[HIGH COURT OF AUSTRALIA.]

RANKIN . . . . . APPELLANT;
PLAINTIFF,

AND

SCOTT FELL & Co. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1904.

SYDNEY, *Dec.* 8, 9, 12.

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

Contract—Ambiguity—Admission of extrinsic evidence to explain subject-matter.

The appellant entered into an agreement in writing with the respondents by which he undertook to float a company for the purpose of acquiring and working a certain colliery property. The capital was to consist of 120,000 shares at £1 each, 30,000 to be issued as fully paid to the appellant, 60,000 to be issued as fully paid up at not less than five shillings per share, and the remaining 30,000 to be at the disposal of the company. The respondents agreed *inter alia*, "to take 5,000 shares, and to take the sole agency of the company," and, in consideration of their so doing, the appellant agreed to "transfer" to them "10,000 fully paid up shares out of the 30,000 shares to be issued to him."

Held, that, on the face of the document, the meaning of the words "to take 5,000 shares" was clear and unambiguous. They meant that the respondents would take 5,000 of the 60,000 shares to be issued to the public. Therefore, evidence of conversations between the parties, prior to the date of the written contract, to show that the 5,000 shares were to be portion of the 30,000 fully paid up shares issued to the appellant, and were to be bought by the respondents from him at five shillings per share, was inadmissible.

Decision of the Supreme Court, ordering a new trial, (1904), 4 S.R. (N.S.W.) 547, varied by ordering that a nonsuit be entered.

APPEAL from a decision of the Supreme Court (1904), 4 S.R. (N.S.W.), 547.

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

In this case the plaintiff and the defendants entered into a contract in writing, dated 20th January, 1903, by which it was

agreed between them that the plaintiff should undertake to float a company and sell to it all his right title and interest in a certain colliery property at Newcastle, together with all the machinery, plant, railways, tools, &c., on the property, or belonging thereto, or used in connection therewith, and all rights held by the plaintiff. The capital was to be 120,000 shares of £1 each, of which 30,000 were to be issued as fully paid to the plaintiff, 60,000 to be issued as fully paid at not less than 5s. per share, and the remaining 30,000 to be at the disposal of the company. The 30,000 shares to be issued to the plaintiff, and £30,000 constituted the full price to be paid by the company to the plaintiff, and the £30,000, for which debentures were to be issued, was to remain a charge upon the property for two years at 3 per cent. per annum. The plaintiff also undertook to pay and discharge all debts and other moneys owing by the proprietary of the property, and to deliver the property free of encumbrance, except the £30,000 payable to him, subject to the rental of £1,000 per annum, and insurances set out in a certain deed referred to as that under which the plaintiff held the property. The contract then went on to stipulate that the defendants "agree to take 5,000 shares and to take the sole agency of the said company, and in consideration of their so doing" the plaintiff agreed to transfer to them or whom they might direct 10,000 fully paid up shares out of the 30,000 to be issued to him, the transfer to be executed at the time of allotment. The defendants were also to receive by way of remuneration £300 per annum and a commission, and the agency of the company for ten years, and there were also certain other subordinate arrangements.

The company was formally floated, and the 30,000 shares were apparently issued to the plaintiff.

The plaintiff sued the defendants on the agreement, which was set out as an agreement that the plaintiff should sell and the defendants should buy from the plaintiff "a further 5,000 of the said fully paid up shares at the price of 5s. per share," and undertake and conduct the agency of the company for ten years. The breaches assigned were that the defendants had paid half the price, and had failed to pay the remainder, and had refused to

H. C. OF A. 1904.

RANKIN v. SCOTT FELL & CO.

accept the shares and the agency. There was also a count for refusing to accept the 5,000 shares from the plaintiff, and an indebitatus count.

The plaintiff also alleged that he had fulfilled all conditions on his part, with the exception of the undertaking to deliver the property to the company free from all debts and encumbrances, and that the defendants had exonerated and discharged him from the fulfilment of that condition. The defendants by their pleas, amongst other things, denied the alleged contract, denied the plaintiff's readiness and willingness to perform the contract, and denied that they had exonerated and discharged him as alleged.

At the trial, evidence of conversations between the plaintiff and the defendants, prior to the date of the written contract, was tendered on behalf of the plaintiff, to show that the real subject matter of the contract, as to the 5,000 shares, was 5,000 of the shares to be issued to the plaintiff. The defendants contended that the contract did not mean that they were to buy any of the plaintiff's shares, but that they were to take that number of the ordinary shares in the company. With considerable doubt, *Owen* J., who presided at the trial, admitted oral evidence on that point.

On the question of the undertaking to deliver free of encumbrance, His Honor held that the plaintiff had proved that he had substantially carried out his agreement in that respect, and that therefore evidence of exoneration and discharge was immaterial. There was no question raised as to its being a condition precedent. Upon that expression of opinion by the learned Judge no further evidence was tendered on the point by the plaintiff's counsel. The jury returned a verdict for the plaintiff for £625, that is, half the price of 5,000 shares at 5s. per share. It appeared that the defendants had paid £625 in respect of these shares, but the evidence was contradictory as to whether that was in part payment for shares bought from the plaintiff, or as an instalment on the shares which they were willing to take in the company when established. A receipt in the following terms was put in evidence by the defendants:—

"Sydney, 9th April, 1903.

"Received from Messrs. W. Scott Fell & Co. the sum of six

hundred and twenty-five pounds (£625), being instalment of 2s. 6d. per share on 5,000 shares at 5s. each, in Ocean Colliery Company Limited.

"E. A. MITCHELL.

"Trustee for Ocean Colliery Company Limited as per deed of the 19th March, 1903."

The defendants moved for a nonsuit or entry of verdict for them or for a new trial on the grounds (1) that His Honor should not have admitted evidence of conversations between the plaintiff and the defendants before 20th January, 1903, the date of the written contract, to show that the 5,000 shares mentioned in the contract of that date were to be 5,000 fully paid up shares belonging to the plaintiff; (2) that His Honor should not have admitted evidence of conversations before that date to show that the defendants agreed to pay the plaintiff the sum of 5s. per share for the said 5,000 shares; (3) that His Honor should have nonsuited the plaintiff, inasmuch as there was no evidence that the defendants exonerated and discharged the plaintiff from performance of the condition that he would deliver the property to the company free from all debts and encumbrances.

The Supreme Court (consisting of *Darley* C.J., *Simpson* J. and *Pring* J.), held, by a majority (*Simpson* J. *dissentiente*), that His Honor was right in admitting the evidence mentioned in the first and second grounds, but were unanimously of opinion that there should have been a nonsuit on the third ground, and granted a rule absolute for a new trial on that ground.

The plaintiff appealed from the decision of the Full Court granting a new trial on the third ground.

James and *Robson* (*J. L. Campbell* with them), for the appellant. At the trial evidence was tendered in support of the allegation that the defendants had exonerated and discharged the plaintiff from the performance of the undertaking to deliver the property free from encumbrance. The defendants objected to the evidence, and the Judge rejected it as immaterial. They should not be allowed to take advantage of the fact that no such evidence appeared, when it was shut out on their own objection. But, without that

H. C. OF A. 1904.

RANKIN v. SCOTT FELL & CO.

evidence, the plaintiff proved that he had substantially complied with the condition. It was contemplated by the parties that there should be an encumbrance to the extent of £30,000, for by the contract the £30,000 was to be a charge on the property. The evidence showed that the plaintiff purchased the property from one Cowlishaw, and mortgaged it to him to secure £20,000 of the purchase money with interest. He then transferred the property to the company, subject to the mortgage to Cowlishaw for £20,000, and instead of receiving debentures for £30,000, agreed to accept debentures for £10,000. The result of the transaction was that the company got the property subject to encumbrances to the extent of £30,000, which was substantially what had been agreed upon between the parties originally. The only difference was that £20,000 of the encumbrance was to be by mortgage instead of debentures. The words of the contract that the "sum of £30,000 (for which debentures will be issued) is to remain as a charge upon the property" are capable of the construction that there was to be a charge by way of mortgage, in addition to the debentures. The company take over the property on those terms, and the defendants have no cause for complaint. If there has been a substantial compliance with the condition by the plaintiff, the allegation of exoneration and discharge is surplusage, and may be struck out.

Shand (*Broomfield* with him), for the respondents. Assuming that the contract was for the transfer of the property subject to a charge, there was no evidence that it was performed. The undertaking to do so was a condition precedent to the right of the plaintiff to call on the defendants to carry out their part of the contract. It was important that the liability of the company should not be materially different from that stipulated for in the contract. The plaintiff was therefore bound to show that there had been no such alteration. He failed to do this, because the mortgage to Cowlishaw was not put in evidence, and there was therefore no evidence of the nature of the liability under it, its duration, rate of interest, &c. It might be that under it the principal could be called up at any time, or that the interest was at a higher rate than 3 per cent. The personality of the mortgagee

was also material. The plaintiff had a large interest in the company, and was therefore unlikely to be hostile to it, whereas the mortgagee might wait until the company had done developing work, and was in financial difficulties, and then foreclose. The plaintiff therefore failed to prove a substantial compliance with the conditions, or an exoneration by the defendants, and should have been nonsuited.

The Supreme Court was wrong in holding that oral evidence was admissible to explain the contract to "take 5,000 shares." The natural meaning of those words is that the defendants were to subscribe for 5,000 of the company's ordinary shares offered to the public. There is no ambiguity appearing on the document, nor is there any arising from the surrounding circumstances. If the words had meant "buy" 5,000 of the plaintiff's shares, a price would have been mentioned, and the shares would have been described in the same way as in other parts of the contract, as "fully paid up," or as "issued to the plaintiff." There being no ambiguity, the plaintiff cannot give evidence of conversations in order to show that the parties intended to say something which they have not said: *Taylor on Evidence*, 8th ed., p. 1021, sec. 1087. Ambiguities may not be conjured up when none are apparent. It cannot be said that the words are equally applicable to the plaintiff's shares and the ordinary shares. *Simpson* v. *Bank of New Zealand* (1), is not in point, because the words "the estimate" in that case referred to some subject matter known to the parties, which could only be identified by oral evidence. If the evidence of conversations between the plaintiff and the defendants is inadmissible on this point, there is no evidence to support the declaration, and there should be a nonsuit. The contract alleged not having been made out, the allegations of breaches are immaterial. [He referred to the *Supreme Court Procedure Act* 1900 (N.S.W.), sec. 7.]

James in reply. The undertaking to transfer the property free of encumbrance is not a condition precedent. It is an independent term of the contract, which could be enforced by action. The company, if they had been made liable on the shares for the

(1) 21 N.S.W.L.R., 1.

H. C. OF A. 1904.

RANKIN v. SCOTT FELL & CO.

mortgage money, could have recovered it from the plaintiff as damages for breach of contract: *Anson on Contracts*, 6th ed., p. 288. If not a condition precedent, the allegation of exoneration and discharge is immaterial, and may be disregarded, the jury having found for the plaintiff.

As to the admissibility of the conversations. The words "take 5,000 shares" refer equally well to several kinds of shares. When the surrounding circumstances raise a doubt as to the subject matter, it may be resolved by oral evidence. Here the evidence of the facts, outside the documents, shows that there were three kinds of shares, the plaintiff's paid up shares, shares paid up to 5s., and the company's shares.

[O'CONNOR J.—Is it not a strained interpretation to put upon the contract which compels you to look outside it in order to find out what was the price to be paid for the shares?]

This is a latent ambiguity appearing from evidence, which was necessarily given, of outside circumstances, and oral evidence is admissible to explain it: *Doe d. Gord* v. *Needs* (1). If not a latent ambiguity in the legal sense, it is such a patent ambiguity as may be resolved by oral evidence: *Phipson's Law of Evidence*, 2nd ed., p. 555.

[GRIFFITH C.J.—The writer there uses the words "patent ambiguity" in a sense which includes cases in which the ambiguity only arises from knowledge of the facts surrounding the contract, the words themselves being clear. That is not the sense in which the term is generally used in the authorities.]

Ambiguity manifested on the face of an instrument is not necessarily exclusive of extrinsic evidence to explain it: *Colpoys* v. *Colpoys* (2). Oral evidence was admitted to explain what was meant by the words "oak plantation" in a document, the ambiguity arising on the face of the instrument, in *Chambers* v. *Kelly* (3).

[GRIFFITH C.J. referred to *Shore* v. *Wilson* (4).]

The ambiguity in this case is similar to that in *Simpson* v. *Bank of New Zealand* (5), and in *MacDonald* v. *Longbottom* (6).

(1) 2 M. & W., 129.
(2) Jac., 451.
(3) I.R., 7 Ch., 231.
(4) 9 C. & F., 355.
(5) 21 N.S.W.L.R., 1.
(6) 1 E. & E., 977.

in which it was held that oral evidence was admissible. The omission to mention the price in a written contract of sale does not invalidate it; silence on that point is equivalent to a stipulation for a reasonable price: *Valpy* v. *Gibson* (1). Verbal arrangements actually made as to the price to be paid may be given in evidence on the question of what is a reasonable price. Even if the written contract was void for uncertainty, there was a parol contract for sale of shares, partly executed, as to which the jury have found in the plaintiff's favour. The evidence was admissible on that ground.

GRIFFITH C.J. [His Honor, having stated the facts, and referred to the documents as set out above, proceeded]:—The receipt of 9th April does not in any way conclude the question whether the £625 was paid to the plaintiff as in part payment for shares bought from him, or whether it was paid, as the defendants alleged, to Mitchell as trustee for the company which was then in contemplation, as an advance on shares which they intended to take in the company. The defendants applied to the Supreme Court for a nonsuit to be entered, or for a new trial, and the Court were unanimous in thinking that the condition to deliver the property to the company free from encumbrance, except as to the £30,000 payable to the plaintiff, was a condition precedent, and also thought, (in fact it was not in dispute), that there was no evidence of any exoneration of the plaintiff from the performance of that condition, and were therefore of opinion that there should be a new trial. Upon that point we see no reason to differ from their Honors. All parties were agreed that it was a condition, and something might, perhaps, be said in support of the contention that the arrangements detailed in evidence were substantially a compliance with the condition by the plaintiff, and a great deal might be said on the other side. But, in the view which I take of the other part of the case, it is not necessary formally to decide that question. It is enough to say that I see no reason to differ from the learned Judges in that respect.

The ground on which it is contended that there should be a nonsuit is that there was no evidence of any such contract as alleged,

(1) 4 C.B., 837.

H. C. OF A. 1904.

RANKIN v. SCOTT FELL & CO.

Griffith C.J.

and that oral evidence to explain or vary the written contract was inadmissible. That question arises on these words of the contract: "Scott Fell and Company agree to take 5,000 shares and to take the sole agency of the said company, and in consideration of their so doing J. C. Rankin agrees to transfer to them or whom they may direct 10,000 fully paid up shares out of the 30,000 shares to be issued to him, such transfer to W. Scott Fell and Company to be executed at time of allotment." The learned Chief Justice and Mr. Justice *Pring* were of opinion that oral evidence was admissible to show that the 5,000 shares referred to were shares belonging to the plaintiff, and not shares of the company, to be issued by the company and which the defendants were to subscribe and take up. Mr. Justice *Simpson* was of the contrary opinion. He thought that there was no ambiguity, that it clearly appeared from the words that the contract was not to take shares from the plaintiff, but to take shares in the company, and therefore that the contract alleged was not proved. Now, there is no doubt that, when the subject-matter of a contract is uncertain, extrinsic evidence is admissible to prove what it was that the parties were bargaining about. That is only a rule of common sense. The first case referred to by the learned Judges was *MacDonald* v. *Longbottom* (1), in which the defendant had agreed to buy from the plaintiff what was described as "your wool." What was meant by those words was clearly something which could not be ascertained from the words themselves, and it was therefore necessary to ascertain, by extrinsic evidence, what the parties were talking about. The conditions and limitations under which oral evidence may be admitted to explain a written contract for the purposes of construction are stated by many authorities. They are very clearly set out in the case of *Shore* v. *Wilson* (2), decided in the House of Lords. In that case Baron *Parke*, afterwards Lord *Wensleydale*, says (3): "I apprehend that there are two descriptions of evidence . . . which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first

(1) E. & E., 977.

(2) 9 C. & F., 355.

(3) 9 C. & F., at p 555.

place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes." He then refers to certain authorities for that position, and proceeds (1): "This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorities for this position are also numerous . . . . From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written. The excepted cases in which such evidence is admissible, if indeed there be more than one excepted case (that is, where there are two subjects, or two objects, both described in the instrument, and each equally agreeing with it), having no bearing whatever on the present question." That statement of the law excludes from our consideration all the cases that were referred to before us. We have to examine the instrument itself, and if there is no ambiguity on the face of it as to its meaning

(1) 9 C. & F., at p. 556.

H. C. OF A. 1904.

RANKIN v. SCOTT FELL & Co.

Griffith C.J.

or intention, there is no room for the admission of oral evidence to qualify it. Some argument took place concerning latent and patent ambiguities, but nobody denies that there must at least be an ambiguity, either patent or latent, before such evidence is admissible. In the case of a latent ambiguity, it must appear from the surrounding circumstances that the words of the document are capable of meaning two or more things. But the words in the present contract are plain. The subject-matter of the agreement is the formation of the company, of which 60,000 shares were to be issued to the public. The plaintiff is the promoter, and it is his interest to get the company floated. He wishes the defendants to become agents for the company, and as an inducement for them to do so, he agrees to give them the agency of the company, when floated, for ten years, and to transfer to them 10,000 fully paid up shares gratuitously, and they, on their part, are to "take" 5,000 shares and the agency of the company. Contrasting the language used in the different provisions as to shares, in one case the plaintiff agrees to "transfer" to the defendants 10,000 shares, the transfer to be executed at the time of allotment, and, on the other hand, the defendants agree to "take" 5,000 shares, no price being fixed. It is not suggested that they were to accept them gratuitously. It is suggested that they were to pay for them, but the price is not mentioned. What was meant seems to me quite clear on the face of the contract, namely, that what the defendants agreed to do was to take 5,000 shares in the company, to acquire them by subscription in the ordinary way. In that view it was not necessary to mention the price, because by another part of the contract it was provided that the shares were to be issued to the public at not less than 5s. per share. The only question is, what did the defendants agree to do, and, on the construction of the written instrument, it seems to me impossible to come to any other view than that they agreed to subscribe for 5,000 shares in the company about to be formed. That is not the agreement upon which the plaintiff is suing, and therefore as he has failed to prove that agreement, the Supreme Court, instead of granting a new trial on a ground which was fatal to the plaintiff's case, should have disposed of the case at once, and made the rule absolute for a nonsuit.

BARTON J. I have come to the same conclusion, and desire only to add a few words in relation to the construction of this contract. If it did not appear otherwise to able minds, whose opinions command my entire respect, I should have thought there was no difficulty in the construction, for it appears to me that, so far as its subject-matter is concerned, and in every other essential, this agreement is express and definite. It is urged that there are two classes of shares, namely, those to be issued to the plaintiff, and those to be offered to or reserved for subscribers, to which the words "agree to take 5,000 shares" are equally applicable, and that this constitutes an ambiguity which warrants the introduction of extraneous evidence. Well, in one way it is possible to apply the words "take 5,000 shares" to either of these classes of shares. If an unusual and improbable meaning, unsupported by any other words in the contract to aid it, is placed upon the word "take," the contract becomes open to construction, though even then a forced construction, in favour of the class of shares, to which the plaintiff contends that it was intended to apply. But if the word is taken in its natural and ordinary meaning, and in due relation to the context, I do not think that can be the case. This is a contract which has special relation to a company, and it is a leading term of the contract that the plaintiff undertakes to float one, selling to it the mining property and plant, and receiving £30,000, with 30,000 fully paid up shares, and apparently no other price. At a time when the flotation of a company is contemplated, if a person has undertaken to another that he will float the company, and that other person says to the promoter, "I agree to take so many shares," I do not see that one can easily attribute any other intention to the person so expressing himself than this, that he means to take that number of the shares offered to subscribers in the flotation of the company Nor would the fact that the promoter was himself to have, as is usual, a large number of paid up shares for his property and rights, cause one to attribute any different meaning to such a form of words. The expression here is not "buy," but "take," and, seeing that there are these two classes of shares, 30,000 of which are to be issued to the plaintiff, and another 90,000 to subscribers, 60,000 to be the first issue, I think it would be the

H. C. OF A. 1904.

RANKIN v. SCOTT FELL & CO.

Barton J.

natural form of expression, if any one of us wished to have some of those 60,000 shares in the company, to say that he would "take shares." It is the every day expression. But if one wishes to purchase promoter's shares, and not to subscribe for shares in a company making up its share list, the ordinary way to express that desire is to say that one will "buy" shares from somebody who will sell them. And it seems to me that this form of expression applies itself naturally when one looks at the context. In the first place this form of words, "Scott Fell & Co. agree to take 5,000 shares," is unaccompanied by any stipulation as to the price of the shares. Which class of shares is it that scarcely requires that an intending "taker" should state a price or explain the kind he wants? I should say, those which are to be offered to subscribers, and at one uniform price. Looking at the portion of the contract, which seems to define the form in which the 60,000 shares are to be issued, namely, "as fully paid up at not less than 5s. per share," it is clear that if one were, in the ordinary acceptation of the term, "taking" shares in the company, there is then a measure of price, a minimum, at any rate, fixed as a condition of entrance into the company by taking shares. If, on the other hand, the intention of the defendants was to buy shares, one would have expected the expression "buy" or "purchase" to have been used in conjunction with a price to be paid, and I do not think that the facts of such an expression not having been so used, and of the omission of all reference to price, can be satisfactorily accounted for on the ground of hurry, as Mr. James suggested. The supposition of hurry is primarily excluded from the acts of parties in reducing their conclusions to the form of written contracts. They are to be taken to have set down all they mean, in reducing their agreement to writing. If we had in that writing terms of trade which required local or mercantile usage to explain them, or any other of the ingredients mentioned in the case of *Shore* v. *Wilson* (1) and other cases on the subject, one could understand parol evidence being necessary to say what the contract was, or to what it was applicable. But the thing to which this agreement to take shares is to apply is specified on the face of the writing, that is to say, it must apply

(1) 9 C. & F., 355.

to 5,000 of the 30,000 shares issued to the plaintiff, or to 5,000 of the 60,000 to be issued to the public in the first instance. The words used are part of our common parlance, against the plain acceptation of which no sufficient reason has been urged, and in that acceptation they must apply to 5,000 of the 60,000 shares, and not to the plaintiff's shares. Confirmation of the natural construction is afforded by the immediate context, as pointed out by the learned Chief Justice. In consideration of Scott Fell & Co. agreeing to "take" 5,000 shares in the company, the plaintiff agrees to "transfer" to them 10,000 fully paid up shares out of the 30,000 to be issued to him, so that, apparently, a distinction is drawn between 5,000 shares to be "taken" by the defendants, and 10,000 fully paid up shares which the plaintiff is to transfer to them at the time of allotment. Nothing is said as to any transfer of the 5,000 shares, and that of itself accentuates the inference that the contract, in that part of it, refers to two different classes of shares. If it does, there can be no doubt to which class the 5,000 shares belong. I see nothing therefore in the contract from beginning to end which takes away from the term "take" its everyday meaning. On the contrary, the writing is not deficient in expressions which confirm the presumption that the parties employed it aptly to convey that meaning.

I might add that, if the appellant's argument is correct, and there is an ambiguity, that ambiguity is patent, being raised on the face of the contract by the passage relating to the two classes of shares. No authority has been cited to warrant the appellant in contending that the rule has become obsolete that, where an ambiguity is patent, parol evidence is not admissible to solve it.

Believing then that the extraneous evidence was erroneously admitted, and that the meaning of the parties in their document is not that which the plaintiff must show in order to succeed, I think the plaintiff has failed to prove the contract he has set out in his declaration. Consequently his action must fail, and the rule should be made absolute, not for a new trial, as he contends, but for a nonsuit.

O'CONNOR J. concurred.