De Bussche* v. *Alt* (1), seems to be of very small moment.

Under these circumstances I think that the learned judges of the Supreme Court were right in the view which they took of the case, and that the appeal should be dismissed.

Appeal dismissed, with costs.

Solicitors, for the appellants, *Minter, Simpson & Co.*

Solicitors, for the respondents, *Allen, Allen, & Hemsley.*

C. A. W.

(1) 8 Ch. D., 286.