ROBERT BARNES (PLAINTIFF) .....APPELLANT;

AND

SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS LIMITED AND SASKATCHEWAN POOL ELEVATORS LIMITED (DEFENDANTS) ..... } RESPONDENTS.

1946
*Oct. 31
*Nov. 1
1947
*Feb. 4

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Co-operative handling and marketing of wheat—Saskatchewan Co-operative Wheat Producers Ltd.—Contracts between company and members—Rights of members—Deductions by company, from returns from sale of wheat, for its activities and towards acquiring handling facilities—Claims for repayment, for interest, or for declaration as to rights—Alleged breach of trust—Claim that interest on claimant's deductions should be paid before payment of patronage dividends to later shareholders.

Saskatchewan Co-operative Wheat Producers Limited, referred to *infra* as the "association", was incorporated in 1923 under the *Companies Act*, Sask., and its incorporation was confirmed by statute (Sask.) in 1924, c. 66. The main object was the co-operative handling and marketing of wheat for its members, grain growers in the province, each member buying a share for $1. Saskatchewan Pool Elevators Limited, referred to *infra* as the "Elevator Co.," was incorporated in 1925 under said *Companies Act* for purpose of acquiring elevator facilities and handling grain delivered to the association; its capital stock was owned by the association and the directors of each company were the same persons.

Appellant delivered wheat to the association. Deliveries during 1924, 1925, 1926 and 1927 were under contract of December 27, 1923. Another contract was made on February 7, 1927, for deliveries for the five years following; but after the crop year of 1929-30, appellant (as were all others who had signed contracts) was released from his obligation to deliver wheat under it. Appellant ceased farming in 1938.

Said contracts provided (as did contracts with other grain growers) for deductions by the association, from gross returns from sale of wheat, of expenses, of a "commercial reserve" to be used for purposes and activities of the association, and of an "elevator deduction" towards acquiring facilities for handling grain.

Under said contracts the association deducted "commercial reserves" and "elevator deductions", crediting the amounts thereof in appellant's account. The last of said deductions were made out of the proceeds of the 1928 crop.

*Present:—Kerwin, Rand, Kellock and Estey JJ. Hudson J. also was present at the hearing, but he died before the delivery of judgment.

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Appellant claimed repayment of amounts so deducted, and interest thereon, or, alternatively, a judgment declaring his rights.

On July 16, 1925, the directors of the association passed a resolution that elevator deductions should bear interest at 6 per cent. This was followed by statements forwarded from time to time by the association to the growers, showing the amount of elevator deductions and interest thereon, but stating that "the crediting of interest during the present contract, as well as the payment of interest on the certificates, is conditioned on the Pool Elevators having sufficient earnings, after taking care of expenses and depreciation, to provide for same."

In 1929 the association issued two certificates, one setting out commercial reserves and the other setting out elevator deductions, taken under said contract of 1923. These certificates were under seal, and, as recommended by the directors, were approved by resolution of November 26, 1928, at the annual meeting of the association delegates. They were delivered to the growers who had signed said contract of 1923, and contained the following (the rate of interest mentioned on commercial reserves and elevator deductions being 5 and 6 per cent. respectively): "Interest from September 1, 1928, will be paid annually at the rate of * * * on the sums represented by this certificate which shall from time to time remain unpaid, provided, however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect."

Interest was paid, on elevator deductions, from September 1, 1925, to August 31, 1930, and on commercial reserves, from September 1, 1927, to August 31, 1930. (In each case, interest for the year ending August 31, 1930, was not paid until 1941). Also it was stated in evidence that on the elevator deductions interest of 3 per cent. was paid for 1943 and would be paid for the next year.

On September 17, 1931, the directors passed a resolution, referring to said certificates and to the association's indebtedness to the Government (hereinafter mentioned), that, as it must use all available funds in order to pay said indebtedness, in future no interest be declared or paid to the holders of such certificates, but that all interest earned by the moneys represented thereby be retained for the purpose of reducing said indebtedness or for any other proper association activity.

Up to and including the crop year 1929-30, the association, when receiving the wheat, made an advance on account of the price to the grower. In 1929-30 this advance was followed by such a drop in the price of wheat that the advance was more than what was ultimately realized. The overpayment to the growers was treated as a loss to the association, which arranged for the Saskatchewan Government to pay its debts to the banks and accept repayment in amortized instalment payments, the last of which is payable in 1951. The assets of the association and the Elevator Company were given as security, as set out in statutes, 1931, c. 90, and 1932, c. 77. By s. 3 of the latter Act, "no person who * * * has or may hereafter acquire

any right, title or interest in any elevator deduction or commercial reserve * * * shall be entitled to demand repayment of money which has been placed in any such deduction or reserve or to bring or continue action to enforce any right or interest in respect of such money or deductions or reserves, or any earnings thereof * * *," until the Government has been paid in full.

After the crop year 1929-30, the association abandoned the compulsory pool which it had operated, notified growers of release from their obligation to deliver wheat, and operated a voluntary pool, rendering the same services as theretofore to those growers who desired it, and it entered into business of buying and warehousing grain.

"Patronage dividends" were paid to growers prior to 1930, and again in 1940 and in subsequent years. From 1940 these patronage dividends have been paid, to shareholders delivering wheat to the association, part in cash and part credited to their deduction accounts. The part so credited has been utilized by the association in arranging for repayments in certain cases, under which appellant, as having ceased farming, would qualify to benefit. Appellant contended that, with surplus funds available, interest should be paid on the commercial reserves and elevator deductions before payment of patronage dividends, which, he contended, were, in breach or repudiation of trust, being paid to later shareholders who had made no contribution to the deductions now in question but were getting the benefit of the facilities provided by these deductions and receiving patronage dividends on the same basis as those who became shareholders under the contracts of 1923 and 1927.

Held: Appellant's claims for repayment of deductions and for interest were barred at this time by said s. 3 of c. 77, 1932. Also his action failed for further reasons as follows:

Per Kerwin and Estey JJ.: The contracts with appellant contained no covenant to repay the deductions. The association received and utilized them within the terms of the contracts. There was no breach of covenant or of trust.

The contracts contained no covenant to pay interest. As to the certificates, the proviso therein should not be disregarded as repugnant. Its language qualified, rather than destroyed, the covenant. That interpretation is the natural and reasonable one, and also accords with the conduct of the parties (which may be looked at to assist in construction). The resolutions of the association for payments of interest were mere expressions of intention.

The association's method of paying patronage dividends without having first paid interest now claimed did not violate any trust. Its abandonment of the compulsory pool and its subsequent steps and operations were within its powers and at the same time maintained for those growers who desired it, through the voluntary pool, all the rights and advantages under their contracts. The commercial reserves and elevator deductions have been used within the terms of the contracts under which appellant authorized them.

There being no breach by the association, and in view of its policies adopted and its unquestioned good faith, no purpose would be served in directing a declaratory judgment, which could only be effective

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after the provincial government has been paid in full. This, according to the terms of agreement with that government, would not be until 1951, while under the association's present policy appellant may have received his repayments before that time.

Per Rand and Kellock JJ.: The association was a corporate body with a nominal authorized capital, its effective capital being intended to be provided by the deductions under the contracts. That effective capital was committed to it for certain purposes and impressed with certain contractual and equitable duties; but administrative control over the funds for the purposes of the association was a condition of and a restriction upon each contributor's interest in the association, which interest was a fractional share in the subsidiary capitalization representing for this purpose the whole of the assets, the amount not being fixed, but fluctuating from time to time as the association's needs might require. The dealing with such interests consistently with the co-operative scheme was designed from time to time to maintain ownership of them in the hands of persons who were active participants in the association's business, and it was desirable as a policy that the interest of a contributor who had ceased to market his product through the association be taken over for transfer to a person participating. The interest of a contributor was not that of a debt. There was no failure of the primary purposes to which the money was to be applied; and no suggested breach of contractual or equitable obligation would amount to such a failure or give rise to any right to rescind the original transaction by winding up or otherwise; the relief in any such case would be confined to such modes of compelling a corporation to adhere to the objects for which it was created as might be open to the interested members.

The contributions were made without express stipulation as to interest. The fundamental object of the enterprise would require that any distribution of interest must be only out of net returns; such limitation lies initially on any provision for interest. Assuming, but not deciding, that the certificates were an obligation rather than a declaration of intention, yet the mode of exercising the power reserved therein, consistently with the matter in which it appears, must be taken to be informal and, since it is not required to be communicated to the contributor, of a purely internal character; at most the certificate sets a standard of return to which the association should adhere but on which decision is not intended to be brought within a formal rigidity; the essential fact is the recognition of an obligation to distribute grounded in the circumstances of the contributions. The revocation need not be specific for each year or for a term of years. The circumstances in which the resolution of September 17, 1931, was passed were such as to preclude a distribution of interest; the resolution was simply a declaration that, until otherwise decided, no payments would be made; and it was a proper exercise of the reserved power.

In all the circumstances, including the fact that appellant was merely one of a class with identical interests in the association, a declaration defining his interest should not be made.

Appeal from the judgment of the Court of Appeal for Saskatchewan, [1946] 1 W.W.R. 97, dismissed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1) allowing (Gordon J.A. dissenting) the defendants' appeal from the judgment of Bigelow J. (2) which declared that the defendant Saskatchewan Co-operative Wheat Producers Limited became a trustee for the plaintiff of the deductions made from his grain for commercial reserve deductions, being $94.99, and the amount of the elevator deductions, being $158.03, and that the plaintiff had effectively terminated the trust so declared, and that the plaintiff was entitled to payment by the defendant Saskatchewan Co-operative Wheat Producers Limited of the amount of the said deductions when the claims of the Province of Saskatchewan under the Statutes of Saskatchewan, 1932, c. 77, and 1933, c. 80, are satisfied, together with interest on said deductions (at 5 per cent and 6 per cent respectively, per annum) from September 1, 1930; and ordered that the plaintiff have liberty at any later date to apply for an injunction restraining the defendants from paying further patronage dividends until the plaintiff's claim is paid.

The Court of Appeal allowed the defendants' appeal and dismissed the plaintiff's action. (Gordon J.A., dissenting, would have declared that the defendant Saskatchewan Co-operative Wheat Producers Limited held the deductions in question in trust for the plaintiff, that it committed a breach of trust which justified the plaintiff in determining that trust, and that it was bound to pay interest to the plaintiff annually at said rates provided that such interest was earned.)

Special leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Saskatchewan.

G. H. Yule K.C. and *H. M. Hughes K.C.* for the appellant.

R. H. Milliken K.C. and *E. C. Leslie K.C.* for the respondents.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.—The appellant, Robert Barnes, was a farmer and wheat grower in the Rush Lake District in Saskatchewan until he retired in 1938 and moved to Winnipeg.

(1) [1946] 1 W.W.R. 97; [1946] 3 D.L.R. 552.
(2) [1945] 1 W.W.R. 257.

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The respondent, the Saskatchewan Co-operative Wheat Producers Limited, hereinafter referred to as the Association and commonly known as the Pool, was incorporated in 1923 under the *Companies Act* of the Province of Saskatchewan and confirmed by statute in 1924 (1924 S.S., c. 66, and amendments thereto).

The respondent Saskatchewan Pool Elevators Limited, hereinafter referred to as the Elevator Company, was incorporated in 1925 under the Saskatchewan *Companies Act* for the purpose of acquiring elevator facilities and handling grain delivered to the Association. All the capital stock of the Elevator Company has been at all times and now is owned by the Association and the directors of the Association and the Elevator Company always have been and are the same persons. It is a totally owned and controlled subsidiary of the Association.

In 1923 the appellant was one of a large number of wheat growers in Saskatchewan who entered into contracts with the Association, in the main for the co-operative handling and marketing of wheat.

The first contract with the appellant was dated the 27th day of December, 1923, and under this and a subsequent contract, dated the 7th day of February, 1927, he delivered wheat to the respondent from the year 1924 until he (as were all others who had signed contracts) was released from his obligation to deliver wheat after the crop year of 1929-30.

The appellant claims the repayment from the Association of certain amounts deducted from the selling price of his wheat under the terms of these contracts and known as commercial reserves and elevator deductions; interest thereon at the rate of 5 per cent and 6 per cent respectively from September 1, 1930; or in the alternative a declaratory judgment setting forth the rights of the plaintiff with respect to these commercial reserves and elevator deductions.

Under the first contract the appellant purchased a share of the capital stock of the Association for $1.00. Since then he has been and is a shareholder of the Association. In this action, however, he bases his claim upon his con-

tracts rather than upon his position as a shareholder and therefore his rights must be determined as fixed by the contracts between himself and the Association.

The first contract, dated the 27th of December, 1923, provided for the taking of the commercial reserves and the elevator deductions in the following terms:

(*a*) Commercial Reserves

8. (*d*) To pay or retain and deduct from the gross returns from the sale of the wheat delivered to it by the Growers the amount necessary to cover all brokerage, advertising, taxes, tolls, freights, elevator charges, insurance interest, legal expenses, operating costs and expenses, and all other proper charges, such as salaries, fixed charges and general expenses of the Association and, in addition, the Association may deduct such percentage, not exceeding one per cent (1%) of the gross selling price of the wheat as it shall deem desirable as a commercial reserve to be used for any of the purposes or activities of the Association.

(*b*) Elevator Deductions

8. (*f*) To deduct from the gross returns from the sale of all wheat handled by the Association for Growers who have executed this agreement or an agreement similar in terms a sum out of each Grower's proper proportion thereof, not exceeding two cents (2c.) per bushel and to invest the same for and on behalf of the Association in acquiring either by construction, purchase, lease or otherwise such facilities for handling grain as the Directors of the Association may deem advisable or in the capital stock or shares of any company or association formed for the purpose of so erecting, constructing or acquiring such facilities and to sell or otherwise dispose of any such investment and re-invest the proceeds thereof in like manner.

Before the completion of this contract and under date of February 7, 1927, the appellant and the Association entered into a second contract covering the years 1928 to 1932 inclusive. The authority to deduct the commercial reserve is provided for in this second contract in para. 6(*d*) in identical language as in para. 8(*d*) of the first contract except that after the word "used" the words "in the conclusive discretion of the Association" are inserted.

The elevator deductions are provided for under para. 6(*e*) of the second contract in language much to the same effect as para. 8(*f*), except that it contains these words:

* * * to hold and retain the same for such period as the Directors of the Association may deem advisable, either with or without paying interest thereon; * * *

This is the only reference to the payment of interest with respect to these funds in either of these contracts.

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Under the first contract the Association deducted commercial reserves from Barnes in the sum of $67.38, and under the second contract $27.61, a total of $94.99. The elevator deductions under the first contract totalled $110.56 and under the second contract $47.47, or a total of $158.03, or a total deduction under both contracts of $253.02. As these deductions were made the Association credited the amounts thereof in Barnes' account. The last deductions under the contracts were made out of the proceeds of the 1928 crop.

Similar amounts were deducted from all growers, and thereby the Association realized commercial reserves in the sum of $6,567,851.17, and elevator deductions in the sum of $12,188,060.07, a total of $18,755,911.24.

Commercial reserves were used for the purposes and activities of the Association, and the elevator deductions were utilized to purchase the capital stock of the elevator company.

If, as the appellant contends, these commercial reserves and elevator deductions were received and applied by the Association, subject to a trust, for the benefit of the growers who signed the contracts, the terms of the trust must be found within these contracts. They contain neither a covenant for payment of interest thereon nor for repayment of the principal. The evidence establishes, and it is not contended otherwise, that the Association has received and utilized these funds within the terms of the contracts and its own powers as incorporated. There is no breach of covenant or of trust under these contracts alleged with respect to these deductions nor does the record disclose any. The appellant's claim for repayment thereof must fail.

The appellant submits that he is entitled to interest upon these two funds. This claim is not founded upon any covenant or term in the contract of the 27th of December, 1923, or that of the 7th of February, 1927, but upon subsequent events. In fact, the only reference to interest in either of these contracts is that in the contract dated February 7, 1927, where in para. 6(*e*) it is provided that with respect to elevator deductions these may be

retained "for such period as the Directors of the Association may deem advisable, either with or without paying interest thereon."

It would appear that, while the Association did not obligate itself to pay interest under these two contracts, as early as July 16, 1925, it did entertain an intention to pay interest. Upon that date the directors passed a resolution that elevator deductions should "bear interest at the rate of six per cent (6%) and that interest date from the date of the final payment". This resolution of July 16, 1925, was followed by statements issued and forwarded from time to time by the Association to the growers showing the amount of the elevator deductions and interest thereon. These statements contained the following:

> The crediting of interest during the present contract, as well as the payment of interest on the certificates, is conditional on the Pool Elevators having sufficient earnings, after taking care of expenses and depreciation, to provide for same.

Interest was paid upon elevator deductions from September 1, 1925, to August 31, 1930, (the payment for year ending August 31, 1930, not made until 1941).

The first contract covered the crops up to and including that of 1927. In 1929 the Association issued two certificates, one setting out commercial reserves and the other elevator deductions taken under the first contract. These certificates were under the seal of the Association and as recommended by the directors were approved by a resolution passed November 26, 1928, at the annual meeting of the Association delegates. They were delivered to the growers who had signed the contract of December 27, 1923, and bind the Association. These elevator deduction certificates contained the following:

> Interest from September 1, 1928, will be paid annually at the rate of Six (6) per cent per annum on the sums represented by this Certificate which shall from time to time remain unpaid, provided however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect.

The identical language appears in the certificate evidencing commercial reserves except that the rate of interest is 5 per cent instead of 6 per cent. This is the first

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mention of interest on commercial reserves, but Mr. Robertson stated it was decided to pay interest on them in 1928 and that interest was paid thereon from September 1, 1927, to August 31, 1930. Deductions under the contract dated February 7, 1927, were taken only in the crop year 1927-28 and no certificates were issued covering same.

These certificates contain an obligation on the part of the Association to pay interest from September 1, 1928, with a proviso that the Association may declare that a lower rate or no interest shall be payable "in any year or years". The appellant submits that the proviso in effect destroys the covenant to pay interest and is therefore repugnant and should be disregarded.

It would appear, however, that the language used in the proviso qualifies rather than destroys the covenant. In appreciation of the possibility of reduced earnings the Association reserved the right by this proviso to "in any years or years" reduce the rate or provide that no interest should be paid. Not only does such an interpretation appear the natural and reasonable construction, but it is in fact in accord with the conduct of the Association. These certificates were issued in 1929. The Association had paid interest on the elevator deductions since September 1, 1925, and on commercial reserves from September 1, 1927, and continued to do so until August 31, 1929. The heavy loss incurred by the overpayment in 1929-30 and the subsequent indebtedness to the government made any payment of interest impracticable if not impossible. When in 1941 the financial position of the Association permitted, interest was paid for the year ending August 31, 1930. It was also stated in evidence that interest on the elevator deductions of 3 per cent was paid for 1943 and would be paid for the next year. This payment is subject to the suggestion that it was prompted by the commencement of this action, but it should also be noted that the financial position of the Association had considerably improved. Moreover, the appellant took no exception to, nor made any inquiry with respect to any of these steps. In fact, it would appear that throughout he left the question of the paying of interest entirely a matter for the Association. He made

no mention of interest until his last letter to the Association dated August 31, 1943, before the commencement of this action.

Such conduct may be looked at to assist in the construction of this resolution: *Chapman* v. *Bluck* (1), where Tindal, C.J., stated at p. 193:

* * * there is no better way of seeing what they intended than seeing what they did, under the instrument in dispute.

and Park, J., at p. 195:

The intention of the parties must be collected from the language of the instrument, and may be elucidated by the conduct they have pursued.

See also *Watcham* v. *East Africa Protectorate* (2), and *Firestone Tire and Rubber Co. Ltd.* v. *Commissioner of Income Tax* (3).

This construction is supported both by the language of the resolution and the conduct of the parties, and is to be preferred to that suggested by the appellant, in that it avoids any application of the rule as to repugnancy. *Git* v. *Forbes* (4), where Duff J. (later Chief Justice), whose conclusions were supported by the Privy Council (*Forbes* v. *Git* (5)), stated:

The rule as to repugnancy, therefore, is obviously a rule to be applied only in the last resort and when there is no reasonable way of reconciling the two passages and bringing them into harmony with some intention to be collected from the deed as a whole.

In fact, interest at 6 per cent was paid on elevator deductions on the basis of the resolution of July 16, 1925, to August 31, 1930, and interest at 5 per cent on commercial reserves from September 1, 1927, to August 31, 1930. Interest was therefore paid in accordance with the terms of these certificates from September 1, 1928, until August 31, 1930.

Counsel for the appellant submits that a resolution passed by the Board of Directors on September 17, 1931, and the consequent non-payment of interest constitutes a breach of the Association's obligations to pay interest under these two certificates. This resolution reads as follows:

Resolutions passed by the Pool Board Sept. 17, 1931:

Whereas elevator deduction certificates and commercial reserve certificates have been issued to all persons from whom elevator deduc-

(1) (1838) 4 Bing. N.C. 187.
(2) [1919] A.C. 533.
(3) [1942] S.C.R. 476, at 482
(4) (1921) 62 Can. S.C.R. 1 at 10.
(5) [1922] 1 A.C. 256.

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tions and commercial reserve deductions have been taken from the proceeds of the sale of wheat and (or) coarse grains delivered to the Company during the years 1924 to 1927 both inclusive; and

Whereas such certificates provide for the Company paying interest thereon; and

Whereas large sums of money are owing by the Company to the Government of Saskatchewan in connection with the sale of the 1929 crop; and

Whereas the Company must use all available funds in order to repay such sums of money;

Therefore, be it resolved that in future no interest be declared or paid to the holders of any such elevator deduction certificates and (or) commercial reserve certificates, but that all interest earned by the moneys represented by such certificates be retained by the Company for the purpose of reducing its said indebtedness to the Government of Saskatchewan or for any other proper Company activity.—Carried.

This resolution was passed when the financial position of the Association was such that it was indebted to the provincial government for over $22,000,000, as security for which had been pledged assets of both of the respondents, and when, as Mr. Robertson stated:

It was necessary for us to secure a guarantee of our bank line of credit from the Dominion Government in 1931 in order to be able to operate.

Both in the recitals and in the operative part of this resolution reference is made to the indebtedness to the Government of Saskatchewan. This indebtedness was created by an overpayment to the growers in 1929-30. Up to and including the crop year 1929-30, the Association received the wheat and coincident therewith made an initial payment or an advance on account of the price to the grower. Then as his agent it pooled and sold the wheat and paid to the grower the balance of the price in subsequent payments as funds permitted. This practice is provided for in para. 16 of the contract. In 1929-30 the initial advance was followed by such a drop in the price of wheat that the advance per bushel was more than that ultimately realized, with the result that in making its initial payment or advance the Association overpaid the growers to the extent of $13,305,654.98. In this emergency the Association arranged with the government to pay its indebtedness to the bank and accept repayment thereof "in nineteen equal amortized payments, principal and interest", which totalled over $22,000,000. The last instalment is payable in 1951,

and at the time of the trial, while all payments had been made up to date, there was still a balance owing of about $7,700,000. The assets of both of the respondents were given as security therefor, as set out in the Statutes of Saskatchewan, 1931, c. 90, and 1932, c. 77. Under section 3 of the latter statute:

* * * no person who * * * has or may hereafter acquire any right, title or interest in any elevator deduction or commercial reserve * * * shall be entitled to demand repayment of money which has been placed in any such deduction or reserve or to bring or continue action to enforce any right or interest in respect of such money or deductions or reserves, or any earnings thereof * * *

This section constitutes a bar to the plaintiff's action except in so far as he asks a declaratory judgment and an injunction.

It is provided in para. 17 of the Articles of the Association "the business of the Company shall be managed by the Directors". No question is raised as to the authority of the directors to pass this resolution of September 17, 1931.

The operative portion of this resolution, when read in the light of the recitals, is intended, and should be so construed, to cover the period of financial need created by the overpayment of 1929-30 and now evidenced by its indebtedness to the government and repayable as already stated. The depression had greatly reduced the price of wheat. A perusal of these agreements and statutes will indicate the depressed condition of the wheat market and the uncertainty with regard to the future. Under these circumstances it was evident that all available sources of revenue would be required for some time to pay the government and the necessary costs of operations. The directors, under the certificates and para. 17 of the Articles of the Association, had authority to provide for non-payment of interest "in any year or years". That authority did not require that they specify the years; they might have done so, but the fact that they did not does not constitute an excess of authority nor invalidate the resolution.

The last phrase in the resolution, "or for any other proper Company activity", evidences their further caution in that these revenues might be required, or it might be

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more convenient at a given moment to use them in some other activity of the Association other than for the payment of the government indebtedness. Without the addition of these words it might be contended that the resolution restricted them entirely to payment of the government.

Any other construction of this resolution would involve a distinct change in policy on the part of the Association with respect to the payment of interest, which was not intended, as evidenced by the payment in 1941 of the interest due as of September 1, 1930, and as stated upon this point by Mr. Robertson:

> The policy has always been the same since the inception of the organization.

Immediately after the overpayment, consideration was given to the collection of it from the growers to whom it was paid. That was not done; rather it was decided to treat it as a company loss.

There were no certificates and therefore no convenant to pay interest on the deductions under the contract of February 7, 1927. The appellant's essential difficulty in his claim for interest is that when he signed the contracts in 1923 and 1927 he did not then see to it that there was a provision included for the payment of interest. It is true that the Association through its resolutions provided for the payment of interest, but these are, to one who claims on a contract, mere expressions of intention. The Association has been very careful in its communications with the growers and in the phrasing of the certificates not to unqualifiedly obligate itself to pay interest.

The appellant's further contention is that, with surplus funds available, interest should be paid upon the commercial reserves and elevator deductions before payment of patronage dividends. His position is stated as follows:

> The Appellant's complaint is not that to pay patronage dividends is not proper, but to pay them as they have been paid without making provisions for performance of the promise of the trustee to pay interest, and to divert monies to pay patronage dividends without paying interest, is a breach of trust or what may be more accurately described as a repudiation of trust.

If there be a trust it is, as Mr. Justice MacDonald states, by virtue of the contracts dated December 27, 1923, and

February 7, 1927, and whatever trust their terms may create, with respect to these funds, they do not impose any obligation upon the Association to pay interest. The certificates cover only the deductions under the first contract (December 27, 1923). They do not create a trust but only a promise to pay subject to a proviso already discussed. The absence of any unqualified obligation to pay interest disposes of the appellant's contention, but as he suggests that his investment is being "wiped out" and asks for a declaration as to his rights, it should be pointed out what the Association is now doing with regard to these funds.

Notwithstanding the absence of any covenant to pay interest or to repay the principal, the Association has been providing for repayment of the principal to certain of its members, including now those who find themselves in a position similar to that of the appellant. In recent years the Association has realized substantial surpluses, out of which it has transferred to the patronage dividend account the following amounts:

1939-40	$ 500,000
1940-41	900,000
1941-42	1,030,000
1942-43	1,800,000

Out of this patronage dividend account, in 1940 and since, have been paid (*a*) patronage dividends and (*b*) in 1944 during the currency of this litigation, payment of 3 per cent on elevator deductions. These patronage dividends or, as the Association prefers, excess profits refunds, were paid to the growers prior to 1930 and were then discontinued until 1940.

From and after 1940 these patronage dividends have been paid to the shareholders delivering wheat to the Association, part in cash and part credited to their deduction accounts. This part so credited has been utilized by the Association to make repayments to (*a*) estates of deceased members, (*b*) growers who have ceased farming, (*c*) growers who are totally disabled but may still have an interest in delivering grain, and (*d*) growers who have reached the age of 70 years, or such lower age as the Board may from time to time determine. In 1940, $2,559,217.44,

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representing the accumulated credits of growers for patronage dividends covering the period 1930 to 1938 inclusive, was paid to the growers. In addition, an amount of $290,065.66 was retained for the purchase of deduction certificates, making a total distribution during the fiscal year ending July 31, 1940, of $2,849,283.10. Then in the three following years the distribution was as follows:

	Paid out in cash as part of Patronage Dividend to Growers	Retained to purchase Certificates
1940-41	$239,981.01	$239,703.12
1941-42	441,350.34	433,650.73
1942-43	510,365.32	463,271.58

At the trial, Mr. Barnes' age was given as being over 70 and he therefore qualifiies for repayment under both (*b*) and (*d*) of the foregoing heads.

This method enables the Association to pay out the deductions taken from those who have ceased to be growers and to transfer the amounts thereof to the deduction accounts of those who are currently growers. The Association under this method works toward the end that those who are currently growers and shareholders provide the capital. The financial position of the Association during the years 1930 to 1940 made impracticable, if not impossible, the payment of patronage dividends.

Under this plan the Association is not violating any trust or obligation that it has assumed with respect to these deductions, and therefore does not subject itself to any liability.

One of the appellant's main complaints seems to be that those who purchased shares since 1932 and made no contribution to the deductions are getting the benefit of the facilities provided by these deductions and receiving patronage dividends on the same basis as those who became shareholders under the contracts of 1923 and 1927. When the compulsory pool was abandoned, no further contracts were entered into. In order to maintain and to increase its volume of business, the Association decided to offer shares to growers not already members at $1 per share. Some 24,800 growers purchased these shares. It is true that they then made no contribution to these deductions,

but since 1940 they have contributed toward the purchase of these deductions, as above explained, through a retention of a portion of their patronage dividends and for which they received credit in their respective deduction accounts. It possibly would have been done earlier had the Association realized sufficient surplus to declare a patronage dividend. In any event, the Association has again acted within its powers and without creating a breach of any obligation it owed to the appellant.

The appellant further contends that these deductions were taken subject to an undertaking that the wheat would be handled by the Association in a pool in which it would act as agent on behalf of the growers, and that since 1929-30 it has not done so and is therefore in breach of its contract. It is clear that at the time the contracts of 1923 and 1927 were executed, the Association intended and covenanted to operate a compulsory pool in which it would act as agent for the grower. The experience of 1929-30 caused the Association to abandon the compulsory pool and as a consequence notified the growers that they were released from their obligations to deliver wheat under the contract. The Association then decided to operate a voluntary pool, rendering the same services as contracted for in the compulsory pool to those growers who desired it. This it did from 1931 in the years that "the Canadian Wheat Board did not function. That is the Wheat Board operates as a pool of course."

At the same time the Association entered into the business of buying and warehousing grain delivered by its shareholders, and further, as required by the Grain Act, it received grain from non-members so far as its facilities permitted. The Association in making this change acted well within its powers under its Act of Incorporation, and at the same time maintained for those growers who desired it, through the voluntary pool, all the rights and advantages under their contracts.

The appellant does not suggest that he was denied any rights under his contracts of December 27, 1923, or February 7, 1927, nor that he, either at the time or now, objects to the Association having adopted this additional method of handling grain. In fact, after he was advised

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that he was not obligated to deliver wheat to the Association, he continued to do so, but the evidence does not disclose whether the Association purchased or stored the grain or whether it was pooled.

These commercial reserves and elevator deductions have been used within the terms of the contracts under which the appellant authorized their deduction and retention without any covenant to pay interest or to repay the principal. The subsequent steps taken by the Association, and already detailed, do not provide a basis upon which the appellant can claim either of these.

The Association, however, has as a matter of policy commenced making repayments of the principal, on the basis already discussed, to certain groups of which the appellant is one. These payments are made to the members within these groups in the order of the reception of their respective applications and in any year up to the amount of the funds available.

Under the circumstances of this case, there being no breach on the part of the Association and it having adopted the policy just mentioned, and the good faith of the Association not questioned, there would appear to be no purpose to be served in directing a declaratory judgment which, as the appellant concedes, could only be effective after the provincial government has been paid in full. This, according to the terms of the agreement with that government, would not be until 1951, while under the present policy of the Association the appellant may have received his repayment before that date.

The appellant cited a number of cases including *Grainger* v. *Order of Canadian Home Circles* (1). There the company imposed upon the plaintiff substantial changes in the contract. Some of these changes were validly made, but so far as they were not, a declaratory judgment was directed setting forth the plaintiff's rights. A breach of contract was in that case proved. In the case at bar no breach has been established, and no case has been cited that goes so far as to direct a declaratory judgment against a party carrying on within the limits of its contractual rights.

The appeal should be dismissed with costs.

(1) (1914) 31 O.L.R. 461, affirmed (1915) 33 O.L.R. 116.

The judgment of Rand and Kellock JJ. was delivered by

RAND J.—The incorporation of the co-operative company in 1923 and its confirmation by statute in 1924 had as its object the establishment of co-operative selling of the principal product of Saskatchewan, wheat. Prior to that time the business of marketing grain was carried out as a separate private enterprise; and it can be gathered from the material before us, what is a basic inference from the co-operative principle, that elimination of the intermediate profit was the *sine qua non* of the organization.

The mode of introducing that feature into the mechanism adopted makes it important to examine closely the constitution of the company incorporated to achieve the purposes in view. There was the general authorization to carry on the business of co-operative collecting, buying, handling, marketing and selling the product in all of its ramifications. But a business of the scope envisaged required obviously a substantial capital, and it is the manner in which capital was to be raised and dealt with that constitutes, for the purposes of this appeal, the controlling consideration of the enactment.

The share capital, originally $100,000, later $200,000, was divided into the same number of shares of the value of $1 each. Members were to be grain growers in the province, and originally were required to bind themselves by contract to market all their wheat through the company. Power was given to limit the holding of a member to one share, and that was done by clause 4a of the Articles. Section 6 specifically forbade the declaration or payment to the shareholders of any dividend. Clause 24 of the Articles provided:

> 24. * * * The Directors may, subject to the terms of the Grower's contract, deduct such sums for elevator purposes as they deem advisable and may invest on behalf of the Company, such deductions, either in the purchase of elevator facilities or in the stock of a company or companies to be formed or hereto formed, for the purpose of acquiring such facilities.

Sections 13 and 14 of the Act were as follows:

> 13. In the event of the company going into liquidation or being wound up, voluntarily or otherwise, the assets of the company in liquidation shall, after the payment of all just debts, claims, costs and expenses, be distributed among such persons, their successors or assigns, whether members of the company or not, who have delivered to the company a

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commodity or commodities for sale by the company, *pro rata,* in proportion to the amount retained by the company from the proceeds of the sale of such commodity or commodities, and shown to be standing to the credit of such persons on the books of the company at the time of the commencement of such winding up or liquidation.

14. No transfer sale or assignment of or charge on the interest of any person in any moneys deducted by the company from the proceeds of any commodity or commodities handled by the company, or the interest of any person in any security or property in which the same may have been invested, or in the proceeds of any such investment, shall be valid until approved by the company, in a manner to be determined by the company, who shall have an absolute discretion as to the granting of such approval, and until such approval the company shall not be required to recognize any such transfer, sale assignment or charge in any way whatsoever.

The share capital was obviously not designed to raise the necessary funds, and the method of doing that is implied by clause 24 of the Articles. Under the original contracts which bound the member to an exclusive marketing for a period of five years, there were the following provisions dealing with deductions and related matters:

8. The Grower hereby appoints the Association his sole and exclusive agent * * *

* * * *

(*d*) To pay or retain and deduct from the gross returns from the sale of the wheat delivered to it by the Growers the amount necessary to cover all brokerage, advertising, taxes, tolls, freights, elevator charges, insurance interest, legal expenses, operating costs and expenses, and all other proper charges, such as salaries, fixed charges and general expenses of the Association and, in addition, the Association may deduct such percentage, not exceeding one per cent (1%) of the gross selling price of the wheat as it shall deem desirable as a commercial reserve to be used for any of the purposes or activities of the Association.

* * * *

(*f*) To deduct from the gross returns from the sale of all wheat handled by the Association for Growers who have executed this agreement or an agreement similar in terms a sum out of each Grower's proper proportion thereof, not exceeding two cents (2c) per bushel and to invest the same for and on behalf of the Association in acquiring either by construction, purchase, lease or otherwise such facilities for handling grain as the Directors of the Association may deem advisable or in the capital stock or shares of any company or association formed for the purpose of so erecting, constructing or acquiring such facilities and to sell or otherwise dispose of any such investment and re-invest the proceeds thereof in like manner.

* * * *

17. The Grower covenants and agrees to, and hereby does irrevocably apply for one (1) share out of the Ordinary Shares in the capital stock of the Association and agrees to pay to the Association the par value

thereof, namely, the sum of One Dollar ($1.00). The Association covenants and agrees to accept the said application and to allot to the Grower one (1) share of stock out of the Ordinary Shares in the capital stock of the Association, provided the signatures required by paragraph 1 hereof are obtained within the time therein set out. Should such signatures be not so obtained the Grower agrees that the said sum of $1.00 shall be a contribution to the Association for the purposes set out in paragraph 18 hereof.

18. The Grower covenants and agrees to pay the further sum of Two Dollars ($2.00) to defray the expenses of organization, including the expenses of and of formation of the committee known as The Wheat Pool Organization Committee to carry on field service and educational work and other proper activities of the Association.

Power to distribute money, proceeds or investments was contained in section 4(*cc*) of the Act:

(*cc*) To pay or recoup to, reimburse for or distribute to, any person or persons who have entered into a marketing contract with the company, any moneys contributed directly or indirectly to the company by them, or deducted or withheld from the proceeds of any grain sold by them through the company or the proceeds of any such moneys or any investment thereof. All such payments or distributions, as far as practicable, to be made on the basis of the same proportion in which they were contributed by such persons respectively; such payment or distribution to be made in whole or in part at such times and place and in such manner as in the absolute discretion of the company may seem expedient; provided any or all of such contributions, deductions, or the proceeds or earnings thereof may be withheld or retained with or without paying interest thereon and may be invested or reinvested in any company, corporation or business, whether operated upon a profit, non-profit, patronage dividend basis or otherwise. The provisions of this clause shall be construed and read as if they had been in force since the first day of January, 1929.

Clause 10 of the Articles dealt with the case of a member ceasing to be under contract or making default in its performance, and power was given the directors to forfeit the share held by him. A proviso declared

that upon such forfeiture any surplus of reserves or elevator or other deductions standing to the credit of such member, shall thereupon be valued by the Directors of the Company and settlement made with such defaulting member. The decision of the Board of Directors as to the value of the interest of such member in such surpluses, reserves or other deductions shall be final.

In the case of death or bankruptcy of a member, clause 11 provided that the representative "shall be entitled to the same distribution and other advantages" as if he were the registered holder of the share.

By clause 19 the business was to be conducted in such manner and on such a basis that so far as possible no

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profit should be taken from, charged to or exacted against any member on the marketing of any grain for him by the company, pursuant to a contract between them.

At the end of the first contract period, which covered the crop years from 1923 to 1927 inclusive, there was issued to each contract holder, from whom elevator deductions had been made, a certificate under the seal of the company in these terms:

ELEVATOR DEDUCTIONS
CERTIFICATE

THIS IS TO CERTIFY that R. BARNES, 166-007 of RUSH LAKE in the Province of Saskatchewan has been credited on the books of SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS LIMITED, with the sums shown on the attached coupons, which sums represent the Elevator Deductions made in accordance with the terms of the contract between the said Company and its grower members, from the returns of the sale of wheat and other grains delivered prior to July 21st, 1928; particulars of which Deductions are shown for each year on coupons attached.

Interest from September 1st, 1928, will be paid annually at the rate of Six (6) per cent per annum on the sums represented by this Certificate which shall from time to time remain unpaid, provided however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect.

The Company may, in accordance with the terms of the said contract, retain the said sums or may repay all or any part of the said sum or sums upon any interest due date, by giving notice of its intention so to do, in at least two daily newspapers to be published in the province of Saskatchewan, or by letter addressed to the holder thereof at his last address appearing on the books of the company and interest on the sums to be so repaid shall cease to accrue from the date for payment fixed in such notice, or the company may at its option in lieu of payment, allot to the holder of such certificate shares of stock in any company in which the company may have invested the said moneys, to an amount equal to the principal sum then remaining unpaid, provided, that if the holder hereof shall cease to be a member of the company by reason of the forfeiture of the share of such member as provided by article 10 of the Articles of Association of the Company, the sums then standing to the credit of such holders as evidenced by this Certificate shall be valued and paid by the directors as provided by the aforesaid article 10.

No portion of the sums represented by this Certificate shall be paid without the delivery to the Company of the coupon covering the sum intended to be paid, or in the case of the final coupon payment without the delivery of such coupon accompanied by this Certificate.

The amount set forth herein is subject to income tax deductions (if any).

No transfer or assignment of this Certificate or any portion thereof shall be valid unless and until approved by the Company in such manner and subject to such conditions as the Company may determine.

A similar certificate was issued to cover the commercial reserve deductions.

The question raised in this appeal is whether the appellant, from whose returns both elevator and reserve deductions were made, is entitled to a declaratory judgment that, as for a breach of trust or otherwise, the principal sums or interest on them or both are now owing to him. Admittedly his right to recover is in any case barred at this time by section 3, chapter 77, of the Statutes of Saskatchewan, 1932.

What was set up was a corporate body with a nominal authorized capital, the effective capital of which, both fixed and working, was intended to be provided by the deductions under the contracts. This meant an informal within the formal capitalization.

The former, as to the elevator deductions, has been invested by the company in fixed assets. The handling facilities are owned largely by the elevator company of which the parent company holds all of the capital stock; and that stock is seen to be the converted form of the original contributions. The commercial reserves were to be held and applied generally to the purposes of the company, including working capital for subsidiaries.

What, then, is the relation of the individual contributor to the company? The clue to that lies, mainly, I think, in the provision of section 13 for the mode of distribution of assets on liquidation. That section treats the contributions as the basic capital and each contributor as having an "interest" in the company. That interest is recognized throughout the Act, and I think it clear that it is a fractional share in the subsidiary capitalization representing for this purpose the whole of the company's assets. The amount is not fixed, but from time to time fluctuates as the needs of the company may require. Theoretically, the operations on the co-operative basis would never yield a profit; but they would take into account all appropriate accounting charges, including that on the capital which furnished the means for carrying them on.

The effective capital was thus committed to the company for certain purposes and impressed with certain contractual and equitable duties; but it was committed permanently

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to those purposes and duties. Should the original purposes fail, the company would be wound up and the distribution of assets made under section 13 of the Act; but administrative control over the funds for the purposes of the organization was a condition of and a restriction upon the interest created.

The dealing with those interests consistently with the co-operative scheme is designed from time to time to maintain ownership of them in the hands of persons who are active participants in the company's business. If, for instance, a contributor has ceased to market his product through the company, it is desirable as a policy that he cease likewise to have a voice in the company's affairs and that his interest be taken over for transfer to a person participating; and clauses (*dd*) and (*ee*) of section 4 of the statute seem directed to that object:

> (*dd*) To provide for the expropriation of or taking over of the shares or other interests in the company or in the assets thereof of any person or persons who cease to become holders of contracts with the company and to make provisions for compensation therefor;
>
> (*ee*) To make provision that a shareholder who ceases to be a holder of a contract in the company shall not have any right to vote in the affairs of the company;

Thus the entire concern of the company, plant, administration and operations, becomes confined to those who are presently availing themselves of its functions. Paragraph (*cc*) provides for a partial distribution of money, proceeds or investments, among other cases, as where the informal capital was being reduced because of an excess in deductions or where surplus assets or profits appeared. But the elimination of these interests, except upon a winding-up, could no more be brought about than that of share capital.

From this it follows that the interest of the contributor is not that of a debt, and that it is inaccurate, technically, to speak of the repayment or the recovery of the contributions. If the recital in the certificate that the sums may be repaid on any interest due date, means "in accordance with the terms of the said contract", it is without foundation in fact; and so far as it purports to declare a power based on a misconception of and inconsistent with the nature of the interest affected, it is *ultra vires*. There has been no failure of the primary purposes to which the

money was to be applied; and no suggested breach of contractual or equitable obligation would amount to such a failure or give rise to any right to rescind the original transaction by winding-up or otherwise. The relief in any such case would be confined to such modes of compelling a corporation to adhere to the objects for which it was created as might be open to the interested members.

The contributions were made without express stipulation as to interest: the certificate is claimed to have contractual force only because it is under seal; there is nothing in the Act expressly authorizing its issue; and no question of estoppel can arise.

The contention is that the certificate constitutes an obligation by which interest became payable except as the company might for each year declare that none or a reduced percentage would be paid. This presents more complication, but when viewed in the background of the *de facto* capital structure, the purpose and intention of the language become clearer.

The real complaint is that, while since 1930 no return has been made to the contributors, enormous sums are being distributed as patronage dividends by the elevator company. But the latter are part of the operations of the enterprise. The implied contract with those offering grain on co-operative terms is to handle the products at cost. That was the essence of the original purpose to which the contributions were made. It happens that the appellant is no longer farming and is not now enjoying the benefit of this co-operative feature. But he was its beneficiary until retirement; he was likewise one of the recipients of an initial over-advance in 1929, amounting to more than $13,000,000, the settlement of which with the banks and the provincial government has taxed the entire resources of the company and on which there still remains a principal debt of over $5,000,000.

The provision for "interest" reflects the minds of the incorporators. They sought to shun even the appearance in terminology of profits; and in relation to dividends on the capital stock of the elevator company, the resolution of July 8, 1931, speaks of "interest on capital stock". What is intended is a limitation in distribution to the equivalent

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of interest from the returns of the funds committed to the enterprise, but that distribution can be made only out of net returns. To confine interest to available earnings could never defeat the fundamental object of the enterprise; to bind the company to pay interest in any event, might do that, and consequently be *ultra* the company's powers. This limitation lies initially, then, on any provision for interest. Whether as to its payment the company is a debtor or under a trust duty, it is unnecessary to decide.

What then is the effect of the language of the certificate? Is it a declaration of intention or of obligation? Assuming, but not deciding, it to be the latter, in the background of investment as against money lent and the limitation of payment out of net returns, its interpretation takes on another aspect. That

> Interest from September 1st, 1928, will be paid annually at the rate of Six (6) per cent per annum on the sums represented by this Certificate which shall from time to time remain unpaid, provided however, that the Company reserves the right to declare that a lower or other rate of interest, or no interest, shall be payable in any year or years, all interest payments shall be non-cumulative in effect.

adds nothing to what I should consider the duty of the company toward the holder, except as it might be construed as analogous to a standing declaration which, as each year expires without action under the reservation, gives rise to a right to that year's interest. But the mode of exercising the reserved power consistently with the matter in which it appears, must be taken to be informal and, since it is not required to be communicated to the contributor, of a purely internal character.

This view is strengthened when it is set against the fact that there is no other competing interest in the company for these distributions. At most, the certificate sets a standard of return to which the company should adhere but on which decision is not intended to be brought within a formal rigidity. The essential fact is the recognition of an obligation to distribute grounded in the circumstances of the contributions; and the exclusive appropriation of returns for the benefit of conflicting interests such as patronage dividends would be a violation of that duty.

In those circumstances, the contention that the revocation should be specific for each year or for a term of years, must be rejected.

On July 8, 1931, the elevator company passed the following resolution:

> That all earnings of Pool Elevators in future years, declared to be available, including interest on capital stock and excess earnings, be used to meet the amount of the overpayment.

And on September 17, 1931, that was followed by one of the company in this language:

> Whereas elevator deduction certificates and commercial reserve certificates have been issued to all persons from whom elevator deductions and commercial reserve deductions have been taken from the proceeds of the sale of wheat and (or) coarse grains delivered to the Company during the years 1924 to 1927 both inclusive; and
>
> Whereas such certificates provide for the Company paying interest thereon; and
>
> Whereas large sums of money are owing by the Company to the Government of Saskatchewan in connection with the sale of the 1929 crop; and
>
> Whereas the Company must use all available funds in order to repay such sums of money;
>
> Therefore be it resolved that in future no interest be declared or paid to the holders of any such elevator deduction certificates and (or) commercial reserve certificates, but that all interest earned by the moneys represented by such certificates be retained by the Company for the purpose of reducing its said indebtedness to the Government of Saskatchewan or for any other proper Company activity.

It may be pointed out that the surplus of the company comes substantially from the elevator company, and from the action of the latter it followed, apart from the outstanding debt to the province, that virtually no net would accrue to the company in that period. This would preclude a distribution of interest. The company's resolution "that in future no interest be declared * * * all interest earned by the moneys represented by such certificates be retained by the Company", so far as it might be taken to purport to bind the company for the future, would obviously be of no effect; it is simply a declaration that, until otherwise decided by the company, no payments will be made; and I think it a proper exercise of the reserved power.

Is the appellant, then, entitled to a declaration defining the interest held by him in the company? In addition to the complication of the arrangement, what must be kept in mind is that he is only one of many thousand grain

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growers who are members of the company and have made similar contributions. The preamble of the contract recites:

> And whereas, this Agreement, although individual in expression, is one of a series either identical or generally similar in terms between the Association and Growers of wheat in the Province of Saskatchewan and shall constitute one contract between the several Growers of wheat in the Province of Saskatchewan signing the same and this Association.

The appellant is therefore merely one of a class with identical interests in the company. In all these circumstances, I do not think such a declaration should be made.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Gilbert H. Yule.*

Solicitors for the respondents: *MacPherson, Milliken, Leslie & Tyerman.*