[HIGH COURT OF AUSTRALIA.]

CREAMOATA LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

THE RICE EQUALIZATION ASSOCIATION LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 15-17; *July* 23.

Williams A.C.J., Fullagar and Kitto JJ.

Deed—Release in equity—Deed executed by association of rice millers and member—Effect of resolution passed at meeting of board of directors of association that member should resign from association—No formal deed of release executed.

Contract—Restraint of trade—Validity—Reasonableness—Implied term—Incorporation of rice equalization association—Agreement by all millers with association as to percentages of harvest to be sought from Rice Marketing Board—Covenant by millers not to obtain or attempt to obtain during currency of agreement any alteration of allocation from board without consent of association—Definition of allocation to mean proportionate part of annual harvest of paddy rice to which millers from time to time entitled.

Upon harvesting, the whole of the crop of rice grown in New South Wales, except for some small portions exempted for various purposes, becomes vested in a board constituted under the *Marketing of Primary Products Act* 1927-1940 (N.S.W.) and is disposed of by that board. In 1946 all the eight millers who purchased the harvest from the board incorporated R., a company limited by guarantee, and each became a member thereof and entered into similar deeds. The purpose of the deed was to institute a scheme to equalize the proceeds of milled rice, and to agree upon the proportions of the harvest that each would seek from the board. Under it the whole of the rice available for sale was sold to the eight millers in the proportions so agreed upon. This agreement was embodied in negative covenants contained in the deed each had respectively entered into with R. In 1949 C., a company, was, upon application to the board, given an allocation of 1,500 tons, or approximately three per cent of the 1949 harvest available for sale, a condition imposed being that C. would build a mill at Yenda. The mill was completed in November 1949, and C. then applied to the board for a further allocation from the 1950 harvest. After some negotiations, during which it was agreed that C.'s allocation as a member of R. should be five and one-half per cent

and that the allocation of seven of the other millers should be reduced accordingly, C. became a member of R. on 15th November 1949, and on 25th November 1949, entered into the deed in suit. Clause 4 of that deed was as follows: "The miller shall not during the currency of the deed obtain or attempt to obtain any alteration of his present allocation from the . . . Board . . . without the consent in writing of the other millers, nor shall he obtain or attempt to obtain any alteration in the allocation of any other miller". R.'s articles of association by art. 6, provided that "members shall cease to be members . . . (B) upon resignation but such resignation shall not affect any existing contract between" R. and the member concerned; art. 30, that the directors of R. shall be persons appointed by each of its members; and art. 48, that the management of R.'s business shall, subject to the memorandum and articles, be vested in the directors. In consequence of a proposal by certain growers of rice to form a co-operative milling company and apply to the board for an allocation, a meeting of the directors of R. was held on 14th and 15th November 1950 at which it was proposed that all members of R. should agree not to mill rice for anyone else and that all members of R. should execute a supplemental deed to this effect. C. declined on 15th November 1950 to sign the deed and the members of R. by vote then agreed that C. should resign. Instructions were given by R. to its solicitors to prepare a deed of release for signature by C. but it was never signed. C. applied to the board for an allocation of rice from the 1951 harvest in excess of five and one-half per cent of that harvest. The board proposed to grant this application. R. thereupon brought an action in which it claimed (*inter alia*) an injunction to restrain C. from committing a breach of cl. 4 of the deed.

Held that the action failed—

By *Williams* A.C.J. and *Kitto* J. on the ground that the effect of what passed at the meeting of 14th and 15th November was to release C. in equity from any obligation under cl. 4 of the deed in respect of any rice harvest after that of 1950:

By *Fullagar* J. on the grounds (1) that the obligation imposed by cl. 4 was subject to an implied condition that it should be binding only in respect of seasons in which the board was willing to allocate the whole of the rice harvest among the members of R., (2) that, if the agreement was not read as subject to that implied condition, it imposed an unreasonable restraint on trade and was void.

APPEAL from the Supreme Court of New South Wales.

In a suit brought in the equitable jurisdiction of the Supreme Court of New South Wales the plaintiff, Rice Equalization Association Ltd., sought an injunction to restrain the breach by the defendant, Creamoata Ltd., of an express negative covenant contained in a deed entered into between them on 25th November 1949.

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The plaintiff was a company limited by guarantee and was incorporated as such under the provisions of the *Companies Act* 1936-1940 (N.S.W.), on 24th October 1946.

Amongst its objects as expressed in cl. 3 of its memorandum of association were : " (a) to maintain develop and preserve the rice industry in the Commonwealth of Australia and to promote and protect the interests of persons from time to time engaged in the said Commonwealth in the milling and marketing of rice ; (b) to secure to millers of rice in the said Commonwealth as far as reasonably practicable equal rates of returns from the sale of rice . . . (h) to enter into agreements from time to time with millers of rice produced in the said Commonwealth for the purpose of carrying into effect all or any of the objects of the Association."

The plaintiff's articles of association provided in art. 6 that " Members shall cease to be members . . . (b) upon resignation but such resignation shall not affect any existing contract between the Association and the member concerned " ; and in art. 7 that " the rights and privileges of any member . . . shall cease in the event of his . . . resignation . . . but this article shall not affect any existing contract between such member and the Association."

There were eight signatories to the memorandum and articles of the plaintiff and at the time of its incorporation they were the only millers of rice in Australia. The whole, or substantially the whole, of the rice grown in Australia is grown in the Murrumbidgee Irrigation Area and the Wakool Area in New South Wales, and as harvested it is vested in and subject to the control of the Rice Marketing Board for the State of New South Wales, a body corporate constituted under the *Marketing of Primary Products Act* 1927-1940 (N.S.W.).

For some time before the plaintiff was incorporated the whole of the rice available for sale was sold by that board to the eight millers who formed the plaintiff and they took it in proportions agreed upon amongst themselves and milled it at their mills in New South Wales and Victoria. After the plaintiff was formed each of those millers entered into a deed with the plaintiff, which deeds were in terms substantially identical with that subsequently entered into between the defendant and the plaintiff upon which the plaintiff now sued. Until the 1949 rice crop was disposed of by the board the harvests of each year were sold by it to the eight members of the plaintiff in certain proportions fixed by the directors of the plaintiff and agreed to by the millers. The directors were

each of the individual members of the plaintiff (there was only one) and an individual appointed by each of the corporate members.

The defendant had for many years been a miller of various types of grain not including rice. For a few years prior to 1949 its directors had been considering undertaking rice milling and in 1948 the board agreed to make available to it 1,500 tons of the 1949 harvest of rice subject to certain conditions, the most important of which was that the rice was to be milled in the area where it was grown. The board also indicated its intention at this time to sell larger quantities of rice from the harvests of subsequent years if the defendant's mill and milling met with its approval. The defendant thereupon built a mill at Yenda in the rice-growing area and the mill commenced to operate in 1949. The board sold to the defendant 1,500 tons out of the 1949 harvest of rice, that being approximately three per cent of the total harvest of that year available for sale to the millers. The balance of the available harvest of that year was sold to the members of the plaintiff in proportions agreed upon by the directors and members of the plaintiff.

Towards the end of 1949 the defendant applied to the board for the allotment and sale to it of a larger quantity of rice from the 1950 harvest. The chairman of the board suggested that the defendant should become a member of the plaintiff, and after some negotiations the defendant applied for and on 15th November 1949 was admitted to membership of the plaintiff. The defendant's quota of rice "commencing with the 1950 harvest" was then fixed at five and one-half per cent and the quotas of the other members of the plaintiff were adjusted and fixed as new percentages to permit the defendant to buy five and one-half per cent of the available rice commencing with the 1950 harvest. The defendant received five and one-half per cent of the rice available for sale from the 1950 harvest and the other members of the plaintiff received the rest of it in the various proportions which had been fixed by the directors of the plaintiff.

On 25th November 1949 the deed in question in the suit was executed by the plaintiff and the defendant. Its provisions dealt mainly with the matter of securing equal returns to the millers in respect to milled rice marketed by them whether it be sold by them within the State, or elsewhere within the Commonwealth or outside the Commonwealth. Clause 4 of the deed was directed to a different matter. It provided as follows :—"The miller shall not during the currency of this deed obtain or attempt to obtain any alteration in his present allocation from the Rice Marketing Board for the

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State of New South Wales without the consent in writing of the other millers nor shall he obtain or attempt to obtain any alteration in the allocation of any other miller". "Allocation" and "other millers" are defined in the deed as follows:—"'Allocation' means the proportionate part of the annual harvest of paddy rice to which the miller is from time to time entitled". "'Other millers' means the millers in the said Commonwealth (other than the miller) who have already entered or contemporaneously herewith enter or hereafter during the continuance of these presents shall enter into agreements with the Association in terms the same or substantially similar to this deed and at the relevant time remain bound by such agreements". By the deed it was provided that it should continue in force until 30th January 1954; but by a supplementary deed made on 2nd May 1950 it was provided that the original deed should remain in force for ten years from the date of execution of the supplementary deed, with certain options for the extension of the period.

Ever since the plaintiff was incorporated, and, apparently, for some years before that, the rice harvests had yielded insufficient grain to keep the mills available for milling it working at full capacity. In fact they had been and were working at probably less than half their capacity. The defendant's entry into the rice-milling business could not have been welcomed by the then members of the plaintiff but not being able to prevent it they were no doubt glad to accept the defendant as a member of their association. In 1950 certain rice growers decided to establish a co-operative company to conduct a rice mill. Towards the end of 1950 the board made it clear to members of the plaintiff that it proposed to sell a substantial proportion of the 1951 harvest to the co-operative company. The evidence did not show how far the co-operative company had advanced towards establishing a mill and it appeared likely that it would not be able to mill all the rice which the board proposed to sell to it in its own mill. The plaintiff then sought to have its members execute a deed by which they should each covenant not to mill rice for any person who was not a member of the plaintiff, the purpose obviously being to compel the co-operative company to cut down its purchases to such a quantity of rice as it would be able to handle in its own mill. The defendant refused to sign that proposed deed, and some other members of the plaintiff who had mills in the rice-growing areas were doubtful as to whether they would do so.

A meeting of directors of the plaintiff was held to consider the position on 14th and 15th November 1950. Every member of the

plaintiff was represented at it by a director or an alternate director and the chairman and managing director of the defendant, he not being a director of the plaintiff, was present by invitation. A full record of the discussion at that meeting had been kept as minutes of it. The chairman of the plaintiff's board of directors strongly urged that the deed should be signed by all the members of the plaintiff, and expressed the view, which appeared to have been concurred in by the others present, that the issue involved the question of continued membership of the plaintiff and might involve a break-up of the association and the creation of the position that in seeking rice from the board everyone should work for himself. On 15th November the chairman of the defendant, having in the meantime consulted the other directors of that company, announced that the company would not execute the deed. The chairman of the plaintiff then "reiterated his interpretation of what the refusal by Creamoata to sign the deed would mean to the Association and in" his "opinion it would imply a withdrawal from the whole of the Association's interests". A director and the secretary of the plaintiff stated "that it would be necessary for Creamoata to continue negotiations in relation to the current pool but other matters in relation to the new season's crop they would be omitted and any dealings of this nature they would be excluded from the meetings". There was then a general discussion and finally "a vote was taken and it was agreed that Creamoata should resign from the Association" and from certain activities connected with membership of it.

At the next meeting of the plaintiff's directors, which was held on 15th December 1950, "the chairman announced that in view of the information conveyed by Creamoata Ltd. that they did not wish to remain in the association, it would be necessary for formal retirement to be made by deed. Accordingly it was resolved that the company's solicitors be instructed to prepare the appropriate deeds and documents to give effect to the resolution carried on 15th November 1950, that Creamoata Ltd. should resign from the association and its activities including Echuca Milling Pty. Ltd." The resolution was carried unanimously. "Mr. Hallows of Creamoata Ltd.", an alternate director of the plaintiff, "was informed that the official deeds would be sent to his company for execution".

No deeds or deeds dealing with the resignation of the defendant were in fact executed nor did the defendant submit any written resignation although, by a letter dated 5th February 1951, it "confirmed" its resignation. On 2nd January 1951 the defendant applied to the board for an allocation to it of rice from the 1951

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harvest, seeking an amount far in excess of five and one-half per cent of the expected harvest for that year. In that letter the defendant stated that it was no longer a member of the plaintiff. On 22nd February 1951 the board informed the defendant that it had decided to allot the defendant 6,000 tons from the 1951 harvest. It was conceded that that amount of rice was considerably in excess of five and one-half per cent of the 1951 harvest. Shortly thereafter this suit was commenced.

The plaintiff claimed that the defendant was still bound by its covenant in the deed of 25th November 1949 and had committed a clear breach of the negative stipulations contained in cl. 4 and should be restrained from committing further breaches of those stipulations.

The defendant relied upon a number of defences which may be stated as follows :—

(i) that cl. 4 of the deed cannot operate because either (a) " present allocation " means allocation existing at the date of the deed and the defendant had no such allocation, or (b) if " present allocation " means the allocation existing at any particular time there is no present allocation as to the 1952 harvest and there was no such allocation as to the 1951 harvest when the defendant sought to obtain rice from that harvest ;

(ii) that the deed was entered into upon the basic assumption that the whole harvest would be sold to the members of the plaintiff and upon a substantial proportion of the harvest being sold to an outside miller, namely, the co-operative company, it became impossible to apply its terms because no miller could obtain his present allocation without some other or others of them having his reduced. Alternatively it was submitted that the deed came to an end by frustration when that basic assumption failed ;

(iii) that the defendant was discharged from his obligations under the deed by an anticipatory breach or repudiation by the plaintiff ;

(iv) that the conduct of the plaintiff amounted to a release in equity of the defendant from the obligations of the deed or alternatively gave rise to a defensive equity or equitable estoppel in the defendant's favour ;

(v) that cl. 4 of the deed was in unlawful restraint of trade and so unenforceable against the defendant ; and

(vi) that the remedy of injunction was inappropriate to the circumstances of the case as it involved indirectly the grant of specific performance of an agreement which as a whole was not the subject matter of specific performance and that the plaintiff should be left to its remedies, if any, at law.

Upon motion made on behalf of the plaintiff *Roper* C.J. in Eq., on 21st May 1951, granted an interlocutory injunction restraining the defendant, until the hearing of the suit, from thereafter obtaining or attempting to obtain from the board any quantity of paddy rice from the harvest of rice in any year other than an amount equal to five and one-half per cent of the amount of that harvest.

On 16th April 1952, having heard the suit, his Honour declared that the present allocation to the defendant within the meaning of that expression as used in cl. 4 of the deed made between the plaintiff and the defendant on 25th November 1949, was the proportion of each annual harvest of paddy rice ascertained as the proportion which five and one-half per cent of so much of the amount of each such harvest as was made available by the Rice Marketing Board of New South Wales for sale to members of the plaintiff bore to each such annual harvest. His Honour ordered that the defendant be restrained from obtaining or attempting to obtain any alteration of its present allocation from the Rice Marketing Board for New South Wales without the consent in writing of the persons who or which were within the meaning of the expression as used in the deed "the other millers".

From that decision the defendant appealed to the High Court.

Further facts appear in the judgments hereunder.

W. J. V. Windeyer Q.C. (with him *H. E. Reimer*), for the appellant. The suit should be dismissed as the covenant had ceased to be operative. If any injunction were granted the appellant should have been restricted to its proper proportion of the whole rice harvest (excluding seed rice) and not to a proportion of so much of that harvest as the Rice Marketing Board should sell to members of the association. Such injunction, if any, should only be granted on the terms claimed; it should be the interlocutory injunction as granted below. His Honour did not enforce the negative covenant according to its terms. He put a gloss upon it; and, with a desire to make it effective in circumstances different from those existing when it was entered into, he enforced it in a sense which it does not properly bear. The Court ought to enforce a negative covenant only when it can bind the parties by the terms of the bargain they have made (*Doherty* v. *Allman* (1), *Halsbury's Laws of England*, 2nd ed., vol. 18, p. 55). Firstly, the covenant on its proper construction had ceased to operate. To determine its true construction all the circumstances existing at the time it was made should be considered. Each member of the association had made a similar

(1) (1878) 3 App. Cas. 709, at p. 720.

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covenant with the association. These covenants could not be enforced according to their terms against all members once a substantial part of the harvest was sold by the board to someone who was not a member. His Honour met that difficulty by adopting a construction of the covenant which it does not naturally bear. But the more correct conclusion is that the covenant ceased to operate. It is not a question of frustration so much as of construction (*British Movietonews Ltd.* v. *London & District Cinemas Ltd.* (1)). Clause 4 of the deed is not applicable at all because the appellant had not at the date of the deed a "present allocation" from the board within the meaning of those words in the clause. Secondly, the correct interpretation of what happened at the vital meetings was that the appellant was expelled from the association and accepted the position that it was lawfully expelled and had ceased to be a member and ceased to be bound by the covenant. The appellant was therefore effectively discharged in equity. The resolution passed by the association at the end of the debate amounted to a representation that, for future harvests, the appellant was outside the association and no longer bound by or entitled to the benefit of the provisions of the deed. The appellant accepted that position and acted accordingly (*Greater Sydney Development Association Ltd.* v. *Rivett* (2) ; *Grundt* v. *Great Boulder Pty. Gold Mines Ltd.* (3) ; *Automobile & General Finance Co. Ltd.* v. *Hoskins Investments Ltd.* (4)). Thirdly, the covenant as construed by his Honour is not proper to be enforced in equity because (a) it is too vague and uncertain, and (b) it hampers the board in the exercise of its functions. The Court can restrain applications to the board ; but is it proper for it to do so ? Compare the cases on applications to Parliament—*Lancaster & Carlisle Railway Co.* v. *North-Western Railway Co.* (5) ; *Kerr* on *Injunctions*, 4th ed. (1903), pp. 392-393. Fourthly, the covenant is an unlawful restraint of trade. It operates until 1960 and prevents the appellant buying either more or less than the prescribed proportion. It is really a covenant in gross, as it is not with other millers, but with the association ; and the association does not carry on any business (cf. *Heron* v. *Port Huon Fruitgrowers' Co-operative Association Ltd.* (6)). It is not really ancillary to the main activities of the association. There is not any way of escaping from the covenant, resignation from the association

(1) (1952) A.C. 166, at pp. 183-185.
(2) (1929) 29 S.R. (N.S.W.) 356 ; 46 W.N. 99.
(3) (1937) 59 C.L.R. 641, at pp. 674-676.
(4) (1934) 34 S.R. (N.S.W.) 375 ; 51 W.N. 129.
(5) (1856) 2 K. & J. 293 [69 E.R. 792].
(6) (1922) 30 C.L.R. 315, at pp. 333, 334.

does not terminate the obligation; see *McEllistrim* v. *Ballymacelligott Co-operative Agricultural & Dairy Society Ltd.* (1). The restriction is rigid. It does not merely restrict the appellant to a quota. He is bound to take no more and no less. It is not a pool.

[FULLAGAR J. referred to *Albion Quarrying Co. Pty. Ltd.* v. *Associated Quarries Pty. Ltd.* (2).]

Here each member does not get what rice he can and pool it so that the association can sell it. No rice becomes the property of the association. The scheme differs markedly from the scheme in the *Quarries Case* (2). Nor is it a collective bargaining scheme, because the association does not represent all millers. His Honour said the parties were at arm's length and knew the bargain they were making. But that is not realistic, because neither party construed the covenant as his Honour did. The appellant's chairman of directors said in evidence—and he was not contradicted—that before his company signed the deed it was told it was to get a fixed percentage of the whole harvest. The respondent when it commenced the suit so construed the covenant; it sought and obtained interlocutory relief on that basis.

Noel McIntosh Q.C. (with him *H. W. Robson*), for the respondent. The arguments submitted for the appellant are similar to those submitted in the court below and the correct answers to them appear in the considered judgment of the Chief Judge in Equity. Whilst the deed of 25th November 1949 is difficult to construe it should be read *ut res magis valeat quam pereat.* When cl. 4 is considered with the definition of "allocation" in cl. 1 and the deed as a whole, it is apparent that the scheme envisaged a proportionate distribution amongst the members of the association of only so much of the annual harvest as the board might choose to make available from time to time. The definition of "other millers" and the exclusion of seed rice, which would vary from season to season, could only have reference to such an interpretation. The appellant came into the scheme with the knowledge that the other members of the association were bound by earlier agreements imposing obligations expressed in the same terms. Numerous passages in the deed indicate that the real purpose of the scheme was for the association to bargain on behalf of its members as to quantity, price and delivery. The prospective variations in quantity had in contemplation varying proportions of the total annual crop being made available to the members of the association by the board.

(1) (1919) A.C. 548.

(2) (1945) V.L.R. 1.

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In the alternative, it would be a proper case for terms to be implied whereby the percentages to which the parties were entitled as between themselves though expressed in relation to the total crop, were adjusted to the proportion thereof actually made available (*Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* (1)). On either ground the deed was not void *ab initio*, nor was it frustrated by any subsequent event. At the time of the alleged breach the appellant had a "present allocation" in accordance with the formula as stated in the decree. At no stage was anything done or said by the parties to provide the appellant with any defensive equity (*Hanbury* on *Modern Equity*, 6th ed. (1952), pp. 51 et seq., *Greater Sydney Development Association Ltd.* v. *Rivett* (2), *Automobile & General Finance Co. Ltd.* v. *Hoskins Investments Ltd.* (3)). The discussions and resolutions at the meeting of the association held on 14th and 15th November 1950 must be read as a whole. It was always clear that no subscribing member to the deed could press for an increased quota during its currency. At the meeting held on 15th December 1950 the chairman did not leave any doubts in the mind of the appellant's representative that the deed in question could only be varied by a further deed. The appellant had not altered its position by that time and no further deed was ever executed. The statements of an individual director cannot bind the company. Having regard to the objects of the association, the powers of the board, and the relationship between the association and the board, the deed does not create an unlawful restraint of trade. It is reasonable as between the parties and it is not prejudicial to the public interest (*Heron* v. *Port Huon Fruitgrowers' Co-operative Association Ltd.* (4)). Parties formerly at arm's length were at the time under consideration in a scheme operating to their mutual advantage in relation to the basic problems of the industry. There was not any conflict with the public interest. The board itself had suggested that the appellant should join the association. There could not be any interference with the statutory functions of the board.

W. J. V. Windeyer Q.C., in reply. Had the appellant's undertaking been by simple contract the result of the events at the meetings would have been a rescission of the contract. Here the original agreement was by deed ; but it could be, and was, discharged

(1) (1943) 67 C.L.R. 169.
(2) (1929) 29 S.R. (N.S.W.) 356 ; 46 W.N. 99.
(3) (1934) 34 S.R. (N.S.W.) 375 ; 51 W.N. 129.
(4) (1922) 30 C.L.R. 315.

in equity by agreement. Therefore equitable relief ought not to be granted to enforce it.

[WILLIAMS A.C.J. referred to *Berry* v. *Berry* (1).]

See *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (2).

Cur. adv. vult.

The following written judgments were delivered :—

WILLIAMS A.C.J. This is an appeal by the defendant from a decree of the Supreme Court of New South Wales in its equitable jurisdiction made by *Roper* C.J. in Eq. on 16th April 1952, whereby his Honour declared that the present allocation of the defendant within the meaning of that expression as used in cl. 4 of a deed made between the plaintiff and defendant on 25th November 1949, is the proportion of each annual harvest of paddy rice ascertained as the proportion of which five and a half per centum of so much of the amount of each harvest as is made available by the Rice Marketing Board of New South Wales for sale to members of the plaintiff bears to each annual harvest and ordered that the defendant be restrained from obtaining or attempting to obtain any alteration of its present allocation from that board without the consent in writing of the persons who or which are within the meaning of the expression as used in the deed " the other millers ".

The deed in question, the term of which was extended by a further deed dated 2nd May 1950, until 2nd May 1960, was entered into between the plaintiff and the defendant under the following circumstances. Practically the whole of the rice grown in Australia is grown in the Murrumbidgee Irrigation Area in New South Wales. In its unmilled condition the rice is known as paddy rice. The crop is harvested in the period commencing towards the end of April and ending in June of each year. Upon harvesting the whole of the crop, except for some small portions exempted for seed and other purposes, becomes vested in the Rice Marketing Board of New South Wales, a body corporate constituted under the *Marketing of Primary Products Act* 1927-1940 (N.S.W.), and is disposed of by that board. Prior to 1949 there were only eight millers of rice interested in purchasing the harvest from the board. In 1946 they incorporated the plaintiff, which is a company limited by guarantee, and each became a member of the plaintiff and entered into deeds with the plaintiff similar to the deed in suit. These deeds had a two-fold purpose. The first and perhaps the dominant purpose was to institute a scheme to equalize the proceeds of the sale of

(1) (1929) 2 K.B. 316. (2) (1947) K.B. 130.

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milled rice so that the same return would ultimately be derived from each sale irrespective of the actual sale price, and the other was to agree upon the proportions of the harvest that each would seek to purchase from the board. The result of this agreement was that in the period in question the whole of the harvest available for sale was sold to the eight millers in these proportions. The agreement between the millers to share the harvest in this manner was embodied in the negative covenants contained in the deeds they had respectively entered into with the plaintiff.

In 1949 the defendant decided to extend its activities to the milling of rice and to build a mill at Yenda in the Murrumbidgee Irrigation Area. It expected to be able to commence milling there towards the end of the year. It applied to the board for an allocation of rice from the 1949 harvest and was given an allocation of 1,500 tons or approximately three per cent of the total harvest available for sale. A condition of the allocation was that the defendant would build this mill. The mill was completed in November 1949, and the defendant then applied to the board for a further allocation from the 1950 harvest. The chairman of the board suggested to the plaintiff and the defendant that the defendant should become a member of the plaintiff and should agree with the other eight millers upon a reasonable allocation. After some negotiations, in the course of which it was agreed that the defendant's allocation as a member of the plaintiff should be five and one-half per cent, and that the existing allocations of the other millers, except for one small miller, should be reduced accordingly, the defendant became a member of the plaintiff on 15th November 1949, and on 25th November 1949, entered into the deed in suit.

Clause 4 of the deed is in the following terms:—"The miller shall not during the currency of this deed obtain or attempt to obtain any alteration of his present allocation from the Rice Marketing Board for the State of New South Wales without the consent in writing of the other millers, nor shall he obtain or attempt to obtain any alteration in the allocation of any other miller".

The articles of association of the plaintiff provide by art. 6 that members shall cease to be members (b) upon resignation but such resignation shall not affect any existing contract between the association and the member concerned. Article 30 provides that the directors shall be the members of the association being individuals and individuals appointed from time to time by members of the association being corporations or partnerships provided that each corporation or partnership member shall be entitled to appoint one director only. Article 50 provides for the appointment of

alternate directors. Article 48 provides that the management of the business of the association shall, subject to the memorandum and the articles, be vested in the directors.

All might have been well and the now nine millers might have been content to live in amity and divide the harvest available for sale between themselves in the new proportions. But a new competitor soon reared its head for in the middle of 1950 the growers, or some of them, decided to form a co-operative mill and enter into the business of milling rice themselves. They proposed to apply to the board for an allocation from the 1951 harvest. The board was composed of five growers' representatives and two Government appointees so that the plaintiff and its members had every reason to believe that the new competitor would be likely to obtain a large allocation. The chairman of the plaintiff had been informed that 15,000 tons of the coming harvest would be allocated to the new company. But its mill had still to be built and if it had to rely on its own resources it could not hope to obtain more rice than it would be able to mill. But rumours were rife that at least two of the millers who were members of the plaintiff were prepared to do the milling for the new company until it could mill for itself.

To prevent this occurring, and to keep the new company out of the field for as long as possible, some members of the plaintiff proposed that all its members should enter into a supplemental deed with the plaintiff covenanting not to mill rice for anyone except members of the plaintiff. At a meeting of directors of the plaintiff held on 10th October 1950, the representative of the defendant informed the meeting that he could not say whether or not the defendant would sign such a deed but the question would be discussed at a meeting of the board of the defendant later in the week and the plaintiff would be informed of its decision as soon as possible after the meeting. At a further meeting of the board of the plaintiff held on 24th October, the secretary advised that the supplemental deed had been circulated to all members but the defendant had advised him that it would not enter into the deed. The secretary also advised the meeting that he had been informed that definite discussions were taking place between the defendant and the co-operative mill. The minutes of the meeting state that, consequent on the defendant withdrawing from the deed and the agreement reached at the previous meeting that all members must participate in the agreement, it was decided that no further action be taken until the November meeting when it was hoped that Mr. Beveridge might speak more specifically on the matter. The reference is to Mr. J. W. Beveridge, the chairman and managing

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director of the defendant. He was not the defendant's director on the board of the plaintiff. This director was his son Mr. J. Beveridge, the general manager of the defendant. His alternate director on the board was Mr. J. K. Hallows. The matter came to a head at a meeting of the board of directors of the plaintiff held on 14th and 15th November 1950. All the members were represented at the meeting and Mr. J. W. Beveridge also attended. At that time the members of the plaintiff were not only engaged in milling the rice grown in the Murrumbidgee Irrigation Area. They were also engaged in forming a company to build a mill at Echuca in Victoria. They had each applied for shares in the new company. They were also considering a plan to grow and mill rice in the Kimberley District in Northern Australia. At this meeting all these activities were mentioned. The chairman commenced with a lengthy address to Mr. J. W. Beveridge. He pointed out that other members had been generous in allowing the defendant to join the plaintiff, that the plaintiff had heard that the defendant had agreed to mill rice for the new co-operative company, and that this company would be granted a much greater share of the coming crop than would be possible if it had no such assurance and had to rely on its own milling capacity. The chairman expressed his disappointment that Mr. Beveridge, notwithstanding his initial enthusiasm, had indicated his determination not to participate in the Kimberley project, and then proceeded to say that they had circulated the supplementary deed because of the rumours they had heard and they felt they had to know where the members of the plaintiff stood in the matter. So they asked each of them to declare themselves so that everyone would know precisely the position which confronted them as they went into the new season. He concluded by asking Mr. Beveridge to complete the deed so that they could remain with an unbroken association and work out a policy for the future of the industry that would be an advantage to each and all of them. Mr. Beveridge in reply denied that he had entered into any obligations with the co-operative mill but said that he had advised his board not to sign the supplementary deed. The chairman pointed out that the basic deed which the defendant had executed included a proviso that no subscribing member would press for any increased quota during the currency of the deed.

A long discussion followed in the course of which the chairman said that if all the members did not sign the deed it would be a case of everyone for himself and that the issue before them went to the full extent of the membership of the association. He assumed that in the event of any member deciding to pursue a policy

contrary to that of the expressed wish of all members of the association that member would desire to retire from the association and would be offering his shares in the Echuca Milling Pty. Ltd. for sale to the remaining members. He pointed out that the quotas of all members would be encroached upon so far as supplies were made available to the new mill. He said that refusal to sign the deed would indicate that the party concerned desired to withdraw from the whole set-up including Echuca. In the end Mr. Beveridge said he would like to discuss the matter further with his own board and he would try and get his board together for a meeting and would give the plaintiff a final answer on the following day.

When the meeting resumed on the following day Mr. Beveridge said that he had been able to get his board together and they were quite definite that the defendant would not sign the supplemental deed. He said that he had told his board that it was a case of all in and those who were not prepared to be all in had to be out. The chairman said that in view of the debate of the day before the other members interpreted the position as a determination on the part of the defendant to go its own way and sever itself from the plaintiff and its members. The chairman reiterated his view that the refusal by the defendant to sign the deed implied a withdrawal from the whole of the interests of the plaintiff including not only the M.I.A. activities in respect to which the defendant had made its reservation, but also Echuca, the North Australia Developments, and anything else which the plaintiff as a body decided on as a programme. Mr. Beveridge said that whatever the decision of the meeting in this regard his company could only accept it. The secretary then said that it would be necessary for the defendant to continue negotiations in relation to the current pool but that in other matters and in relation to the new season's crop it would be omitted, and in any dealings of this nature it would be excluded from the meetings. A vote was then taken and it was agreed that the defendant should resign from the association and from its activities in the Echuca Milling Pty. Ltd.

At a further meeting of the board of directors of the plaintiff held on 15th December 1950, the defendant being represented, the chairman announced that in view of the information conveyed by the defendant that it did not wish to remain in the association it would be necessary for its formal retirement to be made by deed. "Accordingly it was resolved that the company's solicitors be instructed to prepare the appropriate deeds and documents to give effect to the resolution carried on 15th November, 1950, that Creamoata Limited should resign from the association and its

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activities in Echuca Milling Pty. Limited." The minutes state that Mr. Hallows of Creamoata Ltd. was informed that the official deeds would be sent to his company for execution and he was requested to inform the secretary in writing of his company's desire to dispose of its shareholding in Echuca Milling Pty. Ltd. This request was complied with. The defendant disposed of its shareholding in Echuca Milling Pty. Ltd. by distributing its shares amongst the remaining members of the plaintiff and was refunded its application moneys.

At a further meeting of the board of directors of the plaintiff held on 15th January 1951, the defendant again being represented, the chairman requested members to express their views on the matter of quota. He indicated that, although the defendant had expressed its intention to retire from the plaintiff, that intention had not been made effective by the execution of a deed of release, consequently it must still be regarded as a member of the plaintiff in negotiations for the purchase of the crop. It was pointed out to Mr. Beveridge that the plaintiff, acting on legal advice, considered that the obligations undertaken by the defendant on the execution of the deed of 25th November 1949, would continue until a release was similarly effected by deed. Mr. Beveridge replied that Creamoata Ltd. did not retire from the association but had been asked to do so and that, acting on legal advice sought by his company, he considered that the defendant was no longer a member of the plaintiff, other than in respect to the marketing of the current rice crop. Accordingly the defendant had made direct application to the Rice Marketing Board for a quota from the 1951 harvest equivalent to the capacity of their mill, viz., 10,000 tons on a two-shift basis and 15,000 tons on a three-shift basis.

From then onwards the parties were at arm's length. The plaintiff was contending that the defendant wished to retire but the plaintiff had not consented, and that, until the 1950 harvest was finalized and the defendant was released by deed, the defendant was still a member of the plaintiff bound by its negative covenant. The defendant on the other hand was contending that it had been asked to retire from the plaintiff and all its activities and had agreed to do so and that it was no longer a member of the association of the plaintiff or bound by the covenant, the only outstanding matter still to be finalized being the winding up of the 1950 harvest.

I have referred at some length to the events immediately preceding, occurring at, and succeeding the meeting of the board of directors of the plaintiff held on 14th and 15th November 1950, because they give rise to what appears to me to be the crucial issue in the suit,

namely, whether the events that took place at the meeting in question on 15th November resulted in an agreement immediately operative in equity that the defendant should resign from the plaintiff and be released from all its obligations under the deed of 25th November 1949, except its rights and obligations in respect of the 1950 harvest. The defendant raised a number of other defences to the suit which are set out and discussed in his Honour's judgment and I need not repeat them. I have carefully considered the arguments addressed to us by Mr. *Windeyer* in relation to these defences. But I am not prepared to accede to them and see no reason to disagree with his Honour's conclusions. In my opinion the fate of the appeal turns upon the true legal effect to be given to the resolution passed at the meeting of the board of directors of the plaintiff on 15th November 1950, that the defendant should resign from the plaintiff. Of this defence his Honour said :— "The fourth of the enumerated defences is based upon what happened at the meeting of 14th and 15th November 1950. It is put that it was then represented by the plaintiff to the defendant that the former would not hold the latter nor itself bound by the deed and that the defendant should take its own course to procure such rice as it could from the 1951 harvest. The defendant acting on this representation, it is said, did then negotiate with the board and procured 6,000 tons of rice for which it became liable to pay and paid £150,000. Consequently it is submitted that the defendant is entitled to set up these facts as a defence to the attempt of the plaintiff to enforce in equity compliance with the covenant of the deed (*Greater Sydney Development Association Ltd.* v. *Rivett* (1) ; *Automobile & General Finance Co. Ltd.* v. *Hoskins Investments Ltd.* (2)). In my opinion what was said by the chairman and others at the meeting on 14th and 15th November 1950 cannot be properly regarded as representation made by the plaintiff to the defendant. The only relevant resolution passed at that meeting was that the defendant should resign. It may be that some or all of the directors then thought that this would involve a complete severance of all relationships between the plaintiff and the defendant and that the provision of arts. 6 and 7 were not present to their minds. It is clear however that by 15th December it was realized that a deed would be necessary to discharge the plaintiff and the defendant from their obligations under the deed of 25th November 1949. Nothing had been done up to 15th December to further the resolution that the defendant should resign nor does it appear that

(1) (1929) 29 S.R. (N.S.W.) 356 ; 44 W.N. 99.

(2) (1934) 34 S.R. (N.S.W.) 375 ; 51 W.N. 129.

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until then the defendant had acted upon anything relied upon as representation by the plaintiff. If there were any representations binding upon the plaintiff arising from what occurred on 14th and 15th November and I think there were not, it was made clear in my opinion on 15th December that the defendant could not regard itself as being discharged from its obligations under the deed until a further deed to effect that result was executed. I do not think that any estoppel or defensive equity arose in the circumstances".

I cannot agree with his Honour that it was made clear at the meeting of directors of the plaintiff held on 15th December 1950, that the defendant could not regard itself as being discharged from its obligations under the deed until a formal deed to that effect was executed. The chairman's statement at that meeting appears to me capable of meaning that the plaintiff's solicitors were to prepare the necessary documents to formalize an agreement that had already been made. In any event it does not matter what the parties subsequently contended the resolution meant. The question is what, if any, immediate legal effect did it have. The question raises the same issue that has often arisen before. That is to say, did the parties intend to make an immediate agreement or did they intend the resolution only to be a preliminary step in the making of an agreement which would only be complete when it had been embodied in a formal document and that document had been executed by the parties? If the resolution was intended to create an immediate agreement, the further question arises as to its scope. Was it confined to an agreement that the defendant should resign as a member of the plaintiff but would still remain bound by the deed of 25th November 1949, or did it extend to a complete severance of all the existing legal relationships between the parties and include an agreement that the defendant should be released from the deed including the negative covenant? The chairman had said on 14th November that the issue went to the full extent of membership of the plaintiff. Immediately before the vote was taken he had said that the refusal by the defendant to sign the supplemental deed would imply a withdrawal from the whole of the plaintiff's interests and the secretary had explained that Mr. Beveridge's statement "that whatever the decision of the meeting in this regard his company could only accept it" meant that it would be necessary for Creamoata to continue negotiations in relation to the current pool, but in other matters and in relation to the new season's crop it would be omitted. The question whether the whole of the existing relations between the association and the defendant, apart from winding up the 1950 crop, should be

completely severed was the subject of the debate. The plaintiff was not entitled to compel the defendant to resign from the plaintiff if it refused to execute the supplemental deed. But the chairman representing the other members was calling upon the defendant to do so and the defendant was willing to accede. There was nothing conditional about the vote that was taken. It was a vote that the defendant should resign and it was in terms final. The defendant was to be omitted in relation to the new season's crop. This could only mean that the defendant was not to benefit under the equalization scheme or share in any of the new crop that was allocated to the plaintiff on behalf of its members. The vote can only be read as intended to bring about a complete severance of the legal relations existing between the plaintiff and the defendant. The major portion of the deed is concerned with the equalization scheme. This scheme is embodied in covenants entered into between the association and its members. The business of the association is managed by a board of directors on which each member has a representative. The deed gives the association wide powers of control over the business of the millers. It can from time to time levy upon them for moneys required by the association for a number of purposes, including the administrative purposes of the association, the establishment of a reserve fund and the establishment of a Commonwealth fund for equalization purposes. It can fix from time to time a price or prices at which rice shall be taken into account for equalization purposes when sold intra-State, inter-State, or on any other market. It can make such payments to or reclamations from millers as will, in the opinion of the association, ensure as far as practicable to the millers equal returns in respect of their rice sold on any market in each quarter or taken into account in such quarter for equalization purposes. It can by an appropriate sales programme take steps to ensure that the millers shall respectively have an even distribution of sales throughout the harvest year. The millers covenant with the association to take all necessary steps for the purpose of conforming to the sales programme directed by the association, to pay all levies imposed upon them by the association, to accept and be bound by the quarterly adjustments made from time to time and to furnish monthly returns showing the total quantity of paddy rice milled, the total quantity unmilled and the total quantities and prices of rice sold intra-State, inter-State, for export &c. The millers also covenant to conform to any directions of the association respecting wholesalers, it being understood that the position of wholesalers in the trade approved by

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the association shall be maintained by adequate gross profit margins. The deed contains a number of other important provisions affecting the business of the millers which I need not enumerate. I am unable to accept his Honour's view that the provisions of art. 6 were probably overlooked at the time. The very centre of the storm was whether the defendant would execute a supplemental deed giving the association powers over its members additional to those contained in the deed of 25th November 1949. This deed had been expressly referred to by the chairman on several occasions on 14th November. The basic fact of membership of the plaintiff was surely the covenants into which the members had entered. These covenants were in form covenants with the plaintiff but they were in substance mutual covenants between the members. The plaintiff was not itself engaged in trade. It existed only as a convenient entity through which the millers could work the equalization scheme and collectively bargain with the Rice Marketing Board for the purchase of the available rice and agree upon the proportions in which they would share it. The most important advantage that they derived from membership of the association was representation on the board and a voice in the important administrative decisions vitally affecting their business which the board was authorized to make from time to time. The powers of control which the association could exercise over the business of the defendant were so wide that it is impossible to believe that any of the directors present at the meeting could have thought for a moment that the defendant would agree to resign from the association and lose its representative on the board if it was still to remain bound by the covenants in the deed. It may have been advisable to embody the agreement in formal documents but they would be only documents giving effect to what had already been agreed upon. A deed can be released or varied in equity by a parol agreement for valuable consideration: *Hill* v. *Gomme* (1); *Lady Lanesborough* v. *Ockshott* (2); *Berry* v. *Berry* (3); *Fry* on *Specific Performance*, 6th ed. (1921), p. 478. In the present case the release of the plaintiff and defendant from their mutual rights and obligations under the deed constituted such consideration.

For these reasons I am of opinion that the appeal should be allowed with costs, the decree below should be set aside, and in lieu thereof there should be a decree dismissing the suit with costs.

(1) (1839) 1 Beav. 540 [48 E.R. 1050]; 5 My. & Cr. 250 [41 E.R. 366].

(2) (1719) 1 Bro. P.C. 151 [1 E.R. 479].

(3) (1929) 2 K.B. 316.

FULLAGAR J. This has seemed to me to be a case of considerable difficulty. The difficulty lies largely, I think, in arriving at a correct understanding of the relation one to another of (a) the Rice Equalization Association, (b) the members of that corporation, and (c) the Rice Marketing Board of New South Wales. The latter body is a marketing board constituted and incorporated under the *Marketing of Primary Products Act* 1927-1940 (N.S.W.). It has seemed to me that it is of some importance to remember throughout that all rice harvested in New South Wales was vested under the Act in this board and that this board had at all times a complete and absolute discretion as to the disposal of all rice harvested in New South Wales. Whatever agreement might be made between members of the association or between the association and its members, the association and its members alike were powerless to direct in any way the disposal of the harvest of paddy rice of any year.

The association was incorporated in New South Wales on 24th October 1946 under the *Companies Act* 1936-1940 (N.S.W.). What may be regarded as its primary object (implicit, indeed, in its name) was: "To secure to millers of rice produced in the Commonwealth as far as reasonably practicable equal rates of returns from the sales of rice". Another stated object (cl. 3 (aa)) was:—"To promote freedom of contract and to resist, insure against, counteract and discourage interference therewith". The memorandum and articles were signed by eight persons, each of whom was engaged in the business of the milling of rice. The incorporated association was limited by guarantee. The "guarantee" was that every member should contribute to the assets of the association, in the event of its being wound up while he was a member or within one year afterwards, for payment of the liabilities of the association contracted before he ceased to be a member and for the adjustment of rights of contributories, such amount as might be required not exceeding the proportionate part of the sum of £10,000 represented by the percentage allocation of the harvest of paddy rice to which he was entitled at the date of the winding up or at the date of his ceasing to be a member whichever date should be the earlier. This provision in the memorandum shows clearly enough that it was contemplated that each member of the association would—in some way or by some means—become "entitled" to a "percentage allocation" of each future harvest of rice. Article 5 of the articles of association provided that subject to art. 6 (a) the association should consist of the signatories to the memorandum and such other persons being millers of rice who should apply for membership

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and should pursuant to a resolution carried at a general meeting of the association be admitted to membership. Article 6 provided that members should cease to be members (a) in the case of individuals upon death and in the case of corporations upon dissolution, (b) upon resignation, but such resignation should not affect any existing contract between the association and the member concerned. Article 6 (a) was subject to a proviso which provided for succession to membership if the successor in business of a member continued to carry on the business of milling rice, formally applied for membership, and " entered into the appropriate equalization agreement with the Association ".

Within about three months of the date of the incorporation of the association each of its eight original members (all millers of rice and all signatories of the memorandum) had executed a deed to which the association was the other party. This is apparently the " equalization agreement " contemplated by art. 6 (a). The deed was a long and elaborate document consisting of twenty clauses, most of which were concerned with providing the necessary machinery for the attainment of the main object of the association —to secure to millers as far as reasonably practicable equal rates of returns from the sales of rice. Clause 4, however, broke ground not touched by the memorandum or articles of association. It provided that " the Miller shall not, during the currency of this deed, obtain or attempt to obtain any alteration of his present allocation from the Rice Marketing Board in the State of New South Wales without the consent in writing of the other millers, nor shall he obtain or attempt to obtain any alteration in the allocation of any other miller ". Clause 1 of the deed was an interpretation clause and it contained two definitions which have or may have a bearing on cl. 4. It is provided that " allocation " means " the proportionate part of the annual harvest of paddy rice to which the miller is from time to time entitled ". It is also provided that " other millers " means " the millers other than the miller " (i.e., other than the miller who is a party to the particular deed) " who have already entered or contemporaneously herewith enter or hereafter during the continuance of these presents shall enter into agreements with the Association in terms the same as or substantially similar to this deed and at the relevant time remain bound by such agreement ".

It would appear that in the rice seasons 1946-1947 and 1947-1948 the whole of the harvest (except, of course, rice retained for seed) was sold by the Rice Marketing Board to the eight millers who were members of the association in proportions agreed upon

between them and communicated by the association to the board. In the year 1949, however, the defendant company, Creamoata Ltd., which is incorporated in Victoria and was not then a member of the association, appeared on the scene. It asked the board to sell to it a proportion of the 1948-1949 harvest and in fact purchased from the board 1,500 tons of paddy rice out of that harvest at a price of £28,364. The balance of the harvest appears to have been sold by the board to the members of the association in the same proportions relatively to one another as in the two previous years. Creamoata had intimated that it would desire to purchase larger quantities of rice from future harvests, and the board informed Creamoata that it would require that company to establish a mill in one of the rice-growing areas of New South Wales if it was to receive a proportion of each harvest. At the same time the board suggested to Creamoata and also to the association that Creamoata should become a member of the association. The main reason for this suggestion was doubtless that there were advantages to the board in being able to negotiate with a single body with regard to price and other conditions of sale of rice for milling. Creamoata did in fact erect a mill in a rice-growing area, and on 15th November 1949 it was admitted as a member of the association in accordance with the terms of art. 5. The resolution admitting the new member contained the words " their quota, commencing with the 1950 harvest, to be on the basis of five and one-half per cent, such quota to be taken on a *pro rata* basis from that of all the members excepting W. T. Henham ". The " new quotas " of the members, now nine in number, were then set out: 19.81 per cent, 19.81 per cent, 17.93 per cent, 10.61 per cent, 8.49 per cent, 7.78 per cent, 7.25 per cent, 5.50 per cent (Creamoata) and 2.82 per cent. It would appear that in December 1949 the terms of purchase of the 1949-1950 harvest were agreed between the association and the Rice Marketing Board, and at a later date, viz., on 15th June 1950, when harvesting would be nearing completion, the association wrote to the board referring to the terms of purchase and " confirming " that in negotiating those terms it had been acting as agent for its nine members " whose names are set out below each in respect of the percentage quota of the crop set against its name ". Then followed the names of the nine members and their respective percentages as determined by the resolution of 15th November 1949. Creamoata had on 25th November 1949 executed a deed, the other party to which was the association, in the same terms as the eight deeds which the other members had executed shortly after the incorporation of the association. The deeds originally

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provided that they were to remain in force until 30th January 1954. By later deeds, however, the period was extended to 2nd May 1960.

I will deal a little later with the difficult question of the construction of cl. 4 of the deed to which Creamoata was a party. At this stage, however, it may be noted that the situation which the incorporation of the association and its contracts with its members were designed to create seems to have been two-fold. It seems to have been intended to ensure (1) the securing to members of the association so far as possible of equal rates of returns from sales of milled rice, and (2) the sharing of the harvest of each rice season between members of the association in agreed proportions. So far as one can see, neither object was essentially dependent on the other: either might have been pursued though the other were abandoned, and it may be noted here that there is no mention of the second object in the association's memorandum. There may, however, have been thought to be a practical connection between the two objects. In any case it seems clear that the literal attainment of the second object would become impossible, and the satisfactory attainment of the first might be seriously jeopardized, if any substantial part of the harvest of any rice year were sold by the board to persons other than the association or its members. I say to persons other than the association or its members because, although the deeds do not refer to the millers as members of the association, in fact every miller who executed a deed was a member of the association, and every member of the association executed a deed.

The board, as I have pointed out, was entirely free to sell rice to whomsoever it pleased. And in 1950 the board did decide to sell a very substantial proportion of the harvest to an outsider. The situation subsisting at this stage and the events which immediately followed I will describe substantially in the words of *Roper* C.J. in Eq. in giving reasons for the judgment under appeal. Ever since the plaintiff was incorporated the rice harvests had yielded insufficient grain to keep the mills working at full capacity. Creamoata's entry into the rice milling business could not have been welcomed by the then members of the association, but, not being able to prevent it, they had no doubt been glad to accept Creamoata as a member. In 1950, however, a much more unwelcome move was made when certain rice-growers, dissatisfied with the prices which they had been receiving, decided to establish a co-operative company to conduct a rice mill. Towards the end of 1950 the board made it clear to the members of the association that

it proposed to sell a very substantial proportion of the 1950-1951 harvest to the co-operative company. The association, believing that the new company would not be able to mill all the rice which the board proposed to sell to it, then invited each of its members to execute a deed covenanting not to mill rice for any person who was not a member of the association. Creamoata refused to sign this proposed deed, and a meeting of directors of the association was held on 14th and 15th November 1950 to consider the position. Every member of the association, including Creamoata, was represented at this meeting, of which a full record has been kept. The chairman of the association strongly urged that the deed should be signed by all members, and expressed the view, which appears to have been concurred in by all, that the issue involved the question of continued membership of the association and might involve a " break-up " of the association and the creation of the position that in seeking rice from the Rice Marketing Board it would be " every man for himself ". On 15th November Creamoata's representative, having in the meantime consulted the other directors of that company, announced that Creamoata definitely refused to execute the deed. The chairman then reiterated his interpretation of what the refusal by Creamoata to sign the deed would mean to the association, and Mr. Farley, a director and secretary of the association, stated that " it would be necessary for Creamoata to continue negotiations in relation to the current deal, but as to other matters in relation to the new season's crop they would be omitted, and in any dealings of this nature they would be excluded from the meetings ". There was then a general discussion and finally, as the minutes record, " a vote was taken, and it was agreed that Creamoata should resign from the Association " and from certain activities connected with membership of it. On 22nd February 1951 the Rice Marketing Board informed Creamoata that it had decided to allot to it 6,000 tons from the 1951 harvest.

The suit was commenced by the association against Creamoata on 29th March 1951. Though the relief claimed included an injunction in general terms against committing any breach of the contract of 25th November 1949, the case has been conducted throughout on the footing that cl. 4 of the deed alone is in question. On 21st May 1951 an interlocutory injunction was granted restraining Creamoata until the hearing of the suit from " obtaining or attempting to obtain from the Rice Marketing Board any quantity of paddy rice from the harvest of rice in any year other than an amount equal to five and one-half per cent of the amount of that harvest ". The final decree in the suit, which was pronounced on

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16th April 1952, declared that the " present allocation " of the defendant within the meaning of cl. 4 of the deed was " the proportion of each annual harvest of paddy rice ascertained as the proportion which five and one-half per cent of so much of the amount of each harvest as is made available by the Rice Marketing Board for sale to members of the Association bears to each annual harvest," and the injunction was framed to correspond with this interpretation of cl. 4. The declaration on which the injunction is founded is obscurely worded, but it seems to me to mean no more and no less than that the defendant is not entitled to more or less than five and one-half per cent of whatever rice from each harvest is made available to members of the association. This interpretation of cl. 4 differs, of course, substantially from that which formed the basis of the interlocutory injunction, and, in any year in which any substantial proportion of the harvest was not made available by the board to members of the association, would be much more unfavourable to Creamoata.

I am, with respect, unable to accept the interpretation put upon cl. 4 of the deed by the final decree in the suit. That clause was, in my opinion, correctly interpreted in the interlocutory injunction, though it does not follow that an injunction should have been granted in those terms or at all. The word " allocation " is defined by cl. 1 as meaning " the proportionate part of the annual harvest of paddy rice to which the miller is from time to time entitled ". The application of this definition to cl. 4 presents great difficulties, but at least it seems clear that, whatever allocation or apportionment is meant, it is an allocation or apportionment of the *annual harvest*, i.e., the whole annual harvest. It seems to me impossible to say that the words " annual harvest " mean " so much of the annual harvest as the Board is willing to sell to members of the Association ". The words used do not mean that. They cannot, to my mind, be taken as referring to a quantity which might be a very small fraction of the harvest. No doubt the word " harvest " is not to be taken quite literally, for it would not include such rice as might be retained for seed (as to which see s. 11 (4) (c) of the *Marketing of Primary Products Act* 1927-1940). But, subject to that, the words " annual harvest ", in my opinion, must mean the whole harvest and cannot mean anything else. The same meaning must, one would think, be given to the words " harvest of paddy rice " in cl. 4 of the association's memorandum. Again, no other meaning seems possible.

The next question, and to my mind a much more difficult question, is what is meant by the expression " present allocation from the

Rice Marketing Board ". The words " from the Rice Marketing Board " must, I think, be read with the word " allocation ", though I do not know that I attach any great importance to this. The alternative is to construe the clause as if it read " obtain or attempt to obtain from the Rice Marketing Board any alteration of his present allocation ". Whichever grammatical reading be adopted, it seems clear enough that the Rice Marketing Board is regarded as being a party to the " present allocation " and as being able to alter that allocation, the purpose of the clause being to restrain the miller from either seeking or accepting any such alteration. But I prefer the former reading, because I think it represents the natural sense of the words themselves. The critical words are " present allocation ". *Roper* C.J. in Eq., attempting to apply the whole of the definition of the word " allocation " in cl. 1, read those words as meaning the allocation subsisting from time to time by agreement among the members of the association. But again I am not able to accept his Honour's view. It seems to me impossible to read the words as referring to anything but an allocation subsisting at the date of the execution of the deed. They are not really capable of meaning anything else, and it is simply impossible to apply the words " from time to time " which occur in the definition of the word " allocation ", and which are inconsistent with the word " present ".

It does not, however, follow that, as Mr. *Windeyer* suggested, there was *no* " present allocation " at the date of the deed within the meaning of cl. 4. There was, I think, such a " present allocation." I think that the reference must be taken to be to the actual percentages fixed at the meeting of 15th November 1949, when it was unanimously agreed, immediately after the admission of Creamoata to the association, that Creamoata's share of the 1949-1950 harvest should be five and one-half per cent. The percentages were fixed in anticipation that the board would accept them, and it would appear from the letter of 6th June 1950 that the board did accept them. The deed was executed ten days after the meeting at which the percentages were agreed upon, and it seems to me that the " present allocation " of Creamoata was intended to mean, and does mean, the five and one-half per cent of the harvest which had at that meeting been allocated to Creamoata.

The anticipated harvest of 1950-1951, which was much smaller than that of the preceding year, was about 50,000 tons, and of this quantity Creamoata sought to obtain from the board 6,000 tons. This amount the board was willing to sell to Creamoata. It is, of course, very considerably more than five and one-half

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per cent of 50,000 tons. It would therefore appear that Creamoata was attempting to obtain an alteration of its present allocation from the board—an alteration which would necessarily involve also an alteration of the allocations of some one or more or all of the other millers, and this would appear prima facie to be a breach of contract which should be restrained by injunction.

But important consequences seem to me to flow from the construction which I have felt compelled to place upon cl. 4. In considering the position created by that clause the position of the " other millers " calls for a moment's consideration. Each of the eight " other millers " had executed a deed which was, one gathers, in the same terms as that executed by Creamoata. These deeds were not put in evidence, but apparently each contained a reference to the " present allocation " of the miller executing it. In each of the eight cases, however, all the " other millers " had agreed on 15th November 1949 to an alteration of its present or original allocation. For the purposes of Creamoata's deed, therefore, it would seem that the allocation of each of the other eight millers was the allocation determined at that meeting.

Now, I have already said that the percentages or allocations referred to in cl. 4 are, in my opinion, percentages or allocations of the annual harvest and not of some quantity less than the annual harvest. As soon as this is accepted, it seems to follow that Mr. *Windeyer* was right in saying that cl. 4 could operate in a rational way only so long as the Rice Marketing Board was prepared to sell the whole of the annual harvest to the members of the association. This may be illustrated by taking the actual approximate figures for the 1950-1951 season. The harvest, as I have said, was some 50,000 tons. Of this quantity the board allocated some 17,500 tons, probably more than one-third of the total harvest, to the growers' co-operative mill. It thus became obviously impossible that each of the nine millers who had executed the deed should receive its agreed percentage of the harvest. Some or all must of necessity receive less than its agreed percentage. But cl. 4 forbids any of them to obtain either more or less than its agreed percentage. A position is thus created in which some or all of the members of the association must commit a breach of contract unless *all* are prepared to agree upon *some* different allocation of percentages.

It may, of course, be argued that this result affords a reason for construing cl. 4 in some other way. But there are, I think, two answers to this argument. The first is, in my opinion, that the words used are not really capable of any other meaning than that which I have attributed to them. " Annual harvest " simply means

annual harvest. The second answer is, in my opinion, that there is a simple explanation of the apparently absurd position which arose in 1950-1951. For the truth is, I think, that the whole framework created, the whole basis of cl. 4 of the association's memorandum and of cl. 4 of the deed, rested on a fundamental assumption by all concerned that the whole of the harvest of each season would be made available by the board to the members of the association. It is not possible, to my mind, to avoid the conclusion that the possibility of a substantial allocation of paddy rice to an outsider or outsiders was simply not envisaged. And herein is to be found, I think, the first answer to the association's claim in the suit. Clause 4 became simply unworkable in the events which happened. And I agree with Mr. *Windeyer* that this is just the kind of case in which the law will imply a term in the contract. Clause 4 of the deed must, in my opinion, be read as being subject to an implied term to the effect that it is to operate only so long as the Rice Marketing Board is willing to allocate the whole of the annual harvest of rice to members of the association. This view, it should be noted, does not make cl. 4 of the memorandum unworkable, because the allocation of the harvest is there taken merely as a measure for apportioning liabilities, and there might be, and was, an allocation of "the harvest" although that allocation could not be effectuated.

The implication of such conditions has become familiar in a long line of cases, one class of which has come to be known as the frustration cases. So long ago as 1919 Lord *Finlay* in *Bank Line Ltd.* v. *Arthur Capel & Co.* (1) said: "The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed". And it has been repeatedly discussed since. Quite recently the cases were examined fully in this Court by *Latham* C.J., *McTiernan* J. and *Williams* J. in *Scanlan's New Neon Ltd.* v. *Tooheys Ltd.* (2). The learned Chief Justice analysed extensively what he described as "the theories behind the doctrine of frustration". He referred to a well-known passage in Lord *Wright's* judgment in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* (3), as basing the whole doctrine on a "theory that the courts simply determine what is fair and just" (4). But the courts always determine, or endeavour to determine, what is fair and just, and I would not myself think that Lord *Wright* intended to convey that the courts were in such cases exercising anything in the nature of a dispensing power.

(1) (1919) A.C. 435, at p. 441.
(2) (1943) 67 C.L.R. 169.
(3) (1942) A.C. 154, at p. 186.
(4) (1943) 67 C.L.R., at p. 187.

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The substance of his Lordship's view seems to be clearly indicated in a passage on the following page (1), which is quoted by *Williams* J. in the *Neon Sign Case* (2). His Lordship said: "The essential feature of the rule is that the court construes the contract, having regard both to its language, its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things, as its basis or foundation. If that is gone, the life of the contract in law goes with it, at least as regards future performance" (1). I cannot find any difference of substance between the views so expressed and the much earlier but equally well-known statement of Earl *Loreburn* L.C. in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-American Petroleum Products Co. Ltd.* (3). The Lord Chancellor said: "In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that that was at bottom the principle upon which the court proceeded. It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted" (4).

The present case appears to me to be a case in which a term to the effect indicated above must almost of necessity be implied. It is indeed implicit in the very basis of the division provided for, and in its absence a literally absurd position arises as soon as the board announces that it is going to sell a substantial part of the harvest to an outsider or outsiders. It has often been said that the court should be cautious in implying terms in a contract and that no term can be implied where the contract will work perfectly well without it: see, e.g., *L. French & Co. Ltd.* v. *Leeston Shipping Co. Ltd.* (5) (per Lord *Buckmaster*). But here the contract, on the construction which I consider inevitable, will not "work" at all.

If one looks at the substance of the position, it seems very unlikely that the parties would have set up the structure which they did set up if they had not felt assured that the whole, or at least the great bulk, of each annual harvest during the currency of the contract would be divided among them. The situation where the whole of a harvest was available was very different from the situation where (say) only a small fraction of it was available. They had, of course, every reason to anticipate that the whole

(1) (1942) A.C., at p. 187.
(2) (1943) 67 C.L.R., at p. 223.
(3) (1916) 2 A.C. 397.
(4) (1916) 2 A.C., at pp. 403-404.
(5) (1922) 1 A.C. 451, at pp. 454-455.

would be available, because they comprised all the persons engaged at the time in the milling of rice, and, as none of the mills was working to capacity, outside competition was not to be expected. If they had foreseen the future, they would most probably have made some provision for it. They might have provided that cl. 4 should cease to be binding if less than some specified proportion of an annual harvest should be made available to them by the board. As it is, they have so framed their obligation that the only implication which the law can make seems to be that which I have indicated above. The implication is perhaps consistent with its being held that the withholding of a very trifling quantity of rice by the board would not bring the obligation to an end. But this question need not be considered.

What I have said is sufficient to dispose of the case. The view which I have expressed, however, turns on the construction which I place upon cl. 4 of the deed, and I think I should add that, if that construction were wrong, I should agree with an alternative argument submitted by Mr. *Windeyer*.

Roper C.J. in Eq. found it possible to read cl. 4 as referring to the proportions in which the members of the association were to share whatever quantity of rice, large or small, might in any season be made available to the association or to all its members by the Rice Marketing Board. According to this view cl. 4 forbids each miller to obtain or attempt to obtain from the board either more or less than such percentage *of the quantity of rice made available to all the millers* by the board as is allocated to him from time to time by agreement among all the millers. On this view the relevant percentages at all material times would be those allocated by the resolution of 15th November 1949. If this construction be adopted, I am of opinion that cl. 4 imposes an unreasonable restraint on trade and is void.

The contract constituted by cl. 4 of the deed is of a peculiar nature. The whole "set-up" bears a superficial resemblance to that which subsisted in the case of *Albion Quarrying Co. Pty. Ltd.* v. *Associated Quarries Pty. Ltd.* (1), but there are radical differences. In the Victorian case the whole object of the scheme was to set up a sort of co-operative marketing system: cf., and contrast with each other, *McEllistrim's Case*, (2), and *English Hop Growers Ltd.* v. *Dering* (3). In the present case no restriction is imposed on the selling of milled rice: the restriction is imposed on the buying of paddy rice for milling. In this respect the case presents an

(1) (1945) V.L.R. 1.
(2) (1919) A.C. 548.
(3) (1928) 2 K.B. 174.

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unusual feature, but I can see no reason why the same principles should not apply to restrictions on buying as to restrictions on selling.

Lord *Macnaghten* in *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co. Ltd.* (1), observed that the law with regard to restraints of trade had changed much even since *Mitchel* v. *Reynolds* (2). It may be correct to say that it has changed further since 1894, but I think the truth probably is that, while the principles are the same, the approach of the courts to the question has in some degree altered. In particular the approach to a restrictive clause in a service contract is viewed nowadays with much more strictness than a restrictive clause in an agreement regulating the business relations of traders. So Lord *Haldane* in *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* (3) said: "My Lords, when the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves" (4). But even in a case of the latter type it is still, I think, true to say that there must be consideration for the restrictive promise even though it be made under seal. It is also still true, I think, to say that the promisee must have a real interest to be protected by the restrictive promise. Lord *Birkenhead* in *McEllistrim's Case* (5) said: "it has been laid down by your Lordships over and over again that in this class of case the covenantee is not entitled to be protected against competition per se." It is also, I think, still true to say that in this class of case, although prima facie the parties themselves are the best judges of what is reasonable, the restrictive promise will be held void if it is actually found to be unreasonable or to be against the public interest: see *Heron* v. *Port Huon Fruitgrowers' Co-operative Association Ltd.* (6), and *Victorian Onion and Potato Growers' Association Ltd.* v. *Finnigan* (7) (a case decided by *Cussen* J.).

Before considering the actual effect of cl. 4 on the construction given to it by *Roper* C.J. in Eq., it is to be observed that the

(1) (1894) A.C. 535, at p. 565.
(2) (1711) 1 P. Wms. 181 [24 E.R. 347].
(3) (1914) A.C. 461.
(4) (1914) A.C., at p. 471.
(5) (1919) A.C., at p. 564.
(6) (1922) 30 C.L.R. 315.
(7) (1922) V.L.R. 384.

covenantee is the corporate association. Two points of some difficulty arise from this fact. In the first place, it is not easy to see what is the consideration moving from the covenantee for the covenant contained in cl. 4. So far as the eight original deeds are concerned, there is not much difficulty in regarding them as all connected together, with the result that the consideration for the covenant of each miller is seen to be the obtaining by the association of similar covenants from the other millers. But, in the case of Creamoata, which executed the deed some three years later, this can hardly be regarded as the consideration. Perhaps the consideration should be regarded as being the admission of Creamoata as a member of the association. The instrument being under seal, the matter of consideration is, of course, only material in connection with the question of the validity of the restraint of trade. It is at this point that it occurs to one that the association as such had no interest to be protected by the restrictive covenant. Though it had power under its memorandum to carry on a business of milling rice, it was not itself a miller, and I have already said that I can see no necessary connection between the equalization of the rates of returns to millers, which it was the primary object of the association to secure, on the one hand, and the imposition of restrictions on the freedom of its members to buy paddy rice on the other hand. Indeed, as I have already mentioned, one of the objects of the association was "to promote freedom of contract and to resist, counteract and discourage any interference therewith". It may be suggested, however, that, although the association as such had no interest to be protected by the restrictive covenant, yet each of its members had such an interest, and the association was in effect a trustee of the *chose in action* created by each of the nine covenants. In other words, it may be said that the case falls within the principle of a line of cases of which *Lloyd's* v. *Harper* (1) is a well known example. Contrast *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (2). On this view the position must be that the association is a mere repository of nine promises, being a trustee of each covenant for each of the other covenantors, so that, on the one hand, it cannot release or vary any covenant by agreement with the covenantor without the consent of all the other covenantors, while, on the other hand, any covenantor could compel the enforcement by it of the covenant of any other covenantor. This is a rather curious position, and it has been said that such a trust will not be inferred unless there is some affirmative evidence of intention to create a trust apart from the mere fact

(1) (1880) 16 Ch. D. 290.

(2) (1933) A.C. 70.

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that the contract is made with a view to the benefit of a third party: see *Vandepitte's Case* (1), and *Ryder* v. *Taylor* (2). I am inclined to think, however, that it is the true position here, and, if it is, it would seem of little consequence that the association as such had no interest to protect.

Having regard, then, to the passage from Lord *Haldane's* speech quoted above, there would seem to be no reason why traders should not agree to share an available market between them whether as sellers or as buyers. When, however, we come to consider the actual content of cl. 4 it is seen, I think, to have far-reaching and remarkable effects. It is to be binding for ten years, and it is to be binding whether the covenantee remains a member of the association or not. It forbids the covenantor to accept from the board either a greater or a less proportion of the available rice than the fixed percentage. Since all the mills have been working under capacity, it was no doubt thought unlikely that any miller would desire to take less than his allotted percentage, but it is easy enough to imagine circumstances in which a miller might find it imperative to take much less, and circumstances might change greatly in the course of ten years. Again, the clause is so framed that no two or more millers could agree to alter the percentages as between or among themselves. If A, having thirty per cent, and B having ten per cent, wish to take fifteen per cent each, they could not agree to do so without the consent of all the others. In these respects cl. 4 appears to me to go beyond what is reasonable in the interests of any miller. But there is a further consideration which appears to me to be decisive. Clause 4 seems to proceed on the assumption that the Rice Marketing Board must observe, or will be willing to observe, the percentages agreed upon among the members of the association, and will distribute paddy rice accordingly. The assumption is, of course, entirely without foundation. The board can sell rice or refuse to sell rice to anybody at all for any reason at all or without any reason, good or bad. Suppose that the board for a good reason, e.g., because the plant of A was inefficient, refuses to sell rice to A but is willing to divide the harvest or part of the harvest among the other eight millers in any proportion they wish. Neither A nor the association can, by obtaining an injunction against the other eight millers, compel the board to sell to A his pre-determined percentage or to sell to A any rice at all. The enforcement of cl. 4 against the other eight millers could in such a case have nothing but a dog-in-the-manger effect. If it

(1) (1933) A.C., at pp. 79-80.

(2) (1935) 36 S.R. (N.S.W.) 31, at p. 48; 53 W.N. 40, at pp. 42-43.

be answered that the obtaining by A of an injunction against the other eight millers might bring pressure to bear upon the board to sell rice to A, then I would agree with Mr. *Windeyer* that the operation of the clause is against public policy.

For the above reasons I am of opinion that, on the construction adopted by *Roper* C.J. in Eq., cl. 4 imposes an unreasonable restraint on trade and is void.

I think I should refer in conclusion to one further argument presented by Mr. *Windeyer* for the defendant. He relied on what took place at the meeting of 14th and 15th November 1950 as discharging Creamoata from the obligations created by the deed, including the obligation created by cl 4, except so far as the "equalization" of returns for the current year was concerned. All the members of the association were represented at this meeting, and, if all those present had agreed that Creamoata should be discharged from those obligations, the discharge would, I should think, have been effective in equity although those obligations subsisted by virtue of a deed: see, e.g., *Webb* v. *Hewitt* (1), and *Steeds* v. *Steeds* (2). I do not, however, myself think that an agreement that Creamoata should be discharged can be inferred from what took place at that meeting. At that meeting a resolution by which "it was agreed that Creamoata should resign from the Association and from their activities in the Echuca Milling Pty. Ltd." appears to have been carried unanimously. This amounted, in my opinion, to a clear resignation by Creamoata from the association, and a clear acceptance of that resignation by all the other members of the association. I can see no reason for saying that any further or other act or thing was required in order to constitute an effective resignation by Creamoata. As to the latter part of the resolution, this was later carried into effect by Creamoata's selling and transferring its shares in the Echuca company to the other members of the association. But the resignation of Creamoata and the transfer of the Echuca shares could not affect the binding character of the deed, assuming it to have a binding character. Assent by all to a discharge or release of Creamoata's obligations under the deed could, in my opinion, only be inferred from clear evidence, and I am not able to find any clear evidence of any such assent. Feeling no doubt ran high at times during the long meeting, and expressions were used by individual speakers such as "It must be all in or all out"—"It will be a case of every man for himself"—"It will imply a withdrawal from all the Association's interests".

(1) (1857) 3 K. & J. 438 [69 E.R. 1181].

(2) (1889) 22 Q.B.D. 537, at pp. 539-540.

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But the use of these and similar expressions falls far short of being evidence of any such assent as it is necessary to prove. I doubt indeed whether anything short of a formal resolution unanimously carried could provide sufficient evidence of such assent. It should be mentioned too, that the chairman, after Mr. Beveridge (representing Creamoata) had addressed the meeting, reminded Mr. Beveridge that he had signed a "basic deed" which prescribed his quota of paddy rice. I am not able to accept the view that there was any release or discharge in equity.

It was also urged that, even if there were no discharge, what took place at the meeting was of such a character as to make it inequitable to grant an injunction against Creamoata. I may say that I think that the proper inference from what took place is that Creamoata's resignation was demanded by the other members rather than volunteered, and that Mr. Beveridge may well have left the meeting under the impression that (apart from "equalization" for the current year) Creamoata's relations with the association were at an end. But whether these things would afford ground for the discretionary refusal of an injunction I need not determine, because, as I have said, I am of opinion that the legal basis for an injunction is lacking.

In my opinion, the appeal should be allowed with costs, and the decree of the Supreme Court discharged. In lieu thereof it should be ordered that the suit be dismissed with costs.

KITTO J. I agree with my brother *Williams* in thinking that the appeal should succeed upon the ground that after 15th November 1950 the appellant company was entitled to be treated in equity as no longer bound by the deed in suit in relation to future rice harvests.

By its statement of defence the appellant relied upon the events of 14th and 15th November 1950 in two ways. By par. 6 it sought to find in those events a representation made by the respondent that the appellant would no longer be treated as bound by the material provisions of the deed, and it alleged that the respondent thereafter altered its position in reliance upon that representation. Thus it set up a defensive equity. In my opinion *Roper* C.J. in Eq., was right in deciding that even if anything which occurred on the dates mentioned amounted to such a representation as the appellant alleged, it was made clear to the appellant on 15th December 1950, before the representation had been acted upon, that the respondent regarded a formal release by deed as necessary before the appellant could treat itself as freed from the obligation of the deed.

But that leaves for consideration the other defence I have referred to, which was raised by par. 9 of the statement of defence. That paragraph alleged a repudiation of the deed by the respondent and an acceptance of that repudiation by the appellant. This defence is made out if the proper interpretation to be placed upon the happendings at the meeting of 14th to 15th November is that the respondent by its board of directors announced to the appellant an intention to treat the deed as at an end (save as regards the 1950 harvest) unless the appellant should agree to enter into a covenant against milling any rice for a non-member of the respondent, and that the appellant, refusing to enter into such a covenant, accepted the termination of the deed, so far as future harvests were concerned, as the only alternative left open to it.

I have read several times the minutes of the meeting and the other evidence before the Court in relation to that meeting, and I am satisfied that that interpretation should be accepted. It was not as if those present at the meeting were considering only the sort of resignation to which arts. 6 and 7 of the respondent's articles of association refer, that is to say a resignation from bare membership of the respondent as a corporate body, leaving contracts other than that of membership still subsisting. What everyone present was concerned with was the much wider and deeper question, whether the appellant was to maintain or to sever its connection with the combination of millers which had been created and was being maintained by means of their co-membership of the respondent association and their contractual relations with it under the deeds they had respectively executed. Whether they would "all remain together"; whether the appellant would "continue with us"; what was to be the future of the "set-up which has been most carefully and laboriously built up"; by such forms of expression as these the chairman repeatedly faced the respresentatives of the appellant with the choice they were being given. His speech lacked nothing in frankness or clarity. He pointed to four matters which had disturbed the members other than the appellant. They had heard that the appellant had agreed to mill for a new-comer into the industry; there had been a breakdown of arrangements concerning local distribution; there had been complaints about quality; the appellant had determined not to participate in a project of the respondent called the Kimberley project. And now a supplemental deed had been circulated for execution by all the members, because of the rumours (about the appellant) that the others had heard. "We felt we have to know", said the chairman, "where our members would stand in the matter, and so we asked

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each of them to declare themselves so we might know precisely the position which confronts us as we go into the new season". He emphasized that the new deed was intended to make quite clear something that was regarded as implicit in "the original undertaking". And having said these things, he invited the representative of the appellant "to complete the deed and to remain with an unbroken Association". "Now, Sir," he concluded, "I ask you, will you sign the Deed?"

I find it impossible to interpret this ultimatum as restricted to the question of company membership. The "set-up" to which the chairman referred was not to be found only or even chiefly in the memorandum and articles of the respondent. The substance of it was in the deed which each member had entered into with the respondent. The purposes for which they would "remain together", if they did, were the purposes of the deed—"the basic deed" as the chairman called it; and membership of the corporate body was a matter of merely incidental concern, for the body existed only to serve those purposes. So, when the chairman went on to say, after the appellant's chairman of directors, Mr. Beveridge, had stated his company's objection to executing the new deed, that the issue before the members went "to the full extent of membership of the Association", adding that "we are either a united body or not", it was surely not the dry husk of membership of the corporation that was in question, but the whole substance of the scheme for which the members were linked together through the corporation and by means of the deeds. The chairman could not have had anything less in mind, nor could his hearers, for he candidly said that his own company (and he expected all others would be in a similar position), had given careful consideration to "the action and policy to be followed in the event of a breakup in the Association", pointing out that "that is what faces us on this present issue". The necessity for individual decisions as to action and policy would arise from the abandonment of the scheme embodied in each member's deed, and not from anything less. Refusal to sign the new deed, said the chairman, "would indicate that the party concerned desired to withdraw from the whole set-up". Mr. Beveridge retired to consult his own board, and when he returned to the meeting on 15th November and stated that he had reported to his directors that "we are told it is a case of all in or those who are not prepared to be all in had to be out", no one denied the accuracy of his translation of the previous day's utterances. Mr. Beveridge then conveyed to the meeting an emphatic and final refusal on the part of the appellant to enter into the new

deed. He was told by the chairman that " this simply means you are not prepared to continue with the Association *policy* " (the italics are mine), and that he would be " well aware of the fact that our members have interpreted the position as determination on your part to go your own way and to sever yourself from the Association and its methods ". He was told that the refusal would imply a withdrawal from the whole of the association interests, and in relation to the new season's crop the appellant " would be omitted, and in any dealings of this nature they would be excluded from the meetings ". With all this before him, Mr. Beveridge maintained the refusal which his board had authorized him to give, and the board of the respondent association then resolved that the appellant " should resign from the Association and from their activities ". It does not appear from the minutes that Mr. Beveridge then retired, but according to his uncontradicted evidence he did.

In the context, the resolution that was passed cannot be read as a mere expression of opinion as to what should happen in the future. No one in the position of Mr. Beveridge could fail to gather that the appellant's deliberate decision that it would not execute the new deed had been followed by the fall of the axe of which clear warning had been given. It must have been abundantly clear to every man in the room that the appellant was being told that the whole relationship theretofore existing between it and the respondent and the other millers was over so far as future harvests were concerned. Legal formalities were for the moment not adverted to ; so far as the parties could do it by their words and by their votes, the appellant was expelled, and it accepted its expulsion rather than yield to the demand for the execution of the new deed.

The explanation of what happened a month later is not difficult to see. I do not think for one moment that at the meeting of 15th December 1950 and subsequent meetings the chairman, having realized too late that if the deed was gone cl. 4 was gone, sought to disguise what had happened and to pretend that the decision reached on 15th November was then intended to be inoperative until the execution of a deed of mutual release by the appellant and the respondent. Mr. Beveridge obviously thought that the chairman was mis-stating what had occurred when he said, as he did on several occasions, that the appellant had not wished to remain in the association, and that the decision that it should retire was its own decision ; but that was a manner of expression which was natural enough in one who had faced the appellant, through Mr. Beveridge, with a choice between signing the new deed and going its own way, and had received the appellant's refusal to sign

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the deed. The chairman did not at any time suggest that anyone present at the meeting on 15th November had then supposed that no presently operative decision had been reached. The fair meaning of the words he used on 15th December 1950 is that the view had been formed since the meeting of 15th November that the mutual decision come to on that occasion to end the relationship between the appellant and the respondent was ineffectual, despite the intention of the parties, because the law required a deed to be executed for the purpose. He later made it clear that this view was the result of legal advice. Apparently the point had not been brought home to him that the technical rule of the common law, that a deed creating mutual rights and obligations cannot be discharged by consent of the parties without the execution of another deed, is disregarded in equity. So it was that from 15th December onwards, the respondent's representatives consistently sought to treat the appellant as still bound by its deed, while the appellant's representatives stoutly maintained the contrary. But nothing turns now upon the arguments that took place between the parties in consequence of the divergent views they took as to the legal result of the absence of a deed. The important point is that what occurred on 14th and 15th November 1950 amounted to a clean break between the parties, intended by them both to deprive the deed of all operation upon either of them in respect of subsequent harvests.

In a court of equity the mutual release thus deliberately agreed upon must have effect. For this reason, in my opinion, the appeal should be allowed and the suit dismissed.

Appeal allowed with costs. Decree below set aside. In lieu thereof order that the suit be dismissed with costs.

Solicitor for the appellant, *Gordon L. Beard.*
Solicitors for the respondent, *John Hickey & Son.*

J. B.