

denying that they are shareholders, they are liable to be placed upon the list of contributories for the face value of the stock.

After much consideration, I have come to the conclusion that the Master's judgment cannot be upheld. The question in this case, it seems to me, depends upon the contract. . . .

[Reference to *Re Wiarton Beet Sugar Co.*, *Jarvis's Case*, 5 O.W.R. 542.]

If the promises on the part of the contracting parties are independent, and the shareholders agree to take and pay for the stock, and the company agrees to buy the property offered at an equivalent sum, to be set off, then each contracting party must perform his part of the agreement; but, if there is only, as here, the one contract, by which the shareholders agree to transfer the property, in consideration of the issue of a certain amount of paid-up stock, then, on the breach by either party of its obligation, the defaulter is liable to the other in damages. In such case—where the shareholder has contracted to pay “in meal or malt,” and not in money—if he makes default, he is liable in damages for the value of the “meal or malt” that he contracted to deliver; but he cannot be made liable upon a contract which he never made—a contract to pay in cash. . . .

[Reference to *Waterhouse v. Jamieson*, L.R. 2 Sc. App. 29.]

The shareholders agreed to take stock only on the terms set out in the document, in satisfaction of the price of certain property to be conveyed. The property may have been worth much or little; the only obligation assumed was to convey it; and damages based upon its value is the only liability for the breach. This may be as much as the nominal value of the stock; more probably it is much less, and approximates more nearly to the real value of the stock, which seems to have been much less than par.

This liability cannot be asserted in these proceedings: and this decision is confined to the one question, the shareholders' liability as contributories.

At one time I thought the situation might be different, because the original agreement contemplated the transfer of the property before the issue of the stock. The change made later on, by which the stock was issued first, seems, on consideration, immaterial; and the rights of the parties upon the agreement as varied are as indicated. . . .

[Reference to *In re Continental, etc., Co.*, [1875] W.N. 208; *Hartley's Case*, L.R. 10 Ch. 157; and *Carling's Case*, 1 Ch.D. 115.]