JOHN KIDSTON (PLAINTIFF).....APPELLANT;

1920

*Oct. 21, 22, 25.
*Nov. 23.

AND

STIRLING AND PITCAIRN, LTD. (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Construction—Essential term—Special meaning—Parol evidence—Company—Shares—Premium—Payment—Appropriation.

Both parties to a contract in writing agreed that one of its terms was not used in the ordinary sense and parol evidence to explain its special meaning was received.

Held, Brodeur J. *contra*, that, such term being essential and the evidence showing that the parties were not *ad idem* as to it, there was no contract. Idington J. was of opinion that there was a contract but the damages should be assessed by a reference and not as the Court of Appeal directed.

Per Brodeur J. (dissenting).—A contract is binding upon the parties notwithstanding their different interpretations of its terms; and it is for the court to determine which of these interpretations must be upheld according to the surrounding circumstances which can be proved by oral evidence.

The appellant having subscribed for fifty shares of the company respondent, they were allotted to him at $120 per share being at a premium of $20 per share. The appellant sent his cheque for $1,500.

Held, Brodeur and Mignault J.J. dissenting, that the $1,500 should be apportioned *pro rata* between the premium and the par value of the shares.

Judgment of the Court of Appeal ([1920] 3 W.W.R. 365) reversed, Brodeur, J. dissenting.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault, JJ.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Clement J. and dismissing the plaintiff's action.

The appellant is a producer of fruits. The respondent company is a co-operative corporation composed of shareholders engaged in the cultivation of fruits and it looked after the marketing and the sale of the fruits of the orchards of which the shareholders of the company were the owners. The parties made a contract by which the appellant undertook to sell and the respondent to buy during seven years the appellant's crop of fruit, "the purchase price to be the market price of such fruit in each year." Both parties are agreed that the term "market price" was not used in the ordinary sense, to wit: the actual price at which a commodity is commonly sold at the place of the contract, as in this case there was no such market; but both parties were not *ad idem* as to the exact meaning of this term. The appellant also applied for fifty shares of the company respondent, which were allotted to him at $120 a share, meaning a premium of $20 on the par value. He sent his cheque for $1,500. The question is whether this sum must be first applied in full payment of the premium and the balance in part payment of the par value of the shares; or whether the said sum must be apportioned *pro rata* between the premium and the par value of the shares.

Eug. Lafleur K.C. and *W. H. D. Ladner* for the appellant.

J. J. Taylor K.C. for the respondent.

(1) [1920] 3 W.W.R. 365.

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Idington J.

IDINGTON J.—I am of the opinion that this appeal should be allowed in respect of three of the specific matters in question.

In the first place I cannot find anything in the interpretation and construction of the several respective contracts made between appellant on his own behalf and on behalf of the two others he represented, which should maintain the application of the particular sliding scale put forward in the evidence as the only one fitted for determining the rights of the parties.

It was neither expressly nor impliedly incorporated in any of the said contracts or in the terms upon which the appellant was admitted as a shareholder or director of the respondent.

It was not put forward in the negotiations as a final determination for the term of the ensuing seven years these contracts were to run, but simply as an illustration of the mode in which the respondent had for a year or two then past, been trying to adjust the yearly settlement of its accounts with those selling their products to it.

It was not applied for such purpose in regard to the first year's entire products sold the respondent under the contracts now in question.

Indeed it is doubtful if it was applied as to any material part of such products.

In order to help the court in the interpretation of an ambiguously worded contract, extrinsic evidence may be given of the surrounding circumstances under which it was entered into.

The identity of the object which the parties had in view as well as the identity of the subject matter with which they were dealing may be better understood when read in light of such surrounding circumstances.

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Idington J.

For example take one of the contracts before us which reads as follows:—

Agreement made (in duplicate) this twenty-ninth day of May, A.D. 1914, between John Kidston (hereinafter called the vendor) of the one part, and Stirling & Pitcairn, Limited, a body corporate duly incorporated under the statutes of British Columbia, and having its head office at Kelowna, in the province of British Columbia, (hereinafter called the purchasers), of the other part, whereby it is agreed as follows:—The vendor will sell and the purchasers will buy the crop of fruit now growing or to be grown on the trees of the orchard of the vendor as at present planted, situate near Vernon, in the Coldstream municipality, for a period of seven (7) years from the first of May, 1914.

The purchase price shall be the market price of such fruit in each year.

The vendor shall pick and gather the said fruit in due course, and when sufficiently mature for the purpose of gathering and taking the same, shall deliver the same to the purchasers' warehouse, reserving such fruit as may be required for the use of the ranch.

Signed, sealed and delivered.

John Kidston (Vendor),
Stirling & Pitcairn, Ltd.,
(Purchasers).

In the presence of E. C. Kidston.

Others in question are in same form.

The "purchase price" as thus defined when using the words "the market price of such fruit in each year" is capable of several distinctly different meanings.

Was it to be the market price in the nearest market town on the day of delivery for each respective kind and quantity and quality as delivered and to be paid in cash on delivery?

Or was it to be determined by means of arriving at some average price for the fruit season for each kind and grade in quality of each kind?

And was that to be according to what the application of fair dealing and reasonableness applied to the course of business in each year would disclose?

In the latter alternative, or something akin thereto, a knowledge of the surrounding circumstances would materially assist in understanding what the parties were about.

That once discovered would in its turn doubtless admit of the application of proper methods to demonstrate what would be fair and reasonable methods of determining what had been the market price for any given year.

What is fair and reasonable often can be applied in law to help out what the parties have inadvertently failed to make as expressly clear as a court might desire.

It is even conceivable that a sliding scale of some kind may, when the accounts come to be taken, be found a valuable auxiliary to work out the result to be determined.

But it never would be permissible to act upon the theory that the sliding scale mentioned above had become incorporated in the foregoing contract or the others in same form.

Had it been demonstrated that the said sliding scale had been, to the knowledge of all the parties, actually applied, without objection, as a factor in determining the price for the year (in July of which the contract was executed though dated in May) it might have been possible (acting upon many decisions which rest upon what the parties did immediately after the execution of the contract and in pursuit thereof) as a means of determining what they had in fact intended by the language used to imperatively uphold the continuation of such use.

It is not pretended that the said sliding scale is commonly used in carrying on such business as in question herein.

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Idington J.

In short I can find no ground upon which to rest the provision in the formal judgment of the Court of Appeal for the application of the said sliding scale, and would allow the appeal.

There is much to be said in favour of the course of dealing which both parties agreed in and adopted immediately after execution of the contract as demonstrating that both adopted the view that what was in fact intended to be the market price was to be the result of respondent's marketing elsewhere than in British Columbia and that to be determined by deduction of expenses and a fair commission. I think that is likely to be best determined by a referee proceeding on the basis of what was fair and reasonable.

In the next place I think that the learned trial judge was right in allowing the plaintiff, now appellant, the sum of $562.50, balance due for dividend on his stock.

The contention that the first payment of $1,500 account fifty shares of stock must be first applied in payment of the premium, seems to me quite unfounded whether we look at the nature of the purchase or the letter of appellant appropriating the money and receipt of the secretary of respondent expressly putting it as $30.00 per share.

It is quite true that the late Mr. Pooley's record of his way of looking at the payment was in accord with what the respondent contends, but that is by no means clear in what he submitted to the appellant.

The judgment of the learned trial judge ought to be restored. The appeal ought to be allowed in this case with costs throughout to the appellant.

The respondent brought an action against the appellant for specific performance of said contract.

I am unable to find any ground in evidence herein upon which such jurisdiction can be exercised if regard is had to the principles which have settled the limitations of the exercise of such jurisdiction.

The adequate and usual remedy of recovery for damages for breach of contract was open to the plaintiff in that connection.

The many complications involved in the performance of the contract and to be pursued in the remedy given by means of specific performance, were such as to bar a resort to that remedy.

The ambiguous nature of the contract of which so many varying views have been taken render specific performance inappropriate.

I need not continue my list of serious objections to the exercise of such a mode or relief, but may be permitted to refer to the authorities cited on pages 26 *et seq.* of Fry on Specific Performance, 4th ed. relative to my first objection; to pages 38 *et seq.* of the same work relative to my second and to pages 294 *et seq.* of same work, as well as foregoing, in relation to the third objection I take.

The interim injunction which was granted was only ancilliary to the specific performance which was sought, and that should have ended with the proper dismissal of the action by the learned trial judge.

Another injunction of a similar nature was granted in the Court of Appeal pending the hearing of appeal thereto.

That, of course, falls, or should fall, in my opinion, with the failure to establish a right to specific performance, which, I repeat, is the remedy specifically sought in and by the said action.

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Idington J.

If the relief by injunction is to be held as sought independently of the right for specific performance, then I can find no authority that would entitle respondent to such mode of relief in such a case as presented.

The authorities on that head are collected in Kerr on Injunctions, chapter 10, wherein, or in reports of later cases, I can find none to uphold such a contention.

The respondent relies upon the decision in the case of *Metropolitan Electric Supply Co.* v. *Ginder* (1), which I respectfully submit does not, in its essential features, dependent upon a statutory obligation and a covenant, of which the practical effect was to maintain the right of the company to carry out that obligation, maintain the right to an injunction herein.

It does not of my mind present very much resemblance to the features of this case. Yet of all of those cited, on behalf of respondent, it, in principle, comes nearer than any other cited on its behalf, to touching the operation of the principles involved.

The decision of Sir George Jessel in the case of *Fothergill* v. *Rowland* (2) is almost exactly in point in this, and is adverse to the respondent herein.

In conclusion I think the action for specific performance was rightly dismissed by the learned trial judge, and that dismissal should be restored with costs throughout.

The respective counsel for the parties hereto are agreed that there is no local statutory provision under which the damages for breach of the undertaking given on the obtaining of the said injunctions can be dealt with herein.

(1) [1901] 2 Ch. 799.

(2) [1873] L.R. 17 Eq. 132.

They are also agreed that respondent obtained the delivery of the crops of fruit for the balance of the seven year period, whether or not as result of an injunction, which I hold should not have been granted, is not clear.

The appellant's action, according to my opinion, must be maintained, but whether it covers anything beyond the time up to when begun, and thus the later results to be decided thereafter, I refrain from dealing with.

There is thus ample room for a fine crop of litigation.

I would allow the appeal and meantime dismiss the action for specific performance, with costs throughout, and I would direct a reference similar to that which the learned trial judge directed, but guarding against his expression that there was no contract.

I think there was a contract which may be well illuminated by the conduct of the parties relative thereto, whilst excluding the sliding scale in question, and applying the doctrine of what is fair and reasonable which helps so much under our law in the administration of justice.

DUFF J.—My conclusion is that the trial judge was right in his finding that the parties had never arrived at a contract in terms.

On the other hand, fruit, the property of the appellant, was received and disposed of by the respondents in circumstances which exclude the hypothesis that they were not to pay for it, and it follows, of course, that the appellant is entitled to recover from the respondents a reasonable price. My conclusion is that the trial judge's judgment directing a reference to ascertain the value of the fruit understood in this

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Duff J.

sense should stand. I adhere however to the view expressed in the argument that the dealings of the parties afford up to a certain point a satisfactory guide for the ascertaining of what is reasonable in the circumstances and I think the order of reference ought to contain a direction to the referee on this point. The direction should be that the price is to be ascertained by taking the average price realized by the respondents for fruit sold by them of each kind and grade furnished by the plaintiff and from that should be deducted first, expenses incurred in handling the fruit received from the plaintiff, and, secondly a sum representing a reasonable profit. As to the question of the appropriation of the moneys paid by the appellant on his shares, I concur with the reasoning of Mr. Justice Idington.

If follows of course that the respondents' counterclaim for specific performance should be dismissed.

ANGLIN J.—I am, with respect, of the opinion that the learned trial judge reached the proper conclusion upon all the evidence in this case. It discloses a great many incidents which taken together make it reasonably certain that the minds of the parties never met as to the meaning of, or the method of computing, the "market price" to be paid the plaintiff. They are agreed that this term is not used in the ordinary sense—that it meant the average yearly price received by the defendants on each grade and variety of fruit sold by them less certain deductions for expenses and profits. But upon the basis of computation of these deductions they were never agreed. Moreover there is a difference between them as to whether sales for export should be included in ascertaining the average prices. If this latter were the only matter in dispute however, I should

have had little hesitation in determining it in the plaintiff's favour. *Stuart* v. *Kennedy* (1), cited by the appellant from Benjamin on Sales, 5 ed., p. 103, seems closely in point.

I also agree with the learned trial judge that the payments made by the plaintiff on account of his subscription for fifty shares of stock in the defendant company should be apportioned *pro rata* between the premium of 20% at which he subscribed and the par value of the shares. That I think is the true meaning of the contract on which the shares were taken, and, with respect, I am unable to understand the application of the doctrine of imputation of payments to the single debt which the plaintiff incurred.

The conclusion that the parties were not *ad idem* as to a vital term of the contract necessarily involves the failure of the action of *Sterling & Pitcairn, Limited,* v. *Kidston.*

I would allow the appeal of the plaintiff Kidston with costs in this court and the Court of Appeal and would restore the judgment of the learned trial judge in each action, and would dismiss the cross-appeal also with costs.

On the reference, however, directed by the learned trial judge the value of the fruits delivered by the plaintiff (by which I take it a reasonable price for them is meant) should, under the special circumstances of this case, be ascertained by deducting from the average price realized by the defendants in each year for all fruit sold by them of each kind and grade furnished by the plaintiff the expenses incurred by the defendant in handling the plaintiff's fruit and a reasonable sum for profits on the sale thereof. The evidence warrants the conclusion that a fair price will be best arrived at by this method.

(1) [1885] 23 Sc. L.R. 149.

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Brodeur J.

BRODEUR J. (dissenting).—The main question on this appeal is whether or not the contract is a binding one. The trial judge found that the parties were not *ad diem* and that the contract never existed. The Court of Appeal decided there was a valid contract.

The respondent company is a co-operative corporation composed of shareholders engaged in the cultivation of fruits. It looked after the marketing and the sale of the fruits of what is called in the case affiliated orchards, viz., orchards of which the shareholders of the company were the owners. The shares were allotted according to the cultivated area of each orchard.

In 1914, Kidston, who is a producer of fruits, wanted to become a shareholder of the respondent company and to have his fruits marketed and sold by it, and he applied for 50 shares which were allotted to him at $120 a share, meaning a premium of $20 over the par value. In the correspondence and the negotiations which then took place, Kidston was advised that the affiliated orchards sold their fruit to the respondent company for a price to be calculated upon the net returns after deducting for expenses and profits according to what was called the "sliding scale." This sliding scale was communicated to Kidston and he then signed a contract providing for the sale of his crop to the respondent company for a period of seven years at a price which was to be "the market price of such fruit in each year."

He delivered his fruits and he received during those years the same price as was paid to the affiliated orchards, but he claims that he should have received a larger sum and he takes an action in *reddition de compte.*

He had paid $1,500, at first on his fifty shares of which a sum of $1,000 was apportioned by the respondent company for the premium of $20 a share and on which sum of $1,000 he did not receive any dividend. He claims that this $1,500 should have been apportioned equally on the par value of the shares and on the premium and then he should have received larger dividends.

Kidston, after having instituted his action in 1917, continued however to deliver his fruits to the respondent company until 1919, when, having refused to go on with his contract, the respondent company took an injunction to prevent him from selling to other persons. The injunction was dismissed by the trial judge who decided that the contract was not binding, but the injunction was restored by the Court of Appeal.

The case then turns almost entirely on the construction of these words "market price" in the contract.

In its ordinary sense the market price means the actual price at which a commodity is commonly sold at the place of the contract.

In this case, there is no market at the place where the contract was made. These fruits have to be shipped away to the United States or to some cities of the Canadian provinces; and Kidston in his particulars and in his evidence admits that these words had a special meaning in this contract and would not cover the market price of the locality.

They mean, according to his opinion, the average price realized by the respondent company for each grade and variety of fruit, less the expenses and a reasonable commission on the sale.

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Brodeur J.

In view of this admission by the appellant and in view of the statements made by the respondent company in its pleadings and at the trial, I cannot reconcile myself to the idea that there is no binding contract between the parties. If two persons entered into a contract and understood it in a different sense, it is binding upon them. Stevens' Mercantile Law, p. 102. There is no difference of opinion as to the determining of the average price of each variety of fruit. There is no serious difficulty either as to the expenses connected with the sale of the goods.

As to the profits, the respondent company claims that the sliding scale should be used to determine these profits. The appellant opposes this idea.

For my part, I would think that the sliding scale should be considered as part of the contract. It was communicated to the appellant before he signed his contract and was referred to time and again by both parties during their course of dealings. That scale was used with regard to all the co-operative associates.

But if the sliding scale should not be considered as part of the contract, it would form at least a basis on which a reasonable profit could be ascertained.

As to the appropriation of the money made by the appellant on his shares, I consider that out of the amount paid at first the necessary sum for the premium should be deducted and that the appropriation made in that respect by the respondent is well founded.

With regard to the injunction or specific performance, I concur with the views expressed by the learned Chief Justice of the Court of Appeal.

On the whole, I am of the opinion that the appeal should be dismissed with costs.

MIGNAULT J.—The more I have studied the voluminous record in this case, the more I have become convinced that the parties were wide apart from the very beginning as to a vital term of their contract, to wit, the price to be paid the appellant for his fruit. They drew up and signed, in May, 1914, a contract which on its face appears clear and unambiguous. The appellant (vendor), by this contract, undertakes to sell and the respondent (purchaser) to buy during seven years the appellant's crop of fruit, the purchase price to be the market price of such fruit in each year, and the vendor to gather and pick the fruit and when sufficiently mature to deliver the same to the purchaser's warehouse.

Such a contract, I have said, is on its face clear and unambiguous. The court could easily define the expression "market price" which of course would vary from year to year, possibly from month to month, according to the condition of the fruit market, and the appellant would obtain from the respondent the selling price prevailing at the time and place of the sale for fruit of the same kind and quality as that sold to the respondent. With a contract so worded there would of course be no question of expense incurred by the respondent or of any profit realized by it on the resale of the fruit.

Both of the parties, however, agree that the obvious meaning of the language of their contract is not that which they had in mind when they made it. The contract was not an ordinary contract of sale, but it involved a kind of agency of the respondent for the appellant in the sense that the price to be considered, the parties admit, is the price not of the sale by the appellant but of the resale by the respondent, and that certain expenses and charges as well as a reasonable commission must be allowed the latter.

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Mignault J.

Having thus both agreed that the contract does not mean what its language clearly imports, the parties follow widely divergent courses when they attempt to define the "market price" which is to rule, and from the very start they appear to have been hopelessly apart as to the price which was to be paid for the fruit. The appellant defined "market price" in his particulars as the average price realized by the respondent from all sales made by it in each year of each grade and variety respectively, less the expenses properly incurred in handling the same and a reasonable commission on the sale of the fruit. The explanation of the respondent covers nearly a page in the appeal book, and involves considering its policy with what were termed the affiliated orchards, and then, at the end of the selling season, taking the average selling price of a carload lot of each particular variety of fruit, deducting from this a profit on each box in accordance with a scale called the sliding scale adopted by the respondent in its dealings with the affiliated orchards, in addition to which a further sum for packing, overhead and handling charges by package, as per the "sliding scale," would also be deducted. The net result would give the net amount per pound payable to the appellant and would be the market price as the respondent understood it.

With the parties so far apart from the very start, it is not surprising that after four years of dealings there is a very considerable difference between what the appellant contends should have been paid and what he actually received from the respondent. The appellant's action involves an accounting so as to establish the amount of this difference, and as his discussions with the respondent brought about no result, he finally refused to make further deliveries

and notified the respondent that he would sell his fruit elsewhere. The respondent then took an action for specific performance with an injunction to prevent the appellant from selling his fruit to any other purchaser.

I must confess that I endeavoured at first to find out which of the versions of the parties was the correct one, and it is noticeable that the respondent before us showed an inclination to accept the appellant's definition of market price, while contending that the "sliding scale" should be applied in determining the deductions for expenses and the profit to be charged. The appellant however, strenuously argues, and I think rightly, that the "sliding scale" formed no part of the contract. That the conduct of the respondent in fixing the amounts to be deducted for expenses and the commission to be paid it was arbitrary there can be no doubt, and its board of directors, of whom appellant was, during the first years, a member, but a constantly dissenting one, attempted to define the meaning of "market price" and finally proposed that a new contract be made stating that the price payable should be fixed by the directors in each year. Under these circumstances it appears to me impossible to place on this vital term of the contract a meaning which can in any way be considered as ever having had that *consensus ad idem* of the parties which is essential for the existence of a valid contract.

I find myself therefore in agreement with the opinion of the learned trial judge that there was no valid contract. I may add that there is no room for construction here because the natural and legal meaning of the term "market price" was not intended by the parties and they never agreed as to the special meaning which it should bear.

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Mignault J.

The question of the payments made by the appellant on the shares purchased by him in the capital stock of the respondent company is a rather difficult one to solve. The appellant's application for shares stated that these shares, of a nominal value of $100 each, were issued at a premium of $20 per share, and the appellant, applying for fifty shares, sent his cheque for $1,500, being a deposit of $30 per share and promised to pay $22.50 per share on May 1st, 1915, and a like amount on the 1st of May of the years 1916, 1917 and 1918. He made besides the deposit of $30 per share, the first payment of $22.50 per share due on May 1st, 1915. The respondent acknowledged receipt of the application and of the deposit of $1,500, stated in the formal receipt sent to the appellant to be a deposit of $30 per share on an application for fifty ordinary shares of $100 each issued at 20% premium, but in its books the respondent credited $1,000 to the premium account and $500 to the capital account, so that, of the first payment of $30 per share, $20 went to the premium and $10 to the share itself. The result was that inasmuch as dividends are paid by the respondent on the paid up portion of its capital, the respondent received a lesser dividend than if the payment had been credited ratably on the premium and on the shares, which the appellant contends, but without citing any case supporting his contention, should have been done.

I do not think that authorities as to appropriation of payments can help us here, for there was only one debt, i.e., for fifty $100 shares sold for $120 each. If there had been two debts, one for the premium and the other for the share itself as distinguished from the premium, I would think that there has been no appropriation by the appellant, who paid first

$30 and subsequently $22.50 generally on each of the shares subscribed by him, but that there was an appropriation by the respondent which credited $1,000 to premium and $500 to the 50 shares, and this appropriation was subsequently notified to the appellant when he asked for explanation as to the amount of the dividend cheque sent to him. So that it seems to me that when the learned trial judge allowed the payments made by the appellant to be ratably applied to the premium and to the share itself, thus treating the premium and the share as if they were two separate debts, he could not, under the authorities, ignore the appropriation made by respondent and notified to appellant. In this view of the matter the case of *Cory Bros. & Co.* v. *Owners of "The Mecca,"* (1), cited by the respondent would be in point and would sustain the judgment of the Court of Appeal.

But here I find one debt only, that of $120 for each share of a nominal value of $100. As I have said, the appellant paid generally, at first $30 and subsequently $22.50 on each share purchased by him and the receipt given him for the first payment of $30 is also general. The notes of the appellant's conversation with the respondent's manager Pooley, when a subscription of forty shares was contemplated, show that a total liability of $4,800 was mentioned, on which 25% of the total price was to be paid on allotment, and the balance in four equal annual instalments. When the appellant made the first payment of $30 per share subscribed for at $120, he still owed $90 on each share, for the price to him of the shares was $120 each. The dividends of course were paid on the par value,

(1) [1897] A.C. 286, at p. 293.

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Mignault J.

but unless the premium and the par value be distinguished so as to form two separate debts—and then the rules governing appropriation of payments would apply—the appellant still owes $67.50 on his shares and can certainly not claim dividends on the balance due by him on shares, which he purchased at $120. If the premium and the par value be differentiated, it does not seem unnatural that the premium, which is the profit of the company for the privilege of purchasing its shares and not a part of its capital, should be paid first.

I therefore on this point, and for these reasons, agree with the Court of Appeal.

There remains the action for specific performance with the injunction taken by the respondent against the appellant. In my view that there was no valid contract, it is clear that this action was rightly dismissed and the injunction dissolved by the learned trial judge.

I would therefore allow the appeal of the appellant with costs here and in the Court of Appeal except as to the claim of the appellant for additional dividends and the costs properly ascribable to this claim. The respondent's cross-appeal which presupposes a binding contract between the parties should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Cochrane, Ladner & Reinhard.*

Solicitors for the respondent: *Cowan & Gurd.*