COMMERCIAL LAW REPORTS.

(ANNOTATED.)

BEING REPORTS OF IMPORTANT DECISIONS RELATING TO COMPANIES, BANKS AND BANKING, INSURANCE, INSOLVENCY, AND SIMILAR SUBJECTS IN THE FEDERAL AND PROVINCIAL COURTS;

VOL. IV

EDITOR:
W. E. P. PARKER, B.A., LL.B.,
OF THE TORONTO BAR.

TORONTO:
CANADA LAW BOOK COMPANY,
LAW PUBLISHERS
32-34 TORONTO STREET.
1905

COMMERCIAL LAW REPORTS

OF CANADA.

(ANNOTATED.)

BEING REPORTS OF IMPORTANT DECISIONS RELATING TO COMPANIES, BANKS AND BANKING, INSURANCE, INSOLVENCY, AND SIMILAR SUBJECTS IN THE FEDERAL AND PROVINCIAL COURTS, TOGETHER WITH ANNOTATIONS.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

SMITH v. FORBES ET AL.

Brokers—Instruction to purchase stock—Discretion—Ratification.

Action against the defendants, stock-brokers at Toronto, for breach of duty in not buying certain stock for the plaintiff. On March 25th, the plaintiff by telegram instructed defendants to buy the stock at 114 or less, which defendants by letter in reply agreed to do, but said that the telegram was received too late to enable them to act on it that day. On Monday following, the 27th, defendants telegraphed plaintiff that they had cancelled his order in the meantime, as there was unfavorable rumours about the stock, and that they were writing. The plaintiff received this about noon the same day, but did not answer it, waiting for the letter, which he received about five o'clock the following day, the 28th, being to the same effect as the telegram, and asking the plaintiff to repeat the order if he wished defendant to buy for him. The plaintiff on the receipt of the letter wrote, that from defendants telegram he expected something more tangible and definite than mere general unfavorable impression and suspicion for not filling his order, and therefore waited for defendants' letter; that he had given a positive order to buy, &c.

Held, (1) That the correspondence shewed that the plaintiff ratified or assented to the defendants' course of conduct in disobeying his instruction and exercising their discretion; that the construction of the correspondence was for the Court and not for the jury:

(2) That at all events no damage was proved, as on the Monday when the plaintiff became aware that defendants had decided not to buy, the stock was still at 114.

ACTION against the defendants, stock-brokers, carrying on business in Toronto, for breach of duty in not buying a quantity of telegraph stock.

The action was tried before Armour, J., and a jury, at Toronto, at the Summer Assizes of 1882.

The following facts were proved:

On Saturday, 25th March, 1882, the defendants, who had on a former occasion acted as agents for the plaintiff in purchasing stock, telegraphed to the plaintiff at Buffalo: "Montreal Telegraph opens 13½ to 14."

The plaintiff replied to this by telegram from Buffalo: "Buy me 100 shares at 114 or less; draw for margin," and also wrote the same day: "On receipt of your telegram to-day about Montreal Telegraph stock I telegraphed you to buy for me 100 shares at 114 or less. Please do so, and draw for necessary margin at sight. If you can do better give me the benefit of it."

On the same day the defendants wrote the plaintiff as follows: " * * Telegraph stock broke yesterday to 112 and opened this morning at 113¼ to 114, closing 114 to 114½. Your telegram to-day was received after Board, therefore can do nothing to-day for you. (No afternoon Board on Saturdays). Will continue order until revoked, or executed. We think at about these figures it is a purchase."

On the morning of the 27th March (Monday) the defendants telegraphed the plaintiff: "Rumours so unfavorable we cancel orders in meantime to buy. Writing."

The plaintiff said that he received this telegram about 11.30 a.m., or 12 o'clock on Monday. It was marked as received at the Buffalo office at 10.50 a.m., and it was said that there was practically no difference between Toronto and Buffalo time.

The defendants also wrote on the same day: "As wired you this morning we in the meantime cancel the order to buy 100 shares Montreal Telegraph stock at 114. * * In your interest we thought it best to hold over order until at any rate you could consider the situation, and may be get further information on it. Market opened pretty steady with sales from 114 to 113½ closing at 113½ and 114. We trust our action will meet with your approval. Kindly repeat your order when you wish us to operate."

The plaintiff received this letter on the afternoon of Tuesday, 28th March, and on that day about five o'clock, he replied by letter: "I am in receipt of your letter of yesterday explaining your telegram of yesterday morning and your action in not filling my order. I must say from your telegram I was prepared for something a good deal more tangible as a reason for not filling my order than the mere general unfavourable impressions described in your letter. * * If there has been any decided advance I think I am justified in expecting you to make me good in the matter. I gave you a positive order to buy. * * Of course in giving this order, I knew that with such an important decline the air would be full of all kinds of rumours and uncertainty, but having faith in the ultimate result was willing to risk my money. When your telegram arrived on Monday a.m., I of course supposed something a good deal more tangible than mere conjecture had caused it, and therefore waited for your letter. * * Have just telegraphed you to know how the market closed to-day." The telegram referred to is as follows: "Letter received. Don't think justified in not buying. How did market close to-day?"

The defendants' telegram of Monday morning, the 27th March, was not otherwise replied to.

On the morning of the 29th (Wednesday) the defendants telegraphed plaintiff: "Last sale yesterday 120. Market still very uncertain."

The stock could have been obtained at any time on Monday at 114; on Tuesday at 118; on Wednesday at 120, and on Thursday at 122.

It was not suggested that the defendants had not acted in good faith, or to the best of their judgment.

The plaintiff's contention was, that they had accepted a positive order to buy, and had no discretion in the matter.

The learned judge left it to the jury to say whether the plaintiff, by not answering the defendants' telegram of Monday morning, and directing them to go on and buy the stock,

had acquiesced in the course they were pursuing—acquiesced in their exercising their discretion, on the rumours coming to their ears, whatever they were, in not purchasing the stock—and told them that if the plaintiff did acquiesce the defendants were not responsible: that if they thought the plaintiff was justified in waiting until he got their letter, and telegraphing immediately on getting it, then he was not acquiescing in their conduct, and that it was for the jury to say, looking at the correspondence passing between the parties, and at the course of conduct, whether in their opinion the plaintiff was, on Monday, acquiescing or consenting to, or concurring in the course of conduct the defendants had apprized him by telegram they were carrying out, viz., that owing to unfavourable rumours they were not purchasing according to order; that if the jury found that the plaintiff did acquiesce, then the defendants were not liable, but if they found he did not acquiesce, then the defendants were liable, under their contract to purchase the shares.

As to damages, he told them that it was the duty of the plaintiff, if he wanted the shares, to have bought them within a reasonable time, after he knew the defendants were not purchasing them for him, and that the amount he would have to pay in such reasonable time over and above what he would have had to pay for them on Monday, would be the measure of damages. If they thought Tuesday a reasonable time, then $160 would be required, Wednesday, $240, and Thursday, $360.

The charge was objected to on the grounds mentioned in the order *nisi*.

The jury found a verdict for the plaintiffs, with $240 damages.

At the Michaelmas Sittings, November 12, 1882, *McMichael*, Q.C., obtained an order *nisi* to set aside the verdict for the plaintiff, and for a new trial, on the ground of misdirection in the learned judge in directing the jury that the defendants could not cancel the order given them to purchase stock; and

on the ground that the judge should have told the jury that the delay by the plaintiff from Monday until Tuesday was an acquiescence, and should not have left the question of acquiescence to the jury, but have directed a verdict for the defendants on the admitted facts; and that he should have told the jury that the defendants acting as agents should have exercised a discretion, and that if they had acted *bonâ fide* in the exercise of their discretion they were not liable for an error in judgment; and for misdirection as to damages the judge should have told the jury that if there was a breach it was on Monday, and the difference in the value of stock on that day was the measure of damages; and on the ground that the verdict was contrary to law and evidence, or for a non-suit or to enter a verdict for the defendants.

During the same sittings, November 29, 1882, *McMichael*, Q.C., supported the order. The first question is whether the plaintiff acquiesced in the defendants' using their discretion in the matter. The plaintiff by not answering the defendants' telegram of Monday until the following day, and the telegram and letter sent by the plaintiff on that day, clearly shew such acquiescence. If the plaintiff desired to hold the defendants to the order given he should have so telegraphed them. The construction of the correspondence was a matter for the court, and, as the correspondence itself shewed acquiescence, the question should not have been left to the jury. The plaintiff avails himself of the defendants' discretion, and when he finds that it has not turned out to his advantage he endeavours to enforce the original instructions. The law is clearly laid down in *Story* on Agency, 9th ed., secs. 478-9; *Wharton* on Agency and Agents, sec. 107. Then as to damages, no damage was proved. On the Monday when the breach, if any, occurred, the stock was still at 114, the value of the stock when the contract was made: *Powell* v. *Jessopp*, 18 C.B. 336; *Tempest* v. *Kilner*, 3 C. B. 249..

Falconbridge, contra. The plaintiff gave the defendants a direct and positive order to buy the stock, and the defendants

in their reply accept the order and agree to buy it. They say they will continue the order until revoked or executed, that is, until revoked by the plaintiff or executed by the defendants, and the defendants entered upon the performance of the contract. There is nothing in the subsequent correspondence which shews that the contract was not to be carried out. The case may be looked upon in two aspects, 1st disobedience to orders, and 2nd the right to renounce. There is no question that an agent must carry out his principal's orders and is liable for disobedience: *Wharton* on Agency and Agents, secs. 247, 248. Then as to renunciation, the contract was founded on a valuable consideration, and therefore there was no right to renounce; and even assuming that it was a gratuitous agency, still the defendants having entered upon the performance of their duty were bound to perform it; there was no discretion given to the defendants: *Story* on Agency, 9th ed. secs. 189-90, 478-9; *Wharton onAgency and Agents,* secs. 107, 247; *Bruce* v. *Davenport,* 36 Barb. 394; *United States* v. *Jarvis,* Davies's Circuit R. 274. This, however, was a question of fact for the jury, and was therefore properly left to them, and they found for the plaintiff: *Story* on Agency, secs. 189, 192, 217; *Ireson* v. *Mason,* 12 C. P. 475. Then as to the damages. The plaintiff had a reasonable time after the contract was broken to purchase the stock, and the jury have found that Wednesday was a reasonable time for such purpose, and they have given as damages the difference between the market value of the stock on that day and the contract price; *Mayne* on Damages, 3rd ed., 188; *Graham* and *Waterman* on N.T., vol. iii., p. 832.

December 29, 1882. OSLER, J.:—This case arises out of a contract of agency, and the question is, whether the defendants, who are the agents have been guilty of a breach of it which entitles the plaintiff, their principal, to recover damages.

The plaintiff gave, and the defendants, for valuable consideration, accepted a positive order to buy a certain number of shares of Montreal Telegraph stock at a named price. Having

received express instructions the defendants' duty was to obey them strictly, if by the exercise of due diligence they could do so. Using, however, their own discretion they disregarded them, and the plaintiff alleges that he has in consequence, suffered loss.

Two points arise for consideration, (1) whether the plaintiff ratified or assented to the defendants' course of conduct in disobeying his instructions and using their discretion. (2) If he did not, what is the proper measure of damages.

In *Russell* on Mercantile Agents, 2nd ed., p. 23 it is said that, "in general, a mercantile agent is bound to follow his instructions literally, unless there be something in the nature of the instructions themselves which renders it improper that he should do so; or unless, by the happening of certain events after the instructions are given, he should be relieved from the whole, or some part of this duty." See also *Story* on Agency, 9th ed., sec. 189; *Wharton* on Agency and Agents, sec. 247.

And if an agent deviate from his instructions, unless their meaning be doubtful, and he has acted under a *bonâ fide* though mistaken notion of their purport, he will be liable for all loss resulting therefrom, whether such deviation originated in an intention to benefit his principal or to defraud him: *Russell* on Mercantile Agents, p. 42; *Ireland* v. *Livingston*, L. R. 5 H. L. 395, at p. 416.

Again, although an agent may renounce his agency after entering upon the business, he must give his principal timely notice of his intention to do so, and, if he does not, will be liable for any loss the latter may sustain by the breach of his engagement. He cannot wantonly withdraw from it without rendering himself responsible for the consequences of doing so: *Story* on Agency, 9th ed., sec. 478; *Wharton* on Agency and Agents, sec. 107; *United States* v. *Jarvis*, Davics's Circuit Court Reports, 274, 283.

In the case before us the defendants, instead of executing the plaintiff's order, telegraphed him early on Monday, the first

day on which they could have bought the stock, that owing to unfavourable rumours thay cancelled his order to buy. They do not merely say that they will not buy during that day, or until a lapse of some definite time. They inform him that they have absolutely cancelled his order in the meantime, which I understood to mean until they receive a further order. They added that they were "writing," that is, of course and as the plaintiff understood it, in explanation.

Dealing first with the question of ratification or assent or, in other words, of an implied variation by the plaintiff of the terms of his order, as a defence to the action, it appears that he took no notice of the defendants' message until 5 o'clock in the evening of the following day, when, having in the meantime received their letter written at the same time as the telegram, he telegraphed them that he did not think they were justified in not buying the stock, and he wrote to the same effect a letter, to which I shall presently refer more particularly, intimating that he would hold them responsible for any loss he might sustain if they should now be unable to purchase the stock at the price he had given them.

The defendants contend that the plaintiff's conduct in not replying to their telegram until Tuesday evening was an acquiescence in or ratification of the course of conduct which that telegram apprized him they were pursuing. They also urge that his letter and telegram of Tuesday conclusively shew that he was so acquiescing in it, and that the learned judge should have so ruled at the trial.

The plaintiff's contention, on the other hand, is, that he was warranted in delaying his reply to the telegram until the receipt of the defendants' letter of explanation: that he was not until then bound to determine whether he would or would not acquiesce; and that the question of acquiescence, however evidenced, was for the jury.

That might be so, if it depended merely upon the proper inference to be drawn from the plaintiff's conduct in not reply-

ing to the defendants' telegram for nearly two business days, considering the fluctuating nature of the property they were dealing with, and the facilities of communication, though it might well be urged that the silence of the principal ought to raise a conclusive presumption that he intended to ratify the transaction, especially where it has a direct tendency to influence the agent: *Wharton* on Agency, sec. 87; *Hope* v. *Lawrence*, 50 Barb. 238, a case very similar to this. But it is different with the plaintiff's letter of the 28th March. We think the defendants are right in saying that it should not have been merely substituted to the jury as a fact in the case, but that its construction was for the court, and that it proved the plaintiff's acquiescence.

Bearing in mind that the plaintiff had given the defendants a positive order to buy, and that he had received from them distinct notice that they had cancelled his order, he writes, on the Tuesday evening: "I was prepared for something more tangible than the mere general unfavourable impression described in your letter," * * and again: "When your telegram arrived on Monday a.m., I *of course, supposed* something a good deal *more tangible than mere conjecture* had caused it and *therefore waited for your letter.*"

We think that the plain meaning of this is, that although the plaintiff had at first given the defendants no discretion in the matter, he was quite willing that they should exercise it in his favour, that he had in his own mind assented to their doing so pending the receipt of their letter, and for that reason had not repeated his order. During the intervening period he was assenting to their judgment in not buying. He might afterwards dispute its soundness, but he had taken his chance of its being right, and *qui sentit commodum sentire debet et onus.*

In *Wallace* v. *Telfair*, 2 T. R. at p. 189 (note), Buller, J., speaking of the assent of the principal to the agent's unauthorized act, says: "If, with a knowledge of all the circumstances, he adopted the defendant's acts for a moment, he ought to be

bound by them;" and in *Prince* v. *Clark*, 1 B. & C. 186, Holroyd, J., at p. 190, says: "Circumstances might possibly exist to justify an agent in not strictly pursuing his instructions. It might possibly be ruinous to his principals to pursue them. Coffin and Clark in this case, having deviated from their instructions, gave the plaintiff notice of the purchase which they had made; and the only question is, whether he ever assented to the act done by them, which might or might not in the event turn out beneficial. If he did assent, it is quite clear that he cannot succeed in the present action."

The only fact which was material to be known by the plaintiff here was, that the defendants were not obeying his instructions, but were exercising their discretion. His letter tells us to what extent and for how long he was assenting to that course, and if he assented at all or in any contingency, he was found, and the defendants were discharged. With deference therefore to the view taken by the learned judge at the trial we think the exception to his ruling on this point was well taken, and that the defendants were entitled to judgment.

Assuming, however, that the case was promptly left to the jury on the question of acquiescence, the defendants say that the plaintiff was not entitled to damages after the 27th March, on which day there was a complete breach of their contract. The plaintiff could have treated their message as an absolute renunciation of their agency—as a distinct refusal to perform their agreement; and they contended at the trial and before us that he was bound so to treat it, if he meant to deny their right to deviate from his orders or to exercise a discretion to carry them out or not, as they should deem best for his interests. Of course they were not then at liberty by changing their minds to place him in a worse position than if they had refused to undertake the agency at all, but his damages would in that case, if he desired to buy the stock, be measured by reference to what was a reasonable time for that purpose having regard to the time at which he had notice of the defendants' refusal to perform their agreement.

In my opinion the defendants are right in their contention. No limit of time had been given by the plaintiff within which they might purchase the stock, and therefore it cannot be said that he was entitled to treat their notice as inoperative, or as a mere notice of an intention not to carry out a contract at some future time, until the arrival of which they were at liberty to change their minds, and perform it, if the plaintiff had not in the meantime elected to treat what had occurred as a breach: *Frost* v. *Knight*, L. R. 7 Ex. 112, 113.

It may be tested in this way. Could the defendants after sending the telegram, have bought the stock without further orders, and charged the plaintiff with it. I should say clearly they could not.

If this is the correct view to take of the defendants' liability, the question of acquiescence becomes immaterial, because there is then no evidence that the plaintiff sustained any loss by the defendents' breach of contract. On the contrary, the evidence shews that he had notice of it in time to have given orders to buy the stock on that day at his own price, and it has not been suggested that that was not a reasonable time.

If there was any ground for thinking otherwise, a new trial might be granted to enable the plaintiff to take the opinion of a jury on that point, but we see none.

If, however, it be said that there was not an absolute refusal, at all events, to purchase the shares, but only an intimation that the defendants deemed it better, in the plaintiff's interest, not to buy at present, that was equally a deviation from instructions and a breach of their contract. It was notice to the plaintiff that they meant to use their own discretion instead of obeying his order, which, in effect, of course prohibited them from using any discretion at all.

If he acquiesced in the defendants using their discretion that is a defence to the action. If he did not, still the contract was broken on the 27th March to the knowledge of the plaintiff, and he sustained no damage. We cannot think he is war-

ranted in saying to the defendants, as in effect he does, "I know that you are disobeying my orders either by determining not to buy for me at all, or by using in my interest a discretion which I have not given you, but I will wait further information before I decide whether the rumours by which you are guided are of sufficient importance to justify your course. I will acquiesce if you prove to be right, but I will not if you are wrong." That was the position the plaintiff took, but he could not by doing so enhance the measure of damages to which he would be entitled if in the end he determined not to acquiesce.

We think, therefore, the jury should have been told that if they thought the plaintiff did not acquiesce in the defendants' course of conduct their contract was broken on the 27th, and that the damages should be ascertained by considering what was a reasonable time for the plaintiff to buy the stock after he received notice of the breach. As we have pointed out the evidence shews that in that case Monday was a reasonable time for that purpose, and no damage was proved.

In whatever way the case is looked at the defendants are entitled to recover.

WILSON, C.J.:—On the 25th of March, the plaintiff instructed the defendants to buy for him Montreal Telegraph stock for 114 or less. The telegram was received by the defendants too late that day to enable them to act upon it. On the 27th, Monday, the defendants telegraphed the plaintiff that they cancelled his order in the meantime to buy, as the rumours about the stocks were so unfavourable, and they would write. The plaintiff received that telegram upon the same day about noon. The plaintiff waited for the defendants' letter, which they wrote the same day, and he received it in the afternoon of the 28th, and about 5 p.m. that day he wrote to them stating, among other things: "I gave you a positive order to buy."

The first enquiry is, had the defendants any discretion in executing their commission? The next is, if they had, did they act with reasonable discretion in forbearing to buy until they

communicated with their principal and received his further instructions? And the last is, if they had no discretion to exercise, or if they did not exercise it wisely, so that they are responsible in law for their conduct, is the plaintiff to blame for delaying from noon of the 27th of March till the evening of the 28th, when it was too late for the defendants to act upon that day?

The contract on the part of the agent with the principal is, that he will act with reasonable skill and ordinary diligence, and he is consequently liable for injury sustained by his employer by reason of the agent's failure in these respects. He may deviate from his instructions on certain occasions, but in general he must follow the instructions of his principal. Here the agent was to buy the stock at a price not higher than a certain rate. There was rumours of the depreciation of the stock, and the defendants fearing from such rumours their principal would be a loser if they bought for him in a falling market did not buy for him, but telegraphed him they had not bought in consequence of these rumours. It appears to me they had a discretion to act if they acted upon fair and reasonable grounds or information, and in good faith for their principal's interest. It is impossible that in no case of the kind can the agent use any discretion of his own. The principal was in Buffalo, the defendants were in Toronto, and they had an agent or correspondent in Montreal. The defendants intended to fill the plaintiff's order in Montreal, where there was a better market in every respect for such stock. If a change had taken place suddenly in the stock the principal at a distance could not act, and to say that the agent on the spot should not exercise any judgment whatever to buy or not to buy would be wholly unreasonable. If the defendants had bought at 110 on the strongest assurances that the next day the stock would fall to 100, and in their own belief that it would fall or probably continue falling, it would, unless the instructions were of the most imperative nature to buy in any event or at all hazards according to the directions, be an act of extreme imprudence, perhaps I might say of folly, to buy in such a case without first referring to the principal.

As to the second question, I find nothing impeaching the due exercise of the defendants' discretion.

If, however, they were under positive orders to buy in any event, it is quite plain they informed the plaintiff by noon on the 27th of March they did not think so. And when so informed he should, if he thought they were under positive orders, have telegraphed them at once, that his orders were positive and they must buy for him. He did not do that, but left them without any order till the evening of the following day. If he had telegraphed them on the 27th, as he could have done, the defendants could have executed his order in the terms of it, and no loss would have happened.

It is no excuse that the plaintiff did not answer the defendants' telegram of the 27th because he was waiting for the letter which they promised to write to him, for his case is, they had no right to telegraph him or write to him; they had no discretion about buying or not buying; their duty was to buy within the limits given to them; they had their instructions already, and all they had to do was to obey them.

It is quite manifest, when he knew they were not filling his order, and when he knew they were exercising their judgment whether to buy or not, he should have directed them at once to buy; they had their orders already, and did not acquire further instructions from him.

It was in consequence of the plaintiff's own neglect he has sustained a loss, if his instructions were of the positive nature he attributes to them.

GALT, J., concurred.

Order absolute.

Note:

A person who employs a broker is taken to authorize him to act as other brokers do, that is according to the rules of the Stock Exchange and usages and customs prevailing among brokers: *Mitchell* v. *Newhall*, 17 L.J Ex. 78; *Bayliffe* v. *Butterworth*, 15 M. & W. 308, and no private instructions to a broker can limit the general authority implied by authorizing

him to deal on the Stock Exchange and according to its usages: *Coles* v. *Bristowe*, L.R. 4 C.P. 36; *Forget* v. *Baxter*, [1900] A.C. 467.

The fact that the client has not sufficient means to purchase outright and never in reality intends to take delivery to himself of the stock, and that the broker has the stock transferred to him and pledges it with the Bank for the balance of the purchase money does not constitute gaming in stocks within the provisions of the Criminal Code: *Forget* v. *Ostigny*, [1899] A.C. 318.

PURCHASE ON MARGIN.

This transaction has been analyzed and the rights of the parties stated as follows by Lewis on his work on Stock Brokers at page 125:—

The brokers need not necessarily purchase the shares in the exact block ordered by his individual clients. It is customary among brokers to lump several orders for one stock and there is nothing to prevent them buying the total amount required by their various customers in a block: *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Scott & Horton* v. *Godfrey*, [1901] 2 K.B. 726.

Broker agrees—

1. To buy the stock indicated.
2. To advance all money required for purchases beyond the margin furnished by customer.
3. To carry or hold such stocks for benefit of customers so long as margin is kept good, or until notice given.
4. At all times to have in his name or under his control and ready for delivery the shares purchased or an equal amount of other shares of the same stock.
5. To deliver such shares on receipt of advances and commission.
6. To sell on the order of the customer on payment of the like sums to him and account for the proceeds.

Customer agrees—

1. To pay a certain margin on current market value.
2. To keep good such margin according to the fluctuation of the market.
3. To take the shares when required by the broker and pay the balance.

A broker is bound to exercise his judgment and discretion to the best advantage for the benefit of his principal: *Gray* v.

Haig, 20 Beav. 219. But he cannot exercise his discretion as to the advisability of following his clients' instructions. If he does not comply it is at his peril.

The broker must purchase the exact stock designated by the client. If he exercises reasonable care he is not liable if the certificates turn out to be spurious: *Westropp* v. *Solomon*, 86 B. 346; *Mitchell* v. *Newhall*, 15 M. & W. 308; *Young* v. *Cole*, 3 Bing. H.C. 724. But see *Re London Exchange Bank*, L.R. 9 Eq. 270.

Instructions to sell must be as strictly complied with as instructions to buy. The stock must be sold at the price named or at the market price, which ever may be specified: *Bush* v. *Cole*, 28 N.Y. 261. An authority to sell exists until countermanded or revoked by implication: *Davis* v. *Gwynne*, 4 Daly (N.Y.) 218, 57 N.Y. 676. But where an order has been given in writing, parol evidence may be given to shew that the written order was subsequently modified or cancelled by the client: *Clarke* v. *Meigs*, 10 Bosu. (N.Y.) 337. If the client files a stop order or direction to the broker not to carry the stock below a certain figure, but to sell as soon as the stock touches that figure, or buy in in case of a short sale, this must be strictly complied with also: *Porter* v. *Wormser*, 94 N.Y. 443; *Campbell* v. *Wright*, 118 N.Y. 594; *Davis* v. *Gwynne*, 57 N.Y. 676; *Wicks* v. *Hatch*, 62 N.Y. 535. But see *Smith* v. *Bouvier*, 70 Pa. St. 325.

Where a broker makes an authorized sale of stock, carried for the client, the client may ratify and claim the benefit of the sale or may recover from the broker the market value of the shares on the day of the sale: *Taussig* v. *Hart*, 58 N.Y. 425.

Where a short sale is instructed, the broker if possible should sell at the specified price. This form of transaction is closed by buying in to cover, and the broker has no right to do this without instruction. But if the client fails to respond to a demand for margins the broker may apparently buy in to protect himself: *White* v. *Smith*, 54 N.Y. 522; *Boyle* v. *Henning*, 121 Fed. Rep. 376; *Hess* v. *Rau*, 95 N.Y. 359; *Campbell* v. *Wright*, 118 N.Y. 594.

If, however, the broker acting without negligence is obliged to buy in at a higher figure than instructed, the client will be liable for the difference: *Smith* v. *Bouvier*, 70 Pa. St. 325.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

DUGGAN v. THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY ET AL.

Transfer of shares subject to a trust—Constructive notice—Signature of Bank manager as "manager in trust."

The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers, and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of "margins" certain other shares in the same company, the transfer being in the same form "in trust." Subsequently the loan company were paid off by the brokers at the plaintiff's request, and the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier "in trust," and from time to time changed the loan to other banks and financial institutions each transfer being made from and to the managers thereof "in trust." An allotment of new shares was taken up by the then holders of the pledged shares at the request of the brokers. Subsequently the brokers on the security of the old and new shares obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers the shares being transferred by the then holders to the defendants.

Held, that the appellants, as derivative transferees from the lender, were not affected by a trust in favour of the respondent, unless such trust was clearly disclosed on the face of their author's title, or was otherwise notified to them.

The words "manager in trust," appended to the signature of a bank manager import that he held and transferred the shares in trust for his employers, the Bank, and are not calculated to suggest that he stood in a fiduciary relation to some third person, so as to affect a transaction for value with constructive notice of such relationship.

THIS action was tried by STREET, J., who gave judgment in favour of the plaintiff (reported 19 O.R 272). On appeal this judgment was reversed by the Court of Appeal (reported 18 A.R. 305). The Supreme Court reversed the judgment of the Court of Appeal and restored the judgment of STREET, J. (20 S.C.R. 481), but this judgment was in turn reversed on appeal to the Privy Council (1893 A.C. 506), and the action finally decided in favour of the defendants. All of these judgments will be found below.

THIS was an action brought by E. H. Duggan against the defendants named in the judgment for the recovery, upon payment of the amount due by plaintiff, of certain shares of stock, which had been transferred to two of the defendants "in trust," as security for such payment, and which shares had been afterwards transferred by the plaintiff's transferees to others as security for other and larger amounts due by them than were due by plaintiff to them.

The following facts are taken from the judgment:

On 27th October, 1881, the plaintiff, being the owner of 160 shares of the stock of the Toronto House Building Association, procured a loan of $1,500 from the North British Canadian Investment Company, and as security transferred 80 of these shares to the defendants, W. B. Scarth and Robert Cochran, who were the managers of the company. The transfer expressed upon its face that it was "in trust."

Messrs. Scarth & Cochran, in addition to their business of managing the North British & Canadian Investment Company, carried on the business of stock brokers and financial agents.

On 20th February, 1882, the plaintiff embarked in some stock speculations, in the course of which he purchased through Messrs Scarth & Cochran a large quantity of Hudson's Bay and North West Land Company stock upon margins, and he transferred to Messrs. Scarth & Cochran on that day the remaining 80 shares of his stock in the Toronto House Building Association to secure them against loss in connection with his stock speculations through them. This transfer was made to "Messrs. Scarth & Cochran, Brokers of Toronto, in trust."

On 23rd February, 1882 they transferred 80 shares of the stock to "John L. Brodie, in trust Cashier," and on 11th July, 1882, they transferred the remaining 80 shares to "John L. Brodie, Cashier in trust." Mr. Brodie was cashier of the Standard Band, and these transfers were made to him to secure advances made to Scarth & Cochran by that bank.

On 23rd January, 1883, they changed the loan from the Standard Bank to the Merchants' Bank, and at their request

the 160 shares were transferred by Mr. Brodie to "William Cook, Manager, in trust," Mr. Cook being at the time manager of the Merchants' Bank in Toronto. The name of the company in which these shares were held was changed at this time from "The Toronto House Building Association" to "The Land Security Company."

On 2nd February, 1883, Scarth & Cochran paid off to the North British & Canadian Investment Company the loan of $1,500, which had been effected by the plaintiff in October, 1881, and the stock appears to have been treated as part of the margin they held from the plaintiff, and was never re-assigned to him.

In April, 1883, Scarth & Cochran arranged with the Home Savings & Loan Company, and with the Federal Bank for an advance upon the security of this stock; the Merchants' Bank was paid off, and 45 of the shares held by Mr. Cook for the Merchants' Bank were transferred at their request to "The Home Savings & Loan Company, in trust," and the remaining 115 shares to H. S. Strathy, Cashier, in trust." Each of these transfers was executed by Mr. Cochran as attorney for Mr. Cook.

On 2nd January, 1885, Mr. Strathy, for the purpose of convenience, transferred to Mr. J. O. Buchanan, manager of the Federal Bank in Toronto, the 115 shares theretofore held by him. This transfer is made by "H. S. Strathy, Cashier, in trust," to "J. O. Buchanan, manager, in trust."

On 2nd March, 1886, having in view a pending allotment of new stock in the Land Security Company, the Home Savings & Loan Company transferred to "J. O. Buchanan, manager, in trust," one share of the 45 shares held by him. In February, 1886, the Land Security Company made an allotment of new shares of the company amongst their present shareholders, and at the request of the plaintiff, Cochran arranged with the holders of the shares to take up the allotments and pay the call made upon them. In pursuance of this arrangement, the Home Savings & Loan Company accepted on 17th February, 1886, an allot-

ment of 67 new shares in respect of the 45 shares then held by them, and Mr. Buchanan, as manager, in trust, accepted an allotment of 172 new shares in respect of the 115 shares then held by him.

On 17th December, 1886, at the request of Cochran, the Home Savings & Loan Company, by Robert Cochran, their attorney, transferred to "J. O. Buchanan, manager, in trust," the 44 old and 67 new shares then held by the transferors, whose debt was paid off with money obtained from the Federal Bank. In February, 1887, a further allotment of new shares in the Land Security Company was made, and "J. O. Buchanan, manager, in trust," received and accepted an allotment of 399 new shares in respect of the 160 old shares then held by him. The calls upon the new stock in each case were added by the holders of it to the debt of Cochran, for which the shares were pledged. The Federal Bank now held the 160 old shares and 638 new shares in the Land Security Company, all in the name of "J. O. Buchanan, manager, in trust."

On September 7th, 1887, Cochran paid off the debt for which the stock was held by the Federal Bank, and obtained from Mr. Buchanan a power of attorney to transfer the stock generally. On the same day he negotiated and obtained an advance of $14,300 from the defendants, the London & Canadian Loan & Agency Company, Limited, and to secure the advance he executed as attorney for "J. O. Buchanan, manager, in trust," a transfer to "James Turnbull, in trust," of the 160 shares old and 638 shares new stock, Mr. Turnbull being manager of the London & Canadian Loan & Agency Company.

Shortly before the commencement of this action the plaintiff tendered to the defendants, the London & Canadian Loan & Agency Company, Limited, a sum of $7,500, alleged by him to be a sum sufficient to cover all that Scarth & Cochran could claim from him, and demanded that the stock should be re-transferred to him. They refused, however, to recognize him in the matter, and claimed to hold the stock for the full amount advanced by

them to Cochran. Cochran wrote to the plaintiff that he was unable to procure a return of the stock upon payment of Duggan's debt, and the stock was thereupon sold by the London & Canadian Loan & Agency Company to realize the amount of their claim against Cochran. The sale took place on 9th January, 1888. The 160 shares of old stock realized $9,670, and the 638 shares of new stock, $7,711.83—in all, $17,381.83.

Duggan was aware from the beginning that Messrs. Scarth & Cochran were raising money upon his stock; this was certainly called to his attention in 1886, when the first allotment of new stock was made, but he was assured then by Cochran that his stock was intact and could be redeemed upon payment of the amount due by the plaintiff to Cochran. He was only made aware immediately before his tender to the London & Canadian that it was pledged for an amount in excess of what he owed the broker upon it. Long before this time all the stocks in which the plaintiff had been speculating had been disposed of, and the balance due Cochran by him represented the losses upon the speculations and the advances made to take up the new stock in the Land Security Company. Messrs. Scarth & Cochran had dissolved partnership in November, 1884, and the business was continued by the defendant Cochran alone. At the time of the dissolution some $4,100 appears to have been due the firm from the plaintiff, and his stock was pledged for a sum considerably larger.

The action was tried at the Winter Assizes, held in Toronto upon the 4th and 8th days of March, 1890, before STREET, J.

McCarthy, Q.C., and *Moss*, Q.C., for plaintiff.
Arnoldi, Q.C., for the Company.
Cassels, Q.C., for defendant Turnbull.
Ritchie, Q. C., for defendant Scarth.

March 20th, 1890. STREET, J.:—

This action is brought against the London & Canadian Loan & Agency Company, Limited, James Turnbull, William B.

Scarth and Robert Cochran, claiming an account from the defendants of the full value of the shares and discovery of their dealings with them, and a declaration that the defendants, the London & Canadian Loan & Agency Company, Limited, and Turnbull could only lawfully hold the stock for the amount due by the plaintiff to Scarth & Cochran.

It appears sufficiently plain from the facts that Scarth & Cochran never held these shares as security for any greater sum than that which was due to them from time to time by the plaintiff, and that as between them and the plaintiff, their duty was to return, or procure the return to the plaintiff of the shares upon his paying the amount due them. This, however, they were unble to do, as Mr. Cochran informed the plaintiff in his letter of 9th December, 1887, because the stock was pledged for a sum largely exceeding the plaintiff's debt to them, and they were unable to raise the difference, and I think, looking at that letter, that a tender to Cochran would have been a useless formality.

The question of the plaintiff's right to follow the stock into the hands of the London & Canadian Loan & Agency Company and their manager, Mr. Turnbull, is, no doubt, a highly important one, but the principles upon which the right is claimed are familiar ones, and their application to the facts of the present case does not appear attended with special difficulty. The shares in question are by statute transferable upon the books of the company in which they are held. They are, however, within the rule which applies to shares as well as to ordinary goods and chattels that a transferee acquires no better title than that of his transferor, unless the true owner has in some way estopped himself from setting up his title as against the transferee. See remarks of Cotton, L. J., in *Williams* v. *Colonial* Bank, 38 ch. D., at p. 399.

Duggan was the true owner of the shares in question, and was undoubtedly entitled to obtain them as between himself and Messrs. Scarth & Cochran upon payment of their advances. His right to obtain them from the transferees, the London & Canadian

Company, is disputed upon several grounds which it is necessary to examine.

It is said, in the first place, that the first 80 shares were transferred by Duggan to William B. Scarth and Robert Cochran individually, and that they have made no transfer in their individual names; that as to these 80 shares the plaintiff cannot recover, because they must be taken to be still standing in the names of the original transferees. A transfer was, however, executed during the continuance of the partnership in the name of the firm of 160 shares which Mr. Cochran says were the shares of the plaintiff, to the manager of the Merchant's Bank, and I am bound to assume upon the pleadings and the facts disclosed that this transfer was made with the authority of both partners, and that, therefore, the 80 shares passed as part of the 160.

Then it is contended that it is impossible to shew that the shares transferred by the Federal Bank manager to Mr. Turnbull were the shares of the plaintiff, because in the course of their journey through various holders, between the first transfer by the plaintiff to Scarth & Cochran and their final arrival in the hands of the London & Canadian Co., they had passed through the hands of persons who held large numbers of other shares in the same company which were in no way distinguishable from those in question; and that it would be unjust to impute to the London & Canadian Co. notice of the plaintiff's rights when those rights had become confused with the rights of other holders.

Now it is quite true that these shares were in no way earmarked or distinguished from other similar shares in the same company. They were not identified by numbers or otherwise, and it is, therefore, alike impossible and unnecessary that the plaintiff should shew that the shares which came to the hands of Mr. Turnbull were the identical shares which he had transferred to Messrs. Scarth & Cochran. It is sufficient for him to shew, as he has done, that the shares have been dealt with by the various intermediate holders as being those shares, in order to entitle

him to assert as against the last transferee his ownership in them: Lewin on Trusts, Bl. ed., p. 1093 (star page 894); *Pennell* v. *Deffell*, 4 D. M. & G. 372; *In re Hallett's Estate, Knatchbull* v. *Hallett*, 13 Ch. D. 696, at p. 711.

Granting, however, for the moment, that the London & Canadian Co. might have had some difficulty in tracing these shares back through the various holders to the true owner, the plaintiff, they have left unanswered the further objection that they did not attempt to do so. They held the shares under a transfer expressed on its face to be from "J. O. Buchanan, manager, in trust," executed by Cochran as attorney for him, and accepted by Mr. Turnbull, their manager, and they were lending money upon the shares to Cochran. They must at least be taken to have known that Mr. Buchanan held the shares as trustee. Here was plain notice that the transferor, Mr. Buchanan, was not the owner of them, and everything to put the London & Canadian Co. upon enquiry as to who was the owner, but they abstained from a single word of enquiry upon the point. Mr. Turnbull, their manager, who negotiated the transaction, was asked at the trial :

"Q. As a fact, you did not know what the trust was? A. I did not know what the trust was.

Q. You did not inquire of Mr. Cochran how he held? A. I did not. *I think it would have been an impertinence if I had.*

Q. Then you did not enquire into the title at all? A. Beyond the fact that we got it.

* * * * * * *

Q. Now, if you had noticed that this stock had been assigned in trust, that the gentleman who purported to assign it to you described himself as holding it in trust would not you have felt bound to make enquiries as to what that trust was? A. I thought I knew what the trust was.

Q. Answer the question! A. No."

The witness afterwards explained in re-examination that if he had noticed that the stock stood in the name of Mr. Buchanan,

"in trust," that circumstance would have made no difference in his action, because he would have understood that to mean in trust for the Federal Bank.

Being put upon enquiry by the form of the transfer to them, the London & Canadian Co. must be taken upon all reason and authority to be chargeable with notice of the facts which existed, and which I am bound to assume they would have learned, had they made enquiry either of Mr. Buchanan or Mr. Cochran: *Jones* v. *Smith*, 1 Ha., at p. 55; *Jones* v. *Williams*, 24 Beav., at p. 62. They would have been told by the former gentleman that he held the shares for the Federal Bank as security for an advance made to Cochran, which had just been paid off; they would, I must assume, have ascertained from Mr. Cochran that the shares had been pledged to Scarth and himself as security for advances made to Duggan, and that Duggan was the owner of them, subject to the payment of some $7,000 or $7,500. Apart therefore, from the supposed difficulty of tracing the shares back to the plaintiff, the London & Canadian Co. seem clearly chargeable with notice of the plaintiff's rights in regard to the shares which were transferred to them.

The London & Canadian Co. further contended, upon the argument, that they were entitled to be treated as assignees of the debt for which the Federal Bank held the shares. This position is not raised upon the pleadings, nor was attention directed to it at the trial. The pleadings treat the advance as having been made directly to Cochran, and do not set up the rights of the Federal Bank as a bar. The evidence at the trial does not connect the money of these defendants with the payment of the debt of the Federal Bank beyond the fact that the advance to Cochran was made apparently on the same day that he paid the debt to the Federal Bank. It would rather appear that the Bank was paid before the Loan Co. actually made any advance. It may, perhaps, be well, however, now to consider the grounds upon which the argument rests.

On the 11th April, 1883, Scarth & Cochran borrowed from the Federal Bank $13,450 upon the security of the plaintiff's

stock and other stocks belonging to their customers. At this time the plaintiff owed them some $45,000 for the purchase money of the speculative stocks which they had purchased for him. Against this they or their English agents held these stocks, and in addition Scarth and Cochran held the 160 shares of Land Security Co. stock and other stocks as a margin. At the end of 1885 all the speculative stocks had been sold and the proceeds placed to plaintiff's credit by Cochran leaving a balance due by plaintiff of between $3,000 and $4,000, and there was due the Federal Bank by Cochran some $8,300, for which they held the plaintiff's stock.

The contention of the defendants, the London & Canadian Co., is that Scarth & Cochran must be taken to have had from Duggan authority to pledge the stock held as margin to the extent of the balance due them by him, and that therefore they had his authority to pledge the stock of the Federal Bank for the full amount for which they did pledge it; that the pledge to the Federal Bank was lawfully made with Duggan's authority for the full amount of $13,450 in the first place, and that although Scarth & Cochrane should have applied the proceeds of the sales of the speculative stocks in reducing this debt, the right of the Bank to hold the stocks for the whole debt was not affected by Scarth & Cochran's failure to do so; that the Bank had, therefore, always the right to hold a lien on the stock against the plaintiff for the amount due them, which, as above stated, was reduced in 1885 to $8,300, but was afterwards increased by the amount they advanced to take up the new stock, and that the defendants, as equitable assignees of the rights of the Bank, are entitled to hold the stock for this $8,300, and for the later advances upon the new stock less any payments since made by Cochran to the Bank in reduction of the amount. No application was made to amend the pleadings, and I think it was too late after the evidence had all been taken to raise such a question, putting, as it does, the case of the Loan Co. upon such an entirely new basis, unless the evidence shewed the strongest and firmest foundation for it. To come to a decision upon it I

should have to go into the whole account between the Federal Bank and Scarth & Cochran, and to ascertain whether the Federal Bank were chargeable with notice from time to time of the plaintiff's rights. I must, therefore, refuse to give effect to this contention.

I can find no evidence upon which I can hold that the plaintiff has estopped himself from claiming his rights. In his transfers to Scarth & Cochran he transferred to them "in trust," thus giving notice to all subsequent transferees from them that their interest was not an absolute one: *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617; *Muir* v. *Carter*, 16 S.C.R. 473. He is not shewn to have been aware until immediately before he gave notice to the defendants, the Loan Co., that his stock had been improperly dealt with by Scarth & Cochran, or either of them, and the mere fact that he knew they had pledged it, when coupled with Cochran's statement to him that it was intact, was not one which required action on his part.

On the part of Scarth it was urged that he should not be held liable for the acts done by Cochran after the dissolution of the partnership; that the loan effected upon this stock whilst he was a partner with Cochran was no greater than was justified by the state of the account between the plaintiff and his firm, and that with regard to the new stock, at all events, he is not in any way answerable for it.

Scarth & Cochran became trustees of the 160 shares, and their duty was to restore them to the plaintiff upon payment of their lien. Scarth had nothing to do with the new stock, and was never a trustee of it; his liability must, therefore, be limited to the value of the 160 shares of old stock, and against this he is entitled to credit for so much of the balance due by Duggan now remaining as represents the balance of the debt due by him to Scarth & Cochran as a firm at the time of their dissolution.

The plaintiff is entitled, therefore, to recover from all the defendants, including Scarth, the value of the 160 shares, less this balance of Scarth & Cochran's claim as a firm against Dug-

gan; and, in addition, to recover from the defendants, other than Scarth, the value of the 638 new shares, less the balance due by the plaintiff to Cochran upon the dealings subsequent to the dissolution of the firm of Scarth & Cochran. The value of the shares in each case is to be taken at their highest market value between the date of the plaintiff's tender to the Loan Co. and the 8th of March, 1890, which was the day upon which the trial was concluded: *Bank of Montgomery* v. *Reese*, 26 Penn. St. Rep. 143, and cases there cited.

There should be a reference as agreed on by the parties to ascertain the value of the shares and to take the necessary accounts, and the plaintiffs should have their costs against all the defendants.

The defendants, the Loan Company, appealed, and the appeal came on to be heard before the Court of Appeal [HAGGARTY, C.J.O., BURTON, OSLER nad MACLENNAN, JJ.A.] on the 19th and 20th of January, 1891.

E. Blake, Q.C., and *O. A. Howland*, for the appellants. The Loan Company are in the same position as if the stock were still held by the Federal Bank, and the learned Judge was not right in holding that they must be treated as if this were a direct transaction between Cochran and themselves; but even if they are so treated, they are entitled to hold the stock for the full amount of the advance which they made to Cochran. Under the Act of Incorporation of the Land Security Company, the stock is made personalty and assignable: 36 Vict. ch. 128, sec. 6 (O.). The shares are not numbered and there is therefore no mode of tracing them. Under the English Joint Stock Companies' Act, the shares ought to be numbered, but even there it has been held that the transferee of shares who has obtained the legal title to them, takes them freed from any equities, of which he has not notice, existing between his tranferor and any other person: *Briggs* v. *Massey*, 42 L.T.N.S. 49. The forms of transfer, "in trust," do not mean more than that, for convenience sake, an officer of the bank or other institution that advances

the moneys, is selected as holder of the shares and receives the transfer as trustee for the institution advancing the money. Even in the case of the second transfer to Scarth and Cochran, where they were not acting as trustees for any bank or other institution, the use of the term "in trust," is explained by them to mean—and it is a reasonable explanation—that they were to be able to deal with the stock in such a way as to raise money on it and to save themselves harmless for any sums which they might be called upon to advance for the plaintiff in the transaction.

We contend that the learned Judge was also wrong in holding that there had been sufficient shewn to identify the shares owned by the plaintiff with those dealt with by the various persons who lent money to Scarth and Cochran and Cochran. On the contrary, the shares were not capable of being identified and definitely traced, and the plaintiff cannot now assert against the appellants his title to the shares which the appellants have disposed of.

The authorities cited by the learned Judge do not justify his conclusion that the plaintiff is entitled to assert against the last transferee his ownership to the shares. All the authorities referred to on this point will be found to be cases in which there have been no higher rights than those of the alleged trustee involved. There was nothing in this case sufficient to put the defendants upon any enquiry as to title. The company were dealing with Cochran and he had authority from the Federal Bank, the registered holders of the shares, to transfer to them. At most Cochran was a mortgagor and *cestui qui trust*. *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617, relied on by the learned Judge, does not apply. There the trust in question was one between the owner and his immediate transferee, of which the bank had notice, and although the language of the judgment is very wide, still it turns on the special facts of the case. It is shewn that if the bank had made the slightest enquiry, they would have found that it was clearly a dealing with property that was confessedly

held in trust for another person. On the face of it it was a contradicition of the character in which the property was being held to pledge it for the individual's own debt, and those who chose to take without enquiry, took all the risks. This distinction runs all through the cases. See *Duncan* v. *Jaudon*, 15 Wall. 165; *Gaston* v. *American Exchange Bank*, 29 N. J. Eq. 98; *Shaw* v. *Spencer*, 100 Mass. 382; *Albert* v. *Baltimore*, 2 Md. 159; *Bayard* v. *Farmers' and Mechanics' Bank*, 52 Pa. St. 232. Then the coure of conduct and dealing, the acquiescence of the plaintiff, leaving this stock in this situation exposed to all these vicissitudes, disables him from now coming forward and taking it from the appellants. He knew that he was running the risk of its being dealt with, and he was relying on Scarth and Cochran and cannot now reclaim it from the innocent transferees.

McCarthy, Q.C., and *J. K. Kerr*, Q.C., for the respondent. The shares in question are not negotiable securities. True it is that they are assignable by virtue of the Act of Incorporation, but the law applicable to negotiable securities does not apply to them. A negotiable security is one which may be transferred from hand to hand, upon which the holder or transferee, without reference at all to the transferor, may maintain an action, but here all that could be done was that the holder of stock might transfer and dispose of it in certain ways provided by charter and statute. There are some loose expressions in some cases as to a defence of purchase for value without notice being applicable to transactions in connection with the sale of chattels, but in strictness that doctrine does not apply to the sale of chattels. Where it has been held that a good title has been obtained to chattels, the transferor not having a good title thereto, the decisions will be found to rest upon the doctrine of estoppel. Either the true owner must sell or he must be estopped from asserting his right. This is the principle upon which *Cook* v. *Eshelby*, 12 App. Cas. 271, was decided, and there is no other principle upon which an owner can be deprived of chattel property. This case is the same as that of *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, and *Simmons* v. *London Joint Stock*

Bank, 63 L.T.N.S. 789. When the North British Company were paid off, the shares were held by the brokers as security for one loan, and the subsequent transfers with the words "in trust" added, were notice to the lenders that the persons transferring the shares were not the absolute owners, and inquiry should then have been made as to the true state of the title: *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617; Lindley on Companies, p. 175; *Williams* v. *Colonial Bank*, 38 Ch. D. 388; 15 App. Cas. 267.

E. Blake, Q.C., in reply.

May 12th, 1891. HAGARTY, C.J.O.:—

I have given much anxious consideration to this case, and finally have arrived at the conclusion that the plaintiff has failed to make these defendants liable.

My learned brother Maclennan has fully stated the facts in evidence, and I need not restate them.

I think the use of the words "in trust" has been explained as applicable merely to shew that the bank or company officer, assignor, or assignee, is not intended to be the beneficial owner, but merely on behalf of his company.

The defendants take over, as it were, the loan made by the Federal Bank to Cochran.

If the defendants had enquired they would have found these shares apparently duly assigned to Buchanan in trust for the Federal Bank by the Home Savings and Loan Company, through Cochran as attorney, and a formal transfer thereof from Buchanan to them, through Turnbull their manager; also, through Cochran. I hardly think the law required them to trace up the title any further.

The formal transfer is as of shares belonging to the Federal Bank, through their manager.

Now the utmost knowledge that we can impute to them on the evidence is, that they knew that Cochran was the party who had these shares pledged to the Federal Bank for advances; that he was a broker, and that the account was being transferred

from the Federal Bank to them. He signs the deed of hypothecation authorizing the defendants to sell without notice, and with a clause that if he should have any future loans from them, the present shares should be a security therefore, etc.

The late case of *Baker* v. *Nottingham Banking Co.*, 7 Times L.R. 235, before Mr. Justice Day, points out the difference between such cases as *Simmons* v. *London Joint Stock Bank*, 63 L.T.N.S. 789, and that before him. He says that the bank knew that Braithwaite, who deposited the shares with them, was a broker; that if they did he could see nothing in the case which should make them infer from that fact that he was not the true owner of the bonds.

Both in *Simmons' Case* and in *Earl of Sheffield's Case*, the facts in evidence warranted the conclusion which the Court drew, that the defendants knew that the broker was pledging other persons' property for his own purposes.

The broker was known to be in the habit of depositing at the same time the securities of different persons to obtain advances, with a right to replace them from time to time with others, etc., etc. From all the facts it was held that (in the language of one Judge), they had "notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that enquiry should be made into such title."

In both these cases the dealing was direct between the broker of the original owner and the defendants advancing the money to him.

Here the shares in question passed through many hands, from one lender or pledgee, till they came to the defendants.

Here the plaintiff's first original transfer of the stock was made to Scarth and Cochran in trust. The transfer is headed by the name of the company; these transferees were managers of the company, and perhaps had enquiry been made, the same explanation as to the meaning of these words would have been given as in the later transfers. The second transfer was not to them as such managers, but apparently for margins in dealings between the plaintiff and the brokers in stock speculations.

On the whole, I cannot feel warranted in holding that the defendants did not receive the transfer and advance their money in good faith; or that they had such information from the nature of the dealing as made it reasonable that enquiry should be made into the origin of the title and of all intermediate transfers.

The case seems to me to fall within the well known principle that, when one of two innocent persons must suffer by the misconduct of a third, the scale must naturally incline against that person who has placed it in the power of the wrong-doer to commit the wrong. There is much in the case to induce the belief that the plaintiff must have known that he had placed it in the broker's power possibly to use for his own purposes the property intrusted to him.

If we decide in the plaintiff's favour, I think we shall extend the general principle governing such cases much beyond any decisions of which we are aware.

I think this appeal must be allowed.

BURTON, J.A.:—

The advocates of the Torrens system are in the habit of contrasting the expensive and cumbrous system of dealing with land and its concomitants of deduction of title, abstracts, objections and requisitions, with the facility, simplicity, and absence of expense in the sale and transfer of stocks in the public funds and shares in joint stock and other companies; but if the present judgment is to stand, it seems to me that there will be more difficulty and uncertainty in the title to shares than there is under the present system with regard to land, more especially in a case like that before us, in which the shares are not numbered, and in which, therefore, it would be next to impossible to trace the title to the shares in question.

I should have thought it unnecessary to add anything to what has been said by the other members of the Court, but that we are overruling the learned Judge, and that my previous views upon the subject of what was sufficient notice to a purchaser to put

him upon enquiry, had received something like a shock from the quotations of the language used by some of the Judges in England, in such cases as *Earl of Sheffield* v. *The London Joint Stock Bank*, 13 App. Cas. 333, and *Simmons v. London Joint Stock Bank*, 63 L.T.N.S. 789, which, having been used in reference to negotiable securities—in the sense in which bills of exchange and promissory notes are negotiable, so that delivery by a person who has no title, confers, nevertheless, a title on a *bonâ fide* holder for value without notice—would be equally applicable to a case of this kind, where the legal title passes by transfer, unless the Factors' Act applies.

Before referring to the distinction which I think exists between those cases and the one we are considering, I may say that I quite agree with the learned Judge below, that the general rule of law in respect to the transfer of ordinary goods and chattels, applies to shares in a public company, subject to this qualification which applies to both descriptions of property, viz., that if the equitable title is in one person, and the legal title is in another, the purchaser from the legal owner *bonâ fide* and without notice of the equitable title, acquires a good title; and here, I think, is the distinction between this case and *Williams* v. *The Colonial Bank*, 38 Ch. D. 388, relied on by the learned Judge, viz., that the evidence in that case shewed that, in the state in which the share certificates were at the time they were deposited with the bankers, they were not in order—that is, that business men would not take them without enquiry.

I come then to consider the cases I have referred to: One of them, the *Earl of Sheffield's Case*, is a decision of the House of Lords, but I think it is no authority for holding that the defendants in this case were put upon enquiry.

Mozley, in his evidence in that case, in answer to a hypothetical case suggested by the Judge, viz., if £14,000 worth of securities were deposited by the gentleman who borrowed that £14,000, replied: "Upon his repayment of that £14,000, I was bound to return him any securities which he had deposited," and added "I lent money upon them, and up to the extent I lent upon them I could use them again."

All the Judges, both in the Court of Appeal and in the House of Lords, were of opinion that, as a matter of fact, the banks knew the nature of Mozley's business; and Lord Halsbury says: "If this was the course of business which the banks knew, how can it be said that it would not be contrary to good faith for the banks to retain the securities, not only for the amounts borrowed upon them by the owners, but for what Mozley owed to them?"

It is the subsequent passage in the Lord Chancellor's judgment which startled me: "But if they had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to enquire." This is, no doubt, somewhat sweeping, but must, I think, be qualified by what he had said as to the knowledge of the bank.

Lord Watson remarks that the character of the transactions was of itself sufficient to notify to them that Mozley's interest was limited; and Lord Bramwell, holding with the other lords that the banks had notice, expressly says that he does not think that "notice that possibly the pledgor had no power to pledge as he did," would be sufficient, "because," he added, "that is always possible."

In the subsequent case to which I have referred, the Court of Appeal based their judgment upon the facts that the bank did not believe that the broker had been authorized by the real owner to deposit the bonds en bloc with other securities which belonged to other persons, and to raise a lump sum upon the whole, and if this was the true view of the transaction, the bank never became *bonâ fide* holders for value without notice, since they never believed that the broker was the true owner—and never, indeed, believed that any authority had been given by the true owner.

The Court having come to that conclusion as to the bank's knowledge, it followed that the real owner was entitled to recover. But is there anything in this case that can warrant us in coming to the conclusion that the defendants or their man-

ager Turnbull had any reason to believe that Cochran was not the true owner? It may be true that he was under an erroneous impression as to the law; and that even if he had suspected that the shares were not the property of Cochran, but were entrusted to him with only a limited authority to pledge them, that he would have acted in the same way, in which case the defendants might have suffered as the banks did in the cases referred to; but there is no finding by the learned Judge that Turnbull had any notice, and there is no sufficient evidence, in my opinion, to have warranted such a finding; on the contrary, the learned Judge places his decision upon the fact that he had notice that Buchanan held them in trust, and that put him upon enquiry.

I should have thought it apparent here upon face of the instrument, that the only effect of the words used here was to shew that Buchanan held the shares, not for his own interest, but as trustee for the bank of which he was manager; but the evidence shewed that to be the case. What further enquiry therefore was then imposed upon a purchaser? Cochran appeared to be absolute owner, and there was nothing to shew that he held in trust for any one.

The case is wholly different from *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617, where a person indebted to the bank, was transferring, in security for his own debt, shares which the bank knew were not his own, but were held in trust for some one.

I agree, therefore, in thinking that if the plaintiff has any remedy, it must be sought in another direction; and that no case has been made out for impeaching the transfer to the defendants, and the judgment below should, as regards the defendants, the London and Canadian Loan and Agency Company and Turnbull, be reversed, and the action as to them, dismissed.

In this view of the case, it become unnecessary to consider the effect of our Factors' Act.

MACLENNAN, J.A.:—

This case is of great general importance, and was very elaborately argued on both sides.

By the Act incorporating the company, the shares of whose capital stock are in question, 36 Vict. ch. 128, sec. 6 (O.), it is declared that the shares are personal estate, and are assignable, and that no transfer of any share shall be valid, until entered in the books of the company, according to such forms as the directors may from time to time appoint. There are other restrictions upon the right and power of transfer, but they are immaterial to the present case, and need not be noticed.

All the several transfers which were so much discussed were entered in the company's books, and no question was made as to their being in due accordance with the forms prescribed by the directors, and there can therefore be no doubt that each transfer was effectual to pass the legal title and property in the shares to the transferee. It is also clear and beyond dispute that in each case there was a valuable consideration for the transfer. The defendants the London and Canadian Loan Company therefore are in this position. They have the legal title or property in the shares in question, and they have paid a valuable consideration for them. They do not dispute that they hold them as a security for the money which they advanced when they obtained the transfer, but they contend that, subject to the admitted right of redemption stipulated for when they received the shares, their title is unimpeachable.

The situation of persons who have acquired the legal title or property in goods for valuable consideration is well understood.

In *Dawson* v. *Prince*, 2 De G. & J. at p. 49, Lord Justice Turner said: "Both upon principle and upon authority I take it to be perfectly settled, that as against a purchaser for valuable consideration without notice, having a legal title, this court will give no relief." I have quoted this case because it was, like the present, a suit respecting personal estate, to shew that the doctrine is as applicable to personal estate as it is to land.

In Blackburn on Sales, 2nd ed., pp. 164-5, cases are cited with approval, shewing that where a contract has been induced by fraud, if the intention was to pass the property, the fraudulent purchaser may make a good title to an innocent purchaser for value, and I do not think Cotton, L. J., intended to question this doctrine in his remarks in *Williams* v. *Colonial Bank*, 38 Ch.. D. at p. 399, referred to in the court below.

In *Cundy* v. *Lindsay*, 3 App. Cas. 459, decided in 1878, Lord Cairns used the following language (p. 464): "With regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed. * * If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which was purported to pass the property to him from the owner of the property, here the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with the contract, which would enable the original owner of the goods to reduce it and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract, and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced." And in *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. at p. 345, Lord Bramwell, speaking of what took place in that case says: "What he (that is the owner of the shares) did, however, as to his shares, was to execute a transfer of them, which he duly registered; the legal estate in them became vested in some of the respondents, who, being purchasers for value, acquired a title which could not be set aside, unless they had notice of the infirmity of the title of those from whom they claimed," and although the principle is not in terms stated by the other lords it is evidently recognized throughout all the judgments as having been correctly stated by Lord Bramwell. The general doctrine is also stated by Lord Selborne in *Société Générale de Paris* v. *Walker*, 11 App. Cas. at p. 27, in a case like this, relating to shares, in this

manner: "The appellants in this case cannot succeed unless they shew either that they have acquired a legal title to the shares in question, unaffected, as between them and the respondents, by any equity, or that (both titles being equitable) their equity, though posterior in time, ought to be preferred to that of the respondents." See also Lindley on Companies, p. 476.

I should not have thought it necessary to cite authorities on this point, because I think the law has long been settled, but that the learned judge in the court below did not, as I think with great respect, attach sufficient importance to the fact that the plaintiff had parted with the legal title in his shares, and also that the learned counsel for the plaintiff contended that the plaintiff's original transfer having been expressed to be in trust, and having been in fact made for purposes of security to the transferees Scarth and Cochran, every subsequent transferee, necessarily, and independently of notice of the trust, took the shares upon the same trust and subject to the same qualification. The learned counsel referred to *Cooke* v. *Eshelby*, 12 App. Cas. 271, as supporting his contention, and as shewing that the general principle governing such cases was estoppel, and that the present plaintiff not having done anything to impair his rights as between him and Scarth, Cochran & Co., could not be deprived of them by an assignee from them. That case, however, merely decides that a purchaser from an undisclosed principal could not set off against the price, a demand against the vendors' agent personally, unless he was induced by the conduct of the principal to believe and did believe that the agent was selling on his own account. The distinction between a case like that and the present is plain. The agent who is selling has not the property in the goods, and unless the purchaser is led to believe, and does believe, it is otherwise he can have no right to set off. Here the plaintiff transferred to Scarth and Cochran the legal title in the shares. They were made transferable by the statute, and a purchaser for value must be allowed to keep them as property which he has honestly bought and paid for, unless there is some equitable ground on which they can be taken away from him.

I think that is the situation of the defendants, the Loan Company; and unless they had notice of the plaintiff's equitable title, at or before the time they acquired title in the shares, that title cannot be taken away or reduced.

The real situation and rights of the parties on the 7th September, 1887, when the defendants obtained their title were as follows:

The Federal Bank had the legal title to all the shares, the 160 old, fully paid up, and the 638 new, issued in 1886 and 1887, respectively paid up to $5 per share only, the legal title being in fact vested in Mr. Buchanan as the bank's trustee. The bank held them as mortgages merely. The exact sum which was due to the bank has not been stated any where I think, but I think it is to be inferred that it was the same amount as was afterwards advanced by the defendants, the London and Canadian Loan and Agency Company, $13,450. The bank's borrower was Cochran, who had a right to redeem the shares on payment of what was due to them. But Cochran himself was in reality only a mortgagee, and the real owner of the shares was the plaintiff, who had a right to redeem Cochran on payment of a much less sum than was due to the bank—namely, about $6,800.

In that state of things, the defendants obtained the legal title to the shares, and paid therefor, in the form of an advance by way of loan to Cochran, $13,450, and the question is, whether they are *bonâ fide* purchasers without notice, so that they are entitled to hold the shares against the plaintiff for the full sum advanced. The onus of proving notice is on the plaintiff. There is no dispute about the position of Scarth, Cochran & Co., the original transferees of the 160 shares. They received them and held them by way of security in connection with speculations in stocks, which they were carying on for the plaintiff. For some time after they obtained them, the plaintiff's debt to them was very large, as much as $40,000: and while they also held the shares which were subject of the speculations by way of security, I think it cannot be denied that the shares in question were also

a security for the whole debt. The debt continued to be as much as $18,000 until October, 1883, and in November of that year it was reduced to about $4,000 or $5,000, and save for the sums paid to take up the new shares has never at any time since exceeded the last mentioned sum. In February and July, 1882, while the plaintiff's debt was very large, Scarth & Co., assigned the shares to the Standard Bank, as security for money advanced. After that time the legal title in the shares never came back to Scarth & Co., or to Cochran, but passed from one bank manager to another, at the request, and in most cases by the act, of Cochran as attorney for the transferor; the new transferee advancing the sum necessary to pay off the debt due to the transferor. In one case the transfer was not to a bank, but to the Home Savings and Loan Company, which held 45 shares from 11th of April, 1883, to the 14th of December, 1886. In all these cases the transferees held the shares as security for advances made either to or at the request of Cochran. But it does not appear what the sums were which were advanced from time to time, except this that he tells us on April 11th, 1883, he borrowed from the Federal Bank $13,450, on 235 Land Security, and 300 of Scottish Ontario shares; that payments were made from time to time, and some shares were released, and that at the end of 1885, the debt was about $8,300, and the stocks held by the bank were 115 Land Security, old; 117 new; 175 Scottish Ontario, and 70 shares of Ontario and Qu'Appelle. There is some confusion as to what took place on the 11th of April, 1883. He says he borrowed the $13,450 on that day from the Federal Bank on 235 shares of Land Security, and 300 of Scottish Ontario. There is no doubt 235 shares of Land Security were transferred to the Federal Bank on that day, from Mr. Cook of the Merchants' Bank. But Mr. Cook on the same day assigned 45 shares to the Home District Savings Company, which are said to be part of the plaintiff's shares. At all events, in 1886, these 45 shares, with the new allotment in respect of them, were transferred to the Federal Bank, and the latter became the holders of all, and whatever may have become of the other 120 old shares, which Cochran

says were part of the security for the advance he received on the 11th of April, 1883, it was the fact that on the 7th of February, 1887, the Federal Bank had 160 old shares, and 638 new, ready to be returned to Cochran on payment of the advances made to him, or at his request, on the security of the shares. The amount due to the bank was, as I have already mentioned the balance of the advance made on the 11th of April, 1883, the sum paid by them to the Home District Savings Company in 1886, and the sum paid by themselves to the Land Security Company to take up the new shares.

It is to be noted that the legal title in the new shares never was in the plaintiff, nor in Cochran; 67 of them had been allotted to the Home Savings and Loan Company, and the rest to the Federal Bank.

It was contended that Cochran had no right as between him and the plaintiff to borrow money on the shares. I was surprised at this contention for I never heard it doubted that a mortgagee could assign his mortgage or could make a sub-mortgage. It may be different where there is an agreement not to do so, or in the case of a mere pledge where the general property remains in the pledgor. I say nothing about that, but I entertain no doubt that a legal mortgagee of real or personal property may assign the debt and the security either absolutely or by way of sub-mortgage as freely as he may deal with any other kind of property. It is not alleged that there was any agreement that Scarth & Co. should not assign the shares; all that is alleged is that there was no arrangement of agreement entitling them to do so.

Then in April, 1883, when Cochran obtained his loan from the Federal Bank of $13,450, Duggan owed him three times that sum. It is true that besides the shares in question Cochran held Hudson Bay shares and North-West Land Company shares to a large amount, also belonging to the plaintiff, and the whole mass was security for the debt. Now if Cochran had notified the Federal Bank on the 11th of April of the actual state of affairs between him and the plaintiff, was there anything to prevent the

bank from making the loan? What impropriety could there be in their doing so? And if, besides, after the money had been borrowed, Cochran or the bank had informed the plaintiff of it, what possble ground of complaint could he have had? The result of the operation would be that the plaintiff would owe the bank so much upon security of the shares in question, and he would owe Cochran so much upon security of the other shares, instead of owing the whole debt to Cochran upon security of the whole mass of shares.

Now that is just what was done; but the bank did not know of the plaintiff's interest, and the plaintiff possibly did not know that his shares had been sub-mortgaged. I think the want of knowledge or notice could make no difference; and I think that the bank having obtained the legal title to the shares, and also the equitable title to the extent of the advance made by them to Cochran, their title as mortgagees to the extent of the loan then made was good.

While it is not essential to the validity of an assignment of a mortgage that notice should be given to the mortgagor: *Jones* v. *Gibbons*, 9 Ves. at p. 410, it is a rule that payments by the mortgagor to the original mortgagee after the assignment, but without notice of it, are binding on the assignee: Coote's Law of Mortgage, 5th ed., p. 723; Fisher's Law of Mortgage, 4th ed., p. 846; *Williams* v. *Sorrell*, 4 Ves. 389; *In re Lord Southampton's Estate*, 16 Ch. D. 178; and if either by actual payment or by means of the proceeds of other securities in their hands, the whole of the plaintiff's debt to Scarth & Co., had been received by them, the bank's claim, in the absence of previous notice to the plaintiff of the assignment, would be wholly satisfied and gone, and they would have had to give up their shares to him. Now that is what actually took place except that the securities realized did not pay the whole debt. By realizing the other securities, Cochran reduced the total debt owing by the plaintiff to $4,000 or $5,000; but he did not pay a sufficient sum to the bank to make the mortgage account correct, as between the bank and the plaintiff. That gives rise to the question whether

after that the bank could hold their security as against the plaintiff for more than the reduced amount. That question depends on notice to the bank of Duggan's equity of redemption.

It is not pretended that any of the banks or their officers had actual notice of Duggan's interest, or actual notice of the words of trust contained in the transfers signed by him; and I think there is clearly no sufficient constructive notice to Brodie or Cook or their respective banks. There is more difficulty in the case of Buchanan on the 11th of April, 1883, because that was a loan on a block of securities of two different kinds. But when it is remembered that the 235 Land Security shares transferred on that day, came not from Cochran direct but from Cook, of the Merchants' Bank, I find it difficult to say how it can be held that Buchanan had any such knowledge as put him upon further inquiry. In the view I take of the case, it is not necessary to decide that question. Whether they had notice or not, in my judgment the mortgage to the Federal Bank was, and continued to be, unquestionable, so far as having the legal title to the shares, and to the extent of the unpaid balance due by the plaintiff to Cochran, plus what was advanced to Cook upon the new shares. The legal title of the latter had never been in the plaintiff or in Cochran, but the bank knew they were an accretion, and they were therefore in equity in the same situation as the original shares.

The result, in my opinion, therefore, is that on the 7th of September, 1887, the bank had a good title as against the plaintiff to all the shares as security to the amount of the balance of the plaintiff's debt to Cochran, plus what was paid to the company to take up the new shares; and this even if we suppose that when they made the loan originally on the 11th of April, 1883, they had full notice that the plaintiff was the real owner of the shares, and that Cochran held them, as he did, merely as a security, and subject to that in trust for the plaintiff.

It is not necessary, therefore, up to this point, to consider the effect of the words "in trust" found in the several transfers; but

I am clearly of opinion that these words in the first transfer meant only that Scarth and Cochran were trustees for the North British Company, and that in the transfers to the respective bank managers, they meant no more than in trust for the respective banks.

In the case of the second transfer to Scarth & Co., and in that to the Home Savings and Loan Company, they could only mean that the transferees were not the beneficial owners, at all events, not absolutely, but that other prsons were interested as well. I do not think that the *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617, obliges us to hold that the words "in trust" in a transfer, mean anything more than the trust the parties intended by the use of the words. The Judicial Committee in that case held that those words in the transfer to Rose, expressed what was the actual fact, that the shares did not belong to him but to the lady; and they also assented to the similar proposition, that the same words in the transfer to Buchanan meant that the shares were not his but those of the bank. An instrument declares that there is a trust, but does not explain what it is. How are you to find out the meaning in order to give effect to the instrument? The only way is to resort to evidence, and find out what it was the parties intended. Here it is proved that the bank officers by and to whom the transfers were made "in trust," used those words as meaning in trust for the respective institutions whose servants they were, and not for themselves, and not as meaning anything else whatever; and it is impossible in my judgment, to contend with any shew of reason that any other or further meaning can be put upon them by the court, or that they can be held as meaning a trust for the plaintiff or any one else who might have a secret interest in the shares.

I now come to the transaction of the 7th of September, 1887, whereby the defendants became the mortgagees of the shares.

As early as November, 1883, Cochran had, by means of the other securities of the plaintiff in his hands, received money enough to pay what was due to him, apart from what was due

to the bank, and a considerable sum more. It was his duty to have paid the whole of that excess to the bank, in reduction of the loan he had obtained from them; or to have paid or accounted for it to the plaintiff, but he did not do so, and the result was, that at the last mentioned date, the bank held the shares for several thousand dollars more than was justly due from the plaintiff to him.

In that state of things, Cochran went to the defendant company and proposed to borrow $14,300 on the security of the shares in question. The proposal was agreed to, and was carried out in the following manner: a deed of hypothecation was executed by Cochran, stating the terms of the loan and the particulars of the security, including a covenant for payment and a power for sale on default, with other stipulations which need not be mentioned. Mr. Turnbull, the agent of the company, and Cochran then attended at the office of the Land Security Company, and there in the books of that company, two transfers were signed and accepted; the first, a transfer of the 160 paid up shares; and the other, of the 638 shares partly paid up, both to Mr. Turnbull. Mr. Cochran produced a power of attorney to himself executed by Mr. Buchanan, authorizing him to make the transfers, and they were made by him in Buchanan's behalf, and Mr. Turnbull accepted them, adding to his name the words, "in trust;" these words being also appended to Mr. Turnbull's name in the body of the transfers. The shares were taken to Mr. Turnbull in trust for the defendants, the Loan Company; and he tells us that was the intention and meaning of the words "in trust," used in the instruments. The money agreed to be advanced, was paid at the same time.

The question now arises whether there is any ground on which this mortgage can be cut down by Duggan to the sum actually due from him to Cochran. The judgment appealed from has so cut it down, and the question is whether it can be supported. Cochran is unable to pay the difference between what is justly due to the company, and the smaller sum

which alone the plaintiff owes, and ought in justice to be called upon to pay. If there is any flaw in the company's title the plaintiff may fairly avail himself of it, and on the other hand the company cannot be deprived of their title or of any of the money they fairly and honestly advanced unless upon some clear ground of equity.

It was urged upon us with great force that this case is governed by the *Earl of Sheffield Case* already mentioned, and the subsequent case of *Simmons* v. *London Joint Stock Bank*, 63 L.T.N.S. 789, but I think there is a great difference between those cases and the present.

In those cases the transactions were between bankers and their customers. The customer in the one case was an extensive money dealer, lending and borrowing money on stocks and bonds and other securities of that kind, and in the other case he was a broker whose business was retaining the securities of clients for safe custody, and buying and selling securities and lending money on them. There was a course of dealing in each case between the banks and the customer, the nature of which was well known to the banks. That course of dealing was for the customer to get large advances from the banks by transferring his clients' securities in mass to cover the whole advance, there being at the same time an arrangement that the customer should be permitted to withdraw from time to time such securities as he might require upon part payment or by substituting other securities. The court held that under such circumstances the banks were not entitled to the position of purchasers for value without notice. It is essential to this defence that the party believe when he buys that the vendor is the owner and can make a good title. It must be an honest *bonâ fide* belief. Knowing what they did the banks could not honestly believe that the securities were those of their customer. As put by Lord Halsbury (p. 341): "They had reason to think that the securities might be Mozley's own or might belong to somebody else." They did not actually know they were not his; it was possible they really were; but they had

reason under the circumstances to think they might not be, and therefore they could not honestly believe they were. They knew the probabilities were very much against their being his own. As pointed out by Lord Bramwell, it is always possible that the vendor may not really be the owner, that a pledgor may not really have the power to pledge. That possibility is immaterial, unless there is some reason to think that the fact is so, if the purchaser without fraud or culpable negligence really believes that he is the owner or has the power to sell or pledge.

The notice which affects a purchaser has often been discussed. The books are full of such cases. Lord Bramwell, in speaking of notice, says he does not think the expression "notice of the infirmity of title," on the part of the vendor, precise or accurate; and that "notice that possibly the pledgor has no power to pledge as he did," will not do, because that is always possible and he adds that the expression should be something like this, "notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that enquiry should be made into such title." The language in which he thus defines the notice, which he deems sufficient, is evidently taken from the Imperial Conveyancing Act, 45 and 46 Vict., ch. 39, sec. 3, which is applicable to purchasers and mortgagees, and also to both real and personal estate. This enactment is considered to have narrowed the range of the equitable doctrine of constructive notice, which was supposed in some cases to have operated with much harshness. See Fisher's Law of Mortgage, 4th ed., at p. 517, and notes to *Le Neve* v. *Le Neve*, 2 W. & T. L.C. 6th ed., p. 45. As we have no such enactment, it is sufficient to say that this case is governed by the perhaps wider rules as to constructive notice established by decided cases. These will be found in Fisher's Law of Mortgage, 4th ed., p. 516, and in the notes to *Basset* v. *Nosworthy*, 2 W. & T. L. C. 6th ed., p. 1, and *Le Neve* v. *Le Neve*, 2 W. & T. L. C. 6th ed., p. 27.

In the present case, Cochran was a broker, and known to be such by Turnbull. There had been several previous transactions of loan similar to that in question between him and the company,

and that was all. There is no proof of knowledge by the company or Turnbull of the nature or extent of Cochran's dealings or that he lent or borrowed money on other people's securities; or that the shares in question were not his own. There was no stipulation in the contract of loan for withdrawing any part of the shares on payment of part or substitution of other securities; but it was a loan for a fixed time for one single sum upon the security of the total number of shares. I confess I am at a loss to see anything connected with this transaction, or the relations of the parties, or the circumstances attending it, as proved in evidence, which ought to have excited suspicion on the part of the company or Mr. Turnbull, or ought to have put them on enquiry.

Mr. Turnbull was very closely pressed in cross-examination by the learned counsel for the plaintiff, and reliance was placed on some answers he gave as to his belief in Cochran's ownership of the shares. He says he made no enquiry—he did not think it necessary, they believed the stock might belong to him, or it might belong to somebody else. We did not know, and of course, in the absence of anything to the contrary, we assumed it belonged to him. I think these answers would be open to observation if it was proved that the company or Mr. Turnbull had reason to believe, from a course of dealing with Cochran, or others, that the shares might probably not be his own, or that he had no power to deal with them, or that his power was limited or qualified; but in the absence of any proof of that kind, the answers are just as might be expected upon a long and sharp cross-examination, and with questions put in a great many different forms. I think Turnbull probably hardly thought at all about title, but took for granted that a respectable man like Cochran would not ask a loan on shares without having them; and the transfer having been completed in the company's books, he had no hesitation in paying over the money. And I think he is telling the simple truth when he says he believed that the shares belonged to Cochran, and did not know they belonged to cus-

tomers of his. His saying that they might have belonged to some one else, is saying no more than, as pointed out by Lord Bramwell, is possible in every case; but I think that possibility did not interfere with his honest belief.

I think then that the cases of the *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, and *Simmons* v. *London Joint Stock Bank*, 63 L. T. N. S. 789, do not govern the present case, and that it ought rather to be decided in the same way as *Baker* v. *Nottingham Banking Company*, 7 Times L. R. 235, and for the same reason, so far as it depends on the nature of Cochran's business, and the course of dealing between him and the defendant company.

Then is there any other infirmity in the company's title? They dealt with Cochran, but they did not get the shares from him. The Federal Bank as we have seen held the shares by way of security. They were not absolute owners, and the transfer to the defendants was from the bank, that is from the bank's trustee Buchanan, who gave a power of attorney for the purpose to Cochran. Now if Turnbull had notice that the bank were were mere mortgagees, it might be contended that Turnbull's title could not be any better than that of the bank. Apart from a power of sale, a mortgagee can not assign more than he has himself, to a person having notice. In the present case the bank was not selling, the defendants were not buying from the bank, but were dealing with Cochran who professed to be owner. If the defendants were aware that the bank were merely mortgagees, then they had a notice of equity of redemption outstanding in somebody. They could only get a mortgagee's interest from the bank; they must get the equity of redemption from some one else. In that case a nice question would arise whether the company could get from Cochran a better equity than he possessed himself. It is not necessary to decide how that would be. There is no evidence whatever of any notice to the loan company or to Turnbull that the bank were or had been mortgagees. Cochran had an undoubted right to call for the legal title, for there was

a balance still due to him from the plaintiff, and if it had in fact been transferred to him before his transaction with the loan company no question could have been raised. As it was however he contracted with the company as owner, as a person having the power to make the mortgage which he professed to make, and when the moment came for transferring the title, he fulfilled his engagement, and by means of the power of attorney duly conveyed the shares to the company. The protection which the law affords to purchasers for value without notice is well illustrated by the case of *Heath* v. *Crealock*, L. R. 10 ch. 22. In that case persons had bought and paid for property and had obtained a conveyance, and a delivery of the title deeds. It turned out that a gross fraud had been practiced upon them by the concealment of a large mortgage in fee which had previously been made. It was held that although they did not get the legal title when they bought, they could not be compelled to give up the title deeds to the mortgagee, because they had obtained them for valuable consideration without notice.

Lord Cairns, in delivering judgment, said (at p. 32): "It appears to me clear, both upon principle and upon all the authorities which were cited, that it is the practice of the Court of Equity to take nothing away from a purchaser for valuable consideration of that which he has bought and holds. But something would be taken away if the title deeds which he has received from one who at the time was the holder of them, and the apparent owner of the estate, were taken away." And Lord Justice James says: "With regard to purchasers, it appears to me there are two cardinal principles and rules of this court which are involved both on the one side and on the other. The first I take to be this, which in my opinion is a rule without exception, that from a purchaser for value without notice this court takes nothing which that purchaser has honestly acquired. If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this court, in my opinion, has no right to interfere with him." Another important case is *Pilcher* v. *Rawlins*, L. R. 7 ch. 259, where James, L.J., says that "in the case of a purchaser for valu-

able consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal state, some legal right, some legal advantage, * * * such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence."

I think, therefore, the defendants having obtained on the occasion of advancing their money, the legal title to the shares without any notice of the plaintiff's claim, are entitled to succeed on this appeal.

I think with great respect to the learned Judge, that the defendants were not bound to make any enquiry of Cochran how he held the shares or whether his interest was absolute or qualified. He professed to have the right and power to convey and mortgage the shares, and when the moment for doing so arrived, he did so.

It was urged that the defendants were bound to trace back the title to the shares through the various transfers. I cannot agree to that, I think it would be impossible to do so. I know nothing which imposes that obligation; all that the purchaser of shares has power to do, has any right to do, or, as I think, ever does in practice, is to find out from the company whether the seller has the shares in his name on the register. The clerk who has charge of the transfer book virtually affirms this by permitting the transfer to be made. One who had no shares, would not be permitted to transfer. If in this case Mr. Turnbull had enquired he would have found that Mr. Buchanan as manager, stood in the company's share-ledger as the owner of the shares which he had authorized Cochran to transfer, and he had no occasion or right to make further enquiry. The case of *Pilcher* v. *Rawlins*, L.R. 7 Ch. 259, cited above shews that a purchaser of real estate is not affected by a trust of which he had no notice, even though it was on the face of a deed without which he could not assert his title in an ejectment. I think this is a much stronger case, and I think we ought to express our opinion distinctly that a purchaser of shares is not bound to examine the

antecedent transfers at the peril of being affected by trusts which may be expressed therein or in any of them.

In the view I take of the case it is not necessary to express a positive opinion on the question of following the shares as trust shares, but having regard to the fact that every transfer from first to last was made by or at the request of the alleged trustee, and that from first to last, subject to their claims for advances, the transferees held them as shares of Cochran, I incline to think their identity was never lost to such an extent as to prevent them from being followed.

OSLER, J.A., gave no opinion.

The appeal was accordingly allowed with costs. The plaintiff appealed to the Supreme Court whose judgment follows.

McCarthy, Q.C., and *Kerr*, Q.C., for the appellant. Shares may be pledged as any other personal property. *Donald* v. *Suckling*, L.R. 1 Q.B. 585.

The owner's title cannot be affected by the mode in which the shares are transferred any more than some informality in registration can affect the validity of a deed. See *Cole* v. *The North-western Bank*, L.R. 10 C.P. 354. *Williams* v. *The Colonial Bank*, 36 Ch. D. 659; 38 Ch. D. 388; 15 App. Cas. 267.

As to what a pledgee may do see *Donald* v. *Suckling*, L.R. 1 Q.B. 585; Story on Bailments, 9 ed. s. 324; Campbell on Sales, 2 ed. p. 57.

If the respondents claim to be transferees without notice they must establish that fact. The evidence brings them within the decision in *Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 270. See also *Williams* v. *The Colonial Bank*, 36 Ch. 659; Ch. D. 388; 15 App. Cas. 267.

As to the intention of the parties in the transaction between Duggan and Scarth & Cochran see *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29.

The learned counsel also referred to *Shaw* v. *Spencer*, 100 Mass. 382; *Muir* v. *Carter*, 16 Can. S.C.R. 473; *Raphael* v. *McFarlane*, 18 Can. S.C.R. 183; *Bank of Montreal* v. *Sweeney*, 12 Can. S.C.R. 661; 12 App. Cas. 617.

E. Blake, Q.C., and *Howland*, for the respondents. In *Bank of Montreal* v. *Sweeney*, 12 Can. S.C.R. 661; 12 App. Cas. 617, the bank dealt with a person who on the face of the instrument was a trustee for some person undisclosed. In this case the only fact brought to the knowledge of the respondents was that the transfer to them was signed "manager in trust." That reasonably meant in trust for the bank of which he was manager.

If a buyer of stock is obliged to make an inquiry in a case of this kind, in which inquiry he is liable to be met with false statements and evasions, there would be an end of buying and selling stocks as no one would be safe in investing money in them.

The respondents acquired an absolute title to the shares subject to redemption on payment of the advance made on them. *Briggs* v. *Massey*, 42 L.T.N.S. 49.

R.S.O. (1887) ch. 128 is an act similar to the Factors Act in England, and sections 1, 10 and 11 apply to this transaction and are a complete bar to the relief sought by the appellant. See *Williams* v. *The Colonial Bank*, 36 Ch. D. 659, and *City Bank* v. *Barrow*, 5 App. Cas. 664.

The respondents took shares without notice and the appellant must show some equitable ground upon which they should be retransferred. *Burkinshaw* v. *Nicolls*, 3 App Cas. 1004.

Sir W. J. Ritchie, C. J.—I entirely agree with the judgment of Mr. Justice Street in this case and think this appeal should be allowed and his judgment restored. I think that where stock is transferred in trust, and that fact appears on the face of the transfer, it is the bounden duty of all or any parties to whom the said stock is about to be transferred to make all reasonable inquiries and proper investigation as to the nature of the trust

on which the transfer has been made, and had that been done in this case I cannot escape the conclusion that the nature of the trust to Scarth & Cochran would have been discovered, and that Scarth & Cochran never had more than a qualified interest in the shares in question; and this duty of making inquiries was not only on those who took these shares from Scarth & Cochran but on all subsequent transferees, all these transfers having been made for the benefit of Scarth & Cochran in trust. I think the defendants had such information as made it not only reasonable and proper, but their duty, to make inquiry into the origin of the title and all intermediate transfers, more particularly as the transaction was in fact between the defendants and Cochran, and had such inquiries been honestly made with a view of discovering the true position of the stock it is to be presumed correct information would have been given. It would have resulted in a discovery of the true facts, and as no such inquiry was made it is no answer to say that had the inquiry been made they might have been met by false or misleading information.

I entirely repudiate the doctrine, as I did in *The Bank of Montreal* v. *Sweeney*, 12 Can. S.C.R. 661, approved of by the Privy Council, 12 App. Cas. 617, that banks or any others can, after their attention is called by the transfer itself to the fact that the stock is held in trust, blindly and without inquiry accept transfers of such stock and so deprive the *cestui que trust* of his property.

The money throughout was all advanced, by each and every one through whom the stock passed, for and to Scarth or Scarth & Cochran. In fact all dealings in reference thereto, including the defendants', were with Cochran. A simple inquiry from Cochran would have elicited a development of all the facts connected with the shares. Cochran having actually made the transfers to Turnbull for the defendants, as Mr. Turnbull says, "we made no inquiry, we did not think it necessary. It might belong to him or somebody else we did not know;" and I think he might have added, "We did not care."

When the transferees find on the books of the company that the shares are held in trust then, in my opinion, arises the duty to inquire.

I think this case does not come within the Factors Act.

The case to which our attention has been called of *Joint Stock Bank* v. *Simmons,* 8 Times L.R. 478; [1892] A.C. 201, has no application whatever to this case. There the instrument was negotiable and there was nothing in connection with it to put any parties on inquiry. It was the case of a bond payable to vendor and a negotiable security of which plaintiffs were *bonâ fide* holders who received it for value in good faith and without knowledge of want of title in its predecessor, and without anything in connection therewith to put the holder on inquiry, and it entirely differs in its state of facts from those which this case presents.

STRONG, J., concurred in the judgment of Mr. Justice Gwynne.

TASCHEREAU, J.—I would dismiss this appeal and hold that the appellant cannot recover against the respondents. The case of *Sweeny* v. *The Bank of Montreal,* 12 Can. SC.R. 661; 12 App. Cas. 617, is not applicable. I adopt the reasoning of the learned judges in the Court of Appeal.

GWYNNE, J.—This action was brought to redeem certain shares in the stock of an incorporated company called the Land Security Company which the plaintiff, as was alleged, had about ten years ago transferred to the defendants William B. Scarth and Robert Cochran, then carrying on business in partnership in the city of Toronto as stock brokers and money brokers, upon certain trusts and by way of security for certain advances made by them to him, and which shares by divers mesne assignments from them had been transferred to the defendants the Canadian Loan and Agency Company, of which company, at the time of their becoming possessed of the shares, the defendant Turnbull was manager. The learned judge before whom the case was tried

rendered judgment for the plaintiff against all the defendants. His decree was that:

The defendants do pay to the plaintiff the value of the one hundred and sixty shares of stock of the Land Security Company less the balance remaining due by the plaintiff of the debt due by him to the firm of Scarth & Cochran at the time of its dissolution, and that the within named defendants other than defendant Scarth do also pay to the plaintiff the value of the six hundred and thirty-eight shares of the said stock less the balance due by the defendant Cochran in respect of their dealings subsequent to the dissolution of the said firm; the value of the shares in each case to be taken at their market value between the 15th December, 1887, the date of the plaintiff's tender to the defendants the London and Canadian Loan and Agency Company, and the 8th March, 1890.

And it was by the said decree referred to a referee to ascertain such value and to take the necessary accounts. From this judgment the London and Canadian Loan and Agency Company and the defendant Turnbull appealed to the Court of Appeal for Ontario; that court allowed their appeal and from the judgment of that court this appeal is brought by the plaintiff. Although the judgment of Mr. Justice Street remains unimpeached against the defendants Scarth and Cochran respectively, it will be necessary to enter into a consideration of the transaction from its initiation between Duggan and Scarth & Cochran in order to the determination of the question raised by the appeal as to the liability of the defendants, the London and Canadian Loan and Agency Company, to the plaintiff.

In 1881 the appellant was possessed as absolute owner of 160 fully paid up shares in the capital stock of a company incorporated by an act of the legislature of the province of Ontario under the name of "The Toronto House Building Association," which name was subsequently by another act of the legislature changed to "The Landed Security Company." By the act of incorporation of the above company it was enacted that the

stock of the company should be deemed to be personalty and should be assignable, but that no transfer of any share should be valid until entered in the books of the company according to such forms as the directors might from time to time appoint. The directors accordingly opened a book in which all transfers should be made in a form adopted by the directors and printed in the book which was called the transfer book.

The act of incorporation did not require the company to issue, and there is no evidence that they ever did issue, any certificates of ownership of shares in the company. An owner of shares in the company had no means, as far as appeared at least, of evidencing his title to shares in the company except by reference to the books of the company which contained the only evidence of any person being a proprietor of shares in the company, whether he was such by original allotment by the directors or by transfer from an original allottee. Being so possessed of the above 160 shares the appellant applied to the defendants Scarth & Cochran, then carrying on the business of stock brokers and money lenders in partnership, for a loan of $1,500. The negotiation for such loan was made and completed with the defendant Cochran, and it was agreed that the appellant should transfer to the defendants Scarth & Cochran 80 of the said shares as security for such loan. To perfect this transaction the appellant on the 26th day of October, 1881, went to the office of the company and had the printed form of transfer in the books of the company filled up and signed the same, which when so filled up and signed was as follows:—

For value received I, Edmund H. Duggan, of Toronto, do hereby assign and transfer unto W. B. Scarth and Robert Cochran in trust of Toronto, eighty (80) shares in the stock of the funds of the Toronto House Building Association of Toronto, numbered in the books of the association as shares No. —— on which has been paid the sum of two thousand dollars subject to the provisions of the Act of Parliament authorizing the incorporation of the association and the by-laws, rules and regula-

tions thereof already passed or hereafter to be passed in accordance therewith.

Witness my hand at the office of the association this 26th day of October, in the year of our Lord one thousand eight hundred and eighty-one.

(Sgd.) E. H. DUGGAN.

On the following day, on the 27th October, 1881, the defendants Scarth & Cochran signed an acceptance of the above transfer at the foot of the transfer in the books of the company, as follows:—

I hereby accept the foregoing transfer of eighty (80) shares of the stock of the Toronto House Building Association on the conditions and subject to the provisions above mentioned.

(Sgd.) W. B. SCARTH, } *In trust.*
" ROBERT COCHRAN, }

It does not appear what was the time, if any was named, for repayment of the loan and in the absence of a time fixed by agreement of the parties we must take it to have been repayable upon notice being given to the appellant demanding repayment, and there is no suggestion that any such demand ever was made. It was not disputed that the transfer of the shares was to be solely as security for repayment of the loan, or that the agreement upon which the loan was effected was that the transferees of the shares should have power, in the event of default in repayment of the loan, to sell the shares or so many thereof as might be necessary to realize repayment of the loan with interest, and that they should pay or transfer to the appellant any surplus of money or of shares which might remain after such repayment. Upon the transfer of the eighty shares to the defendants Scarth & Cochran in trust as expressed in the instrument of transfer the loan was made, and there does not appear on the evidence to have been any default committed by the appellant so as to have given any occasion for the exercise of the transferees' power of sale of the shares. In the month of February, 1882, the appel-

lant entered into a further agreement with the defendants Scarth and Cochran, namely, that they should in their capacity of stock brokers purchase shares for him on margin, as is it called, in the Hudson Bay Company and Canada N.W. Land Company upon the security of divers other shares then held by the appellant in different companies, such shares when transferred by the defendants Scarth & Cochran to be held by them as collateral security merely for any balance that upon an account taken between them and the appellant should become due to them by the appellant upon the purchase of said shares in the said Hudson Bay Company, and in the said Canada N.W. Land Company; accordingly in pursuance of such agreement among other shares transferred to the defendants Scarth & Cochran by the appellant he, upon the 20th day of February, 1882, transferred to them eighty other fully paid up shares in the said Toronto House Building Association by an instrument duly filled up and signed by him in the transfer book of the said association, which instrument so signed is as follows:—

For value received I, Edmund Henry Duggan, of Toronto, Esquire, do hereby assign and transfer unto Messrs. Scarth & Cochran, Brokers, of Toronto, in trust, eighty shares in the stock of the funds of the Toronto House Building Association of Toronto, numbered in the books of the association as shares No. ————, on which has been paid the sum of two thousand dollars, subject to the provisions of the Act of Parliament authorizing the incorporation of the company, and the by-laws, rules and regulations thereof already passed or hereafter to be passed in accordance herewith. Witness my hand at the office of the association this 20th day of February, 1882.

(Sgd.) E. H. DUGGAN.

And on the 22nd day of the said month of February, the defendants Scarth & Cochran accepted the above by a note at the foot of the said transfer in the transfer book of the said association as follows:—

I hereby accept the foregoing transfer of eighty shares of the

Toronto House Building Association, on the conditions and subject to the provisions above mentioned. Dated this 22nd day of February, 1882.

(Sgd.) SCARTH, COCHRAN & Co.

Now that the defendants Scarth & Cochran held these last-mentioned shares solely upon trust cannot, I apprehend, admit of a doubt, and that such trust was that the shares so transferred by the appellant in trust should be held by the transferees only as collateral security to await the result of the transaction entered into by the appellant through them as brokers in the purchase on margin for the appellant of shares in the Hudson Bay Company, and in the Canada N. W. Land Company; and that this was well understood by the defendants Scarth & Cochran fully appears by the accounts rendered by them from time to time to the appellant, wherein it also appears that that they themselves transferred to the like account and acknowledged themselves to hold the eighty shares transferred to them in security for the $1,500 loan upon the like trust as the shares transferred in February, 1882, namely, as collateral security only to await the result of the said purchases as margin. In the month of October, 1882, in an account then rendered by them to the appellant of shares purchased for him in the Hudson Bay Company and in the Canada N. W. Land Company, they acknowledge themselves to then hold as stocks of the appellants held as margin the following shares:—

50 Building and Loan.....	$1,250	
80 Land Security.....	2,100	
80 Land Security.....	6,600	$9,950
80 British Am. As. Co...		

On the 2nd February, 1883, they charge the appellant in account with him in respect of the purchases on margin with $1,610.33 which appears by the evidence to be the amount of the loan of $1,500 obtained in October, 1881; and in an account rendered by them on the 31st January, 1886, they bring in the appellant their debtor in the sum of $3,751.14, for which they still acknowledge themselves to hold as "collateral" the 160 shares

Land Security and 50 shares Building and Loan. On the 6th March, 1886, they charge the appellant with $1,487.50 paid by them for him for new shares, to which the appellant became entitled in the Land Security Company as holder of the old 160 shares in Toronto Building Association, and on the 30th September, 1886, the defendant Robert Cochran renders to the appellant an account of everything from the beginning in his Robert Cochran's own name, and not in the names of Scarth & Cochran in which account, including the amounts charged on March the 6th as paid for new shares accrued to the appellant in the Land Security Company the appellant is brought in debtor in the sum of $5,142.94, and between that date and the 1st of July, 1887, the appellant is debited with other large sums of money as paid on account of other new shares in the Land Security Company as accruing to him in right of the old 160 shares in the Toronto Building Association, such new shares in the whole amounting to 638, and during all this time Scarth & Cochran and Robert Cochran in the accounts rendered on the 30th September, 1886, and subsequently thereto, give the appellant credit for the dividends at the 160 old shares and the 638 new shares regularly as they became due and payable. Now under these circumstances there can be no doubt that the defendants Scarth & Cochran held the appellant's shares in the Landed Security Company, both the old and the new shares which accrued in right of the old, upon trust only as security for the balance of their account on their transactions with the appellant; neither can there, I think, be any doubt that the words "in trust" as inserted by the appellant in the instrument which he signed transferring the legal interest in the shares so transferred must be read as having been inserted by the appellant for the purpose of securing himself in the event of any breach by the defendants Scarth & Cochran of the trust condition subject to which they held the shares, and in the reasonable expectation that any person accepting a transfer of the shares from them would be put upon enquiry as to the nature of the trust. That the defendants Scarth & Cochran com-

mitted a palpable breach of the trust condition subject to which they held the shares cannot admit of doubt, and the only question before us is whether under the circumstances appearing in evidence the Canadian Loan and Agency Company are to be affected by that trust or can they hold the shares which they acknowledge they acquired in virtue only of their contract with Cochran free from all obligation to the appellant in respect of shares which Scarth & Cochran held from him subject to the trust condition in his favour, or in the words of Lord Bramwell in *The Earl of Sheffield* v. *The London Joint Stock Bank*, 13 App. Cas. 346, whether under the circumstances appearing the defendants, The London and Canadian Loan and Agency Company, must not be held to have had notice of such facts and matters as made it reasonable that inquiry should have been made by them into Cochran's title to deal with the shares as his own. The evidence bearing upon this point is that upon the 7th September, 1887, Cochran applied to the company through their manager and agent, the defendant Turnbull, for a loan of $14,300 upon the security of 160 old shares and 638 new shares of the Landed Security Company of which he represented himself to be the owner. Mr. Turnbull knew Cochran to be a stock broker, and had had previous dealing with him as such; he did not, he says, consider whether the shares were Cochran's own or shares belonging to his clients; Cochran represented them to be his own, and Turnbull dealt with him as the owner upon such representation; thereupon Turnbull, on behalf of his company, came to an agreement with Cochran to lend him the $14,300 upon the terms set forth in a deed of hypothecation upon which the transfer of the shares being effected as hereinafter mentioned Cochran executed under his hand and seal, and which as so executed is as follows:—

In consideration of fourteen thousand three hundred dollars this day advanced by the London and Canadian Loan and Agency Company (Limited), I have deposited with the said company as security the following shares, viz., one hundred and sixty

shares of fully paid up Land Security Company, say $4,000, and six hundred and thirty-eight shares of 20 per cent. paid Land Security Company, say $3,190, and covenant and agree to repay the said advance to the said company in three months with interest thereon until repaid at the rate of six and one-half per cent. per annum, at their head office in Toronto, and in default thereof, but without prejudice to the company to recover on the said covenant, hereby authorize the company to sell the said shares without notice in such manner, and either by public or private sale, as they may see fit, the net proceeds to be applied to the payment of the said advance and interest, and the surplus, if any, to be accounted for to the undersigned. In case of deficiency I promise to pay to the company the amount thereof forthwith thereafter with interest thereon as aforesaid. If at any time the said shares should be quoted in the ordinary newspaper reports at a price under 220 per cent. respectively on the nominal par value of such shares, I undertake to make good to the company on demand forthwith the difference between the value of the said shares at the price above mentioned, and at such reduced quotations, in default whereof the company are to be entitled to claim payment at once of the full amount of the said loan with interest thereon as aforesaid, and in case of non-payment to be at liberty to sell the said shares as above mentioned, and the company are not in any case to be liable for any loss arising from any sale of said shares. In the event of the undersigned having any other loan or loans from the said company, the margin of which is insufficient, or in which any deficiency may exist under their respective terms, the company shall not be bound to release the securities hereby deposited until such insufficiency of margin or deficiency shall be made good; and in the event of any sale of the above securities under the powers granted to the company hereunder, the company may apply any surplus that may remain in satisfaction of any claim which they may have against the undersigned in respect of any other loan or loans under the respective provisions thereof. Any demand

or notice which the company may think necessary to make or give is to be held sufficient if mailed to the persons so to be notified at their usual postoffice address or left at their usual place of business, but it is not to be obligatory on the company to make or give any such demand or notice.

Dated at Toronto this 7th day of September, 1887.

(Sgd.) ROBT. COCHRAN.

[SEAL.]

The terms of loan having been agreed upon, Cochran and Turnbull went to the office of the Landed Security Company and there Cochran produced a power of attorney bearing date the same 7th day of September, executed in his favour by one James Oliver Buchanan, as manager of the Federal Bank, of which bank he then was manager, which power of attorney was in the words following:—

Know all men by these presents that I, James Oliver Buchanan, Manager in trust, of Toronto, hereby nominate and appoint Robert Cochran, broker, of Toronto, my true and lawful attorney for me and in my name to transfer one hundred and sixty fully paid up shares and six hundred and thirty-eight 20 p.c. paid up shares in the stock of the Landed Security Company, and as my act and deed to execute all covenants and agreements required to be executed by members subscribing for unadvanced shares, and I hereby agree to ratify and confirm whatever my said attorney shall lawfully do in the premises by virtue hereof.

Witness my hand and seal this 7th day of Sept., 1887.

(Sgd.) J. O. BUCHANAN,

Manager in trust.

[SEAL.]

Thereupon Cochran under and in virtue of the said power of attorney executed, in the transfer book of the Landed Security Company, two several instruments of transfer of shares which the said London and Canadian Loan and Agency Company through their manager and agent accepted (for that appears to

me the effect of the transaction) and which instruments of transfer and acceptances thereof are as follows:—

1st. For value received, I, J. O. Buchanan, manager in trust, do hereby assign and transfer unto James Turnbull in trust, one hundred and sixty old shares in the stock of the funds of the Land Security Company of Toronto numbered in the books of the company as shares No. ————, on which has been paid the sum of four thousand dollars ($4,000) subject to the provisions of the Act of Parliament authorizing the incorporation of the company, and the by-laws, rules and regulations thereof already passed or hereafter to be passed in accordance therewith. Witness my hand at the office of the company this 7th day of September, 1887.

J. O. BUCHANAN,
Manager in trust.
Per ROBERT COCHRAN,
His Attorney.

I hereby accept the foregoing transfer of one hundred and sixty (160) old shares of the stock of the Land Security Company at the conditions and subject to the provisions above mentioned.

Dated this 7th day of September, A.D. 1887.

JAMES TURNBULL,
In trust.

2nd. For value received, I, J. O. Buchanan, manager in trust, of Toronto, do hereby assign and transfer unto James Turnbull, in trust, six hundred and thirty-eight (638) new shares in the stock of the funds of the Land Security Company, of Toronto, numbered in the books of the company as shares No. ————, on which has been paid the sum of $3,190, thirty-one hundred and ninety dollars, subject to the provisions of the Act of Parliament authorizing the incorporation of the company, and the by-laws, rules and regulations thereof already passed or hereafter to be passed in accordance therewith.

Witness my hand at the office of the company, this 7th day of September, 1887.

J. O. BUCHANAN,
Manager in trust.
Per ROBERT COCHRAN,
His Attorney.

I hereby accept the foregoing transfer of six hundred and thirty-eight (638) shares of the stock of the Land Security Company on the conditions and subject to the provisions above mentioned.

Dated this 7th day of September, A.D. 1887.

J TURNBULL,
In trust.

Now the manager of the London and Canadian Loan and Agency Company having thus accepted these transfers to give effect to the terms of the hypothecation deed above set out in full, and by way of security for the loan then made by the company to Cochran, the company through their manager had notice that the shares which Cochran had offered to the company as security for the loan he was negotiating with them for, and of which shares he had represented himself to be the owner, did not belong to him, but were in truth the property of the Federal Bank, held for them in the books of the Land Security Company in the name of their manager, J. O. Buchanan. Mr. Turnbull notwithstanding never asked Cochran for any explanation of this discrepancy between his statement as to the ownership of the shares, and his transferring them as the property of the bank who appear to have held them in the name of their manager subject to some trust and under a power of attorney given to him, Cochran, by the bank's manager. He says:—

We, that is the company, made no inquiries as to the title to the stock. We believed the stock might belong to him (Cochran) or it might belong to somebody else. We did not know, and of course, in the absence of anything to the contrary, we assumed it to belong to him.

Again:—

We did not think it nesessary to inquire whether he was the owner or not the owner. We did not think it was any part of our business.

But he had notice by the transfers that Cochran was not the owner, and that the Federal Bank were, yet he made no inquiries. The transfers having been executed by the manager of the bank with the words "manager in trust" added to his name, the London and Canadian Loan and Agency Company and their manager were, I think, put upon inquiry whether there was any, and if any, what, trust attached to the shares and what was the nature of the bank's title. We see that if the manager of the London and Canadian Loan and Agency had made inquiry of Cochran or the bank, he must have learned that the title which the Federal Bank had was derived from the Standard Bank and the Home Savings and Loan Company, which institutions also held the shares transferred by them respectively subject to some trust, and that they severally derived title from the Merchants Bank, who also held the shares subject to some trust and acquired title from the defendants Searth & Cochran, who claimed title only under transfers executed by the appellant to them, which transfers expressly stated that the shares were only transferred by the appellant to them on some trust. They would then have learned that Cochran alone had never any title to the shares, and that the defendants Searth & Cochran held them only as trustees and subject to a trust imposed by the appellant the nature of which he could explain. If the Loan Company and their agent Turnbull abstained from inquiry as to the nature of the trust from a conception formed in the mind of their manager that the words "in trust" and "manager in trust," as used in the instruments of transfer from the Federal Bank had a meaning more limited than upon inquiry might prove to be correct, they must abide the consequences of their misconception. Cochran produced no certificate of ownership, or any other document evidencing his ownership of the shares. It does not appear that any document

ever had been in existence evidencing any title to the shares in him other than the instrument of transfer to Scarth & Cochran in trust, executed by the appellant; the case was not that of one offering a pledge of his evidence of title to the shares as the owner, but it was the case of one dealing with shares as owner, but offering no evidence whatever of ownership, and the persons making him a loan upon the security of the shares having notice by the transfer which they accepted that he was not the owner, but that the Federal Bank who held them upon some trust were. Under these circumstances the Loan and Agency Company were, in my opinion, put upon inquiry into the nature of Cochran's title to the shares and his right to deal with them and such inquiry must have led them to the knowledge that he never had any right to deal with them to any greater extent than the amount of the appellant's liability to the defendants Scarth & Cochran from whom the loan company's title to the shares is traced. Having made no inquiry into the nature of the title of the persons with whom they dealt for the shares it is but reasonable that they should take subject to the trust to which he was subjected by the instrument of transfer which constituted his sole title. This is the principle involved in *Shaw* v. *Spencer*, 100 Mass. 382, which, in my opinion, enunciates sound law. It cannot be said that the appellant enabled Scarth & Cochran or either of them to commit the fraudulent breach of trust which they have committed to the appellant's prejudice when he declared on the face of the instrument transferring the title to them that it was to them as trustees that the shares were transferred. If the contention of the respondent should prevail under the circumstances appearing in the present case it must equally prevail although the instrument of transfer executed by the appellant should have set out in the most precise terms the trust purposes upon the subject to which the transfer of the shares was made. If we should hold that the London and Canadian Loan Company were not under the circumstances appearing in the present case put upon inquiry into the nature of the title they were acquiring

through their agreement with Cochran, I can see no possible mode by which an owner of shares in the company could transfer them to trustees upon trust in favour of the transferrer if the statement in the deed of transfer that the transfer is made to the transferees in trust is not sufficient to put all persons dealing with such transferee who at least as in the present case produces no document whatever evidencing his title upon inquiry as to the nature of the title. The appeal must, in my opinion, be allowed, and the judgment of Mr. Justice Street be restored.

PATTERSON, J.:—The learned judges who delivered their opinions in the court below have ably and exhaustively explained the grounds on which the judgment is based. I think we should affirm the judgment upon the same grounds. Great reliance was placed in support of the appeal upon the case of *The Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333, before the House of Lords, and *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 270, before the Court of Appeal, but the view taken of those cases in the court below is borne out by the recent decision of the House of Lords in the latter case, [1892] A.C. 201, reversing the judgment of the Court of Appeal and explaining the effect of the judgment in the *Earl of Sheffield's Case*, 13 App. Cas. 333.

The defendant company, through the defendant Turnbull, who was assistant manager of the company, took a transfer of the shares in question from J. O. Buchanan, the manager of the Federal Bank, as security for money lent by the company to Cochran. Mr. Buchanan had held the shares on behalf of the bank as security for money lent to Cochran. Some of the shares had been transferred to him on the books of the company by previous holders, and some were new stock allotted to him as the holder of the older shares. In each case the transfer or allotment was to "J. O. Buchanan, manager in trust." He transferred the shares to Turnbull by a document which described him as "J. O. Buchanan, manager, in trust," and was signed

"J. O. Buchanan, manager in trust, per Robert Cochran his attorney," transferring the shares to "James Turnbull, in trust."

The argument has turned to a great extent on the force to be attributed to these words "in trust." In two or three cases which came to this court from the Province of Quebec, the leading case being *Sweeny* v. *The Bank of Montreal*, 12 Can. S.C.R. 661, which went to the Privy Council, 12 App. Cas. 617, the term was held to convey an intimation that the property was held on behalf of a *cestui que trust* and to call for inquiry by one dealing with the nominal holder as to who was the *cestui que trust*, and the title was read just as if, instead of stopping at the word "trust," it had gone on to say "in trust for so and so." Now suppose the extended form of expression had been used in the transfers to Buchanan and to Turnbull. It would be Buchanan in trust for the Federal Bank," and "Turnbull in trust for the Land Security Company." That was what was meant and what the parties all understood. The transfers might as well, except for the form which was adopted for convenience sake, have been direct to the bank and to the company. Whether Turnbull or his company found the Federal Bank recognized on the books of the Land Security as the absolute holder of the shares, or found that they were held by Buchanan on behalf of the bank, I find no authority for holding that there was a duty to carry any inquiry into the title farther back. The existence of such a duty can be contended for only, as it appears to me, by attributing to those words "in trust" a meaning that was not intended by the persons who wrote them and which they would not naturally convey to a person reading together the associated words "J. O. Buchanan manager in trust." Buchanan would naturally be understood, as Turnbull understood from the document without further inquiry, to hold as manager in trust for his bank. That is the extent of the notice conveyed by the words, and there is nothing to suggest that the legal estate which passed by the transfer may be subject to any equities as against the bank.

There might, as I apprehend, be serious practical difficulties

in the way of tracing back the title to shares which have nothing in the way of numbers or certificates by which they may be identified, but which are transferred only in the books of the company. The possibility for this may be a reason for caution before acceding to the general proposition on which the action is founded. But however this may be I am not satisfied that the inquiry, if carried back in the present case, would compel the result for which the appellant contends. We should find, it is true, one or two instances in which the words "in trust" may be less distinct in their application than in the case of Buchanan. Thus we find 45 shares once transferred as security for a loan to the Home Savings and Loan Company in trust, not to an officer of the company, and we find that while the plaintiff's first transfer of 80 shares to Scarth & Cochran in trust was to secure a loan from a company of which they were managers, his second transfer of 80 shares to "Scarth & Cochran, brokers in trust," was as collateral security on another transaction and not in respect of a loan effected at the time. The use of the words "in trust," may in these two instances be capable of some explanation that does not now call for close examination, possibly, in the case of the Home Company, that the transfer which was from "Wm. Cooke, cashier in trust," was upon a printed form similar to that on which Mr. Cooke on the same day transferred 235 shares to "H. S. Strathy, cashier in trust,"—forms seemingly prepared for transfers to individual officers and not to corporations—and in the case of the second 80 shares there may be the same or some other way of accounting for the use of the words. The question would be whether the words implied a declaration of trust in favour of the plaintiff, or would properly be so understood. It is undeniable that, as between the plaintiff and Scarth & Cochran, the plaintiff's right to redeem his stock in no way depended on those words. It may be easily assumed that if those parties had intended to say that the transfer was by way of pledge or mortgage they would have said so. In place of that they use an expression which appears to be not unusual in these

transactions where one lending money for another, whether as broker or manager of a bank or loan company, takes security in his own name, and which in that situation is an apt expression. We may further note that whatever difference, if any, there may have been in the two transfers of 80 shares each, yet the whole 160 original shares together with the 638 new shares would seem to have been afterwards regarded by the plaintiff as on exactly the same footing. The decision of the appeal does not, in my view, turn upon this topic. I allude to it chiefly for the purpose of expressing my doubts of the ability of the plaintiff to sustain his claim even if it were to be held that the respondents ought to have inquired further into the history of the shares.

In my opinion we should dismiss the appeal.

Solicitors for appellant: *Kerr, McDonald, Davidson & Patterson.*

Solicitors for respondents: *Howland, Arnoldi & Bristol.*

The Court thereupon allowed the appeal with costs. The defendant then appealed to the Privy Council.

Blake, Q.C. (of the Canadian Bar), and *Graham Murray*, Q.C. (of the Scotch Bar), for the appellant.

McCarthy, Q.C. (of the Canadian Bar), and *Gore*, for the respondent.

July 29, 1893. The judgment of their Lordships was delivered by

LORD WATSON:—The controversy between the parties to this appeal, which has occasioned much difference of opinion in the courts below, relates to 798 shares of the Land Security Company of Toronto, of which 160 were old shares fully paid up, and 638 were new shares upon which 20 per cent. had been paid.

The capital of the Land Security Company, which was incorporated under Statutes of the Province of Ontario, has not been turned into stock, and is not divided into shares of a certain fixed amount. Its share are neither numbered, nor otherwise identi-

fied; so that each share simply represents an aliquot part of the concern carried on by the company, which cannot be precisely ascertained except by reference to its stock ledger.

The statutes enact that no transfer of the company's shares shall be valid until entered in its books, according to the forms prescribed, from time to time, by the directors. They make no provision for the issue of share certificates, or any document of title, to members of the company; and no such document has ever been issued. The only legal evidence of the ownership of shares which have been transmitted from the original allottee, is to be found in the transfer book of the company.

It is not matter of dispute that the 160 old shares at one time belonged to the respondent, Edmund Henry Duggan, who, in 1882, transferred them to Scarth and Cochran, a firm of brokers in Toronto, in security of advances. After receiving the transfer, that firm proceeded to use the shares in raising loans for their own accommodation, and as in right of these shares, and in the interest of the respondent, they obtained an allotment of the 638 new shares which are now in question. On obtaining the allotment, they dealt with these new shares also for the purpose of obtaining money advances on their own account. In the course of these transactions, which extended over a period of several years, Scarth & Cochran repeatedly paid up the advances made to them by procuring a fresh loan; and, on these occasions, the shares were transferred to the new lender by the previous holder of them. In the beginnig of 1887, their lender was the Federal Bank, to whom they had agreed to convey in security the whole of these 798 shares; and that agreement had been duly carried out by the previous holders executing transfers, in the transfer book of the company, in favour of "J. O. Buchanan, Manager in trust," which were accepted by him, under the same designation.

In 1887, Scarth & Cochran arranged with the appellants, the London and Canadian Loan and Agency Company, Limited, for an advance of $14,300, to enable them to discharge their debt to the Federal Bank, upon condition of the shares held by the bank,

in name of their manager, being transferred as security to the appellants. In pursuance of that arrangement, two transfers, one of the 160 old, and the other of the 638 new shares, were, on the 7th of September, 1887, duly executed in the transfer book of the Land Security Company, bearing to be granted by "J. O. Buchanan, Manager in trust" to the appellant, "James Turnbull in trust." The said appellant was at that time the manager of the appellant company. Each of these transfers was executed by "J. O. Buchanan, Manager in trust," as transferor, per Robert Cochran his attorney, and was accepted by the appellant James Turnbull, who added the words "in trust" to his signature. The power of attorney by J. O. Buchanan in favour of Cochran was also entered in the transfer book.

The appellant company sold the shares; and after payment of their advance to Scarth & Cochran, there remained a balance, for which they have all along been willing to account. In this action, which was brought by the respondent Duggan, before the Chancery Division of the High Court of Justice of the Province of Ontario, he claims payment from the appellants, not of the price received for the shares, but of their full market value, under deduction only of such debt, if any, as he owed to Scarth & Cochran. Alternately, he claims the balance of the price, after satisfying Scarth & Cochran's debt to the appellant company.

The legal principles involved in this appeal may be of interest to the mercantile community; but in the circumstances of the case, their Lordships have not found their application to be attended with difficulty.

It is conceded on all hands that, in any question between him and Scarth & Cochran, the respondent would have been entitled to get back his shares, or their proceeds, upon payment of the debt which he owed to the firm. Whether the successive transferees, who held the shares intermediately between Scarth & Cochran and the Federal Bank, were affected by the relations which admittedly subsisted between that firm and the respondent, is a matter upon which their Lordships do not find it neces-

sary to express any opinion. No such trust, in favour of the respondent, as has been held to exist in this case, could affect holders of the shares after Scarth & Cochran, unless it was disclosed on the face of their author's title, or was otherwise notified to them. The evidence shews, and all the learned judges in the courts below assumed, that the appellants had no intimation of the existence of a trust running with the shares, other than was conveyed to them by the terms of their transferor's title as it stood in the books of the company. They had a right to satisfy themselves by inspection of the books, that J. O. Buchanan, as representing the bank of which he was manager, was in titulo to transfer to them; and, whether they enquired so far or not, they must be held to have done so. But they had no right, and were under no duty, to trace back the history of the shares, in the course of their transmission from the respondent.

The fate of this appeal must therefore depend upon the single issue—whether the words "manager in trust" appended to the designation and signature of J. O. Buchanan in the transfer book, indicate that he was trustee for some beneficiary other than the Federal Bank, or merely import that he held the shares for behoof of the bank. Apart from the evidence, their Lordships have no hesitation in holding that the added words, according to their natural construction, mean that Buchanan, as an official of the bank, held in trust for his employers, and are not calculated to suggest that he stood in a fiduciary relation to any other person.

It was argued that these words, even though they might not clearly indicate a trust for others than the bank, were at least so ambiguous as to cast upon the appellants the duty of making inquiry. Their Lordships are not of opinion that any such ambiguity exists. But the argument, had there been some foundation for it, would have come to nothing; because it is clearly proved that the Federal Bank intended Buchanan to hold for them, and for them only; and it is also proved, and is assumed by the learned judges who found for the respondent, that the

appellants, if they had enquired, would have received a positive assurance to that effect.

Their Lordships will therefore humbly advise Her Majesty to reverse the decision of the Supreme Court of Canada, to restore the judgment of the Court of Appeal; and to order the respondent to pay to the appellants the costs incurred by them before the Supreme Court, and to declare that the appellants are to be at liberty to retain the sum of $3,080:5 mentioned in the certificate of the Court of Appeal in payment *pro tanto* of their taxed costs in the Supreme Court as well as of the costs to which they have been found entitled by the judgment of the Court of Appeal. The respondent must also pay to the appellants their costs of this appeal.

Solicitors for the appellants: *Gadsden & Theherne.*
Solicitors for the respondent: *Bompas, Bischoff & Co.*

Note:

PLEDGE OF SHARES.

In the ordinary course of dealing on the Stock Exchange between brokers, the pledge of clients' stock is a matter of daily occurrence and as a transaction is usually of an informal nature. In many cases, brokers protect themselves by inserting a clause in the bought note reserving the right to the broker to hypothecate or pledge the shares as security for advances.

There is no reason in law why stock should not be pledged but possession must accompany the pledge. *Wilson* v. *Liddell*, 2 N.Y. 443.

The pledgee of stock cannot foreclose the right of redemption but must sell and he holds the proceeds of the sale in trust to discharge the debt, and to pay the pledgor any balance which may remain over. *Newton* v. *Fay*, 92 Mass. 505.

The form of transfer is usually an absolute one but the true nature of the contract may be proved by parol. *Newton* v. *Fay*, *supra*.

The delivery of the stock endorsed in blank does not pass the legal title but confers upon the pledgee an equitable interest, *Ogden* v. *Lathrop*, 65 N.Y. 158.

Stock pledged may also with the assent of the pledgor be used by the pledgee in any way not inconsistent with the general ownership of the former. *Lawrence* v. *Maxwell*, 53 N.Y. 19.

Story Bailments 8th Edition 324; *Donald* v. *Suckling*, L.R. 1 Q.B. 585. *Legg* v. *Evans*, 6 M. & W. 36.

Where the shares are fully paid up, it is advisable to have a properly executed transfer and have same registered as the pledgor is prevented from any further dealing with the shares and the pledgee is in control of the dividends. In many cases this would not be worth while owing to the temporary nature of the arrangement.

If the shares are partially unpaid, the transfer by delivery of the certificates endorsed in blank is preferable or in such case the pledgee will not be liable to pay calls. *Newry Railway Co.* v. *Moss*, 14 Beav. 64; *Re Land Credit Co.*, L.R. 8 Ch. 831.

In the case of an ordinary pledge of personal property, the pledgee seems to have the right to use the pledged property. Schouler on Bailments 196. And it is clear in a case of stock bought on margin by a stock broker for a client, he has the right to use the shares in his own business.

A broker advances the greater part of the purchase money for which he has a lien and the relation of pledgor and pledgee is established in this way.

No ordinary amount of capital would suffice to carry on a broker's business where he is not allowed to borrow on security of his customers' shares. This practice is quite inconsistent with any theory that the broker should keep on hand the identical stock purchased for a client: See *Price* v. *Gover*, 40 Md., and see *Langton* v. *Waite*, L.R. 6 Eq. 165, but the broker must have at all times ready for delivery to his client shares of the same description and amount: *Nourse* v. *Prime; Gilpin* v. *Howell*, 5 Penn. State 41; *LeCroy* v. *Eastman*, 10 Mod. 499. but where the broker does not continue to keep on hand stock sufficient in quantity to deliver to his client, he is liable for conversion. *Langton* v. *Waite*, L.R. 6 Eq. 165. A subsequent acquisition by broker of a sufficient number of shares would not relieve him from liability. *Taussig* v. *Hart*, 58 N.Y. 425; *Lawrence* v. *Mex.*, 53 N.Y. 19. Where the parties agree that the original certificates

must be kept on hand, a broker must maintain them in the identical condition in which they were purchased: *Hardy* v. *Jaudon*, 41 N.Y. 619.

Any conflict between the broker's interest and his duty will be strongly discountenanced by the courts. The broker must obey instructions strictly and if directed to buy or sell at a certain price, instructions must be carried out to the letter. *Bush* v. *Cole*, 28 N.Y. 261; *Ireland* v. *Livingston*, L.R. 5 H.L. 395.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

COX & WORTS v. SUTHERLAND.

Principal and agent—Speculating in stocks—Instructions to broker—Broker's duty—Money paid for margins.

S., a speculator in stocks, instructed F., a stock-broker, to purchase for him a certain number of shares in F.B. stock, expecting to make a profit out of a rise in the value of said stock in the market:—

Held, affirming the judgment of the Court below, that the relation between S. and F. was that of principal and agent, and F. was bound to purchase the stock and hold it as the property of S. He could not rely on his ability to procure a like number of shares when required, as his interest would then be to depreciate their value so as to obtain them cheaply, which would conflict with his duty to S.

F., being about to retire from the business as a stock-broker, handed over his stock transactions, including that with S., to C., to which S. consented. C. acknowledged to S. having received from F. the amount paid for margins on the stock which F. was instructed to buy, neither F. nor C. having purchased the stock and set it apart as the property of S.

Held, affirming the judgment of the Court below, that C. was liable, in an action for money had and received, to refund to S. the amount so paid for margins.

The defendants set up an alleged custom and usage of the stock exchange, that where a broker is employed to purchase stock for a customer on margin he is at liberty to be himself the seller and nominal pledgee of the stock, and to charge a commission as if a real sale had been effected, although at the time he may not be owner of a single share; and that the broker fulfills his obligation, if he is prepared at any time to deliver the stock to his customer.

Held, that no such custom could prevail; for not only would it be directly opposite to the law which regulates the transactions between broker and employer, but it has this further defect, that it substitutes the personal liability of perhaps an insolvent broker for the real security of the stock.

THIS was an action brought by Robert Sutherland against the firm of Cox & Worts, composed of E. S. Cox and F. Worts, carrying on business as stock brokers and money lenders in the City of Toronto.

The cause was tried at Toronto, at the Spring Assizes of 1884, before Hagarty, C.J., without a jury, who gave judgment in favour of the defendants for $807, without costs.

The pleadings and evidence are fully set out in the judgment of Galt, J.

The following is the judgment of the learned Chief Jutsice at the trial.

HAGARTY, C.J.—Farley was carrying the 500 shares for plaintiff on a ten per cent. margin. The plaintiff left for

England in April, and was told that Farley had obtained a loan on stock from Moat of Montreal at 8 per cent. to 1st Demember, and he was told by Farley that at any time he wanted to sell the interest should cease. Farley got into difficulties; and in July, in the plaintiff's absence, the defendants took over these shares for Farley, settling with him and crediting him with the interest at 8 per cent. to run against the plaintiff in any event to the 1st December.

I find on the evidence there was no such loan from Moat, or any one else. Moat and Farley settled all interest matters up to the middle of July.

I also find that the defendants dealt with Farley, believing that he had the right to charge the plaintiff the interest to 1st December. I do not think that defendants can set up any higher right against the plaintiff than Farley could set up; and I find that the plaintiff must be credited now with this interest as improperly charged against him.

I cannot see that any cause of action is established against the defendants beyond the right to recover back this interest. The defendants advising him not to sell in August, and that, if he did, he would still have to pay the interest to 1st December, does not, I think, give any cause of action, and I cannot hold that such advice was given in bad faith; nor do I understand why plaintiff did not then at once repudiate any absolute liability to pay this interest, sale or no sale, up to 1st December. Nor am I able to fix any legal liability on the defendants for the sale on the 15th October. They had the apparent right to sell, and they had the advice of Mr. J. Leys, the plaintiff's friend, that selling would be the wisest course.

I think the defendants were always in a position to obtain 500 shares of Federal whenever they required them to satisfy the plaintiff or any other person.

I am unable to accede to the plaintiff's views as to the peculiar liabilities of the pledgee of chattels. I treat the case as one to be decided on the ordinary rules and customs regulat-

ing the trafficking and speculating in stocks. The defendants were, as it is called, carrying the plaintiff's stock, he looking for a rise; and I find that the defendants were at any time ready and able to give him his stock or sell it for him if he so desired.

I think the justice of the case requires me to allow to the plaintiff $2,226, the amount of interest, as I find, improperly charged to the plaintiff by the defendants.

I find the defendants entitled on their counter-claim to a balance of $807.

I do think it a case for interest on either of these sums.

I think that as the upshot is, that a balance is coming to the defendants on their set-off or counter-claim I cannot give the plaintiff his costs. Had he merely sued for the over-charged interest I would I think give them to him.

I direct judgment for the defendants for the balance of $807, without costs, and award execution therefor, staying to fifth day of May sittings.

At the Easter sittings, *D. E. Thomson* moved, on notice, to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff for $4,693.

During the same sittings, June 9, 1884, *D. E. Thomson* and *D. Henderson* supported the motion. The plaintiff's intention, as the evidence shews, was to purchase in good faith the 500 shares of Federal Bank stock, he paying a margin and his broker being instructed to obtain the balance of the purchase money by a pledge of the stock. Farley, who was acting as the plaintiff's broker in that transaction, being about to retire from that business, the plaintiff through his agents instructed the defendants to take over the stock, and carry it as the plaintiff's brokers. The defendants, instead of taking over the stock, undertook with Farley to deliver the stock to the plaintiff on the plaintiff's demand. They thus substituted the defendants' liability to deliver the stock for the stock itself. The defendants, however, represented to the plaintiff that they had taken over the stock and assumed the loan alleged to exist thereon

of $75,807.54, concealing from him what the true facts were; and when the plaintiff desired the defendants to sell the stock, they precluded the plaintiff from doing so by the knowingly false statement that the stock was then subject to a pledge for an advance of $78,807.54, bearing interest at 8 per cent. until the 1st December, and that under the terms of the pledge the advance could not be paid off and the stock released without such interest being paid in advance up to the 1st of December. This was a knowingly false statement made by the defendants, with the intention that the plaintiff should believe it to be true and should act upon it, and the plaintiff believing it to be true did act upon it, and refrained from calling upon the defendants to effect a sale of the stock at the then market price; otherwise the plaintiff would have been entitled to receive from the defendants on such sale at the then current rate the sum of $4,600, for which sum he is now entitled to a verdict: *Watson* v. *Poulson*, 15 Jur. 1111, at p. 1112; *Polhill* v. *Walter*, 3 B. & Ad. 114, 123; *Milne* v. *Marwood*, 15 C. B. 778, *Pasley* v. *Freeman*, 3 T. R. 51; *Addison* on Torts, 4th ed., pp. 835-837. There is no evidence in support of the alleged custom referred to in defendants' statement of defence. Such a custom, even if it had been shewn to exist among brokers, would not be binding upon the plaintiff, who was not aware of its existence, and who was not shewn to have contracted with reference to it: *Lewis* on Stocks, p. 33; *Duncan* v. *Hill*, L. R. 8 Ex. 242; *Evans* v. *Waln*, 71 Penn. R. 69; *Sweeting* v. *Pearce*, 9 C. B. N. S. 534; *Shaw* v. *Spencer*, 100 Mass. 382; *Day* v. *Holmes*, 103 Mass. 306. Such a custom as that set up by the defendants, even if supported by evidence, would be illegal, and cannot be allowed to prevail: *Robinson* v. *Mollett*, L. R. 7 H. L. 802; *Taussig* v. *Hart*, 58 N. Y. 425; *Lewis* on Stocks, p. 23; *Jones* on Pledges, ed. of 1883, secs. 510-11; *Redfield* on Carriers and Bailees, ed. of 1869, p. 526, sec. 659; *Levy* v. *Loeb*, 89 N. Y. 386; *Ex p. Dennison*, 3 Ves. 552; *Dykers* v. *Allen*, 7 Hill 497; *Markham* v. *Jaudon*, 41 N. Y. (2 Hand) 235, 239; *DosPassos* on Stock Brokers, pp. 102, 147, 150; *Wigglesworth* v. *Dallison*, 1 Sm. L. C. 8th ed., 594;

Brown v. *Bryne*, 3 E. & B. 703; *Humfrey* v. *Dale*, 7 E. & B. 266; S. C., E. B. & E. 1004. Under the most favourable construction for the defendants this whole transaction was fictitious, except the receipt by the defendants from Farley of the sum of $3,442.46, representing the amount then alleged by Farley to be due to the plaintiff in respect of moneys paid by him on account of margin on the 500 shares of stock. This amount Farley states in his evidence he paid to the defendants, and that evidence is uncontradicted. That was the plaintiff's money; it was received by the defendants, and they are liable for it as money received for the plaintiff's use: *Bullen & Leake*, 3rd ed. pp. 44-48; *Hambly* v. *Trott*, 1 Cowp. 371; *Linden* v. *Hooper*, 1 Cowp. 414; *Litt* v. *Martindale*, 18 C. B. 314. The plaintiff cannot be liable for interest, as he never undertook to pay interest except on the assumption that an actual loan had been procured on his stock. No loan was ever procured, consequently there can be no liability.

J. K. Kerr, Q.C., and *Lash*, Q.C., contra. The only rights the plaintiff has are those that arise under the agreement made between him and Farley. The plaintiff's sole object in entering into the agreement, and dealing with the stock, was that of speculation. He never intended buying or paying for the stock, or taking a transfer of it, or that Farley should do so for him. All that Farley undertook to do, and all that it was intended that he should do, was to account to the plaintiff for the stock, or the market value of it, whenever the plaintiff might call upon him to do so; and to protect Farley, the margin was deposited with him. What the defendants undertook to do was to assume Farley's position under the agreement, that is, to account for the stock or its market value; and the learned judge has expressly found that the defendants were always in a position to obtain the stock whenever required to do so by the plaintiff, or to sell it for him, if so ordered. It must also be considered that when the defendants took over Farley's business, there was no stock held for the plaintiff. The defendants

took over Farley's business as a whole, and the $3,000 paid to the defendants was on the whole business, and not as the margin deposited by the plaintiff with Farley. If the agreement was that the stock should be purchased and held for the plaintiff, then the plaintiff would be entitled to recover damages for the failure to do so, but there can be no damages as the stock fell in value. If the plaintiff is in a position either to adopt or repudiate the contract made by defendants with Farley, he must do so as a whole. He cannot adopt part and repudiate part. If he repudiates then there is no privity between the plaintiff and the defendants, and therefore there is no cause of action; but if he adopts then he must adopt the whole agreement, and the liability must depend upon its terms. The obligation of the defendants was to assume Farley's liability to procure for the plaintiff the stock or pay its market value at the time when plaintiff might demand it, and the plaintiff's agreement was not only to pay the margins, but also to pay 8 per cent. on the $75,867.74, until 1st December. The plaintiff failed to carry out his agreement. The defendants were therefore entitled to do as they did, and to refuse to continue under liability to the plaintiff; but the agreement was not thereby cancelled *ab initio*, but the rights of the parties acquired under it continued, and the defendants had the right to retain all moneys received by them and to call on the plaintiff to make good the amount claimed by the defendants, by their counter-claim, and which the learned judge at the trial held they were entitled to. The judgment of the learned judge is right, and should be upheld. They referred to *DosPassos* on Stock Brokers, p. 180; *LeCroy* v. *Eastman*, 10 Mod. 499; *White* v. *Smith*, 54 N. Y. 522; *Jones* on Pledges, secs. 503, 509.

June 26, 1884. GALT, J.:—This case is one of great public importance, involving the mode in which what may be called "stock jobbing" is carried on in this Province. I therefore set out at length the statement of claim and the defence.

Statement of Claim:

1. The plaintiff is a merchant, residing in the City of Toronto, and the defenders are stock-brokers and money-lenders, carrying on such business under the firm name of Cox & Worts, in the said City of Toronto.

2. On, and prior to the 20th day of July, 1883, one W. W. Farley was carrying on business as stock-broker in Toronto, under the name of W. W. Farley & Co.; and, as such broker, under instructions of the plaintiff, purchased for the plaintiff 500 shares of capital stock of the Federal Bank of Canada, a banking institution doing business under the Banking Acts of Canada.

3. The plaintiff, as the said Farley well knew, purchased the said stock for the purpose of realising profits on the same, by the rise in the market price of the same. The plaintiff not being provided with funds of his own to pay the full amount of the purchase money for the said shares, instructed the said Farley to obtain a loan on the same, the object being to keep the said shares out of the market, and hold the same, thereby making the same scarce in the market, and hold for a profit to be obtained from the rise in the market price of the said shares.

4. The said Farley did obtain such loan, the defendants becoming the pledgees of such stock upon certain terms then agreed upon, with the knowledge of the purpose to which the stock was purchased and loan effected by the plaintiff.

5. While the defendants were the holders of the said shares, and without any default being made by the plaintiff as such pledgor, the defendants wrongfully and tortiously, and without the assent or knowledge of the plaintiff, sold and disposed of the said shares or a portion thereof, and otherwise dealt in same from time to time, with the object and intention of thereby lowering the price of the said shares in the market, to the detriment of the plaintiff, as the defendants well knew, and defeating the very object for which the plaintiff had purchased the said shares, and for which they were pledged to the defendants.

6. The plaintiff charges that by the said dealings with the

said stock the defendants rigged the market, to the detriment and damage of the plaintiff, thereby causing him large losses, by depriving him of anticipated profits on the said shares.

7. The plaintiff further charges that the defendants subsequently rendered an account to the plaintiff, by which they claim to have sold the said shares at a much less sum than the sum at which the shares were pledged to them, and that the plaintiff was indebted to them in large sums of money.

8. The plaintiff charges that the said pretended sale or sales last mentioned were wholly fictitious, and that the defendants sold the said shares at a much larger price than represented in their account sales to the plaintiff.

9. The plaintiff has frequently demanded from the defendants an account of their said dealings and transactions with said shares, which they have refused to furnish; but the plaintiff submits that he is entitled to a discovery of the defendants' books of account, shewing the transactions in the said shares, and an account of their said dealings therewith, and charges that such account will shew large sums of money to be due from the defendants to him.

10. The plaintiff also claims damages for such wrongful sales, for the loss of profits to him by reason of the defendants dealings with the said shares, by which the market price of same was lowered to the detriment of the plaintiff.

AMENDED STATEMENT OF CLAIM.

And for a further cause of action the plaintiff says:

11. On or about the 20th day of July, 1883, the defendants representing that they held, and undertaking to hold for the plaintiff, as his brokers, for reward to the defendants, 500 shares of the capital stock of the Federal Bank of Canada, received thereon from the plaintiff's agent for the use of the plaintiff, as a margin or deposit to secure the defendants from loss in carrying the said stock for the plaintiff, as the brokers or agents of the plaintiff as aforesaid, the sum of $3,500.00.

12. The defendants never acquired the said shares, nor did they ever hold the same for the plaintiff, and the representations

made to that effect by the defendants were false and untrue, yet the defendants have not paid over to the plaintiff the said sum of $3,500.00 or any part thereof, and the same with interest remains due by the defendants to the plaintiff.

The plaintiff claims upon this cause of action $4,000.

And for further cause of action the plaintiff says:

13. The defendants, acting as the shareholders and agents of the plaintiff, held for him 500 shares of the capital stock of the Federal Bank of Canada.

14. The plaintiff requested the defendants, as his share brokers and agents, for reward to them, to sell and dispose of the said shares upon a time and occasion when the market price of the said shares was $161 per share.

15. The defendants then represented to the plaintiff that they had, for his benefit and advantage and as his agents, arranged a time loan upon the said 500 shares of stock, and that such loan could not be paid off without great loss to the plaintiff until the 1st day of December, 1883, and that in consequence thereof the said shares could not, prior to that date, be sold to advantage by the plaintiff.

16. That, relying solely upon the truth of the defendants' said statements, and upon the request of the defendants, the plaintiff withdrew his said instructions, and did not sell the said shares, and the plaintiff lost the market for the said shares at the said price, and the same fell in value shortly thereafter, and were afterwards sold at a loss to the plaintiff, compared with the said price of $161 per share, of $11 per share, besides the loss of interest upon the price thereof in the meantime.

17. The representations made by the defendants, set forth in the fifteenth paragraph hereof, were wholly false and untrue, to the knowledge of the defendants. No such loan had ever been made by the defendants upon such shares of the plaintiff; and the said representations were so made by the defendants for their own purpose and advantage, and to avoid being called upon to produce and deliver the said shares, which they had therefore wrongfully converted to their own use.

And the plaintiff claims on this cause of action, $6,000.

Statement of defence—counter-claim:

1. The defendants deny all the allegations in the plaintiff's statement of claim.

2. The defendants say that the said Farley was a stock broker, doing business in Toronto for a number of years similar to the business carried on by the defendants, and the plaintiff was aware of the mode in which the business of stock brokers in said city was carried on, and of the custom and practice regulating the same: that for a long time prior to and at the times of the transactions between the plaintiff and the said Farley, and between the said Farley and the defendants, and between the plaintiff and the defendants, as hereinafter mentioned, a reasonable and well understood custom of practice prevailed among the stock brokers of the city and their customers respecting transactions in bank stocks of the nature of those in question in this action, with reference to which custom all contracts and dealings with brokers for the pledge, sale, or purchase of bank stocks were made and carried out, and with reference to which the contracts and dealings between the plaintiff and the said Farley, and between the said Farley and the defendants, and between the plaintiff and the defendants, hereinafter mentioned, were made and carried out; and by custom and practice, the broker who purchased on margin for a customer shares in bank stocks, or with whom bank stocks were pledged as security for advances made by him thereon, was, in the absence of any special contract or agreement to the contrary, entitled to treat said shares in the nature of bank bills or money, and to deal therewith as to him might seem best, he being bound at any time to return to the customer, or the pledgor thereof, as the case may be, on demand and on payment of the advances and interest, if any, an equal number of shares of stock in the same bank, and the said broker having the right to demand at any time from the customer or pledgor, as the case may be, repayment of such advances, and to deliver or return to him on such repayment

being made an equal number of shares, as aforesaid; and in default of such repayment to discharge himself from the obligation to return such equal number of shares by crediting the customer or pledgor with the then market price thereof, and accounting to the customer or pledgor for the balance, if any, in his favour, or requiring the customer or pledgor to pay the balance, if any, against him.

3. The defendants say that the transactions between the plaintiff and said Farley, and between the said Farley and the defendants, and between the plaintiff and the defendants, as hereinbefore mentioned, were made with reference to and were controlled by the said custom and practice, and there was no special contract or agreement between them to the contrary.

4. That after the plaintiff had employed the said Farley to purchase for him the said shares of bank stock, and after the said Farley had contracted for the purchase thereof, and before any transactions between the defendants and the said Farley in respect thereof had taken place, the said Farley sold or otherwise disposed of and parted with said shares, but remained liable to return to the plaintiff on demand, and on repayment of the advances procured on said shares by the said Farley for the plaintiff, an equal number of shares of stock in the same bank, and the plaintiff remained liable to be called upon by the said Farley for repayment of the said advances, and interest, and to receive such equal number of shares, and to pay to said Farley any balance in his favour upon the taking of accounts as aforesaid.

5. That after the said Farley had so disposed of or parted with said shares, he became desirous of retiring from the stock broking business, and requested the defendants to take over from him the said liability of the plaintiff, and to assume his said liability to the plaintiff, with respect to the delivery of said number of shares to the plaintiff. The defendants agreed to do so, and did so, and notified the plaintiff thereof, and the plaintiff assented to their so doing, and thereupon the plaintiff and the

defendants occupied towards each other the relations of customer and broker, and the defendants had the right thereafter at any time to demand from the plaintiff repayment of the advances procured by the said Farley upon the said stock, and to deliver to him upon such repayment being made an equal number of shares, as aforesaid; and on default of such repayment, to discharge themselves from the liability to return such equal number of shares by crediting the plaintiff with the then market price thereof, and accounting to the plaintiff for the balance, if any, in his favour, or requiring the plaintiff to pay the balance, if any, against him.

6. That thereafter the defendants notified the plaintiff that they required him to repay the said advances and receive the said number of shares of stock, but the plaintiff made default, and thereupon the defendants became entitled to discharge themselves from their said obligation to deliver said stock to the plaintiff; and, for the purpose of fixing the market price thereof, the defendants offered the said number of shares of bank stock for sale upon the Toronto Stock Exchange, and thereby the market price thereof was fixed: that upon an account being taken of the market price of said stock at the time of such default, and of the moneys payable by the plaintiff to the defendants in respect of said stock, it was found that the plaintiff was indebted to the defendants in a balance amounting to the sum of $3,033.78, which sum thereupon became due and payable by the plaintiff to the defendants, which sum has not been paid.

And by way of counter-claim, the defendants repeat the foregoing statements, and they claim from the plaintiff payment of the said sum of $3,033.78, and interest thereon from the 16th day of October, A.D. 1883.

Statement of defence to amended statement of claim:

1. The defendants deny all the allegations in the plaintiff's amended statement of claim.

2. The defendants plead in answer to the said amended statement of claim the statements contained in their original statement of defence and counter-claim.

3. The defendants further say that the causes of action sued upon by the plaintiff in his amended statement of claim are inconsistent, and they claim the same benefit from this objection as if they had formally demurred to said amended statement of claim.

Issue.

The facts of the case may be briefly stated as follows: The plaintiff being desirous of speculating in the stock of the Federal Bank, had become the purchaser through a firm of stock-brokers of 200 shares, on which he had deposited with them a portion of the purchase money under the name of "margin." He had also made further purchases to the extent of 300 shares additional through a broker named Farley, in the same way; and by arrangement between all parties Farley received from the first firm the margin held by them and assumed the position of broker and customer, as respects the whole 500 shares.

I may here state what I understand to be the manner in which these transactions are concluded. A person desirous of speculating in shares, in expectation of their advancing in price, instructs a broker to purchase say 100 shares in his name, and at the same time deposits with him such portion of the purchase money as may be agreed on between them. This is called "margin." And at the same time arranges with him for payment of the unpaid purchase money, the shares remaining pledged to the person advancing the money as security, that is to say, suppose 100 shares should represent $10,000 par value, and the margin agreed on to be 10 per cent., the purchaser would pay the broker $1,000, and the 100 shares purchased would remain as security in the hands of the broker for the remaining $9,000, or be pledged by him with the person who might agree to lend the money to pay the vendor. There is thus a real security to the broker or pledgee.

It appears further from the evidence, that, in the absence of any special arrangement to the contrary, the pledgee of the shares has a right at any time to call on the pledgor to pay up

the unpaid portion of the purchase money, irrespective of the "margin;" and in order to guard against this it is usual to arrange a "time loan" at a fixed rate of interest, that is to say, the pledgee of the stock agrees not to call on the purchasers to pay the balance due until a named day, the purchaser in the meantime to pay a fixed rate of interest; and also to guard the lender from loss, by at all times keeping good his "margin," that is, by adding to it, if the price falls.

It also appears that when such arrangement for a "time loan" has been made the pledgor may sell his shares at any time, and the pledgee may stipulate that the interest shall be paid up to the named day, although in the meantime the pledgor may have sold his shares and redeemed the pledge.

Let us apply the foregoing to the dealings of the plaintiff with Farley before we connect the defendants. Farley was carrying 500 shares of Federal Bank for the plaintiff, on which a large sum had been deposited as "margin." The plaintiff was about proceeding to England, and was desirous of making an arrangement with him so as to prevent these shares being sold while he was absent.

The plaintiff in his evidence states: "Farley told me he would make a 'time loan on 500 shares until the 1st of December at eight per cent. He said I would have to pay interest at eight per cent.' Q. 'What were the terms of the loan?' A. 'Time loan at eight per cent. until the 1st of December.' I asked him if that would interfere with me in selling the stock at any time during my absence, and that interest would cease at once, and he said I could sell the stock at once, at any time, and the interest would cease at once."

Farley in his evidence says: "I made arrangements with Sutherland before he went to England that I could carry this stock he had until 1st December. Then he went to England."

There is a difference between the plaintiff's evidence and Farley's, as to whether interest was to cease on the sale of the shares, or whether it was payable under all circumstances up to

1st December. This, however, is of no consequence. All I am considering at present is what was the undisputed position of these parties at the time when Sutherland went to England, and Farley held these shares as his broker, and before the defendants had anything to do with the plaintiff or his affairs. It is then beyond dispute the plaintiff considered that Farley held 500 shares on his account, and that he had negotiated a loan on them at eight per cent. to be paid on 1st December. It is also equally plain that Farley stated this to be the case.

The plaintiff left the country, and some short time afterwards Farley being, for reasons of his own, desirous of giving up his business as a broker, with the consent of plaintiff's agent, transferred the plaintiff's stock transaction to the defendants.

As no one was present on behalf of the plaintiff, the first intimation his agent received was by a letter addressed to T. G. Blackstock, on 20th July, 1883, as follows:

"Dear Sir:

"We have received from Messrs. W. W. Farley & Co., 500 shares Federal Bank, account R. W. Sutherland, and paid them $75,807.54, on which we charge interest at eight per cent. until December 1st, as per arrangement."

"Yours very truly,

"Cox & Worts."

As I have already said, no person was present on behalf of the plaintiff when this arrangement was made, so we must rely on the evidence given by the defendant Cox, and the witness Farley. I will refer to that of the latter in the first place.

Farley, called as a witness by the defendants, says: "This particular 500 shares of Sutherland's I made arrangements with Sutherland before he went to England, that I would carry this stock he had until the 1st December. Then he went to England. I made up my mind some time after to give up the stockbroking business, and go into the business I am in now. His solicitors, Beatty & Chadwick, sent me a letter to deliver these 500 shares to Cox & Worts, so I had this stock down with Mr. Moat, and I

had a time loan with him, and I had to go down to Montreal and see Mr. Moat, and I stated to him how it was. I asked him to release this loan; he did not want to do it. Somewhere about the 9th or 10th of July, having received Mr. Beatty's letter, he stated then, if I wished to pay the interest up to the 15th of July, he would then allow me to release it, so I came up and gave the stock to Messrs. Cox & Worts, the amount I had. Moat's clerk told me that if I paid the interest up to the 15th of July, he would allow me to release the stock, so I came up here and having received instructions to give over the stock to Cox & Worts, I gave over what stock Moat had to Cox & Worts, and the $3,000 I gave to Cox after the Sutherland matter was on the general account." Q. "What was the arrangement with Cox with regard to this stock. Had you a specified 500 shares to hand over to him?" A. "I thought I had until the present time; my book-keeper was attending to this; I had given him all the stock I had. Mr. Cox took over all my customers, and any stock I was short of. I had to sell stock to realize margin. Any stock I was short of I told him to buy in for me." Q. "So he was pledged to buy in the 500 shares." A. "I suppose so. Did not know that until to-day, sir."

This evidence was given after Cox had been examined, and given the testimony to which I will presently refer.

After some further examination he is asked. "You at all events satisfied him (Cox) on the margin on this stock?" "Certainly I did; at all events I gave him full margin in Sutherland's case. I protected Sutherland's rights to the end, and all the rest of my clients."

Cox in his evidence, which for the present I will confine entirely to this dealing with Farley, says: Q. "What was your first connection with the 500 shares in question here?" A. "The first connection in July." Q. "In what way was it brought about?" A. "In conversation with Mr. Farley." Q. "What was the arrangement you made with Mr. Farley about it?" A. "Among other accounts I was to take over this of Mr.

Sutherland's" Q. "In taking over that account what did you undertake in connection with it, what was the arrangement and bargain—What was the arrangement with Mr. Farley?" A. "I credited him with the amount as he had given me a memo. of the amount due by Mr. Sutherland. I credited Mr. Farley with that, and debited Mr. Farley with 158½ on the other side of the account." Q. "That is to say it was debit and credit with Mr Farley?" A. "Yes." Q. "You charged Mr. Farley $79,250 being 500 shares of Federal at 158½, on the 18th of July?" A. "Yes." Q. "And you have credited him there with 500 shares at what?" A. "With the amount due by Mr. Sutherland." Q. "It was $75,807.54?" A. "That is the amount."

In order to make this plain it must be borne in mind that Cox was taking over a large number of transactions from Farley, and Farley was paying the difference between himself and his respective customers to Cox; so in this particular case Farley was liable to Sutherland at the then price of the stock in the sum of $79,250, and Sutherland was indebted to Farley, or whoever might be the pledgee of his shares, in the sum of $75,807.54, the difference between these sums being the margin deposited by him with Farley, and which Farley paid over to Cox, viz. $3,443.

In the plaintiff's evidence he states that he paid a much larger sum than this to Farley, but the present defendants have nothing whatever to do with that. If they are liable in this case for money had and received, or on any other ground, they are responsible only for their own transactions, and not for any thing done by Farley.

This arrangement having been made, the defendants wrote the letter to Blackstock: "We have received from Messrs. W. W. Farley & Co., 500 shares Federal Bank, account R. W. Sutherland, and paid them $75,807.54, on which we charge interest at eight per cent. until December 1st, as per agreement."

It is plain from the evidence of Cox himself he had not received 500 shares from Farley & Co., all he had actually re-

ceived was the difference already mentioned of $3,443, and had nominally assumed to be the purchaser of 500 shares. He states, however, in explanation of this that, although the transaction was "debit and credit with Farley," we were long with Moat at the time 600 or 700 shares." The meaning of this is that he was the owner of 500 or 600 shares which had been pledged with a broker in Montreal of the name of Moat, to what amount he does not state. In fact he not only had not received any stock from Farley, but he had no shares; all he had was a right to call on Moat to release to him 600 or 700 shares on payment of any claim Moat might have against him. It is also very plain that the real transaction was never made known to the plaintiff or his agents.

It is beyond dispute the defendants had received from Farley $3,443, on account of the plaintiff, which was to be applied in a particular way, that is to say, to remain in their hands as security to indemnify them against any loss they might sustain in consequences of the selling price of 500 shares being less than $75,807, the plaintiff being at liberty to call upon them at any time to transfer 500 shares to him on payment of that sum.

When we refer to Moat's evidence it does not appear the defendants had any shares at all in his hands in the month of July. His evidence is confined to the months of August and September, and on the 28th of August all they had was 150 shares. It is, however, useless to discuss the question whether at that time they had or had not 500 shares, for before they undertook to sell what they represented were the plaintiff's shares the defendant Cox admits (page 59), that in the month of August when plaintiff consulted him as to the advisability of selling his shares; "that they were short in the neighbourhood of 3,500," that is to say they had sold 3,500 shares more than they possessed.

Irrespective of this the evidence satisfies me that Cox never had 500 shares of Federal Bank in the hands of Mr. Moat to represent the shares he professed to take over from Farley; and

what was more, that he never intended to have them; that his intention was to be short on this transaction. I have already referred to the negotiation between the plaintiff respecting the time loan at eight per cent. until the 1st December. Now on referring to Farley's evidence, we find in answer to the question, "There were 500 shares of stock, and in that way it was to be carried?" he replies, "I wanted to place Mr. Sutherland so that he would not be bothered by having the stock delivered on to him, and knowing Mr. Cox was "short," I thought best to protect Sutherland by giving him the loan the same as I had myself, the interest was to be the same as I had at the time, eight per cent. I spoke to Mr. Cox afterwards—after handing over the whole of the business to him. I told him I had been at a good deal of expense going to Montreal, Moat transferring the stock to me and charging me brokerage, and transferring it back. Now says I, you are "short" of nearly every thing I transferred to you, I think you might divide the interest with me at all events." The meaning of this very plain; it is simply that as Cox was "short" in the stock he should agree to divide the interest which his employers on their sales were liable to pay with Farley, because he (Cox) would receive the interest on the unpaid balance of fictitious sales. Cox, in his evidence, in reference to the plaintiff's 500 shares, at page 55 of his evidence says: "Did you assume any loan?" A. "No we did not." Q. "Your letter of 10th August is not true then?" A. "Quite true. We do not say we assumed any loan, that assumption might refer to the terms; that is all." Q. "Was there a loan on that 500 shares?" A. "We did not assume any loan." Q. "Assuming his loan on same at eight per cent. until the 1st December. These are the words? A. "That is correct." Then in answer to his lordship. "We had nothing to do with Moat at all." Q. "You divided up with Farley, did you not, the interest to be carried on that, up to the 1st December?" A. "Yes." Q. "And in your account with Mr. Farley you take credit to yourself for $1,129.85 interest on 500 Federal?" A. "The reverse of that, we credited him." Q. "And you charge

up in this account double that amount?" A. "Yes." Q. "For interest which you have not paid on any specific loan." Q. "What interest did you pay Moat on any loan you had down there?" A. "During these months we never paid Moat more than six per cent. We did not pay him less than six. In the neighbourhood of 700 shares were held with Mr. Moat in July."

The transaction as sworn to by both these men, is that Farley applied to Cox to be allowed half the interest payable by the plaintiff on his shares, which interest was to be eight per cent. to 1st December, and that Cox actually allowed Farley no less a sum than $1,129.85. Now if this had been a true purchase and sale, what would Cox have said to Farley when he was asked to pay him one-half of the interest to be charged to the plaintiff. He would surely have said, I cannot do that for I am paying six per cent. to Mr. Moat—(It must be borne in mind that he had in a previous part of his evidence, to which I have referred, given the court to understand that he had shares in Moat's hands to meet this transfer. "We were long with Moat at that time 600 or 700 shares.)"—and if I gave you four per cent. I shall be a loser of two per cent., as all I am entitled to claim from Mr. Sutherland is eight per cent. It is therefore manifest that Farley knew, and Cox knew, it was only "debit and credit with Farley," and that Cox had no intention whatever of becoming the owner of 500 shares of Federal Bank shares on account of the plaintiff, but held himself liable to procure 500 shares for the plaintiff if he demanded them, but at the same time to demand payment of interest at eight per cent. on $75,807 on a loan which had never been made. The defendants therefore not having purchased 500 shares for the plaintiff, never could have sustained any loss in consequence of having done so, and are therefore bound to repay the sum received by them on his account with interest, amounting to the sum of $3,632.

I have been considering the case simply on the question as to whether or not the plaintiff was entitled to recover on the

claim for money had and received. But when the case was tried before the learned Chief Justice, the principal discussion appears to have been on what may be called the custom of "The Stock Exchange" in dealings between brokers and their clients. The evidence is of a most startling character, and briefly amounts to this, that if a man in the position of the plaintiff being of opinion that any named stock is likely to increase in price, instructs a broker to purchase stock on his account, the broker is at liberty to be himself the seller and nominal pledgee of the stock, and to charge a commission as if a real sale had been made, although at the time the broker may not be the owner of a single share. It follows that the broker is not only buyer and seller, but places his interest in direct opposition to that of his employer, for if the price rises the broker is the loser, and if it falls the broker is the gainer. Such a mode of dealing is directly opposed to the law which regulates the transactions between the broker and employer, even supposing the broker to be actual owner of the stock. But the case is far worse, if, in a case like the present, the broker is what is termed "short" on stock, namely, undertakes to sell what he does not possess. The so called custom is said to be that the broker fulfils his obligations, if he is prepared at any time to deliver the stock to his client; but such is not the law of the land, and, if there was no other objection it has this fatal defect, it substitutes the personal liability of perhaps an insolvent broker for the real security of the stock.

From the evidence given in the present case the defendants were, according to their own admission, 3,500 shares "short," equal in value at the then price of the shares, in August, say 160, to $560,000, and according to the general custom they must have had in their hands about 35,000 of margin belonging to their clients, and charging them interest on upwards of $500,000 without their customers having any security except their own personal responsibility. Such a custom is, to say the least of it, of such an extraordinary character that no person un-

acquainted with and agreeing expressly to be bound by it can or should be affected by it. The whole law of broker and client is so fully discussed in the case of *Robinson* v. *Mollett*, in the House of Lords, 7 H. L. 802, including this question of custom, that it is unnecessary to do more than refer to it.

In our opinion no broker who makes a fictitious sale to his client, in other words who is "short," can by any possibility be a gainer. If the stock rises he is responsible for the increase, for he could not allege there had been no sale; and on the other hand, if the stock fall, the customer would be entitled to a return of his margin, interest thereon, and commission paid, because in truth there had been no purchase.

The motion will be absolute to set aside the judgment, and to enter judgment in favour of plaintiff, for the sum of $3,632, with costs.

ROSE, J.—I quite agree. It would have been a very unsatisfactory conclusion if we had been forced to award judgment to the defendants against the plaintiff on such a state of facts as here appears.

I illustrate the position thus:—A party goes to a land agent, and instructs him to purchase a property then subject to a large mortgage falling due within, say, six months. The equity of redemption or margin over the mortgage claim is, say, twenty per cent. There is a probability of a sharp advance in value, and to secure the advantage the purchase is directed. The agent receives the twenty per cent., and is to take full charge of the property and watch the interests of the client, it being understood that the client is not in a position to pay the mortgage except out of a sale of the property. At the expiry of the six months real estate has fallen in value, and the agent notifies his client that the property has been sold, and not realizing the mortgage indebtedness, he, the agent, has paid the deficiency, *i.e.*, say $500, and asks his client for such sum. Thereupon the client discovers that the purchase never was made: that the agent merely opened an account in his books

with the matter, crediting the client with the twenty per cent., and debiting him with an amount equal to the interest on the mortgage and the deficiency, also a commission for purchase and sale, holding himself liable to pay any profit that might possibly be coming to his client if the property should advance in value, thus substituting his personal responsibility for the security of the property.

To the demand by the client for a return of the twenty per cent., and interest thereon, what answer could the agent make? It seems to me none. Such a transaction would have been so clearly a fraud on the principal that immediate relief against the agent would be granted. The usual rule that a trustee dealing with trust property in such a way as to involve a breach of trust, renders himself liable to make good all possible loss, and to account for all possible profit, must apply. It would be no answer to say: "If I had bought the property and carried out your instructions the result would have been the same." A complete reply would be: "You substitute your personal responsibility for the security of the property, and placed yourself in such a position that it was against your interest that I should make a dollar of profit."

My brother Galt has most clearly pointed out how these principles apply to the case before us.

It is time that brokers should be made aware of their legal liability and responsibility towards their clients, and that they cannot, in addition to the ordinary and extraordinary results attendant upon stock transactions, subject their clients to the risk of the broker using his influence to prevent stock rising, or his client selling out at a time when a profit would be made, also to the risk of his broker not having the means to answer his call when a favourable turn of the market would lead him to give an order to realize.

I am glad that we are able to reach the conclusion at which we have arrived.

CAMERON, C.J., concurred.

Motion allowed.

From this judgment the defendants appealed to the Court of Appeal.

Lash, Q.C., and *W. Cassels*, Q.C. for the appellants.
D. E. Thomson and *D. Henderson* for the respondent.

The facts are fully stated in the present judgments and in the report of the case in the Court below.

March 10th, 1887. BURTON, J.A.:—The plaintiff employed one Farley, a broker, to purchase 500 shares of Federal Bank stock on margin, and to carry the same at 8 per cent. interest until the 1st December following.

In the absence of any express stipulation or agreement, nothing further being shewn than the mere retainer of the agent so to act for the principal, I should suppose, and the authorities appear to sustain that supposition, that the broker upon the receipt of the margin agrees to purchase for the customer the stock indicated, and either to advance him or procure an advance of the money required for the purchase beyond the margins so furnished on the security of the stock: to have that stock so purchased, or at all events an equal number of shares of the same stock in his name or under his control and ready for delivery to the customer on payment of the advances and his own charges.

And the evidence shews that in a contract of this kind the customer's undertaking is to keep up the margin according to the fluctuations of the market.

This is the way in which this transaction was treated by the plaintiff in his original statement of claim.

He assumes that in pursuance of his instructions, Farley had purchased the 500 shares of stock and that he had obtained a time loan upon them up to the 1st December following, from Mr. Moat, of Montreal, upon which he was to pay interest.

If the plaintiff had, before the transfer by Farley to these defendants, discovered that Farley had failed to comply with his instructions and had in point of fact never purchased any stock

for the plaintiff, but had been charging him interest upon a fictitious loan, can there be a doubt that on the discovery of the imposition he could recover back the money as money paid to him for a particular purpose to which he had not applied it, as well as the interest so wrongfully exacted? I cannot imagine that it can admit of any doubt.

If I am right in assuming that these would be the relations of the plaintiff and Farley, as principal and agent in the original transaction—let us see what followed.

The plaintiff left the country, for a time, leaving instructions with an agent here to attend to the margins if necessary, and to act generally for him.

In the month of July shortly after the plaintiff had left, Farley went out of business and transferred it to the defendants, who advised the plaintiff's agent that they had received from Farley 500 shares of Federal Bank stock on account of the plaintiff, and had paid him $75,807.54, on which they charged interest at 8 per cent. till the 1st December next as per arrangement.

Plaintiff returned in August, and in reply to a letter from him requesting an account of how the stock stood, received the following reply, dated the 10th August, 1883:

"We took over your 500 Federal from Farley on 19th July, paying him $75,807.54, and assuming his loan on same at 8 per cent. until first December. Am going to N.Y. to-day. Back on Tuesday."

The plaintiff appears to have heard some rumors to the effect that the stock had never been transferred by Farley to Cox, and he called upon him to ascertain the fact, and in answer to his inquiry was told, according to the plaintiff's evidence, that he had the stock and that it was under loan to Mr. Moat, of Montreal, adding that if you sell it you will have to be charged interest up to the 1st December, the right to do which, the plaintiff says he disputed as that was not his arrangement with Farley: Cox replied he had nothing to do with that; that was his, Cox's, arrangement with Farley.

Mr. Cox does not state this conversation precisely in the same way, but looking at the nature of the inquiry, the answer was intended to convey to the mind of the plaintiff the same impression.

He says I told him I was "long" with Moat.

I have already pointed out that in his original statement of claim the plaintiff assumed that the stock had been purchased and pledged in accordance with what I assume to be the legal effect of such a retainer, and the defendants in their statement of defence allow him to remain under that misapprehension, but set up what they describe "as a reasonable and well understood custom and practice prevailing among stockbrokers of the city of Toronto and their customers respecting transactions in stocks of the nature of those in question, by which the broker who purchased on margin for a customer, or with whom bank stocks were pledged as security for advances made by him thereon, was, in the absence of any special contract or agreement to the contrary entitled to treat the stocks as money or bank bills, and to deal therewith as to him might seem best, he being bound at any time to return to the customer or pledgor thereof on demand or repayment an equal number of shares in the same bank." If by this is meant, that the broker is not bound to return the identical shares, I see nothing unreasonable in the alleged custom, but if it is meant that the broker is at liberty to use the shares as his own, and dispose of all the shares in his possession so as to be compelled to go into the market and purchase fresh shares in order to comply with his customer's demand, I must demur to such a custom being either reasonable or warranted in law. As well might it be contended that if a person had stored with a warehouseman 1,000 bushels of wheat which was mixed with his own, or with the wheat of others who had also warehoused their wheat with the same warehouseman, the latter would be entitled to dispose of the whole of the wheat so stored, and leave the owner of the 1,000 bushels the personal responsibility of the warehouseman. No doubt he would have the right of going on

selling in bulk, any of the wheat so stored belonging to him and delivering to the holders of warehouse receipts the quantity called for by those receipts, so that the identical grain could not be restored, but that would be immaterial if he had on hand all the time a similar quantity of grain of the same quality and character ready to be delivered on demand.

But the custom now contended for is very different; it was urged that it was not necessary in a transaction of this nature for the broker to purchase the stock at all, but all that was contemplated was that the broker should become liable to account for the market value of the stock whenever the plaintiff called upon him to do so, or then to purchase stock to comply with the demand.

No doubt a person employing a broker may engage his services upon any terms he pleases, but there is nothing in the facts of this case to shew that Farley was employed in any other way than as an ordinary broker to purchase the shares and carry them on the terms specified. The learned Chief Justice who tried the case says that he treats the case as one to be decided on the ordinary rules and customs regulating the trafficking and speculating in stocks. I do not find anything whatever in the evidence to shew any such custom; but assuming such a custom to have any existence among brokers, it could not possibly apply in the case of a person employing a broker to act for him in such a transaction unless it were shewn not only that he knew the custom, but especially submitted to its conditions, and of this there is no evidence.

I do not at all question that the plaintiff's object, as is stated in the first reason of appeal, was speculation in Federal Bank stock, but that appears to me to be a widely different thing from speculating in the ability of Mr. Farley to meet his engagements; and I should require very clear evidence to satisfy me that he was willing to pay the large sum of $2,226 in addition to his margins for having the option of calling upon him for the period agreed on to account for the market value of the stock.

If, then, teh plaintiff, having given such instructions to Farley, had at any time discovered that he had not obeyed his instructions and had not purchased the stock, I do not think there can be a doubt of his right to recover back the money deposited as a margin to assist him in making the purchase.

But it is said that however this may be as regards Farley, the liability of these defendants must depend upon the terms of the arrangement made between them and Farley, and that the plaintiff is bound to adopt or repudiate it as a whole and that if he repudiates it there is no privity between him and the defendants. But this is losing sight of the fact that the arrangement which the plaintiff supposed he was adopting was a transfer to the defendants of shares with the liability upon them of the time loan, in other words that he was employing them as his brokers to carry the shares upon the same terms as he originally employed Farley.

It is perfectly clear that no shares were transferred to Cox & Co., on this account, although he falsely represented to the plaintiff that they had been, and it is equally clear that Cox & Co. got the benefit on account of the margin deposited by the plaintiff with Farley, and when this action was brought the plaintiff was under the impression that the stock had been transferred to Cox & Co., and the real facts were not disclosed until they were extracted from the defendants upon their examination; the plaintiff was then undeceived, and he thereupon amended his statement of claim.

Under these circumstances I do not see how any different rule is to be applied than would have been applicable if the action had been brought against Farley. The defendants undertook to carry these shares on the terms originally agreed on, and so soon as the plaintiff discovered that the shares never had been transferred, but that his money had been deposited with the defendants for a purpose which had never been carried out, he became entitled to recover it as money received to his use, whether it is placed on the ground of a failure of consideration or that

it was obtained through an imposition practiced upon the plaintiff, the defendants having deliberately made a statement to the plaintiff in reference to his stock, and the loan upon it, which they knew to be false.

I think the appeal should be dismissed, and the judgment of the Common Pleas Division affirmed.

PATTERSON, J.A.:—The plaintiff, desiring to speculate in Federal Bank stock by purchasing stock and holding it in hopes of a rise in its selling value, arranged with a broker named Farley to carry for him 500 shares of that stock. He had 200 shares transferred by other brokers, Hope & Millar, to Farley, and Farley was to buy, and represented that he had bought 300 other shares, making the 500.

The course of business is explained to be that the employer pays the broker a margin of ten per cent. on the market value of the stock, and the broker provides the other 90 per cent., holding the stock as his security. The broker is at liberty to require his employer, at any time, to take delivery of the stock and pay the advances, in default in doing which he may sell the stock; and the employer may at any time require the broker to sell, the employer being always liable, incase the stock falls in value, to pay more money or to have the stock peremptorily sold.

The plaintiff was going to Europe in April, 1883, and his arrangements, particularly the taking over by Farley of the 200 shares from Hope & Millar, were made with a view to his absence.

He had to provide for keeping up his margin if called upon, and that he did by arranging with an agent to pay the money. He had also to provide against the contingency of being called on to take delivery, and he adopted a suggestion of Farley to obtain "a time loan" upon the 500 shares.

A time loan I understand may be either made by the broker himself or procured by him from some one else, the effect in either case being that the money recoups the broker's advance,

and the employer cannot be called on to take delivery until the loan matures, though he may sell earlier if he pleases, and his ability to keep up his margin or, in default, to have his stock sold continues.

The plaintiff says that Farley represented to him that he had effected a time loan till the first of December at eight per cent. with Mr. Moat, a Montreal broker.

Farley denies this, asserting that all he told the plaintiff was that he would carry the 500 shares till December at eight per cent. But there can be no hesitation in accepting the plaintiff's statement, as will be evident when we see more of the evidence and especially the evidence supplied by the defendant Cox.

Another question between the plaintiff and Farley upon their evidence is whether Farley gave the plaintiff to understand that the interest on the loan would stop whenever the loan was paid off or whether the interest was to be payable till December in any event. The fact itself is of consequence only incidentally if at all, and the dispute need not, perhaps, have been mentioned except in order to make some of the evidence more intelligible.

Farley did not effect the time loan with Moat.

It is also more than doubtful whether he ever had any of the 500 shares which the plaintiff supposed him to hold on his account. The evidence does not shew distinctly whether he had any shares transferred from Hope & Millar. They transferred to him the margin on 200 shares which they had from the plaintiff, but whether they ever had the shares which the plaintiff supposed they had bought on his account at about 161 is not clearly explained, nor is it, as I apprehend, very material. There is, I think, no pretence that Farley bought any part of the 300 shares which the plaintiff was led to understand had been bought in small lots at from 152 and 153 to 160.

The time loan transaction was obviously entered into on the representation by Farley, and the belief by the plaintiff, that Farley was carrying or had pledged to Moat 500 shares on the plaintiff's account.

The margin deposited with Hope & Millar and with Farley was, as the plaintiff says, about $6,600.

What I have so far stated is only introductory to the plaintiff's dealings with the defendants to which I now pass on.

In July, 1883, Farley being about to close his business, the defendants arranged to take over the transactions he had on hand, and the plaintiff's agents consented, and even urged, that they should take over the transaction in which he was interested. The defendant Cox shews that in arranging with Farley each transaction was treated and settled by itself.

These settlements were made between the 12th and 24th of July, that respecting the plaintiff's matter being on the 18th, or 19th, the entries being made as of the 19th.

Farley had no stock to hand over, and the defendants had no stock to sell him; but it was arranged that the defendants should debit Farley with 500 shares at 158½ or $79,250, which was done, and he was credited with $75,807.54 as the amount due by the plaintiff, leaving $3,442.46 to be paid over by Farley. He did pay by his cheque $3,000 which we find credited him in the account. Three of the credits on the 19th July are, "Interest on 500 Federal $1,129.85; cheque, $3,000; and 500 Federal R. W. S. $75,807.54." The first and last are clearly on this affair, and we may safely assume that the cheque was for part of the margin of $3,442.46. But there is a credit of $1,000 cash on the 20th, and the result of the whole account is to shew a balance in favor of Farley of nearly $5,000; therefore we need not hesitate to adopt the view acted on in the court below that the whole $3,442.46 was paid over to the defendants.

The item of $1,129.85 deserves some notice.

Cox puts it beyond doubt that no such thing as a time loan from Moat was in any way involved in this settlement. He says, I believe, that Moat's name was not mentioned, but that will be found hard to believe in view of what has to be mentioned by and bye. At the settlement he and Farley knew and dealt on the knowledge that there was a nominal time loan on which the

plaintiff was to be charged interest, but that neither had Farley advanced, nor were the defendants to advance, a dollar, and they agreed between themselves that half the interest should go to Farley and half to the defendants. The credit of $1,129.85 is for Farley's half of this interest computed up to December.

This part of the settlement concerns us only as putting in a strong light the fictitious character of the dealing with the plaintiff and the recognition of its being of that character by these brokers when they made the settlement.

The substantial fact, so far as this action is concerned, is the payment by Farley to the defendants of $3,442.46 as money belonging to the plaintiff and on deposit as margin on the supposed 500 shares of stock.

That sum is what the plaintiff now seeks to recover from the defendants as money received to his use.

The demand is resisted on the ground that the transaction as commenced by Farley, and as assumed by the defendants, was not only a legitimate and real transaction, but was what they were employed by the plaintiff to do; that in short, what he paid his margin for and agreed to pay eight per cent. on some $75,000 for, was not 500 shares of Federal Bank stock, nor any stock whatever, but simply for the personal and unsecured undertaking of Farley first and the defendants afterwards, that whenever he required them to do so they would procure 500 shares of that stock and sell it on his account; or that without going through the form of a purchase and sale, they would account with him on the basis of the market price of the stock on that day.

The opposition under such a system between the interest of the broker and that of his employer is obvious, the latter employing the broker to act for him as a bull, while the broker's whole interest is that of a bear. I borrow these terms of art from Mr. Farley's evidence.

If it had been attempted to prove that there was a custom by which such a mode of dealing was sanctioned, this opposition of interests would furnish a formidable argument against the

reasonableness of the custom: *Robinson* v. *Mollett*, L.R. 7 H.L. 802. There is, however, no proof of any such custom, and setting aside the plaintiff's evidence on the subject of what his understanding was, the evidence supplied by the defendant Cox is conclusive that he did not receive the money in the belief that the plaintiff had dealt with Farley on any such terms, and that in his own communications with the plaintiff, Cox did not assume to deal on any such terms, and was fully aware that the plaintiff had no idea of so dealing.

The incident of the time loan cannot be reconciled with the assumption that the plaintiff was dealing or was given to understand that he dealt either with Farley or the defendants on their personal undertaking to procure stock at a future time. It is consistent with the understanding that they held and were carrying the stock for him.

Now for the purpose of testing the plaintiff's right to recover the $3,442.45 as money received to his use and held by the defendants without consideration, let us look at the evidence supplied by Cox, principally by his correspondence, and we shall see how entirely fictitious the ostensible dealing was on the part of the defendants while the plaintiff was led to believe and did believe it to be real.

We take first the defendants' letter of the 20th of July, 1883, to Mr. Blackstock, a solicitor who had acted on behalf of the plaintiff in connection with the transfer from Farley.

DEAR SIR,—We have received from Messers. W. W. Farley & Co. five hundred shares of Federal Bank, account R. W. Sutherland, and paid them $78,807.54, on which we charge interest at 8 per cent. until December first, as per arrangement.

Yours very truly,

COX & WORTS.

Then on the 23rd July Mr. Clarkson, who had a power of attorney to act for the plaintiff in his absence, wrote to the defendants:

DEAR SIRS,

I am representing Mr. Sutherland during his absence in Europe, and would like if the Federal Bank stock received by you from Farley was carried for less than 8 per cent.

Have I the option of changing the loan if I wish? Kindly let me know.

Yours truly,
E. R. C. CLARKSON.

And on the next day the defendants replied:

DEAR SIR,

In reply to your favour of yesterday, the Sutherland Federal Loan cannot be changed without payment of interest to 1st December, at 8 per cent.

We regret this, but understand the terms are the same as agreed upon between Mr. Farley and Mr. Sutherland.

Yours very truly,
COX & WORTS.

In August the plaintiff had returned to Toronto. On the 9th of that month he wrote to the defendant Cox:

MY DEAR COX,

Please make me out a statement of my account re Federal Stock et al. as transferred over by Farley & Co. Also to 1st August. You got out this a.m. before I could thank you for your attention to my interests. May you live forever.

Faithfully yours,
ROB. SUTHERLAND.

And on the following day received this reply:

MY DEAR BOB,

We took over your 500 Federal from Farley, on 19th July, paying him $75,807.54, and assuming his loan on same at 8 per cent. until first December. Am going to N.Y. to-day. Back on Tuesday.

Yours very truly,
E STRACHAN COX.

Then having been told by some one that the defendants had not received any stock from Farley, he saw Farley, and afterwards saw Cox. This is his account of the interview:

"I took him by the shoulder and told him to tell me, as a friend, if he had the stock; and he said he had—it was under loan to Mr. Moat, of Montreal. He said, if you do sell it you will have to be charged interest up to the first December. I said he could not do it; it was not usual; that was not my arrangement with Farley; he said he had nothing to do with that—that was his arrangement with Farley. I then asked him about the stock—what he thought about it. Q. What next? A. On questioning him, he advised me to hold the stock; I would make money on it if I did. Q. What did you say further to him about selling the stock? A. That was about the pith of the conversation; I said I had made up my mind to sell the stock at the present price—161 or 161¼."

The account given by Cox, which I shall read, is not substantially different.

"Q. Now, do you remember Sutherland coming to you one day, and asking whether you really had his stock or not—putting you on your honour to tell him? A. No, he did not do that. He says 'no fooling, Cox.' Q. 'No fooling, Cox—have you got my stock?' A. Yes; that is the interview he referred to. Q. Well he was putting you on your honour in a sort of way—I am not saying it would make you any higher to stand on it? A. Certainly not. Q. Well, what did you answer him? A. I told him we were 'long' on the stock with Moat. Q. Didn't you tell him you had that stock deposited with Moat? A. I did not say that we had his stock deposited with Moat. Q. Didn't you give him to understand his stock was subject to a loan in favour of Moat? A. I don't know what he understood, but I told him we had stock with Moat to the extent of 600 or 700 shares—we were 'long' with Moat. Q. Now, he came there for the purpose of satisfying himself that the stock was in existence? A. Did he? Q. Didn't he? He said, 'now, no fooling?' A. He came to tell

me the story told him. Q. And the stories convinced him that you had no stock? A. It convinced him further that I was 'short.' Q. His interview with you was for the purpose of seeing whether the stock was there or not? A. Yes; I told him about Moat. Q. You did all you could to satisfy him? A. I answered all his questions. Q. Now, you had always refused to give him an account of the Moat loan and the transaction, had you not? A. Yes; I had no Moat loan to give him. Q. And you did not tell him so? A. No."

We are not concerned with the transactions between Moat and the defendants, but it may be noticed that if Cox did tell the plaintiff at this interview that he had 600 or 700 shares of Federal stock with Moat, he told him what is not borne out by Moat's evidence, which seems to shew that while the defendants had some stock pledged with him it was at this time under 500 shares. Even 600 or 700 shares would not go far towards the 3,500 which Cox tells us they were 'short' in this stock.

The next correspondence was occasioned by a demand by the defendants for over $2,000 on their representation that they had sold the plaintiff's stock.

It seems they had written on the 12th of October, 1883, a letter which the plaintiff did not receive calling for $2,000 additional margin, and had then pretended to sell his stock. This proceeding consisted of an arrangement between Cox and another broker that the latter should bid at the exchange for 500 shares which Cox should offer for sale. This was done, the whole thing being a fiction: the one had no shares to sell, and the other was carrying out his part of the conspiracy by going through the form of buying. Cox says it was a genuine sale. He explains what he meant in answer to the question "A genuine sale of a myth?" "Yes," he replied, "because I happened to be the purchaser."

The plaintiff was at that time in Winnipeg. After one or two telegrams Cox wrote to him on the 16th of October:

DEAR SIR,

As wired you, we sold your 500 Federal at 150¼—contract enclosed . This leaves you in our debt, charging interest only to date, $2,286.16, which you will doubless arrange on your return.

There has been no improvement to-day in the financial situation, and Federal to-night sold at 147¼.

No living mortal expected this drop, but it has come—and the result will be, in our opinion, that for some time to come no rise of any moment will take place. There is no "short" interest. The street is full of the stock, and the financial outlook is most discouraging.

Yours very truly,

COX & WORTS.

On the 31st October, the plaintiff again being in Toronto wrote to the defendants:

GENTLEMEN,

Your favour of the 15th inst., directed to Winnipeg, with notices of sale of 500 shares Federal stock on my account reached me yesterday.

Will you procure for me, from Mr. R. Moat, of Montreal, a full and detailed statement of the loan made through him by Farley & Co. last April on my 500 shares, and the conditions attached thereto, and oblige,

Yours truly,

R. W. SUTHERLAND,

And the defendants replied the following day:

DEAR SIR,

In reply to your letter of yesterday, would it not be better for you to ask Mr. Farley to obtain any statement or information you may require as to his loans with Mr. Moat? The latter is scarcely likely to give us any information as to his transactions with Mr. Farley.

Yours very truly,

COX & WORTS.

The defendants wrote on the 5th of November pressing for payment of the balance they claimed, to which the plaintiff thus replied on the 6th:

GENTLEMEN,

Your favour of date just received. Before doing anything further in the matter of which you write about, I would be pleased to get what I am justly entitled to—a statement of Mr. Moat's shewing the loan he made on my 500 shares, through Farley & Co.; also, a statement from him from the time your firm assumed said loan, until the date of the sale of said stock.

Waiting answer, I am yours faithfully,

R. W. SUTHERLAND.

The next letter is one from the defendants dated 16th of November:

DEAR SIR,

We enclose statement of your account and must ask you to arrange the balance at your debit without delay. Referring to yours of 6th, we do not propose to disclose to you or any one else our transactions and dealing with Mr. Moat or any other client; and it is, of course, impossible for us to give you statements of your transactions with Farley & Co.

Yours very truly,

COX & WORTS.

A statement of account dated the 15th of November, 1883, was rendered to the plaintiff:

TORONTO, 15th November, 1883.

July 19—500 Federal F. & Co.	$75,807 54
Interest 8 per cent. to 1st December.	2,226 24
	$78,033 78

CR.

October 16th—500 Federal	$75,000 00
Balance	3,033 78
	$78,033 87

October 16th—Balance, $3,033 78.

The credit of $75,000 is produced, as shewn by a statement of 15th October, by the price bid at the sham sale, viz.:

500 shares at 150¼=$75,125
Less brokerage 125
$75,000

On the 24th November Cox wrote to the plaintiff:

DEAR BOB,

Come in and arrange your debit balance. We can make things pleasant if there be not too much delay.

Yours truly,
E. S. Cox.

The plaintiff replied on the 26th:

MR. E. S. COX, City

DEAR SIR,

Your letter of 24th before me. I intend seeing you in the course of a few days in reference to your statement as rendered. Before arranging with you, I must be convinced that you carried my stock with Moat, and that it was my stock you sold on 15th October last. Absolute proof of this is necessary, and can be given by you, if you so desire. If not, why?

I am, yours faithfully,
R. W. SUTHERLAND.

And the correspondence between the parties closed with Cox's letter of the 10th December:

TORONTO, 10th December, 1883.

DEAR SUTHERLAND,

I don't know that your last letter to me required an answer, as I had already declined the request—and in your case the exceedingly unreasonable request—contained in it. We have treated the sufferers in the Federal deal with a consideration and leniency which had the tables been reversed would not have been accorded to us by either you or them. You can, under the *Baby Act* probably escape the legal responsibility, but not the moral one, of your indebtedness to us, and though a suit may not bring us our money, it will at least close the mouths of your over zealous friends, who so industriously circulate a version of our dealings with you which is anything but truthful; and it

is possible also that in this way you may gain all the information, and perhaps more than you now ask from us.

Yours very truly,

E. STRACHAN COX.

It is true, as Mr. Lash put it, that a man may tell a great many lies without incurring a legal liability, and one may have to regret that dealings so redolent of falsehood and fraud should go unpunished; but those considerations are apart from the use now to be made of the evidence to which I have referred in perhaps unnecessary detail. What is here shewn is the receipt on the 19th of July, 1883, to the use of the plaintiff of $3,442.46 for a purpose which was in no respect fulfilled.

The purpose was to be as margin on stock to be held by the defendants or Mr. Moat, subject to the order of the plaintiff. It was not for any purpose which depended on the solvency of the defendants, of their personal obligation, and that it was so understood by the correspondence, which admits the plaintiff's version of their dealings, when a prompt denial would undoubtedly have been the answer if he had misstated them.

There is really no further matter of law involved in the case. It may be that a broker is not to be expected to ear-mark the stock held for each employer, but may satisfy his obligation by always being able to control a sufficient amount of any particular stock to cover all his liabilities. This appears, from cases cited to us, to have been so held in the courts of a number of the neighbouring States, but not in all.

But in all these cases the transaction were real, and nothing like what the defendants avow to be their usual practice. It was so even in *Wynkoop* v. *Seal*, 64 Pa. 361, where it happened that at one time the broker had parted with so much of the stock that if he had called upon his employer he might not have been able to respond without buying stock. He had bought 600 shares of stock for his employer, and had held it or an equivalent amount of the same stock for a long time, and at last called on his employer to take delivery, and on his refusal sued for his advances, producing in Court scrip for the 600 shares. The

point decided was that it was not error to refuse to tell the jury that the plaintiff could not recover because for a short interval he had not had the stock, though he deposed that he could have then, as well as at the other times have fulfilled his obligation if he had been called upon.

The case is as far as the others from sanctioning the system on which the defendants by their own avowal carry on their business.

The plaintiff has, with his reasons against the appeal, given notice, by way of cross-appeal, of a claim for damages for deceit with which he charges the defendants on the occasion to which I have referred, when he asked the defendant Cox if he had the stock and was given to understand that he had it pledged to Moat.

The plaintiff alleges that his intention at that time was to sell, but that he was prevented by the untrue and dishonest assurances by Cox. The defendants answer that Cox at that time merely advised him not to sell, and that the plaintiff acted on the advice given. It is unnecessary to discuss the matters on which the decision of the dispute might turn, because the claim has not been pressed before us, and could not well be maintained consistently with the grounds on which we hold the plaintiff entitled to recover for money received to his use.

The appeal must be dismissed with costs.

OSLER, J. A.—Farley had the plaintiff's margin on 500 shares of Federal Bank stock which the latter supposed Farley had bought or was holding for him, and the plaintiff was also told by Farley that he had pledged these shares as security for a loan thereon with one Moat, at 8 per cent. interest, payable on the 1st of December.

Farley under these circumstances, transferred his business to the defendants, paying them the margin he had received from the plaintiff, the plaintiff taking the defendants as his brokers and holders of his shares subject to the supposed loan.

Mr. Lash argued that the plaintiff was bound to adopt or repudiate the arrangement between Farley, the defendants and

himself as a whole; and I agree that he was bound to do so, if and so far as it was real and founded on facts disclosed to him. The defendants took over his margin and his supposed shares subject to Farley's pledge, and the plaintiff subsequently dealt with them as in all respects standing in Farley's shoes. But the plaintiff's margin was the only thing that was real. There were no shares, and of course no pledge of them by Farley, and no loan upon them by Moat; and this Farley and Cox knew, though the plaintiff did not. Therefore, as between all parties the defendants have the plaintiff's money, while between Farley and the defendants everything else was a sham, except that they divided between them a sum which they meant to make the plaintiff pay upon a loan that was never made. I cannot say that I have seen anything in the evidence which induces me to believe that the plaintiff would have accepted Farley's or Cox's personal responsibility instead of the shares themselves, or that he was gambling in differences represented by book-keeping, instead of speculating in real shares. To me the evidence is convincing that he believed, and Farley and defendants allowed him to believe, that they had his shares, and there is not a shred of evidence in the case of the existence of a custom, (assuming for the moment that such a custom would be sustainable in law), which authorizies a broker to deal with shares pledged to him, by selling them out and out previous to default, being only liable to replace them (if he can) when called upon to do so, or which authorizes him, when instructed to purchase shares to do so by book-keeping only, without actually buying them.

I think the plaintiff is clearly entitled to recover this money from the defendants, as money had and received by them to his use. The cross-appeal was abandoned on the argument, except in so far as the grounds on which it is based were urged in support of the judgment already given. I think that the judgment is right, and should be affirmed for the reasons therein given.

FERGUSON, J., concurred.

From the above judgment an appeal was taken to the Supreme Court, which was dismissed with costs.

Note:

One who employes a broker to transact business for him upon the stock exchange, impliedly authorizes him to sell according to the general and known customs and usages of the exchange: *Grissell* v. *Bustoll*, L.R. C.P. 112.

In order to bind the client by an unusual course of dealing, there must be express authority to the broker. *Wiltshire* v. *Simms*, 1 Campbell 258; *Brown* v. *Boorman*, 1 Cl. & F. 1.

If the broker is instructed merely to buy or sell without price being fixed, he should buy or sell at the market price. If the broker is unable to purchase the number of shares mentioned in his instructions, he may purchase any less number if the whole amount is not obtainable. *Marye* v. *Strouse*, 5 Fed. Rep. 493.

A broker does not undertake to carry out the order. *Fletcher* v. *Marshal*, 15 M. & W. 756.

In the absence of express limitation, the broker's authority continues until countermanded and the client may cancel his order at any time prior to its execution. In such cases margins may be demanded back. *Fletcher* v. *Marshal*. There is an exception to this rule, however, where a broker has entered into a contract for purchase and became personally responsible upon it. *Sutton* v. *Tatham*, 10 Ad. & E.; 27 *McEwan* v. *Woodz*, 1 Q.B. 13.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

CARNEGIE v. FEDERAL BANK OF CANADA.

Pleadings—Admissions—Master's Office—Departure from Record—Pledge of Stock—Ear-mark—Identification of Pledged Stock.

The plaintiff pledged with the defendants, certain shares of stock, as security for a loan under an agreement in writing, providing, that he was to keep up a cash margin of not less than ten per cent. above the market price of the stock, and authorizing the bank, in the event of default, "to sell or dispose of the said security without notice, and to apply the proceeds in liquidation of the said advance."

The plaintiff claimed that before default was made, the bank wrongfully loaned or sold his stock without his knowledge or consent; and that he was entitled to credit for the amount realized, and to a return of interest paid, and damages for being compelled to give additional security.

The defendants alleged that although the stock was transferred backwards and forwards by way of loan, it was never sold until default was made.

Held, that if the stock was sold before default was made, such sale was *tortious*, and following *Ex p. Dennison*, 3 Ves. 552, that a *loan* of the stock was a *sale*; and that the plaintiff might elect, either to claim damages, or affirm the sale and claim the proceeds and profits made by the bank; one element of the measure of damages being, the highest point of the stock market between the conversion and the next default.

But that if default was made, the bank was entilted to sell the stock without notice; but only for the purpose of liquidating the advance, and that credit must be given for the proceeds, at the current rates of the days on which the transfers were made, until all the shares had been transferred.

THIS was an appeal from the report of the Master in Ordinary made in pursuance of the order of reference in this case.

The ground of this appeal was, that the evidence shewed that on April 23, 1878, the defendants had converted to their own use 160 shares of Ontario Bank stock pledged with them in security for one of the loans in question in this action, and that the Master should have so found, and should have given credit to the plaintiff for the value of the said 160 shares at the current market value on April 23rd, 1878.

The pleadings had been framed and the case tried on the assumption that the securities in question, the said 160 shares of Ontario Bank stock, had been pledged on April 23rd, 1878, when the loan was made; but it was discovered in the Master's office, and then for the first time brought to the recollection of both

parties, that these shares had been pledged by the plaintiff with the bank some months previously on another loan; and that they had been carried forward to the loan of April 23rd.

On this state of facts an issue was raised in the Master's office as to whether the bank actually did hold these shares on that day, the plaintiff contending that having subsequently assigned shares redeemed by other borrowers it had no shares applicable to the plaintiff's loan, and was therefore liable to be charged with their market value as of that day.

In appeared in the Master's office that all Ontario Bank shares received by the bank as collateral securities were placed to the credit of "H. S. Strathy, cashier, in trust," in the books of the Ontario Bank, and that on or before April 23rd, 1878, and as far back as the account was investigated, there were always at least 160 share standing to the credit of this account; and Mr. Strathy, on examination, stated that the bank had always been ready to return the plaintiff's securities on demand. He also stated that at this distance of time, and in consequence of the destruction of a memorandum book, it was impossible for him to identify the devolution of the plaintiff's shares, or to distinguish them from those of others.

The plaintiff attempted to put the bank in default by shewing that if it had been called upon on April 23rd, 1878, to restore the plaintiff's shares and those belonging to other parties which presumably it should have had in its hands on that day, it could not do so out of the account in the Ontario Bank. But no evidence was given as to whether the bank had acted properly or improperly with regard to the shares of such third parties; the plaintiff's contention being, that when the bank transferred any stock received from them it must be presumed the transfer was made in conformity with the trust on which the bank had received the stock, and that if there was any shortage it must be presumed to have been on the plaintiff's stock which the bank denied having transferred.

The Master delivered the following written judgment:—

March 17, 1884. THE MASTER-IN-ORDINARY:—It was in evidence at the hearing that the defendants, on April 23rd, 1878, held certain Ontario Bank shares for various borrowers, all of which shares by June, 1878, they re-transferred to such borrowers, who between those dates paid off their loans, leaving the defendants without any shares applicable to the loan made to the plaintiff. On this state of facts the plaintiff asks me to find that on April 23rd, 1878, the defendants held none of the shares which had been assigned to them as security for the loan made to the plaintiff. And as aiding him in this contention, the plaintiff has given proof before me that these shares were in fact assigned to the defendants on November 1st, 1877, when as is now stated the original loan on the Ontario Bank shares was made to the plaintiff.

The pleadings, and the contract proved at the hearing, negative the plaintiff's right to be thus aided in his contention before me. The one alleges and the other proves that the loan was made on April 23rd 1878, and the decree is based upon the *allegata et probata*. To give effect to what he now asks would require an amendment of his pleading, and also leave to give evidence of a different contract than that upon which the court adjudicated when it directed the reference here. Or, to put the matter in plain terms, it would allow the plaintiff to shew that the shares which in his pleading he states were transferred to the defendants as security for a loan made on April 23rd, 1878, were not in his possession or control on that day, but had been transferred to the defendants on November 1st, 1877, and that the loan which in his pleading he states was made to him on the security of the said shares on April 23rd, 1878, was not in fact made on that day but on November 1st, 1877.

I have no such jurisdiction. Parties who come before the subordinate tribunal of the Master's office, must learn it has only a delegated and a very limited jurisdiction, and that it possesses no part of the original jurisdiction of the court either as to amendment of pleadings, or variation of a decree.

But if such a case were open to the plaintiff, he has given no evidence of the defendants' dealings with Ontario Bank shares between November 1st, 1877, and April 23rd, 1878; and there is nothing before me to shew when the loans redeemed after April 23rd, 1878, were made, or whether the Ontario Bank shares held by the defendants on April 23rd, 1878, were covered by such other loans.

The shares which the plaintiff assigned to these defendants were not ear-marked, and could not be traced or distinguished from other shares assigned to the bank by other borrowers as security for similar loans.

Then as all such Ontario Bank shares had become incapable of identification, it appears to me that the plaintiff's contention is based on the supposition that the contract rights of the other borrowers were the same as those of the plaintiff. In the absense of such borrowers these could not be investigated, nor priority of transfer, nor other equities arising out of such contract rights.

The plaintiff asks me to hold as a presumption of fact that, by reason of the re-transfers of Ontario Bank shares after April 23rd, 1878, to other borrowers who redeemed their loans after that date—which on June 25th, 1878, left no shares available for redemption by the plaintiff, there were no shares held by the defendants for the plaintiff's loan on the 23rd day of April. Apart from this, which, as I have already shewn, would be practically a repudiation of his pleading, there are other presumptions of fact just as forcible, viz., that the defendants had, with the consent of the prior borrowers, sold or trafficked in the shares such borrowers had assigned to them, and that the quantity of shares held by the defendants on April 23rd, 1878, left intact the shares assigned by the plaintiff.

Such presumptions of fact are mere arguments derived wholly from the point of view the circumstances of the case are looked at; and being equally forcible may be held to negative each other. And in the absence of evidence of the actual dealings of the bank

with these shares, assuming such evidence to be admissible, I must decline to give effect to any of them.

But apart from this I note that the Chancellor in his judgment gives what appears to be the result of the evidence before him. Not being incorporated in the decree his conclusions may not technically be findings on the questions of fact; but I doubt if I am at liberty to disregard them. If I am at liberty, I find them consistent with the evidence before me, except in so far as they may be varied by the evidence I have declined to give effect to, and I therefore adopt them, and rule that the account must be taken in accordance with the Chancellor's statement of the evidence or "findings."

The plaintiff now appealed from this decision of the Master on the ground above stated.

The appeal was heard on March 27th, 1884, before Boyd, C.

J. R. Roaf, for the appeal. Under the authority of *Langton* v. *Waite*, L.R. 6 Eq. 165, 4 Ch. 402, cited at the hearing, we are entitled to the identical stock if it can be identified. We are entitled either to the stock or the market value of it at the time of conversion. The Master should have found that on April 23rd, 1878, the defendants did not have the stock. [Boyd, C.:—You had not identified the stock when you gave it to Mr. Strathy. Why then was it his duty to ear-mark it, when you had not done so?] But it was ear-marked when we gave it to him. We gave him certain stock; it was his duty to hold it for us; if he puts it into one common pen, so to speak, he is responsible for it. We simply ask to take Mr. Strathy's own evidence before the Master. He shews on that day, April 23rd, 1878, he was short 160 shares, and we ask to be credited with the value of them. Lewis on Stocks, p. 43, shews there must be something to represent the title to the stock. Cavanagh on Money Securities, p. 155, lays it down in the same way. We should not suffer for the way the accounts were kept, a matter over which we have no control.

A. J. Cattanach, contra. I refer to Jones on the Laws of

Pledges, secs. 508-10, and to *Allen* v. *Dybers*, 3 Hill (N.Y.) 593, 7 *ib.* 497, referred to in the judgment at the trial. See also *McDonald* v. *Lane*, 7 S.C.R. 462; *Nourse* v. *Prime*, 4 John Ch. 490; *LeCroy* v. *Easton*, 10 Mod. 499; *Cud* v. *Ruther*, 1 P. Wms. 569; Lewis on Stocks, p. 125. But the other side say *Langton* v. *Waite*, 6 Eq. 165, 4 Ch. 402, referred to in the judgment at the trial, shews the plaintiff is entitled to the return of the identical stock. That case, however, is distinguishable. The true question here is, whether we had sufficient shares on hand to answer the demand of the plaintiff if he should call upon us. There is no dispute as to the facts, which are as follows: On April 23rd, 1878, there was a consolidation of two loans (there having been previous transactions) resulting in $48,000 being credited to Carnegie, who drew out that amount. On that day there was a new start. The plaintiff is in a dilemma. On April 23rd, 1878, we either had the 160 shares or not. If we had, there is no evidence of conversion after all. If we had not, then there arises the question whether the plaintiff can go back. If he can, we can shew we always had the 160 shares both before and on April 23rd, 1878.

Roaf, in reply. In the cases cited the parties always had in hand the stock sufficient to satisfy the demand which might be made upon them. [BOYD, C.:—What the bank says is, we had 160 shares in our hands on April 23rd, 1878, which we could have transferred to the plaintiff on that day.] Yes; but they also say they had the other loans on hand. We don't want to go into the rights or accounts or dealings with other parties. We simply take Mr. Strathy's statement that he did not on that day have our stock, and he must give us the value of it. If the Master's holding is correct, it overthrows all the benefit that would result from your Lordship's judgment.

April 2nd, 1884. BOYD, C.:—It does not appear to me that the present contention of the plaintiff is open to him on the pleadings and proceedings in this action. What he now claims

is, on the footing of a different cause of action altogether. By the statement of claim the plaintiff sets forth that during the months of April and May, 1878, the bank lent money to the plaintiff, who gave the bank as security assignments of Ontario Bank stock and of Bank of Commerce stock (par. 1). Soon after the making of the loan it is alleged that the defendants sold the Bank of Commerce stock and credited the proceeds (par. 2). It then charges that the defendants did not hold the Ontario Bank shares during the currency of the loan, but that soon after the making of the loan the defendants disposed of that stock without notice to the plaintiff, and that by such sales the defendants received more than enough to pay off the balance due by the plaintiff (pars. 8 and 9). Upon this pleading the parties went to trial upon admissions shewing that the Ontario Bank stock in question was in the hands of the defendants at the date of the loan (*i.e.*, April 23rd, 1878). The agreement is, that "the Exhibit A shews how the officer of the bank held and dealt with the stock of the Ontario Bank transferred to him, including the stock in question." That admission, which is evidence for all purposes in the action (including the proceedings in the Master's office) cannot be inferentially or argumentatively countervailed by detached parts of contradictory evidence going to shew that the defendants had previously disposed of 160 shares of the Ontario Bank stock, and were in default at the date of the loan. The plaintiff's argument now places the parties in this position: the plaintiff was induced to accept a loan from the bank on the representation that the bank had stock security for that loan in their hands, whereas in fact that security had already been sold, and the bank was indebted to the plaintiff for the proceeds of that stock, and should account on that footing. That is a very different state of facts from what is spread upon the record, and discloses a different cause of action.

But apart from this difficulty, and upon the merits of the appeal, Mr. Strathy's evidence in the Master's office as to the dealing with the stock, on p. 27, is to be read with his statement

under oath in exhibits annexed to the affidavits on bringing in the accounts. He there states that the general share account was kept by the bank for all transfers of stock held by the defendants as collateral security, and that there was no distinction between the shares held by the plaintiff and those held by other parties. Unless the evidence went far enough to establish that the shares referred to on that p. 27. *i.e.*, 83 shares and 50 shares, and 95 shares and 61 shares, and 39 shares, were ear-marked so as to be identified as the particular securities of the parties with whom the bank was dealing, it appears to me that the plaintiff has not proved that the bank had not 160 shares applicable to his loan on April 23rd, 1878. There is no such identification of these transferred shares as necessarily to lead to the conclusion that only the *residuum* after deducting these can be treated as the shares of the plaintiff.

I am unable to reverse the Master's report upon any grounds that have been argued before me, and it will be affirmed, with costs.

From this judgment the plaintiff appealed to a Divisional Court.

Moss, Q.C., with him *J. R. Roaf*, for plaintiff. A pledgor of stock is entitled to have the stock held for him intact, in the same manner as he would be entitled to have any goods deposited by him as a security held; and, upon repayment of the loan, he is entitled to a return of the specific stock pledged by him; and the pledgee cannot claim or have any right to return an equivalent amount of stock of the same nature or class: *Langton* v. *Waite*, L.R. 6 Eq. 165. In App., 4 Chy. 402. The defendants claim that they did not sell the stock pledged with them, but only "loaned" it, that is, they transferred it, took a deposit in cash at the market value of the stock, with a right to call upon their transferee to deliver over to them, whenever called upon, a like quantity of stock of the same nature and at the same price. This, as between the parties to this action, is a sale of the stock pledged:

Ex parte Dennison, 3 Ves. 552. The defendants also claim they had a right to deal with the stock as they saw fit, that the plaintiff gave them liberty to do so. The plaintiff denies this, and as the defendants allege the fact they should prove it, while such a permission would militate against the plaintiff, whose object was to keep the stock locked up, and off the market; but, even if it should appear that they had such a right, they did not use it, as their own evidence distinctly shews that they did not deal with it in any different manner tha nthey would have done if they had not had such permission. They also claim a right to sub-pledge; this they might do, as all lenders have a right to re-borrow, but they admit they did not do it. The defendants put all the stock held by them in one common fund, and it is their duty to shew that the stock transferred by them was stock they had a right to transfer, but the evidence shews that they transferred all the stock they had, so there is no doubt the stock of the plaintiff was transferred. Plaintiff is entitled to a full account of how the defendants dealt with his stock. The evidence also shews that the defendants rendered certain accounts or statements to the plaintiff, as if they held the whole of his securities, and any settlement obtained from the plaintiff by means of such statements was one obtained by misrepresentation, and would not be such a settlement as would be binding upon him. The plaintiff having only learned the true state of facts lately, at once claimed an account from the defendants, which, being refused by them, necessitated this action. The Court should aid him by compelling the defendants to give a correct account of their dealings with the securities he had pledged with them.

Cattanach, for defendants. The bank had a common law right independent of contract to sub-pledge the stock for its own advantage: *Donald* v. *Suckling*, L.R. 1 Q.B. 585; approved in appeal, in *Holliday* v. *Holgate*, L.R. 3 Ex. 299. No actual transfer of stock was made by the bank until after plaintiff was in default, and after default the bank had express power to sell or dispose of the stock, and therefore until sale and even before

default was made, had the right to use it. The only obligation on the part of the pledgee, is to be prepared to re-deliver the pledge when required: *Lecroy* v. *Eastman*, 10 Mod. 499. A pledgee has the right to sup-pledge: Lewis on Stocks, p. 133. When the bank loaned the stock it was in fact a mere sub-pledge, as they received the market price for it in money, and held the money until the stock was returned to them, paying four per cent. for it, while they charged the plaintiff seven per cent. uniformly. The bank had a right to re-pledge his securities, unless specially restricted, and thus to make a profit by borrowing at a lower rate than they charged: Collins on Banking, pp. 248, 250. If it is held to be a tort to re-pledge collateral securities, business could not be carried on. A speculator in stocks knows his broker must sub-pledge the stock, if money is to be borrowed, and, if a broker can, why should his sub-pledgee not be at liberty to sub-pledge, and so on. The ordinary contract between a broker and his customer is one of agency, but it is otherwise with regard to a bank and when a broker acts as a banker too: *Duncan* v. *Hill*, L.R. 8 Ex. 242; *Thacker* v. *Hardy*, 4 Q.B.D. 685; cases digested. 21 Am. Law Register, 452; *Foley* v. *Hill*, 2 H.L.C. 28. The contention that the loaning of the stock must necessarily affect the pledgor prejudicially, cannot prevail in the face of the evidence, which shews that the market was firmer after each transfer. The onus is on the plaintiff, and having failed to prove substantial damage, his suit should be dismissed: *Hiort* v. *London and North Western R.W. Co.*, 4 Ex. D. 188; Benjamin on Sales (Corbin's 4th Am. ed., 1018). The pledgee is not bound to return the identical shares: *Cud* v. *Rutter*, 1 P. Wms. 570; Lewis on Stocks, p. 147. If the plaintiff may elect to treat the transfers as sales, he must take the transfers in the order in which they are made: *Hart* v. *Bown*, 7 Gr. 97; *Ex parte Dennison*, 3 Ves. 552. It is shewn that the plaintiff would not sell when the stock was at its highest, and therefore he should not be allowed to make an arbitrary selection now. The settled

account should not now be opened after such a lapse of time, and after the parties have destroyed their papers.

Moss, Q.C., in reply.

January 19th, 1884. BOYD, C.:—Having regard to the contradictory evidence, I am unable to find that any oral agreement was arrived at between the parties, touching the stock and transactions in question.

The only contract which can be regarded as proved, is that contained in the memorandum signed by the plaintiff, when the stock was handed over to the bank.

That provides for repayment of the amount loaned on demand, and that the plaintiff will keep up a cash margin of not less than ten per cent. above the value of the stock, as quoted in the newspapers, and, in the event of default, it thus proceeds, "The bank is hereby authorized to sell or dispose of the said security without notice and to apply proceeds in liquidation of said advance."

It is affirmed, and not denied, that default had occurred in not keeping up a sufficient margin before the 22nd of June, 1878.

The action proceeds upon the ground that, soon after the loan, the bank disposed of the shares held by them in pledge, and it asks a repayment of all sums paid for interest thereafter, and of all sums received by the bank from the disposal of the stock over and above the amount of the loan, and it also claims damages for being asked to give and giving additional security, and for the depreciation in value caused by the disposal of the shares without plaintiff's leave or consent.

This last item of damages refers, as I understand, to the market price being lowered by so much Ontario Bank stock being put on the market by the defendants, but it is not made out in the evidence.

There is no complaint made that the sales were wrongful, but the scope of the bill is to affirm what was done, and to seek an account based on those sales being substantiated.

The pleader has assumed what is probably correct, that if default occurred in keeping up the margins then a right of sale arose without notice.

By the terms of the memorandum, it was open for the plaintiff to inform himself as to the state of the margin by reference to the newspaper stock reports, as for the defendants, and in this view notice of default was not contemplated by the parties.

Then, if there was default prior to the 22nd June a right of sale thereupon accrued, and on that day the bank did dispose of so much stock as reduced the total in their hands to 225 shares. The plaintiff had pledged with them, 369 shares, and at this date there was a shortage of 144 shares.

The terms of the bargain must govern the dealings of the bank. There is express power given to sell or dispose of the shares after default, but only that the proceeds may be applied in liquidation of the advance. There is, by the strongest implication, no power given to deal with or use the shares in the absence of any default, as was argued by the bank, and there is none to deal with or use the shares, even after default, except for the specific purpose of reducing the debt by means of the proceeds. See *Allen* v. *Dykers*, 3 Hill 593; affirmed, 7 Hill 497.

Ordinarily, if property is pledged, the same property is to be returned after satisfaction of the pledge, and that rule applies to stock, if it can be identified.

There is no evidence in the case upon the subject of identification, and, if the strict rule is applied, it lay upon the bank to shew that the stock they dealt with intermediately was the same stock which was afterwards got back and held under the plaintiff's pledge. This has not been done. But, besides this difficulty, the bank admits that the stock was transferred, by way of loan, backwards and forwards, though it was never sold.

I think the case of *Ex parte Dennison*, 3 Ves. 552, interprets such a transaction to be a sale. That decision has not been reversed or adversely commented upon, and it is recognized in the latest text books and cases. The effect of that decision is suc-

cinctly given in Seton on Decrees, 4th ed., p. 1097, thus: "If a mortgagee [pledgee] of stock transfer it by way of loan to another, the transfer will be considered a sale, and in the account between the mortgagee and mortgagor the former will be charged with the value of the stock on the day of such transfer." it is cited, and to the same effect, by Cotton, Q.C., in *Langton* v. *Waite*, L.R. 6 Eq. 167 and authenticated as existing law by Malins, V.C., at p. 173.

So that I conceive the bank is shut up to the conclusion that on the 22nd June there was a disposal of the stock in pursuance of the memorandum of deposit, the proceeds of which at the current market rate were to be applied in liquidation of the advance. At that date the bank retained 225 shares, and these are to be regarded as against the bank as the plaintiff's shares, because the bank went on charging interest and dealing with the plaintiff as if the shares were still his property.

The same process was repeated, and with the same result as to the manner of accounting, and for the same reasons, on the 25th June, when the shares held by the defendants were reduced to 208; again, on the 8th July, when the reduction was to 206; again, on the 9th July, when they held 181; again, on the 15th July, when the balance came down to 63; and again, and finally, on the 16th July, 1878, when the whole of the Ontario Bank shares held by the Federal Bank were disposed of, and passed out of the defendants' hands.

If, upon the taking of the accounts on this footing, the plaintiff appears to be in default at the time of each sale or disposition of shares, credit will be given on the account for the current rates on that day.

If, however, the plaintiff was not in default, the transfer would be tortious, and the plaintiff will be entitled to elect whether he will claim damages, or affirm the sale and claim the proceeds and the profits made therefrom by the bank.

One element of damage will be the highest point of the stock market between the conversion and the next default, and there

may be other items of loss which will be open before the Master.

It is referred to the Master (or Registrar, if the parties wish), to take an account of the dealings between the parties on this footing. Further directions and costs reserved.

If the plaintiff does not seek such a manner of accounting, then the action is dismissed, with costs.

He may elect within the fourteen days as to the course he will take.

Note:

A broker purchasing stock may have it transferred into his own name or that of his clerk, provided he is always ready when called upon by his client to transfer it to him upon the amount of advances being paid: *Nourse* v. *Prime*, 4 Johnson Ch. 490, but this right on the part of the broker would not deprive the client of his privilege or on the stock: *Ex parte Wilson*, 7 Cowp. 492; *Strong* v. *Smith*, 15 Hun N.Y. 222.

The broker is not liable for loss of securities in his hands by way of pledge unless the loss arises from his negligence. *Jenkins* v. *National Village Bank*, 53 Maine, 275; *Abbett* v. *Frederick*, 56 Howard N.Y. Pr. 68; *Bostock* v. *Floyer* L.R. 1 Eq. 26; *Consterdine* v. *Consterdine*, 37 Beav. 330; *Cutting* v. *Marlor*, 78 N.Y. 454.

A broker acting in good faith is not liable for loss of margins placed in the hands of a second broker in the ordinary course of dealing, if such broker becomes insolvent. *Gheen* v. *Johnson*, 90 Pa. St. 38; *Wykoff* v. *Irvine*, 6 Minn. 496.

[IN THE SUPREME COURT OF CANADA.]

BOULTBEE V. GZOWSKI.

Broker—Stock exchange custom—Sale of shares—Marginal transfer—Undisclosed principal—Acceptance—"Settlement"—Obligation of purchaser—Construction of contract -Liability of shareholders—"Stock jobbing."

The defendant, a broker doing business on the Toronto Stock Exchange, bought from C, another broker, certain bank shares that had been sold and transferred to C by the plaintiff. At the time of the sale C was not aware that the defendant was acting for an undisclosed principal and the name of a principal was not disclosed within the time limited for "settlement" of transactions by the custom of the exchange. The transferee's name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant who, three days after the settlement was due according to the custom of the exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions and the plaintiff's name being put upon the list of contributors, he was obliged to pay double liability upon the shares so transferred under the provisions of "The Bank Act," for which he afterwards recovered judgment against C and then, taking an assignment of C's right of indemnity against the defendant, instituted the present action.

Held, that as the defendant had not disclosed the name of any principal within the time limited for settlement by the custom of the Exchange and the shares had been placed at his order and disposition by the seller, he became legal owner thereof, without the necessity of any formal acceptance upon the transfer books and that he was obliged to indemnify the seller against all consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of "The Bank Act."

Appeal from the judgment of the Court of Appeal for Ontario, 24 Ont. App. R. 502, reversing the judgment of the Divisional Court of the High Court of Justice, 28 O.R. 285, which had reversed the decision of the trial court and ordered a judgment to be entered in favour of the plaintiff.

The plaintiff sued under an assignment from one Robert Cochran of a claim against the defendant which arose in respect of the sale of twenty shares of the Central Bank of Canada. The plaintiff, prior to the sale, was the owner of the shares and sold and transferred them to Cochran, who shortly afterwards sold them to the defendant. Within thirty days of this transfer the

bank went into liquidation, and the plaintiff was placed on the list of contributories and compelled to pay double liability on the shares. The plaintiff claimed that Cochran was bound to indemnify him against such payment, and Cochran, while admitting such liability, contended that Gzowski was in turn bound to indemnify him, and having assigned his claim to the plaintiff, an action was brought by him against them both. In an action judgment was recovered against Cochran, but the action as against Gzowski was dismissed without prejudice to the rights of the plaintiff upon the ground that at the time of the assignment by Cochran he had no judgment against Gzowski, and that the right was not assignable at that time. The plaintiff obtained a new assignment from Cochran subsequent to the judgment against him, and then brought this action, which was dismissed with costs at the trial by Mr. Justice Meredith. On appeal to the Divisional Court, composed of Armour, C.J., and Falconbridge and Street, JJ., the trial court judgment was set aside and a judgment ordered to be entered against the defendant, Gzowski, for the amount of the judgment recovered against Cochran, with interest and costs. The plaintiff now appeals from the judgment of the Court of Appeal which reversed the decision of the Divisional Court and restored the trial court judgment dismissing the plaintiff's action with costs.

The facts of the case and questions at issue on the present appeal are stated in the judgments now reported.

H. J. Scott, Q.C., for the appellant. The contract in this case may be summarized as being an offer by one party of a price for the stock and an acceptance by the other. This constituted a complete contract between the parties, and is the contract upon which this action is brought. It is a contract of the simplest kind, the purchase and sale of stock unaccompanied by any special terms and conditions. There was no necessity for any written contract nor was any entered into. The legal results of such a contract are: First, the duty on the part of the vendor to deliver the stock; secondly, the duty on the part of the purchaser to take the stock

when delivered, to pay for it and to accept it *cum onere*, that is, to indemnify the vendor against all the consequences of ownership. It is upon this latter part of the contract that the appellant relies. Both Cochran and Gzowski are brokers and members of the Toronto Stock Exchange, which, unlike the London Stock Exchange, has no rules governing sales, and the rights of the parties depend upon the general principles of law apart from any special regulations, *Maxted* v. *Paine*, L.R. 6 Ex. 132. All the judges agree upon this. See judgments of Meredith and Street, JJ., 28 O.R. at pp. 290, 302; and of Burton, C.J.O., and Osler, J.A., 24 Ont. App. R., at pp. 503 and 506. See also the cases cited in the various judgments, and particularly *Kellock* v. *Enthoven*, L.R. 9 Q.B. 241.

Cochran was therefore entitled, and appellant, as his assignee, is entitled to be indemnified by the respondent, for the amount for which judgment has been recovered against Cochran. The fact of acting for an undisclosed principal does not relieve the respondent from personal liability. The transfer to Henderson was really made by the respondent and he cannot by his own act be relieved from liability. As to transfers in blank see Lindley on Companies (5th ed.), pp. 471 and 472. The equitable ownership of shares, agreed to be sold, depends on the contract of sale and not on the form of transfer; consequently where there is a binding agreement for the sale and transfer of shares it is comparatively immaterial, as between the buyer and seller, whether a transfer in blank has been executed or not. Cases like *Loring* v. *Davis*, 32 Ch. D. 625, involving the doctrine of trustees and *cestuis qui trust* do not depend upon privity of contract and cannot affect the rights of parties under contracts.

I refer also to Cabana, Money Securities, 2nd ed., p. 516; and the case of *Hughes-Hallett* v. *The Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

Aylesworth, Q.C., for the respondent. The plaintiff's liability as a contributory arose while he himself held the shares, and in consequence of his having held them within one month before

the bank's suspension; but his recourse was preserved under the Act as against Henderson, to whom the shares had been transferred, and who, as the registered holder of the shares at the date of the bank's suspension was also made a contributory; R.S.C. c. 120, ss. 70 and 77. The master's decision upon the effect of these marginal transfers was considered and upheld, *In re Central Bank of Canada, Baines's Case*, 16 Ont. App. 237, and the judgment of the master forms a complete bar to the plaintiff's claim, and, under the present circumstances, there cannot be any liability on the part of the respondent towards the appellant. The obligation to indemnify is to be implied from the circumstances of the case in the sense of being the tacit agreement between the parties and not as being imposed by law whether the parties agreed to it tacitly or not; not to be forced upon them by law or in equity *nolens volens*.

The learned trial judge found that it was not contemplated that the defendant should in any case become the transferee, and that the real contract between the two brokers was, that defendant's firm should be personally answerable for the payment of the price of the shares on the day following the purchase, and that upon such payment Cochran would transfer them to any one defendant's firm might name, or by way of "marginal transfer," put it in that firm's power to transfer the shares to any competent transferee, and that it was never contemplated by either that defendant should be in any case bound to take a transfer of the shares, or otherwise come under any personal liability in respect to them, beyond payment of the purchase money, and procurement of a valid transfer of them. The implied obligation was not that the transferee of the shares was to indemnify plaintiff against the double liability which arose whilst he was the holder of them, but, more consistently with the principles of indemnification, it was that the purchaser had the right to call upon the plaintiff or upon Cochran, if he were really the vendor, for indemnity in respect of this liability. *Humble* v. *Langston*, 7 M. & W. 517. The principle of the case of *Burnett* v. *Lynch*,

5 B. & C. 589, does not apply, and although *Grissell* v. *Bristowe*, L.R. 4 C.P. 36, deals particularly with the usages of the London Stock Exchange, note the remarks made by Cockburn, C.J., at page 50 of the report.

The evidence in no way warrants the conclusion that there was at any time a completed transaction of sale and purchase of these shares as between Cochran and the defendant. The effect of the adoption of the form of transfer used in the transaction was to prevent personal liability in respect to the shares from attaching to defendant, and the purpose and intent of the parties was that the shares might be transferred directly to and accepted by the real purchaser, Henderson. The transfer executed by Cochran became, as was intended, a transfer from him directly to Henderson, the real purchaser, establishing direct privity of contract between them. The marginal transfer executed by Cochran was a power of attorney from him to defendant's firm to put forward the person to whom the shares might be sold as the final purchaser, instead of the firm, and this is what was done, he was accepted as the transferee, and he became the shareholder, subject to the double liability, and liable, if anyone was, to indemnify Cochran. A novation took place which precluded Cochran from asserting any demand against defendant in respect of their agreement. In *Walker* v. *Bartlett*, 18 C.B. 845, the defendant was the real purchaser, and yet was not bound to take a transfer of the shares in his own name, but should cause the shares to be registered in that of some other person to be named by him as the owner thereof, the seller having signed an order for a transfer of the shares, leaving a blank space for the name of the transferee. See also *Hawkins* v. *Maltby*, L.R. 4 Eq. 572, and *Re Central Bank of Canada, Baines's* and *Nasmith's Cases*, 16 O.R. 293.

The new Bank Act, 53 Vict. ch. 31, sec. 96, in more clear and precise language makes plain the intention, that the "recourse" of shareholders who had transferred their shares within the prescribed time before the bank's suspension is and was intended to be against those only by whom such transferred shares were actually held at the time of the bank's suspension.

The cases relied upon by the appellant turn upon the view that under the rules of the English Stock Exchange the purchasing broker was held liable, not because he was deemed a purchaser, but because having under the Stock Exchange rules entered into an engagement to produce a purchaser within a certain time and have his name entered as the transferee, he had failed to perform some of the terms of the engagement and was to be held liable as if he had been the purchaser. The rules and usages of the London Stock Exchange are set out in Lindley's Law of Companies, 5th ed., pp. 548 to 557. See also Fry on Specific Performance, 3rd ed., pp. 655 to 671, and the rules are given in full in a foot note to *Grissell* v. *Bristowe*, L.R. 4 C.P. 36, beginning at page 53. The inquiry in these cases was, who was the purchaser, and if the court is not able to find any other purchaser at all competent to deal with the vendor, then the person who assumed to make the contract with the vendor is deemed to be the purchaser. I refer to remarks on the case of *Kellock* v. *Enthoven*, L.R. 9 Q.B. 241, in the judgment of the learned trial judge and the cases there cited by him in that connection. The cases referred to by Mr. Justice Street are inapplicable to the circumstances of this case, because the liability (if any) of a purchaser to indemnify his vendor lasts only as long as the purchaser is the registered owner or holder: *Shaw* v. *Fisher*, 5 DeG. M. & G. 596. The respondent never held the shares at all; or, if he ever held them, he had parted with them before the liability in respect of which he is now sued, arose; the liability (if any) which arose during the time defendant held the shares (if he ever held them) was a liability on the shares in respect of which Cochran might or could be held liable, and not a liability on the shares in respect of which defendant could be rendered liable which arose while he held them, if he ever did so. Lastly, it is found and determined as against the appellant in such a manner as to be *res judicata* against him and to estop him from now contending the contrary, that Cochran was not damnified until after the commencement of the action in which judgment was recovered

against him; therefore, the liability in respect of which the appellant is sued did not arise while he held the shares, if he ever held them. Henderson, as the real purchaser and transferee, became directly responsible and liable to the vendor Cochran in respect of any liability or obligation against which the purchaser of shares is liable to indemnify his vendor, and Cochran's remedy was and is against Henderson: *Brown* v. *Black*, L.R. 15 Eq. 363; 8 Ch. App. 939; *Evans* v. *Wood*, L.R. 5 Eq. 9; *Maxted* v. *Paine*, L.R. 4 Ex. 203; L.R. 6 Ex. 132; *Coles* v. *Bristowe*, 4 Ch. App. 3; *Grissell* v. *Bristowe*, L.R. 4 C.P. 36; *Paine* v. *Hutchinson*, 3 Ch. App. 388; *Bowring* v. *Shepherd*, L.R. 6 Q.B. 309; *Loring* v. *Davis*, L.R. 32 Ch. D. 625.

The effect was that Cochran as vendor accepted Henderson either as the original purchaser or as a sub-purchaser from the appellant, entitled to a transfer of the shares, and transferred the shares to Henderson at the respondent's request; and this dealing put an end to any liability on the part of the respondent to indemnify Cochran, if any ever existed. All liability of the respondent (if any ever existed) ended with the payment of the purchase money and the transfer to Henderson accepted by him, and this remedy being against Henderson, he is not entitled also against the respondent Gzowski, who only acted as intermediary between the real parties to the transaction, and the appellant has no higher or better right than Cochran, who by his own act, made the transfer directly from him to Henderson. See *Castellan* v. *Hobson*, L.R. 10 Eq. 47, also *Coles* v. *Bristowe*, 4 Ch. App. 3. Moreover, the right (if any) of the appellant was and is barred by the proceedings and judgment in the former action referred to in the judgments in this action.

The rules of the Toronto Stock Exchange provide for the settlement of disputes arising between members in reference to any transaction entered into between them in the exercise of their profession as stockbrokers by arbitrators, members of the board, and the matter of defendant's liability (if any) was and is a matter to be determined between him and Cochran according to the rules

of the Exchange, and no assignment by Cochran could put an end to this right to have the matter determined and disposed of in the domestic forum. At all events there is no recourse to the courts until after the domestic forum has been invoked. *Field* v. *Court Hope of A. O. F.*, 26 Gr. 467; *Essery* v. *Court Pride of the Dominion*, 2 O.R. 596. In fact this question was before the assignment by Cochran duly dealt with and determined by the Toronto Stock Exchange in favour of the respondent, and both Cochran and the appellant are bound by that decision or determination.

TASCHEREAU, J. (dissenting):—I would dismiss this appeal. I concur in my brother Gwynne's reasoning.

GWYNNE, J. (dissenting):—In the conclusion arrived at by the learned judge who tried this case, and by the Court of Appeal for Ontario, unanimously, that this action must be dismissed, I entirely concur.

The plaintiff Boultbee, who was examined as a witness on his own behalf, says that upon the 21st or 22nd of October, 1887, being desirous of selling some shares, paid up in full of the capital stock of the Central Bank which stood in his name on the stock registry book of the bank, he employed a Mr. Cochran, a practising broker on the Toronto Stock Exchange, to sell twenty of such shares for him, and he then signed a printed paper which Cochran presented to him for his signature. He does not think that he read the paper, and he cannot say what it was save that he supposes it was a power of attorney or some authority enabling Cochran to sell the shares for him. He says that on the following day he went to Cochran to see if the shares had been sold, and that Cochran then informed him that he had not succeeded in selling them; that he again went the next day for the like purpose, and was again informed that the shares had not yet been sold, and that a short time after he called again, and in fact that he called every day until the affair was completed by Cochran giving him his cheque for $1,940, being at the rate of $97 per

share for the twenty shares. He never signed any paper whatever save that above spoken of when he employed Cochran as his broker to sell the shares for him; after the receipt of the said sum of $1,940 as the proceeds of the sale of his shares, he never heard anything more of the matter until the failure of the bank, when there arose a discussion as to who was liable to the liquidators of the bank for the statutory double liability on the shares.

Now, upon Saturday, the 22nd day of October, 1887, a Mr. Henderson employed Messrs. Gzowski and Buchan, who were also brokers practising on the Toronto Stock Exchange, to purchase for him thirty shares in the capital stock of the said bank. Upon the next business day, namely Monday, the 24th of October, 1887, the secretary of the Stock Exchange in the ordinary manner according to the usage and practice of the Toronto Stock Exchange, called Central Bank stocks for transactions on change, when Gzowski and Buchan, acting as brokers for Mr. Henderson, bid $97 per share for ten shares, which Cochran, acting as vendor's broker, agreed to accept ,and the transaction on change was thereupon closed at that price. The usage and practice of the Toronto Stock Exchange for brokers purchasing stock for their principals is to pay upon the next business day after the transaction on change, the amount fixed by such transaction to the vendor's broker, and subsequently, within a reasonable time, for no time is limited for that purpose by any rule of the Toronto Stock Exchange, the transaction is closed by a formal transfer of the shares by the vendor in the stock transfer book of the bank, and upon the purchaser signing underneath the transfer an acceptance thereof, the transfer is effected. There were no certificates of shares in the Central Bank transferred by the vendor's broker to the purchaser's broker, leaving it to the purchaser to have his name entered as owner upon the stock registry book; the only transfer of shares in the Central Bank stock was effected by the above formal transfer and the acceptance thereof in the share transfer book of the bank. Upon the 25th day of the said month of October, Messrs. Gzowski and Buchan, in accordance with the

usage and practice of the Toronto Stock Exchange, gave their cheque to Mr. Cochran for $970, the price of the ten shares bid for by them on the preceding day, and upon the same 25th day of October they in like manner as upon the 24th, bid $95 per share for twenty-five other shares in the Central Bank stock, which bid Cochran, also acting as vendor's broker, accepted, and this transaction was closed at that price in the ordinary course of the stock exchange as on the preceding day. For these twenty-five shares Gzowski and Buchan gave their cheque to Mr. Cochran upon the 26th of October for $2,375, according to the usage and practice of brokers purchasing shares for their clients upon the Toronto Stock Exchange. There is in these transactions so closed on change no mention made of any particular shares, nor of any particular owner or owners of the shares contracted for. These are matters which, as is well understood by the contracting brokers, are never disclosed until shares in fulfilment of the vendor's broker's contract come to be transferred in the share transfer book of the bank. But although it never is disclosed on change whom a broker is selling or purchasing shares for, still there can be no doubt now upon the evidence in the case that in point of fact as to thirty of the thirty-five shares so bid for and paid for by Gzowski and Buchanan, they were purchased and paid for on behalf of Mr. Henderson, the actual purchaser through his brokers, Gzowski and Buchan; and it is equally clear, I think, upon the evidence, that as to twenty of those thirty-five shares, Mr. Cochran was acting merely as broker for Mr. Boultbee, the actual owner and vendor of those shares. Mr. Cochran's evidence was not given with that precision which one would expect from a broker who could, or at least should, have no doubt whether in his transactions on the Stock Exchange he was acting as a vendor of his own property or as broker for a client. Still, however, notwithstanding his want of precision, the fact I think does abundantly appear that he was acting as broker for Mr. Boultbee, who was the real owner and vendor of twenty of the thirty-five shares. It is proved by the evidence of Mr. Boultbee

himself that he never signed any paper relating to the shares unless it was a power of attorney to Cochran to sell the shares for him, and that upon several days after conferring such power upon Cochran he was informed by Cochran that the shares had not yet been sold, and upon a subsequent occasion he received a sum of money from Cochran as the proceeds of the sale of the shares; it is established therefore that Boultbee had never executed any instrument purporting to transfer himself the shares to any one. Mr. Cochran on his examination as a witness for the plaintiff admitted that in his dealings with Gzowski and Buchan on the said 24th and 25th of October he was pursuing his ordinary calling of a broker buying and selling on the stock exchange, and that he then sold twenty shares of Central Bank stock for Mr. Boultbee; in another place he says that he believes he sold them for him; that he did so is abundantly apparent from other passages in his evidence. He produced a book containing entries as to these transactions. It contained an entry of a charge "to Central Bank stock, 20 shares at $97, from Boultbee." That entry he said might be read either that he sold for Boultbee or possibly that he bought for himself; but he added that he did not think the latter was likely and he repeated that it was not likely—that it was not what he was in for. This book also shewed two payments on the 24th October, and he said that he gave Mr. Boultbee a cheque for $1,940, representing as he said 20 shares at $97 per share; as shewn above he had contracted with Gzowski & Co. for the sale of 10 shares at $97 per share, and he himself had also stated that he had sold 10 shares on the 24th and twenty-five on the 25th October to Gzowski & Co. He was asked then to explain how he came to pay Boultbee on the 24th, to which he answered that he did not know how he paid him more than he had sold for, and added that "it was very foolish." This was all the explanation that Mr. Cochran could give, or at least did give, that it was very foolish for him to give Mr. Boultbee more for his shares than he had sold them for. An explanation might possibly be found in the fact that the sale of the ten shares to Gzowski & Co. on the

24th having fixed the price on change on that day, and as Mr. Boultbee was, as appears by his own evidence, very urgent upon Mr. Cochran to effect a sale, the latter may have given his cheque for the 20 shares at the rate at which the ten had been sold to Gzowski & Co., not doubting that he would be able to sell the other ten shares for the like amount; in this, however, he was disappointed, for the 25 shares sold on the 25th realized only $95 per share, or possibly he might have sold ten shares to some one else of which we have heard nothing. Then being asked to fix the day on which he sold Boultbee's shares he could not say for the reason that as he said he could not tell which were Boultbee's shares ,"because all that stock" (namely, the thirty-five shares sold to Gzowski & Co.) "was probably in my own name," an expression the significance of which will appear later. The evidence as already shewn clearly establishes that Cochran and Gzowski and Buchan were respectively acting as brokers for undisclosed principals in accordance with the usage and practice of the Toronto Stock Exchange, which usage and practice is, like the usage and practice of the London Stock Exchange, "not dissimilar," as is said in *Torrington* v. *Lowe*, L.R. 4 C.P. 26, 32, "to the usage and practice of other branches of commerce," and the question which remains simply is: What was the nature and effect of the contract entered into between Cochran as vendor's broker, and Gzowski and Buchan, as purchaser's brokers, in respect of the said thirty-five shares at the time of the respective transactions which took place on change being there closed in relation to such thirty-five shares? And the plain construction of such transactions, as was well understood and intended by the contracting brokers, in my opinion is, that Cochran, as a vendor's broker, thereby undertook upon receipt from Gzowski and Buchan, acting as purchaser's brokers, in accordance with the usage and practice of the Toronto Stock Exchange, of the monies agreed by them to be paid for the shares to cause thirty-five shares to be transferred in the transfer share book of the bank unto the nominees or a nominee of Gzowski & Co., so that such nominees or

nominee could become legal owners or owner thereof on the shareholders' list in the bank; and Gzowski and Buchan upon their part contracted to pay the price agreed upon for the shares on change in accordance with the usage and practice of the Toronto Stock Exchange, and further to provide a person or persons to accept such shares in the share transfer book of the bank. When Gzowski and Buchan paid, as they did pay, the price agreed upon for the shares, nothing remained for the completion of their contract by Gzowski and Buchan but to produce a person or persons who should accept a transfer or transfers of the shares in the transfer book of the bank as provided in section 24 of ch. 120, R.S.C., and who should thereby assume all responsibility attached to being owners or owner of shares so transferred, which liability as the shares were all paid up in full, consisted wholly, in so far as the vendors or a vendor of the shares or any of them were or was concerned, in an obligation to indemnify the vendors of the shares so transferred against any loss which might be occasioned (in the event of the bank becoming insolvent) by force of the provisions of section 77 of the said ch. 120, which enacts that "persons who, having been shareholders in the bank, have only transferred their shares or any of them to others, or registered the transfer thereof within one month before the commencement of the suspension of payment by the bank, shall be liable to all calls on such shares as if they had not transferred them, saving their recourse against those to whom they were transferred."

Now the proceeding adopted by Mr. Cochran for the purpose of fulfilling his part of the above contract appears to have been, as to twenty shares, for we have no information as to the other fifteen, balance of the thirty-five shares ,that he went to the bank and signed in the share transfer book of the bank a blank transfer of twenty shares fully paid up in the capital stock of the bank, at the foot of which entry in the bank transfer book is subjoined the acceptance following by Mr. Henderson for whom Gzowski and Buchan had acted as purchasers' brokers.

"I do hereby accept the foregoing assignment of twenty shares in the stock of the Central Bank of Canada assigned to me

as above mentioned at the bank this 29th day of October, one thousand eight hundred and eighty-seven.

(Signed) J. D. HENDERSON.

From the time of the signing by Mr. Henderson of this acceptance he has been accepted and entered on the books of the bank as the owner of twenty fully paid-up shares as so transferred, or intended so to be, and as such owner he has been entered on the list of contributories upon the winding-up of the bank, and as such transferee he has assumed the burthen imposed by ch. 120, R.S.C., upon transferees of shares in the bank. The circumstances under which Mr. Henderson thus became the acceptor, transferee and owner of these twenty shares were that, in the margin of the blank transfer which Cochran had signed in the share transfer book of the bank, he inserted the words, "subject to the order of Gzowski and Buchan. R. C."

Mr. Cochran in his evidence says that this was the ordinary mode adopted by the bank for enabling transfers to be perfected; the ordinary way, he said, was to give the above order, the object being, as he explained, that Gzowski and Buchan might either accept the shares themselves in the share transfer book of the bank, or nominate somebody else who should so accept them without Gzowski and Buchan themselves becoming transferees of the shares. This was the mode adopted by the bank of complying with sec. 29 of the ch. 120, R.S.C., which enacted that no assignment or transfer should be valid unless it is made and registered and accepted by the person to whom the transfer is made in a book or books kept by the directors for that purpose.

Now this marginal order so made by Mr. Cochran had no further operation than to direct the bank to accept as Mr. Cochran's transferee of the twenty shares whomsoever Messrs. Gzowski and Buchan should nominate, and accordingly Gzowski and Buchan with this intent inserted on the margin of the blank transfer signed by Cochran in the share transfer book of the bank below the marginal order signed by Mr. Cochran with his initials, "R. C.," the words following: "Subject to the order of J. D. Hen-

derson, G. & B." In accordance with this order Mr. Henderson signed the acceptance of the shares and thereby became Cochran's transferee and the owner of the shares covered by the blank transfer in direct succession to Cochran on the bank books, and thereby also Gzowski and Buchan fulfilled in every particular their contract made with Cochran in so far as 20 shares of the thirty-five contracted for were concerned.

This case is to be governed by the usage and practice of the Toronto Stock Exchange just as much as transactions on the London Stock Exchange are governed by the usage and practice of that exchange, and there is no necessity that such usage and practice should be evidenced by written rules. By Mr. Cochran's own evidence it is sufficiently established that he inserted the marginal order in the blank transfer in accordance with the ordinary usage and practice of brokers on the Toronto Stock Exchange, and for the express purpose of enabling Gzowski and Buchan to nominate the person to accept the transfer and who upon acceptance thereof in the share transfer book of the bank should become transferee and owner of the twenty shares. Upon the London Stock Exchange there is a certain class of persons called "jobbers," who purchase shares on change for speculation, and who are allowed to pass their contract through various hands before ever any person is found to accept and become the actual purchaser of such shares; a day is fixed which is called the name day, by which the jobber must name a person who shall accept and hold the shares so dealt with. Whether there is any usage or practice upon the Toronto Stock Exchange in relation to such "jobbers" does not appear, nor is it material that it should appear in the present case which was plainly one of a purchase by Gzowski and Buchan as brokers for their client a purchaser for investment, and not at all a purchase by themselves for "jobbing" and speculative purposes. The name day in the case of "jobbers" in England is fixed for the purpose of closing the further "jobbing" with the shares so purchased. By this day the "jobber" must find a person to take the shares as the actual pur-

chaser and owner, or be himself held to his purchase. When a person is so produced to accept the shares as the purchaser, the transaction with the purchasing jobber on change is brought to the same point as in the case of a *bona fide* purchase on change by a broker for his client, who is the real purchaser and as such accepts and takes a transfer of the shares contracted for by his broker. *Merry* v. *Nickalls*, 7 Ch. App. 733; and on appeal in the House of Lords, L.R. 7 H.L. 530, must govern the present case. It lays down the law as now finally established after much contrariety of opinion. The case was one where shares were purchased on change by a "jobber," but an actual purchaser had been found for the shares by the name day.

Now that judgment and the rule of law thereby established is in its principle precisely applicable to the case of a broker who purchases for a client who pays for and accepts a transfer of the shares and therefore can be equally applied to the circumstances of a transaction like the present. It is there said in the House of Lords that "it is to be considered as now settled that if the jobber in performance of his contract gives to the broker of the seller the name of a person who is able to contract and is willing to be named as purchaser of the shares and the name is accepted on the part of the seller, the jobber is discharged."

Now, applying the principle of that rule, so said to be established as settled law after much difference of opinion, to the case of a contract like the present, as made between Cochran as vendor's broker, and Gzowski and Buchan as brokers of an actual *bona fide* purchaser for investment, it seems beyond controversy that when Cochran entered in the margin of the transfer in blank signed by him in the share transfer book of the bank the order and direction that Gzowski and Buchan's nominee should be accepted and entered as transferee, and when Henderson who was such nominee signed the acceptance of the transfer in the share transfer book and was entered in the bank books as transferee and owner of the shares mentioned in the blank transfer, Gzowski and Buchan became thereupon absolutely discharged from their

contract with Cochran or his principal and from all responsibility whatever in respect thereof. This, as it appears to me, is the true and rational construction of this transaction construed as it must be by the usage and practice of the Toronto Stock Exchange, where the transaction took place by the intention and understanding of the parties to the contract, and by the mode of transfer in the share transfer book of the bank adopted by the bank; and it is the construction which is in conformity with the principle of the rule applicable to the case as now finally established by the House of Lords in *Nickalls* v. *Merry*, L.R. 7 H.L. 530.

This mode of effecting transfers of shares from a vendor to a purchaser upon a purchase contracted through brokers on change by means of these orders inserted in the margin of transfers in blank signed by the vendor appeared in the winding-up proceedings of the Central Bank to have been much abused for the purpose of purely jobbing transactions upon a most extensive scale, being thereby carried on by the bank itself and its officers and other persons, passing from hand to hand through divers persons, the original contract made on change for jobbing and speculation solely before ever any person should become transferee of the shares, and these jobbing transactions were carried to such an extent as to cause the failure of the bank, and its affairs to be wound up in liquidation; but such abuses so practised cannot affect a case like the present in which the purchasing broker's client, and for whom alone in point of fact the brokers acted in contracting with Cochran as a vendor's broker for the shares in question, accepts in due form of law in the bank books the transfer in blank therein made and signed by Cochran, who thereby assumed for the first time in the transaction the position of vendor. It is perfectly clear upon the evidence that Gzowski and Buchan did not nor did either of them, ever intend to become or contract to become, or in point of fact become transferees or transferee of the shares in question, or of any of them. They never in point of fact acted in the transactions relating to these

shares or any of them in any other capacity than as brokers for Henderson, who has accepted the transfer of the shares as made by Cochran, and all the obligations attached by law to such transfer.

If Gzowski and Buchan had failed to nominate a person who should accept a transfer thereof in the bank transfer book as they had by their transaction on change contracted with Cochran to do, they would doubtless have been liable in an action at suit of the vendor for all damages accruing to him by such their breach of contract, but that is a very different thing from the liability which is attempted to be imposed on them in the present action, which is simply in effect that a broker acting on change for a purchaser is bound to indemnify a vendor against all damage, in the event of his client after acceptance of a transfer of the shares on the books of the bank failing to discharge the obligations imposed upon him by his becoming transferee of the shares.

The Divisional Court of Queen's Bench in their judgment, which reverses the judgment of the learned trial judge whose judgment the Court of Appeal for Ontario have restored, proceeded, first, upon the misconstruction of the contract made on change between Cochran and Gzowski and Buchan, holding it to be similar to that in *Walker* v. *Bartlett*, 18 C.B. 845, which was a contract not made on change at all, or even between brokers, but between the actual owner and vendor of the shares and the actual real purchaser thereof for his own use and benefit, and holding further that the transfer in blank executed by Cochran is to be regarded as having been so executed for the mere convenience of Gzowski and Buchan in the sense that the blank transfer in *Walker* v. *Bartlett, supra,* which was shewn in evidence to have been so executed by the direction of, and solely for the convenience of the defendant, who was himself and for himself alone the actual purchaser of the shares. The court thus assumed that Gzowski and Buchan were the actual real purchasers and intended transferees of the shares on the bank books, thus

ignoring altogether the evidence in the case, and the usage and practice of brokers on the stock exchange, subject to which the brokers were contracting, as was well understood by them and as is explained and admitted by Mr. Cochran himself in his evidence. The court seems to have assumed that brokers practising on the Toronto Stock Exchange could not be governed in their transactions on change by any usage or practice not evidenced by written rules, but there is nothing to prevent persons contracting, wherever the contract may be entered into, namely, whether on change or elsewhere, from contracting in accordance with the usage of a particular trade, or with any well understood usage in relation to a particular matter. All transactions must be construed in accordance with the plain intention of the parties to the contract with relation to contracts on change. *Merry* v. *Nickals*, L.R. 7 H.L. 530, is a conclusive authority that they must be construed in accordance with the usage and practice of brokers, and that such usage may be evidenced partly by oral evidence, partly by written rules. As to the practice and usage of the Toronto Stock Exchange, as affecting the transactions in question here, there is no conflict of evidence. The contract entered into on change by Gzowski and Buchan as already shewn was not in relation to any particular shares, nor as to the shares of any particular vendors, but that they should pay for (which they did) thirty shares in the Central Bank to be transferred by Cochran to some persons or person to be nominated by Gzowski and Buchan, who should accept such transfer in the bank transfer book, and relieve the owner from, and indemnify him against, all the obligations imposed upon him as vendor and transferor of the shares. Now that *Walker* v. *Bartlett*, 18 C.B. 845, has no application to the present case is apparent from this, that there the defendant was the actual purchaser of the shares who had himself contracted for the purchase for his own sole use and benefit, but as it was necessary that as purchaser he should be entered as such upon the stock registry of the company whose shares he was purchasing, he requested that the vendor should deliver to him a

transfer in blank so that he might substitute the name of some other person as the transferee, and accordingly the vendor (at the purchaser's request and for his sole convenience, not for the purpose of doing anything which was part of the vendor's contract to do) delivered to the defendant a transfer in blank, and the defendant having failed to have the name of any other person inserted as transferee, and having thus suffered the vendor's name to remain on the stock registry list of the company, was held bound to indemnify the vendor from obligations to which he was subjected so long as his name appeared on that list. But in the present case Gzowski and Buchan never put themselves forward as the actual purchasers of the shares or any of them, nor was the transfer in blank executed by Cochran at their request, or in point of fact for their mere convenience, but in accordance with the well-known usage and practice of the bank in relation to the transfer of shares bought and sold on change from a vendor to the purchasing broker's client, and to enable such purchasing brokers to nominate their client the actual purchaser of the shares and the person to be inserted transferee thereof in the bank book, which they did, and he in the usual form accepted the transfer and the obligations incident thereto.

The Divisional Court also relied upon the case of *Kellock* v. *Enthoven* in the Exchequer Chamber, L.R. 9 Q.B. 241. That case also, as pointed out by the learned trial judge, has no application in the present case, for there, the person made liable to indemnify the plaintiff, the vendor, was a person to whom the shares had actually been transferred upon the stock registry and who, although he had sold and in like manner transferred the shares to another, was made liable to the vendors who had so transferred the shares to the defendant under sec. 38 of 25 & 26 Vict. ch. 89. In precise accordance with this judgment is sec. 77 of ch. 120, R.S.C., which alone imposes upon the persons therein mentioned who have ceased to be shareholders in a bank, the same liability as is imposed by sec. 70 upon the shareholders at the time of a bank becoming insolvent, as if the persons affected

by the sec. 77 "had not transferred their shares saving their recourse against those to whom they were transferred," but as Gzowski and Buchan never were, nor was either of them, such transferees or a transferee of any of the shares in question, this case of *Kellock* v. *Enthoven*, L.R. 9 Q.B. 24, is inapplicable in the present case.

Secondly, the Divisional Court proceeded upon the ground that in their opinion the double liability under sec. 77 of the ch. 120 is a liability inseparably attached to the shares themselves which are transferred precisely in the same manner as the liability to pay a mortgage upon real estate is attached to the assignment of the equity of redemption in the estate mortgaged and becomes imposed upon every assignee of such equity of redemption, but if this *ratio decidendi* should prevail, then first, the liability to indemnify a vendor of shares against the double liability which is imposed by sec. 77 of ch. 120, would pass to and upon the ultimate transferee of the shares "within the month preceding the commencement of the suspension of payments by the bank," which would be contrary to the express provision for recourse which, by the section, is reserved to the transferor against his transferee, which transferee must be the person to whom the transfer of shares is made under sec. 29 of the Act. And secondly, if the liability by sec. 77 is attached to the shares transferred in the same manner as the liability to discharge a mortgage upon an estate is attached to the assignment of the equity of redemption in the estate mortgaged then of necessity the identity of the shares to which such liability is attached must needs be unequivocally apparent on the instrument transferring them, but in the instrument executed by Cochran as a transfer which Henderson accepted there are no shares mentioned so as to be capable of identification by numbers or otherwise, as having been shares which Boultbee ever owned. How the bank determined what shares should be appropriated by them to Henderson as representing the shares which he had bought through Gzowski and Buchan as his brokers, we have no means of knowing, nor are we

now concerned to inquire, but what we do know from Cochran's own evidence is that *he* could not distinguish which of the thirty-five shares which he contracted with Gzowski and Buchan to sell belonged to Mr. Boultbee, for the reason that as he said, all those shares—not were his own property—but "probably were in his name." What he meant by this expression is not apparent, for there is proved to be in the share transfer book of the bank a paper purporting to be a transfer not of any particular shares capable of being identified by numbers or otherwise, but of "twenty shares," in the stock of the bank as from Boultbee to Cochran executed by Cochran himself as attorney for Boultbee to Cochran himself, and accepted by him and dated the 22nd October, 1887, the day on or about which Boultbee had given to Cochran a power of attorney to sell twenty shares for him. Of this instrument by way of transfer it is plain upon Boultbee's evidence that he was not aware when several days after having given the power of attorney to Cochran he received from Cochran the proceeds of the shares as sold for him by Cochran on change —a sum in excess, to Cochran's surprise, of the amount for which as he says he has sold the shares and had gotten for them. In fact Boultbee could have had no knowledge of this instrument purporting to be a transfer to Cochran until after the failure of the bank, for he says in his evidence that from the day of his receiving the proceeds of the sale of his shares on change for him by Cochran, he never heard anything in relation to the matter until after the failure of the bank, when as he says, discussions arose as to who were liable for the double liability. Then for the first time it would seem that he heard how the transaction had been carried out by Cochran, and then he took proceedings in the liquidation of the bank against Gzowski and Buchan, claiming that they, as purchasers of his shares, should indemnify him against his statutory liability. In that proceeding he failed, but now for the purpose of effecting what he then failed in, through the intervention of Cochran he adopts the document so executed by Cochran bearing date the 22nd October, 1887, as evi-

dencing a sale made by him to Cochran, while his own evidence and also Cochran's, plainly proves that no such sale ever took place; Cochran says in his evidence that in dealing with Gzowski and Buchan in respect of the thirty-five shares he was dealing as vendor's broker, and that he could not tell which of the thirty-five shares were Boultbee's for that all were probably in his own name, and he could not understand how he did such a foolish thing as to pay to Boultbee as the proceeds of the sale of his shares on change more than he had sold them for. His practice appears to have been that upon receiving from his client a power of attorney to sell shares for him he put them into his own name by permission of the bank authorities. By this mode of dealing with his client's property without his authority it is not strange that he should be unable to distinguish what shares were intended by a sale when the shares were not identified by numbers or otherwise. When he executed the blank transfer which Henderson accepted he may have had fifty or one hundred shares standing in his name, but all really belonging to different clients, or partly to clients and partly to himself as real owner; when then he transferred or executed an instrument purporting to transfer shares not identified by numbers or otherwise, it is natural that neither he or anyone else could say to what particular shares any such transfer related; what loss to his clients and what complications would be created by this mode of conducting the business by a broker, in respect of shares which he was authorized to sell for his clients and by this absence of identification of the shares sold by him and professed to be transferred by him, we are not concerned in the present case; all that is necessary for the present purpose is to shew that adopting the *ratio decidendi* upon which the Divisional Court proceeded, it is impossible for the plaintiff to succeed in the present action, for the *onus probandi* wholly lies upon him, and upon the evidence in the present case it is impossible upon this record judicially to say that any shares of which Boultbee had been the owner were ever transferred to any one by Cochran.

Then again, Cochran was not in the liquidation proceedings charged with any liability to the liquidators of the bank under sec. 77 of the Act, as a person who had been a shareholder within the month preceding the commencement of suspension, but who had transferred the shares before the suspension, so that his transferee does not seem to have been liable to any action for indemnity at his suit in virtue of the provisions of sec. 77. If his transferee could be liable in any action at his suit it must be independently of that section; and the liability is assumed to be of this nature—that Cochran's transferee by force of the transfer from him is under an implied obligation to indemnify him against an implied obligation which it is contended he lies under to Boultbee to indemnify him under sec. 77 as being the transferee from Boultbee of his shares. But as it appears in evidence that Boultbee never did in point of fact transfer any shares to Cochran a grave question would arise whether or not Cochran's irregular and unauthorized dealing with Boultbee's shares which he was authorized to sell and professed to have sold for him on change, created any liability to indemnify Boultbee under the provisions of sec. 77 against the obligation imposed upon him by that section or whether Cochran's liability to Boultbee would not in such case arise rather out of and by reason of his irregular dealing with Boultbee's shares; and in the latter case, whether or not his transferee, who had no knowledge that he was acquiring by a transfer from Cochran any shares in which Boultbee had any interest, would be under any obligation to indemnify Cochran in the interest of Boultbee against such his obligation to Boultbee. But it is unnecessary to consider these points further now, or to do more than suggest that these questions would seem to require more consideration than they have received if the case must needs be decided upon the *ratio decidendi* upon which the Divisional Court proceeded. But for the reasons first above given, I am clearly of opinion that the judgment of the learned trial judge and of the Court of Appeal for Ontario should be affirmed, and this appeal dismissed with costs.

SEDGEWICK, J.:—There is little or no dispute as to the facts of the case, and they are very simple. The appellant, Boultbee, prior to the 26th of October, 1887, was owner of twenty shares of the stock of the Central Bank of Canada, and he sold them to Robert Cochran, a stock broker, doing business in the Toronto Stock Exchange. On the 24th of October they were put up for sale by Cochran on the stock exchange and were purchased by a firm of stock brokers, Messrs. Gzowski and Buchan, according to the usual course of business on the exchange. Cochran sold as principal, and Gzowski and Buchan purchased for an undisclosed principal, one J. B. Henderson, who it would appear was neither then, nor has he been since, a person of any means. On the 26th of October the buyers paid Cochran for the shares so purchased, whereupon the latter went to the office of the bank and signed a transfer, leaving out of the body of the transfer the name of the transferee, but writing in the margin opposite the blank where the transferee's name under ordinary circumstances would be: "subject to the order of Gzowski & Buchan." Subsequently Gzowski went to the bank and wrote under the marginal note initialled by Cochran the words: "subject to the order of J. B. Henderson, G. & B.," and subsequently, on the 29th of October Henderson signed an acceptance of those shares, all of the documents so far as the present question is concerned, being as follows:

Subject to the order of Gzowski & Buchan. (Sgd.) R.C.

Subject to the order of J. B. Henderson. (Sgd.) G. & B.

For value received from.....I, R. Cochran, of Toronto, do hereby assign and transfer unto.....of.....twenty shares (on each of which has been paid.....dollars), amounting to the sum of two thousand dollars in the capital stock of the Central Bank of Canada, subject to the rules and regulations of the said bank.

Witness my hand at the said bank, this 26th day of October, one thousand eight hundred and eighty-seven.

(Sgd.) ROBERT COCHRAN.

Witness: (Sgd.) A. B. ORDE.

Within thirty days from the time that Boultbee made his transfer to Cochran and Cochran made the transfer just set out, the Central Bank of Canada went into liquidation, and Boultbee

was placed on the list of contributories and compelled to pay the liquidators of the bank $2,125 as double liability on his shares pursuant to the provisions of the Bank Act. He thereupon sued Cochran and obtained a judgment against him for the amount so paid to the liquidators. Cochran thereupon transferred his claim of indemnity against Gzowski & Buchan to Boultbee, and Boultbee brought this action as such assignee for the purpose of obtaining indemnity from the latter.

There is, as I have said, practically no dispute about the facts. The transaction on the boards of the Stock Exchange of the 24th of October was an ordinary transaction of the simplest kind, Cochran offering for sale the shares in question, Gzowski purchasing them at the price named and a memorandum being made of the transaction by an officer of the exchange. There was nothing more, nothing less than this; no special terms or conditions of any kind. There is not much doubt in ordinary cases as to the legal results of such a contract. They are (1) the duty on the part of the seller to deliver the stock; (2) the duty on the part of the buyer to take the stock when delivered, to pay for it and to accept it *cum onere*, that is to indemnify the seller against all the consequences of ownership. It is so laid down by Blackburn, J., in *Maxted* v. *Paine*, L.R. 6 Ex. 132, 151.

On the other hand the buyer would be bound not only to pay the price and to accept the benefits of ownership, but also to relieve the seller from all the burthens of ownership.

And in Lindley on Companies, 5 ed., p. 492 :

The obligation of the purchaser is to pay the price agreed upon and to accept a transfer of the shares and to indemnify the vendor from all liability in respect of them accruing after the purchaser has become their equitable owner.

And at p. 493:

The obligation of the purchaser to pay the price, accept the shares and indemnify the vendor against liability in respect of them, was recognized at law even before the Judicature Acts, and for a breach of such an obligation an action will lie.

There was not any denial at the argument of these elementary and fundamental propositions, but it was contended that under all the special circumstances connected with the transfer there must have been within the contemplation of the parties an intention to absolve the brokers, Gzowski and Buchan, not from responsibility to pay the purchase money, but to give them an immunity from double liability in respect of the shares under the provisions of the Bank Act.

The Toronto Stock Exchange is an ordinary incorporated association having certain rules and customs which all members of the association as between themselves are presumed to know, and upon the faith and understanding of which they are presumed to contract, but there is no express rule dealing with the subject of indemnity or with the respective rights of the buyer and the seller of shares upon the exchange, nor as far as I can see is there any evidence whatever of any custom or of any understanding as between the members of the exchange upon this question of indemnity. Special provision has been made for it in the rules of the London Stock Exchange, and every contract there made is of course made subject to those rules, but in Toronto a contract such as this was must be governed by the general provisions of the common law apart from any custom or convention varying that law.

The learned trial judge in dismissing the plaintiff's action, and the learned judges of the Court of Appeal in reversing the judgment of Divisional Court which had maintained his action, found in the transfer from Cochran above set out evidence that there must have been, within the contemplation of the parties at the time of the sale upon the Exchange, an intention in the minds of both parties that the buyer was not to be held responsible for any liability that might ever arise in respect of the shares purchased under the Bank Act.

The only substantial oral testimony, as far as I can see, affecting the question is the evidence of Cochran and it is as follows:—

Q. Do you recollect when it was that you gave this marginal transfer? A. It must have been the same day that I got paid by Gzowski and Buchan.

Q. Why didn't you give him an assignment, an actual transfer on the books? A. The ordinary way is simply to give the order.

Q. Why? A. So that they can give it to any one, or accept it themselves.

Q. It puts them in the position of enabling somebody else to accept it? A. Yes.

Q. And puts them in the position of not being acceptors of the stock? A. Yes, in the books.

Q. They do not become transferees of the stock on the books? A. No.

Q. It is to enable them to deal with it without becoming transferees? A. Yes.

HIS LORDSHIP: Can the witness help us in that? There is the document.

It seems to me this is evidence, not of any custom of the stock exchange, but of an irregular practice which the Central Bank of Toronto had permitted to grow up by allowing transfers to be made in this, what I would suppose to be an unusual and extraordinary fashion. But it does not suggest the idea that there was any intention that the common law rights of the parties arising from the simple contract when the shares were up for sale should in any way be altered. But looking at the transfer itself, it is not I take it in any sense a transfer in blank, as that phrase is generally understood. The name of the buyer was not set out in the space where ordinarily it is set out, but the buyer's name was indicated in the margin, and it was impossible for any other name to be filled up in the transfer than such as the seller might approve. No disposition could specially be made of the shares without the signature and transfer of the buyers, Messrs. Gzowski and Buchan, and the document is to be construed as an ordinary mercantile instrument like a delivery order

or a dock warrant for goods. The seller by placing the shares subject to the order and disposition of the buyer, enabling the buyer to do as he liked with them, ceased himself to have any possession or control in respect of them, and as between him and the buyer the latter cannot dispute that he is a legal owner and liable as such owner to all the consequences which his contract of purchase entails. It made no difference to Cochran whether Gzowski and Buchan were acting for themselves or for an unknown principal. The moment the contract of sale was made on the 24th, in my view Cochran possessed of all his rights as a seller, and Gzowski likewise become subject to all the obligations of a buyer, Cochran fulfilling his obligations by the transfer of the stock to the order of Gzowski, and that altogether independently of whether Gzowski ever formally indicated his acceptance of the stock upon the transfer books of the bank. There is no indication in the evidence that there was any intention that the common law obligations of the buyer should be split up, one of these remaining the personal obligation of the buyer himself, and the other the personal obligation of somebody of whom the seller knew nothing and never did know anything until long after the whole transaction had been completed. I venture to say with great submission, that the judgment of the court appealed from has made a contract for these parties which they themselves never dreamed of. Special terms and unusual conditions not within the contemplation of the parties, and not made by them, have been forced into it by giving a fallacious efficacy to the terms of the transfer which was not any part of the contract but simply giving effect to the contract so far as the seller was concerned. As stated in Lindley on Companies, pages 472-473:—

The equitable ownership of shares, agreed to be sold, depends on the contract of sale and not on the form of transfer . . . Consequently where there is a binding agreement for the sale and transfer of shares, it is comparatively immaterial, as between the buyer and seller, whether a transfer in blank has been executed or not.

I am clearly of opinion that Messrs. Gzowski & Buchan (the name of Mr. Buchan has been eliminated from the case by consent of parties) are as purchasers of these shares liable to indemnify the plaintiff in respect of them.

I do not deem it necessary to refer to the further points raised by the respondent as they were substantially disposed of at the argument. In my opinion the judgment appealed from should be reversed and the judgment of the Divisional Court restored, the whole with costs.

KING, J., concurred.

GIROUARD, J.:—The whole question seems to be: Was Gzowski a transferee of the Boultbee or Cochran shares or was he acting as a mere broker? It is admitted that brokers on the Toronto Stock Exchange, standing in this respect very differently from brokers in the London and European Exchanges, buy and sell on their own account. According to the custom of the Toronto Stock Exchange, all transactions must be "settled" not later than the following day, and on the Monday following if the sale be made on Friday, the exchange being closed on Saturday, a custom which seems to be reasonable. It is not proved what this settlement fully means; it certainly means the payment of the purchase money and the transfer of the shares by the vendor; but does it also comprise its acceptance by the client of the broker or the real purchaser? It is alleged that it is sufficient to accept and disclose his name within a reasonable time. I find no evidence of any custom to that effect, and to my mind the word "settlement" must mean everything that is necessary to complete the transaction, that is the payment of the purchase money, the transfer of the shares and its acceptance either by the broker or his principal, who must be disclosed not later than on the day of settlement, if the broker wishes to free himself from any personal responsibility. The committee of the Toronto Stock Exchange, who were called upon to report on this transaction at the request of Cochran, admit that the brokers are

bound to disclose their principals, but omit to mention when this should be done, although it is conceded it is never done at the board at the time of the sale. But in this instance, the disclosure was made on the transfer book of the bank three days after the day of settlement, and I easily understand why the committee would not decide whether, as a matter of fact, the two brokers, or even one of them, had acted as mere brokers or on their own account. In the absence of any custom to extend the time of the acceptance of the transfer, and consequently the disclosure of the real purchaser, beyond the day of settlement, I feel that I am bound to apply the ordinary principal of law, that a broker buying on a stock exchange, without disclosing his principal within the delay fixed by the regulations of the association, is personally responsible for the transaction, just as if he had acted on his personal account. It seems to me therefore that, as no transferee's name other than that of the buying broker, was mentioned on the day of settlement, the transaction was closed, "settled" on his behalf and for his own benefit and subject to all the burdens attached to the same.

Any other conclusion would lead to any amount of uncertainty which is not consistent with stock exchange operations. I am therefore of opinion that the appeal should be allowed, and the judgment of the Divisional Court restored with costs.

Appeal allowed with costs.

Boultbee & Boultbee, solicitors for the appellant.
Barwick, Aylesworth & Franks, solicitors for the respondent.

Notes:

A broker holds a fiduciary relation towards his client. He has no right, therefore, without his client's knowledge and consent to sell his own securities to the client or buy for himself the client's securities. Even if the client suffers no loss he can refuse to indemnify the broker or can repudiate the bargain: *Thompson* v. *Meade*, 7 T.L.R. 698.

It is immaterial that the dealings were at the market price of the securities and that the broker took no advantage of the client: *Rothschild* v. *Brookman*, 5 Bli. N.S. 165; 2 Dow & Cl. 188; 7 L.J. Ch. 163.

Where a broker instead of buying shares for his client as directed bought at one price for himself and then sold to the client his own shares at a profit; and instead of selling for the client, bought from the client and resold at a profit the whole of the transactions were set aside, and the broker was not allowed to recover an indemnity: *Stange* v. *Lovity*, 14 T.L.R. 468.

A contract should be interpreted in accordance with the intention of the parties thereto and the usage or custom of any particular trade, occupation, business or place when it is reasonable, uniform, well settled and not in opposition to fixed rules of law or in contravention to the express terms of a contract, is deemed to form a part of the contract and to enter into the intention of the parties: Dos Passos, 2nd ed., vol. 1, p. 220.

A person employing one who is notoriously a broker must be taken to authorize his acting in accordance with the rules of the Stock Exchange: *Sutton* v. *Tatham*, 10 Ad. & E. 27.

A broker, jobber, or other person who has made a bargain on the Stock Exchange, is bound when the time for completion arrives, to do one of two things: he may himself complete by delivering, or by taking delivery and paying; or he may provide some other person who is competent and willing to do so.

On the London exchange a seller has ten days in which to deliver, during which he may make inquiries as to the position of the transferee and can object to the name given: Schwabe and Branson, Law of the Stock Exchange (1905), p. 154.

If the name is accepted, no objection can be taken to it on the score of insufficient means: *Coles* v. *Brestowe*, 4 Ch. 3; *Maxtid* v. *Paine* (No. 2), L.R. 6 Ex. 132. But the jobber is not relieved of responsibility and the execution of a transfer and payment of the price, notwithstanding such acceptance, if it appears that the transferee was not competent and willing to contract, as where the transferee is an infant: *Nickalls* v. *Merry*, L.R. 7 H.L. 530; or a non-existent person or one who has not authorized the use of his name: *Maxtid* v. *Paine* (No. 1), L.R. 4 Ex. 81; or a corporation acting *ultra vires*: *Truor* v. *Whitworth*, 12 A.C. 409; *In re Barned's Banking Co.*, 3 Ch. 105; *Royal Bank of India's Case*, 4 Ch. 52.

The broker is, of course, in his relations with other members of the Stock Exchange, a principal, and as such is liable to them for any loss arising from the name of one incompetent or unwilling to contract being passed by him. And it has been held that a client who has sold can insist on his broker enforcing such claim against the buying broker, and can himself maintain an action against the buying broker: *Queensland Investment Co.* v. *O'Connell*, 12 T.L.R. 502.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

SMITH v. ROGERS ET AL.

Shares—Blank Transfer—Fraud—Usage of Stock Exchange—Bonâ fide Holder for Value—Validity.

The registered owner of shares in a company gave to her brokers for the purpose of selling the shares, the certificate of ownership upon the face of which the shares were stated to be transferable on the books of the company in person or by attorney upon surrender of the certificate and upon which was indorsed a transfer and power of attorney, signed by her, and having a blank left for the name of the transferee. The brokers improperly deposited the certificate as security for advances to them with a bank, who received it in the ordinary course of business without any notice of the owner's rights. There was evidence at the trial that, according to the usages of the stock exchanges of Ontario and Quebec, such a share certificate so endorsed passes from hand to hand and is recognized as entitling the holder to deal with the shares as owner and pass the property in them by delivery, or to fill in the blank with his own name and have the shares so registered on the books of the company:—

Held, that the bank was entitled to hold the shares as against the owner. *France* v. *Clark* (1884), 26 Ch. D. 257, distinguished.

THIS was an appeal from a judgment of FALCONBRIDGE, J., in an action brought by the owner of shares in certain incorporated companies against a firm of brokers, to whom she had intrusted the custody of her share certificates, and a bank to which the brokers had transferred the certificates as security for an advance to themselves.

The action was tried at the Ottawa Assizes on January 19th and 20th, 1898, before FALCONBRIDGE, J., without a jury.

Aylesworth, Q.C., and *G. M. Greene*, for the plaintiff.
O'Gara, Q.C., and *Wm. Wyld*, for Molsons Bank.

Judgment was given by consent against the defendants Rogers and Hubbell, the brokers, but was reserved as against the bank.

April 13th, 1898. FALCONBRIDGE, J.:—

I find as a fact that the plaintiff is mistaken when she denies the signature to the indorsement of the Montreal Street Railway certificate.

But the result of the recent English authorities is to establish the plaintiff's right to recover against the bank, and there will be judgment against the bank accordingly with costs.

Judgment against Rogers and Hubbell in terms of consent filed.

I refer to Lindley's Law of Companies, 5th ed., p. 475 *et seq.*; *France* v. *Clark* (1884), 26 Ch. D. 257; *Williams* v. *Colonial Bank* (1887), 36 Ch. D. 659, (illustrating the difference of the American law) *S. C.* (1888), 38 Ch. D. 388; *The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267; *Fox* v. *Martin* (1895), 64 L.J. Ch. 473; *The London & Canadian Loan & Agency Co.* v. *Duggan*, [1893] A.C. 506; *Société Générale De Paris* v. *Walker* (1885), 11 App. Cas., at p. 29; *Rumball* v. *The Metropolitan Bank* (1877), 2 Q.B.D. 194; *Lewis* v. *Clay* (1897), 14 Times L.R. 149.

From this judgment the defendants the Molsons Bank appealed, and the appeal was argued on the 9th of September, 1898, before a Divisional Court composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

Geo. F. Henderson, for the appeal. The plaintiff had signed the transfers indorsed on the back of the share certificates with the name of the transferee in blank, and had given an irrevocable power of attorney to fill in the name and had left the certificates with her brokers, Rogers and Hubbell. The evidence shews that by the custom of the stock exchanges in Ontario that entitles the holder of the certificates to pass the property in them by delivery, or to fill in his own name or that of any one else and have the shares registered in the books of the companies. The plaintiff, by her conduct in indorsing and leaving the certificates

with Rogers and Hubbell is estopped from denying their transferability: *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476. The plaintiff, *being the owner*, is bound by the act of her brokers, even although fraudulent as against her: *per* Lord Watson in *Colonial Bank* v. *Cady* (1890), 15 App. Cas., at p. 278. Most of the cases relied upon by the trial Judge are distinguishable from this because the custom was not proved as it was here. In *Fox* v. *Martin* (1895), 64 L.J. Ch. 473, there was no power of attorney. When the number of shares being pledged is small, as here, it would not raise suspicion as it might in cases where brokers pledge a large number of shares *en bloc*, the latter being probably the property of customers: *The London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201. The certificates are the evidence of title: *Société Générale De Paris* v. *Walker* (1885), 11 App. Cas., at p. 29. I refer also to *The London & Canadian Loan & Agency Co.* v. *Duggan*, [1893] A.C. 506; *Rumball* v. *The Metropolitan Bank* (1877), 2 Q.B.D. 194; *Hone* v. *Boyle, Low, Murray & Co.* (1891), 27 L.R. Ir. 137; *Waterhouse* v. *Bank of Ireland* (1892), 29 L.R. Ir. 384.

Aylesworth, Q.C., contra. The judgment is right and the plaintiff must succeed, as the law is correctly enunciated in *France* v. *Clark* (1884), 26 Ch. D. 257; and the cases decided subsequently do not turn on any custom. In *France* v. *Clark*, there was an absence of evidence of mercantile usage. In *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, usage or practice was not allowed to make or control the law. In *Williams* v. *Colonial Bank* (1887), first reported in 36 Ch. D. 659, notwithstanding the evidence at the trial, the Court of Appeal (1888), 38 Ch. D. 388, and House of Lords (1890), 15 App. Cas. 267, reversed the judgment in favour of the bank and it did not appear that if the owner had been alive the judgment would have been different. Although the plaintiff here did sign one transfer with instructions to sell when the stock arrived at a certain figure, she never intended to sign even a transfer of the other stock, and there was no authority to pledge the shares.

The words of the form of transfer gave no power to pledge, the words in the one case being "sell, assign and transfer," and in the other "sell, assign, transfer and make over." The purchaser acquires no better title than the vendor has unless the owner is estopped from denying the title: Lindley's Law of Companies, 5th ed., 475. A purchaser dealing with a broker who exceeds his authority and obtains a blank transfer from him obtains no better title than the broker is authorized to transfer: Lindley, 480. In *Waterhouse* v. *Bank of Ireland* (1892), 29 L.R. Ir. 384, the broker was authorized to obtain a loan. The evidence here shews the bank manager never knew these brokers to have any stock of their own up to the time they pledged the first certificate, and the second was taken by the bank as a security for an antecedent debt. The evidence of custom given was not of the custom of business men or of the business community, but of the bank only, which is not sufficient. Estoppel cannot arise, as the bank is secured by a guarantee and will not lose anything in any event. See also Buckley on Companies, 7th ed., 489.

Henderson, in reply. In *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, the greater equity prevailed.

January 7, 1899. MEREDITH, C.J.:—

The proper conclusion upon the evidence is, I think, that according to the usage of the stock exchanges in Ontario and Quebec and the course of dealing in or with shares such as those in question in this case, a share certificate indorsed with a transfer and power of attorney, signed by the person named in the certificate as the owner of the shares, having a blank left for the name of the transferee and attorney, passes from hand to hand and is recognized and treated as entitling the holder of the certificate, so indorsed, to deal with the shares as owner of them and to pass the property in them by delivery of the certificate, so indorsed, or to fill in the blanks with his own name and to cause the shares to be so registered on the books of the company.

The evidence upon this point was not very strong, but being uncontradicted was sufficient to justify this conclusion.

The question of law which arises on this state of facts is as to the right of the appellants, who received the certificates in question from the defendants Rogers and Hubbell in the ordinary course of business for value and without notice of the plaintiff's rights, to retain them against her, although the dealing with the certificates by the defendants Rogers and Hubbell, was, as between them and the plaintiff, an unauthorized dealing with and fraudulent appropriation to their own use of the plaintiff's property.

My brother Falconbridge, by whom the action was tried, decided apparently on the authority of *France* v. *Clark* (1884), 26 Ch. D. 257, that the appellants were not entitled to hold the certificates as against the plaintiff, and that they had acquired no title to them or to the shares, and gave judgment for the plaintiff accordingly.

Since the decision in *France* v. *Clark*, the question of the rights, as against the true owner, of a transferee who obtains the documents of title under such circumstances as exist in this case has been considered in several cases.

In *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D., at p. 44, Mr. Justice Chitty, referring to a practice similar to that which I have said is in this case proved to exist, says: "The plain legal effect of this recognized practice is, that the transferor who executes the transfer in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee; and each successive holder for the time being, when the documents pass through several hands, passes on this authority."

In *The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, the same question was under consideration by the House of Lords. The question to be decided was as to the right of two banks to hold as against the plaintiffs, the executors of one J. M. Williams, certain shares in the New York Central and Hudson River Railroad Company.

Williams, who was the registered owner of the shares had died, and the plaintiffs, who were his executors, desiring to have the shares transferred to their own names, sent the certificates to their London brokers for that purpose, having previously signed as executors blank transfers and powers of attorney which were endorsed upon them. The brokers in fraud of the executors delivered certain of the certificates to the Colonial Bank as security for advances, and certain others of them they pledged to the London Chartered Bank of Australia as security for a loan. The executors having discovered the frauds brought actions against the two banks to establish their title to the shares and to restrain the banks from dealing with the shares held by them respectively. A practice similar to that referred to by Mr. Justice Chitty prevailed with regard to the mode of dealing with the shares, and it was contended by the banks that having obtained the certificates in good faith and for value they were entitled to hold them as against the executors.

The House of Lords held, affirming the decision of the Court of Appeal (1888), 38 Ch. D. 388, that the title of the executors could be defeated only upon the principle of estoppel, and that there was no estoppel on the facts of that case, because the possession of the certificates, indorsed as they were, was consistent either with their having been entrusted to the brokers to sell, or with their having passed into their hands in order to have the names of the executors entered in the register of the shareholders as owners of the shares mentioned in the certificates; and that being so the banks were put upon inquiry as to which of these two purposes was that for which the brokers were entrusted with the certificates.

Lord Herschell and Lord Watson in their speeches expressed in clear and unambiguous language the opinion, that had the transfers been executed by Williams himself and the certificates sent by him to the brokers for safe custody, the brokers though acting fraudulently would have, nevertheless, been placed in a position to give a title to an honest purchaser which Williams

could not dispute. As put by Lord Watson on pp. 277, 278, delivery of the certificates with the transfer executed in blank by the registered owner passes, not the property of the shares, but a title, legal and equitable, which enables the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner; and again at p. 280, Lord Watson said, "When the registered shareholder executes the transfer indorsed on his certificate, he can have only one intelligible purpose in view, that of passing on his right to a transferee."

In *Hone* v. *Boyle, Low, Murray & Co.* (1891), 27 L.R. Ir. 137 & 151, the view expressed by Lord Herschell and Lord Watson, to which I have referred, was adopted and given effect to by the Court of Appeal in Ireland and it was recognized in *Waterhouse* v. *Bank of Ireland* (1892), 29 L.R. Ir. at p. 394, as a correct statement of the law.

Mr. Justice Kekewich, however, in *Fox* v. *Martin* (1895), 64 L.J.N.S. Ch. 473, declined to adopt this view of the law which he thought was inconsistent with *France* v. *Clark*.

It is, I think, not impossible to reconcile *France* v. *Clark*, with the opinions of Lord Herschell and Lord Watson in *Colonial Bank* v. *Cady*. In *France* v. *Clark*, there was no evidence of a mercantile usage to the effect that holders of certificates of the shares which were in question in that case, indorsed with blank transfers signed by the registered owners, were treated as having the right to transfer the shares mentioned in the documents, as if they were the owners of the shares, and not only was there no evidence of such an usage but, as the Lord Chancellor pointed out at p. 264, the inference was for the reasons which he mentions, rather, that no such usage could be shewn to exist. On the other hand, the basis on which the opinions of Lord Herschell and Lord Watson rested was, that in the case with which they were dealing such a mercantile usage or recognized practice, as Mr. Justice Chitty calls it (which I take to mean the same thing), was proved to exist.

However this may be, the weight of judicial opinion and the reason of the thing appear to me to justify us in holding that the law is, as it is stated by Lord Herschell and Lord Watson to be, and I am the more ready to so hold because the adoption of the opposite view would, in my judgment, seriously impede the rapid carrying on of a large branch of commercial business, to the successful carrying on of which in these modern days celerity of despatch in its transaction is essential.

The appeal should in my opinion be allowed with costs, and the action, as against the defendants the Molsons Bank, be dismissed with costs.

MACMAHON, J.:—

The plaintiff by a share-certificate, dated 31st January, 1895, became the owner of five shares of the stock of the Commercial Cable Company, of the par value of $100 per share, which is "transferable only on the books of the company in person, or by attorney duly authorized on the surrender of this certificate." On the back of the certificate there is a blank form of transfer of the shares mentioned in the certificate, and an irrevocable power of attorney to transfer the stock on the books of the company. This transfer and power of attorney which the plaintiff admits having executed, is dated the 28th April, 1897. The certificate with the transfer so endorsed in blank, the plaintiff states she left with the firm of Rogers and Hubbell, stockbrokers, at Ottawa, to sell the stock for her when it reached 175.

By a certificate dated 14th June, 1897, the plaintiff became the owner of ten shares of the stock of the Montreal Street Railway Company, of the value of $50 each, transferable on the books of the company in person or by attorney upon surrender of the certificate. There is endorsed on this stock certificate an assignment and transfer in blank, dated 18th June, 1897, which the trial Judge has I think properly found, as against her want of recollection of having signed it, that the plaintiff did sign it.

The plaintiff occasionally dealt in a small way in stocks, and prior to the transaction out of which the present litigation arose, was the owner of ten shares of Canadian Pacific Railway stock, which she had sold through Rogers and Hubbell, and had endorsed on the certificate a transfer of the C.P.R. shares somewhat similar to the transfers of the shares in question.

The defendant Rogers took very little part in the management of the brokerage business, which was almost exclusively conducted by Hubbell, in whom the plaintiff said she had confidence.

Hubbell, on the 11th May, 1897, procured from the defendants the Molsons Bank at Ottawa, where the firm of Rogers and Hubbell kept their account, a discount of the firm's note for $1,350, payable in one month, and as security for such discount gave the bank the certificate for the five shares of Commercial Cable stock endorsed in blank as already stated. In addition thereto the bank took from Rogers and Hubbell an independent assignment hypothecating these five shares of Commercial Cable stock, together with other shares of stock, as collateral security for the payment of the note so discounted, or any renewals, or part renewals, of the same, and also as collateral security for all other indebtedness of the firm to the bank. The assignment represents that these five shares of Commercial Cable are "in favour of Georgina Smith."

When Hubbell came to get this particular discount, he told Mr. Brodrick, the manager of the bank (according to the latter's evidence), that he owned the five shares of Commercial Cable, as well as the other shares of Commercial Cable standing in the name of one Nicholson.

On the 14th June, the day the $1,350 note matured, the bank debited Rogers and Hubbell's account with the amount, and on the following day an advance of $150 was made by the bank, and a note for $1,500, representing the $1,350 and the $150, was discounted and the proceeds placed to the credit of the firm. There was a further renewal of this note on the 17th July at one month,

and an endorsement appears thereon, dated August 3rd, 1897, crediting $351, being the proceeds of the two shares of Commercial Cable mentioned in the hypothecation sheet as standing in the name of V. C. Nicholson. Neither in June nor in July was there any further bargaining, nor any fresh assignment taken at the time either of the above renewals was given.

Mr. Brodrick's account of the transaction relating to the transfer of the shares of Montreal Street Railway stock is that two or three days prior to the 15th July, 1897, the firm of Rogers and Hubbell was allowed an overdraft of $1,000, and Hubbell left the certificate there as security for such overdraft; and on the 17th a note of Rogers and Hubbell for $1,000 was discounted and the proceeds placed to their credit; and an assignment of this railway stock was taken on the 17th July as collateral security, containing terms similar to those in the assignment of the Commercial Cable stock.

Hubbell absconded to the United States on the 19th July, and has, as far as known, never been in Canada since that date.

Judgment was entered by consent for the plaintiff against the defendants Rogers and Hubbell. Falconbridge, J., reserved judgment as to the issues raised by the defendants, the Molsons Bank, and he afterwards directed judgment to be entered for the plaintiff against the bank.

Daniels, in his work on Negotiable Instruments, 4th ed., designates such stock certificates as those in question here as *quasi* negotiable instruments, and says, section 1708 *g*: "Commercial corporations generally encourage the assignment of their shares, as their value is increased by the facility of transfer; and it is generally provided on the face of their certificates of stock by virtue of their charters, by-laws, or regulations, that the shares 'are transferable on the books of the company, in person or by attorney, on the surrender of this certificate.' And on the back of the certificates there is generally a printed form of sale and assignment, with an irrevocable power of attorney in blank, authorizing the unnamed person to do all things requisite to per-

fect the transfer on the books of the corporation. When such formal assignment, and power of attorney in blank, is signed by the shareholder, and the certificate is delivered therewith, an apparent ownership in the shares represented is created in the holder. And the general principle sustained by the great weight of authority, as well as of reason, is that when the owner of a certificate of stock with such a power of attorney in blank thereon written, or thereunto attached, entrusts it to an agent with power to deal therewith, a *bonâ fide* purchaser for value without notice will be protected in his acquisition of the certificate, although the agent to whom it has been entrusted has diverted it from the purposes for which it was put in his charge, or has been guilty of a fraud or breach of trust in reference thereto. This doctrine does not rest upon the idea that the certificate of stock is a negotiable instrument; but upon the equitable principle that where a person confers upon another all the *indicia* of ownership of property, with comprehensive and apparently unlimited powers in reference thereto, he is estopped to assert title as against a third person, who, acting in good faith, acquires it for value from the apparent owner."

The statement as to the law in the United States enunciated in the text, is fully borne out by the case in the Supreme Court of the State of New York, of *The Commercial Bank of Buffalo* v. *Kortright* (1839), 22 Wend. 348, and by the Supreme Court of Pennsylvania in *Wood's Appeal, Wood* v. *Smith* (1880), 92 Penn. 379, and in *Burton's Appeal* (1880), 93 Penn. 214, and in a number of other cases decided by Courts in other States of the Union, referred to in Mr. Daniels' work.

The mode of transfer of these stock certificates, with blank endorsements, is the same both in England and the United States. The usual method of transfer in England is thus stated by Chitty, J., in *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. at p. 44: "According to a practice which has extensively prevailed, and has been recognized and acted upon by the company, the transferor signs the transfer and power of attorney without fill-

ing in the names of the transferee and attorney; and these blank transfers readily pass on the market from hand to hand by delivery only until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are cancelled, the transferee is registered, and new certificates in his name are issued in the manner already described."

"The plain legal effect of this recognized practice is, that the transferor who executes the transfer in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee; and each successive holder for the time being, when the documents pass through several hands, passes on this authority. The holders must of course be *bonâ fide* holders for value without notice." See also the judgment of Lord Watson in *The Colonial Bank* v. *Cady* (1890), 15 App. Cas., at p. 277.

Therefore, once the owner of a share certificate signs a transfer and power of attorney in blank, the stock-certificate may pass from hand to hand through any number of transferees; so that having regard to such practice the designation given to them by Daniels of *quasi* negotiable instruments is not inappropriate. And accordingly in the United States such certificates with a transfer in blank, signed by the holder and given to his broker to be dealt with by him, although the latter be guilty of fraud in dealing with it, the doctrine of estoppel being invoked protects a *bonâ fide* purchaser or pledgee for value without notice of the fraud.

In England the estoppel created by the execution of such a blank transfer by the owner of stock has, in one instance, been described as a limited one. In the case already referred to, of *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D., at pp. 53, 54, Chitty, J., said: "Estoppels cannot be manufactured arbitrarily; no estoppel can be raised on a document inconsistent with the terms of the document itself. What, then, is the estoppel here?

Having regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee, and is estopped from denying such authority; and to this extent, and in this manner, but not further, is estopped from denying the title of such holder for the time being. By the delivery an inchoate legal title passes, but a title by unregistered transfer is not equivalent to what has been termed 'the legal estate' in the shares or to the complete dominion over them. Had the plaintiffs filled in their own names or the name of some nominee of their own in the blank transfers while in their possession, the case would have stood differently."

But Lord Watson in *The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, holds that the legal title passes under the circumstances stated by Chitty, J. He says, at pp. 277, 278: "The appellants' witnesses say that delivery of the certificates with the transfer executed in blank, 'passes the property' of the shares; but that statement must be accepted subject to the explanations by which it is qualified." . . . "It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, *but* a *title legal* and *equitable*, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner." And that was what was held by Sir George Jessel, M.R., in *In re Tahiti Cotton Co., Ex p. Sargent* (1874), L.R. 17 Eq. 273.

In *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, the circumstances were peculiar. The stock had been bought in August and October, 1883, for the defendant, by Thomas & Co., who received the certificates from the persons from whom the shares were bought. The defendant allowed Thomas & Co. to retain the

shares for the purposes of registration. In November, Thomas & Co., in fraud of the defendant, deposited the share certificates with the plaintiffs to secure the balance then due to them. The certificates had been executed by the person or firm in whose names the shares were registered as transferors; the name of the transferee and proposed attorney being in each case left in blank. On the 11th of December, Thomas & Co. obtained from the plaintiffs the certificates on the representation that they desired to send them for registration. When received, Thomas & Co. filled in the name of the defendant in the blank transfer forms, and the stock was registered in the books of the company in his name. Thomas & Co., when they handed the certificates to the company to be registered, obtained a receipt for the same, which they sent to the plaintiffs, which they retained until February, 1884, when, learning that a partner of Thomas & Co. had absconded, they sent to the agents of the company the receipt and obtained the new certificates which had been issued in defendant's name.

The plaintiffs claimed a declaration that the shares were theirs. But it was held that the defendant was the legal owner; the share certificates being in his name, and being delivered to the Colonial Bank in error, and that the defendant was entitled to have such new certificates delivered to him.

Mr. Justice Chitty puts the position of the plaintiffs and defendants respectively in regard to the certificates in this way, at p. 54:—

"Had the plaintiffs filled in their own names or the name of some nominee of their own in the blank transfers while in their possession, the case would have stood differently; the defendant would not have been registered as the holder of the shares. As it is, the plaintiffs never had a present absolute unconditional right to register. Their inchoate title was liable to be defeated, and has been defeated by the defendant acquiring in good faith for value a complete legal title by transfer filled in with his name as transferee and by registration."

It is hardly necessary to refer to *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476, and *Rumball* v. *The Metropolitan Bank* (1877), 2 Q.B.D. 194, which were cited during the argument, because in both of these cases the scrip certificates were held to be negotiable instruments.

In the *Goodwin* case the scrip was that of a foreign government, and it was admitted by the special case submitted for the opinion of the Court that, by the custom of all stock exchanges in Europe, they were negotiable instruments and passed by mere delivery to a *bonâ fide* holder for value, and as English law follows the custom, any person taking it in good faith obtained a title to it independent of the title of the person from whom he took it.

The decision in *Rumball* v. *The Metropolitan Bank* followed the judgment in *Goodwin* v. *Robarts*.

The decision in the case in hand must, therefore, turn on whether *France* v. *Clark* (1884), 26 Ch. D. 257, is still a binding authority, or whether it has not virtually been reversed by *The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267.

The head-note to *In re Tahiti Cotton Co., Ex p. Sargent* (1874), L.R. 17 Eq. 273, which sets out the facts sufficiently for our present purpose, states: —

"Where the owner of shares borrows money and deposits with the lender certificates of his shares, and also transfers thereof signed by him, but with the date and name of the transferee left blank, the lender has implied power to fill up the blanks, and the transfers will pass the legal interest if the articles of association do not require a deed; otherwise only an equitable interest."

That case was dissented from by the Court of Appeal in *France* v. *Clark* (1884), 26 Ch. D. 257, in which a summary of the facts and an epitome of the judgment of the Court delivered by Lord Chancellor Selborne is contained in the following paragraphs of the head-note: "France, the registered holder of shares in a company, deposited the certificates with Clark as

security for £150 and gave him a transfer signed by France, with the consideration, the date, and the name of the transferee left in blank. Clark deposited the certificates and the blank transfer with Quihampton as security for £250. Clark died insolvent, after which Quihampton filled in his own name as transferee, and sent in the transfer for registration. The shares were accordingly registered in Quihampton's name, but whether this was done before notice given by France to the company and to Quihampton that France denied the validity of the transfer, was doubtful on the evidence:—

"*Held*, affirming the decision of Fry, J., that Quihampton had no title against France except to the extent of what was due from France to Clark."

Lord Selborne, in effect, said: "A person who, without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument.

"If a debtor delivers to his creditor a blank transfer by way of security, that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract."

And the Lord Chancellor, referring to *In re Tahiti Cotton Co., Ex p. Sargent* (1874), L.R. 17 Eq. 273, said at p. 264:—

"The case of *Ex p. Sargent* was upon an application to rectify the register of a company by substituting the name of Sargent for that of Fry, who, being the registered owner of certain shares, had signed a transfer in blank to Cannon, by way of security; and Cannon had transferred it in the same state to Sargent, who afterwards filled in his own name. Sargent does not appear to have claimed to stand as more than a transferee, with a right to get in the legal title, of such interest as Cannon had when he handed over the documents, and the Master of the Rolls relied upon the power of every mortgagee 'to reborrow

and to transfer his security.' There were several communications between Fry and Sargent after the transfer, which may, perhaps, have been thought to amount to ratification; and the Master of the Rolls said that Mr. Fry's own counsel had admitted Sargent's equitable right to have the shares transferred to him, which admission, in his Lordship's judgment, covered the legal right also. If the case is to be thus explained, it is not an authority in point on the present occasion; if not, we should not be prepared to follow it."

In that case Cannon had filled up the blank transfer with his own name and sent it to the company for registration, but Fry, being the chairman of the board of directors, induced the company not to register the transfer. Sir George Jessel said, at p. 280 (L.R. 17 Eq.): "As I have already said, I hold there was authority to fill up the blanks over the signature of Mr. Fry, and therefore they were validly signed, and I think ought to have been registered." He, in effect, was holding that the legal title to the shares was in Cannon.

Williams v. *Colonial Bank* (1888), 38 Ch. D. 388, was before the House of Lords *sub nomine The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, the facts of which are set out with sufficient fullness in the head-note: "The registered owner of shares in a New York company held certificates which stated that the shares were held by him and were transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereof. The indorsement was in the form of a transfer for value received, blank in the names of the transferor and transferee, with a power of attorney in blank to carry out the transfer. On the death of the owner his executors obtained probate of his will, and in order that the shares might be registered in their own name, signed as executors the transfers on the back of each certificate, without filling up the blanks, and sent the certificates to their broker, who fraudulently deposited the certificates with a bank, which took them *bonâ fide* and without notice as security

for advances. The bank retained the certificates and took no steps to obtain registration. By the law of New York such a delivery of signed transfers by the registered owner of shares would estop him from setting up his title against a purchaser for value without notice. But neither on the New York nor on the London Stock Exchange are transfers so signed by executors treated as being in order, or received as sufficient security for advances, unless duly authenticated."

The House of Lords was unanimous in affirming the judgment of the Court of Appeal (1888), 38 Ch. D. 388, on the points decided by the Lords Justices, namely, that the particular documents in question were not negotiable instruments; and that the executors were not estopped by what they had done in signing the transfers in blank, nor by having left the documents with the brokers for a considerable time, from denying the title of the Colonial Bank: Lindley's Law of Companies, 5th ed., p. 482.

In that case the share certificates were in the name of the original owner of the stock, J. M. Williams, while the transfers endorsed on the certificates were signed by the executors and without being duly authenticated by a consul were "not in order" for registration in the books of the company, and, therefore, business men would not take them without enquiry. The defect existing in the documents was one which should have put the Colonial Bank on enquiry before accepting the certificates.

Lord Chancellor Halsbury in his judgment at p. 272, said: "It is admitted that the shares (or to speak more accurately the share certificates) are not negotiable instruments, and the executors being informed that in order to get themselves registered in the books of the company they must sign their names at the end of the document acted upon that assurance, and, as I have said, entrusted the possession of the share certificates (never intending to part with the property in them) to Blakeway. Blakeway was a stock broker in London, and the transaction of loan took place in London; but the shares in question are shares in a corporation established in New York and subject to the laws of that State."

Lord Watson's observations, coupled with those of Lord Herschell, from whose judgment I shall presently quote, are of the utmost import in dealing with the case in hand. Lord Watson says, at p. 277: "In so far as the law of America is concerned, your Lordships have the aid of three experts, two of whom were examined by the appellants and one by the respondents. As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect, from those by which an English Court would be guided in similar circumstances. When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour."

And again at pp. 278, 279, he says: "Whether the respondents are estopped from saying that Blakeway had not their authority to dispose of the certificates in question is, in my opinion, the sole question presented for decision in these appeals. Had the transfers been executed by John Michael Williams, and the certificates thereafter sent by him to Thomas, Sons & Co. for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute. But that is not the case with which we have to deal. The transfer was signed by the respondents, who were not the registered owners of the shares and were not named in the certificate. Whatever may be the effect of an instrument so executed, one thing is clear, that it cannot be regarded

as, either in law or by custom, equivalent to a certificate and transfer executed by the registered owner himself."

And, at p. 280: "When the registered shareholder executes the transfer indorsed on his certificate, he can have only one intelligible purpose in view, that of passing on his right to a transferee. It is not so in the case of an executor, whose only title to the shares is by legal assignment to the interest of the defunct."

Lord Herschell says, p. 285: "The evidence of the American lawyers, however, makes it equally clear that such certificates of shares are not in the United States, any more than in England, negotiable instruments. The mere delivery of them with the indorsed blank transfer and power of attorney signed, irrespective of any act or intent on the part of the owner of the shares, is not of itself sufficient to pass the title to them. If delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice for the purpose. But if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them. If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value. And this doctrine has been held by the Court of Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed to him by a broker who fraudulently or in excess of his authority sells or pledges them. The banks or other persons taking them for value, without notice, have been declared entitled to hold them as against the owner.

"As at present advised, I do not see any difference between the law of the State of New York and the law of England in this respect. If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I

should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them. But this is not the case with which your Lordships have to deal. The transfers in this case were not signed by the registered owner, John Michael Williams, but by his executors. If they had been so signed and delivered by the executors for the purpose of effecting a transfer, I see no reason to doubt that such a delivery would have been effectual for that purpose. But they were not."

. . . . . .

"The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer. But when the indorsement is signed by executors who are not the registered owners, there can be no such presumption. They may well have signed it merely to complete their title without the intention of ever parting with the shares."

In *Fox* v. *Martin* (1895), 64 L.J.N.S. Ch. 473, the plaintiff, the registered owner of shares in a limited company, instructed a broker to sell the same, and for that purpose delivered to him the share certificate and a blank transfer signed by the plaintiff. The broker improperly deposited the blank transfer and certificate with the defendant as security for his own debt. The defendant afterwards filled up the blank transfer with the date, consideration, and name of transferee, and sent it for registration to the office of the company, where it lay for more than a fortnight without being registered. The plaintiff brought his action to restrain registration and establish his right to the shares.

Kekewich, J., held, following *France* v. *Clark* (1895), 26 Ch. D. 257, that the defendant had acquired no title to the shares as against the plaintiff; and assigned as a reason for not follow-

ing *The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, that although these were expressions of opinion by the Lords inconsistent with *France* v. *Clark*, he considered that case as not being expressly overruled by it.

According to *France* v. *Clark* (1895), 26 Ch. D. 257, and *Fox* v. *Martin* (1895), 64 L.T.N.S. Ch. 473, where any owner of a share certificate executes a transfer in blank and hands it to his broker, the fact that such transfer is in blank affects an intending purchaser or pledgee with notice and puts him on enquiry as to the extent of the broker's authority.

France v. *Clark* was referred to by the appellants in *The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, and although it is not expressly mentioned in any of the judgments of the Lords, it is impossible that it should not have been considered. For it must not be lost sight of that these opinions of Lords Watson and Herschell were expressed, although when the case then being considered was before the Court of Appeal, Lords Justices Cotton and Lindley, had delivered opinions in consonance with that of Lord Chancellor Selborne in *France* v. *Clark*, and the judgments of Lords Watson and Herschell deal with the very point upon which the decision in *France* v. *Clark* hinged; and what they enunciate as being the law is the very converse of that laid down in *France* v. *Clark* and *Fox* v. *Martin*. For as already pointed out, Lord Watson says, at p. 278: "Had the transfers been executed by John Michael Williams, and the certificates thereafter sent by him to Thomas, Sons & Co. for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute." And Lord Herschell, at p. 285, said: "If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them."

In *France* v. *Clark* and *Fox* v. *Martin*, according to Lords Watson and Herschell, the transferees of the share certificates in each of those cases would have a title by estoppel, and that is what was held by Sir George Jessel, M.R., in *In re Tahiti Cotton Co., Ex p. Sargent* (1874), L.R. 17 Eq. 273, the judgment in which was dissented from in *France* v. *Clark*.

The above short excerpts from the judgments of Lords Watson and Herschell, in *The Colonial Bank* v. *Cady*, are referred to in the judgment of North, J., in *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch., at p. 144, as illustrating what he regards as the settled law for his guidance in dealing with the case then before him for decision. And these extracts also appear in the judgment of FitzGibbon, L.J., in the Court of Appeal, Ireland, in *Hone* v. *Boyle* (1891), 27 L.R. Ir., at p. 171, who follows the opinions expressed therein, saying at p. 169 of his judgment, "The so-called 'estoppel' is the equitable effect of leaving a person in the possession of the symbols of property, or of the *indicia* of rights affecting property; and these certificates, as between mesne holders, are the absolute *indicia* of an uncontrolled right and power of obtaining a transfer of the shares which they represent." And Barry, L.J., in the same case puts the question for consideration concisely at pp. 175, 176: "The question here is not whether these certificates are 'negotiable,' but whether their delivery to a *bonâ fide* taker for value (like the defendant here), does not confer upon such taker a right to retain them against the registered proprietor, or any person claiming through him. Now, for a long time there has prevailed on the Stock Exchange, not alone of America, but of England, and, I believe, of other European countries, a usage of passing such certificates by delivery from hand to hand in sale or pledge; and it is laid down by the highest authority that where a certificate of such shares as we are dealing with is duly delivered in the form and manner prescribed by the usage, the endorsed transfer having been executed by the registered owner in blank, such delivery will confer on the deliveree for value and without notice, not

the property in the shares, but a right to have his name entered by the company on the register of shareholders, and thus constitute himself the legal owner of the shares; and as a necessary consequence such holder of the certificate is entitled to retain it against any person claiming title from the registered owner."

So also in *Waterhouse* v. *Bank of Ireland* (1892), 29 L.R. Ir., Chatterton, V.C., at p. 394, refers to these opinions of Lords Watson and Herschell, and recognizes them as authorities by which he is bound.

I do not think we are concerned with *Earl of Sheffield* v. *The London Joint Stock Bank* (1888), 13 App. Cas. 333, because the facts disclosed in that case shewed that the banks in dealing with one Mozley, a money-lender, either actually knew, or had reason to believe, that the securities deposited with the banks as security for large running accounts might not belong to Mozley but to his customers.

There was great misapprehension as to the effect of the decision in that case, and Lord Chancellor Halsbury, who took part in the judgment of the House, explained its effect in *London Joint Stock Bank* v. *Simmons*, [1892] A.C., at p. 211, where he says: "The inferences derived from the business carried on by the the money-lender in *Lord Sheffield's* case, were peculiar to that case, and have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities. The deposit of securities as 'cover' in a broker's business is as well-known a course of dealing as anything can possibly be, and the phrase that they are deposited *en bloc* seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know, that the banker could reasonably be expected to presume that they belonged to different customers, and that the limit of the broker's authority was applied to each individual security by his own client. It would, therefore, to my mind, be as totally different

from the facts proved or inferred in *Lord Sheffield's* case as anything could well be.

"I do not think that in that case any countenance was given to the notion that because Mozley, the money-lender, was assumed to be the agent for the owners of the property, that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt. To lay down as a broad proposition that in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in *Lord Sheffield's* case could justify so novel an idea."

Rogers and Hubbell were reputable stock-brokers. Hubbell possessed the confidence of the plaintiff, otherwise it is not reasonable to suppose she would have executed transfers of these stock certificates in blank and entrusted him with them.

According to the plaintiff's statement she signed the transfer on the Commercial Cable certificate, and delivered it to Hubbell with the intention of parting with her property in it. And Falconbridge, J., has found that she signed the transfer of the Montreal Street Railway shares, and, as said by Lord Watson, "When a registered share-holder does that he can have only one intelligible purpose in view, that of passing on his right to a transferee:" p. 280, 15 App. Cas. And that is the effect of what is said by Lord Herschell in the above short extract from his judgment.

Some observations of FitzGibbon, L.J., in *Hone* v. *Boyle* (1891), 27 L. R. Ir., are so apposite as to the dealings between Rogers and Hubbell and the Molsons Bank in this case, and by which the latter acquired the stock certificates, that I extract them. He said (p. 166): "There is no illegality nor startling improbability in a stock-broker's being possessed of securities of his own. But further, not only is there no improbability in a stock-broker's being authorized to pledge securities for his customers, but there is a body of proof that such transactions are of every-day occurrence; and the House of Lords, in *Lord*

Sheffield's case has treated it as 'part of the ordinary course of a banker's business' to make advances to money-lenders on pledge of the securities of individuals to whom the pledgers are to lend in turn. A large department of banking business must cease if the mere fact that the holder of securities is a broker puts the banker upon inquiry, or subjects him to the burden of proving the broker's authority to pledge. At best this 'putting on inquiry' is only a half-hearted conclusion. If the question, 'Are these shares yours?' or, 'Have you authority to pledge them?' were held to suffice, the answer 'Yes' would add little or nothing to the representation *ipso facto* made by the request for the advance, and the offer to deposit the securities." See also the judgment of Lord Chancellor Halsbury in *The London Joint Stock Bank* v. *Simmons*, [1892] A. C., at p. 211.

Hubbell, without any inquiry being made as to the ownership of the Commercial Cable stock, represented to Mr. Brodrick that he had purchased it. In a bank's dealings with a broker who is obtaining an advance on a deposit of securities, where the registered owner of stock signs a transfer and power of attorney in blank and hands it to a reputable stock-broker, what is there in such a transaction to put a banker on enquiry? From whom would he enquire? and what would be the form of the enquiry? The enquiry would be made from the person pledging the securities, and as to one of the securities the bank had Hubbell's statement that he was the owner. If enquiry was necessary and had been made as to the other, we may well infer that the representation as to that would have been the same.

The only evidence as to custom was that given by Mr. Brodrick, furnished by his experience as a banker. And where we have the universal custom detailed as to the mode of transfer of such securities both in England and the United States, in *Colonial Bank* v. *Hepworth*, 36 Ch. D. 53, and *The Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, which accords with Mr. Brodrick's evidence, we may conclude that the custom in Canada does not differ with that of bankers in Great Britain and the

United States. In *The Colonial Bank* v. *Cady*, five officials of London banks were examined by the appellants as to the custom by banks in dealing with transfers of such certificates.

I have not considered the question as to the effect of the bank having taken a separate assignment from Hubbell by hypothecating the certificates when the advances were made, as I consider on the authorities the bank is entitled to retain the shares as against the plaintiff. But one observation may be made as to the hypothecation sheet pledging the Commercial Cable stock. It pledged two shares of the same stock standing in the name of V. C. Nicholson, which had been purchased by Rogers and Hubbell, and which the bank sold on the 3rd of August, three months after it had been pledged.

The appeal will, therefore, be allowed with costs, and judgment directed to be entered for the defendants the Molsons Bank, dismissing the action as against it with costs.

ROSE, J.:—

The opinions of the other members of the Court are so full that I content myself with expressing my concurrence in the result reached by them, that the appeal must be allowed.

Notes:

NEGOTIABILITY.

The extent to which documents of title to securities which pass by delivery are negotiable instruments depends apart from statute upon the form of the documents and custom prevailing in dealings in them. Where the form of the instrument is such that it can be sued upon by the possessor of it for the time being in his own name and not in the name of his transferor and where at the same time the instrument is by the custom of trade transferable, like cash, by delivery, the instrument is a negotiable instrument, and passes a good title to the property secured thereby to anyone taking it in good faith and for value notwithstanding any defect in the title of the transferor. Where either of these conditions is absent the instrument is not a negotiable instrument.

Schwabe and Branson, Law of the Stock Exchange, p. 37; *Glyn* v. *Baker*, 13 Sast 509; *Gorgier* v. *Milville*, 3 B. & C. 45. Their form may, however, be such that no custom can render them negotiable. *London and County Banking Company* v. *London and River Plate Bank*, 20 Q.B.D. 232; 21 Q.B.D. 535. And conversely the form will not in itself render them negotiable if the custom is absent. *Lang* v. *Emyth*, 7 Bing. 284.

The law does not lay upon a purchaser any obligation to enquire into the title of the person in possession of such securities. If there is anything calculated to arouse suspicion the case would be different. The existence of such suspicion or doubt would be inconsistent with good faith. And if no enquiry were made the purchaser would be held to be wanting in good faith. *London and Joint Stock Bank* v. *Simmons*, [1892] A.C. 207. *Sheffield* v. *London Joint Stock Bank*, 333. And see *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q.B. 658; *Edlestein* v. *Schuler*, [1902] 2 K.B. 144, where negligence on the part of the transferee to detect his transferor's bad title cannot be pleaded as a defence to an action by the transferee. *Venables* v. *Baring*, [1892] 3 ch. 527.

FOLLOWING SHARES.

Where a broker has wrongfully hypothecated the stock of his client, the client can follow the same and compel the delivery of the stock to himself by paying the amount due. However, when a broker hypothecates his client's stock, the one to whom he does so is a *bona fide* holder in two cases:—

"(1) Where no hypothecation has been authorized by the client but the broker is apparently the owner of the stock and the pledgee has no notice that actually he is not such owner.

"(2) Where the power to hypothecate for the general purpose of the broker's business is expressly or impliedly given": Dos Passos, 2nd ed., vol. 1, p. 276; *Fox* v. *Martin*, 64 L.J. Ch. 473.. See, however, *Smith* v. *Rogers* (*supra*), which seems to treat *Fox* v. *Martin* as practically overruled.

[IN THE PRIVY COUNCIL.]

FORGET v. OSTIGNY.

Client and Broker—Alleged Gambling Transactions—Civil Code (Quebec) Art. 1927.

Art. 1927 of the Civil Code of Quebec does not differ substantially from 8 & 9 Vict. ch. 109, sec. 18, and renders null and void all contracts by way of gaming and wagering.

A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment but speculation:—

Held, that these was not gaming contracts within the meaning of the Code.

Appeal from a decree of the Court of Queen's Bench (Sept. 27, 1893) affirming a decree of the Superior Court of Montreal (Dec. 19, 1891).

The facts are stated in the judgment of their Lordships.

The Superior Court regarded the issue as being whether the appellant was seeking to recover money claimed under a gaming contract; and decided it in the affirmative. It found as facts (1) that the respondent had never had the intention of taking delivery, but merely to speculate on the rise and to settle according to the variation of prices; (2) that the appellant could not have been ignorant of the circumstances of the respondent, and that he encouraged the speculations of the respondent by not fixing any date for the delivery of the shares; (3) that each transaction between the appellant and the respondent was nothing else but a bet upon the rise of the shares in question, the appellant undertaking to pay to the respondent the difference of prices if they rose, and the respondent undertaking to pay to the appellant the difference of prices if they fell; (4) that under these circumstances the purchase of shares by the appellant had no other effect than to shield himself against the rise of price expected by the respondent.

The Court of Queen's Bench (dissentiente Hall, J.) affirmed this decision. It held that the respondent was bound to prove that the money claimed by the appellant was exigible under a

gaming contract or a bet; and further, that the Superior Court had not incorrectly appreciated the evidence.

Fullarton, Q.C., and *English Harrison*, for the appellant, contended that he was entitled to the full amount claimed. They referred to art. 1927 of the Civil Code of Quebec; to 8 and 9 Vict. ch. 109, and to the Dominion Act (51 Vict. ch. 42), which was passed after the date of the transactions in this case. They contended that the evidence shewed that actual purchases and sales of shares were in every case effected by the appellant pursuant to the respondent's instructions; that there was actual transfer or delivery of shares bought or sold in every case; that the appellant did not gain nor stand to gain anything, and did not lose nor stand to lose anything, by the rise or fall in the price of the shares. The appellant in fact charged a fixed commission, and there was no evidence that his transactions with the respondent were by way of gaming and wagering. The evidence precluded that view, and even as between the appellant and third parties the transactions were real. Reference was made to *Thacker* v. *Hardy*, 4 Q.B.D. 685; *Carlill* v. *Carbolic Smoke Ball Company*, [1892] 2 Q.B. 484, 491; *Bridger* v. *Savage*, 15 Q.B.D. 363; *Read* v. *Anderson*, 13 Q.B.D. 779.

Alexander Young, for the respondent, contended that the judgments below were right. The effect of the evidence was to discharge the respondent of the onus imposed upon him of shewing that the transactions were gaming contracts or bets. An action brought to recover money claimed thereunder was precluded by art. 1927 of the Civil Code of Lower Canada. Further, the appellant's claim, if not forbidden by art. 1927, was barred by prescription, all the transactions, except one in 1886, having taken place more than five years before action brought. The effect of the transaction in 1886 was not to interrupt prescription, having regard to art. 2227. It did not amount to a renunciation of the benefit of lapse of time or to an acknowledgment of the plaintiff's right within the meaning of that article.

Fullarton, Q.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—The appellant is a member of the Montreal Stock Exchange. The action which has given rise to this appeal was brought to recover a sum of $1,926.87, the balance alleged to be due from the respondent in respect of certain contracts entered into by the appellant on his behalf and by his directions for the purchase and sale of shares in various joint stock companies. The respondent pleaded, first, that the claim was prescribed by lapse of time; and, secondly, that the transactions which gave rise to it were gambling transactions on the rise and fall of shares, and that therefore the action could not be maintained.

In view of this latter defence it is necessary to state the facts with some particularity. The transactions between the parties commenced with the purchase by the appellant in December, 1882, of twenty-five shares of the Montreal Street Railway Company. Additional shares were subsequently purchased in the same undertaking. Purchases were also made of the shares of other companies. The price paid for the shares purchased was debited to the respondent by the appellant with ¼ per cent. commission added. The shares so purchased were sold from time to time, and the proceeds were credited to the respondent less a commission of ¼ per cent.

It is not in dispute that all these transactions were entered into at the instance and on behalf of the respondent. When a purchase of shares was to be made he furnished the appellant with a small portion of the purchase-money which would be required: thus in the case of the first transaction to which allusion has been made he paid $62.50. In every case delivery of the shares was obtained by the appellant from the member of the Stock Exchange from whom he purchased, and the shares were duly paid for. The money necessary for this purpose beyond that supplied by the respondent was raised by the appel-

lant by means of loans from a bank, the shares serving as security. The loans needed for the respondent's transactions were not always raised specifically upon the shares purchased for him. The appellant acted as broker for many clients, and the advances which were required for the purpose of completing contracts entered into on their behalf were raised by hypothecating to a bank their several securities and obtaining the advance of a lump sum.

When the shares purchased for the respondent were sold they were redeemed from the bank and delivered to the purchaser. In respect of the advances obtained from the bank, the appellant charged the respondent 1 per cent. more than the interest for which he had made himself liable to the bank. If between the time of the purchase and that of the sale of particular shares dividends were paid upon them, these dividends were credited to the respondent.

It should be added, as reliance is placed upon the fact, that the respondent was a bank clerk with a salary of $900 to $1,000 a year.

It is conceded that the only law prevailing in Canada upon which the respondent can rely for the purpose of establishing that the appellant is not entitled to recover the sum claimed is art. 1927 of the Civil Code of Lower Canada. It is in these terms:—

"There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet."

In order, therefore, to sustain his defence it was incumbent on the respondent to shew that the money sought to be recovered was claimed under a gaming contract or a bet. The learned judge who tried the case, and, on appeal, the Court of Queen's Bench for Lower Canada (Hall, J., dissenting), thought he had made this out—hence the present appeal.

The defence turning upon the question whether the claim is founded upon a gaming contract, it is essential to ascertain the exact nature of the obligation relied on by the appellant. Unless

there was a gaming cantract between the parties to this action, so that the appellant, in order to make good his claim must rely on such a contract, the defence obviously fails.

What, then, was the nature of the contract between these parties?

The appellant was employed by the respondent as his mandatory or agent to make certain contracts of purchase and sale on his behalf. The contracts made, which were unquestionably within the authority given by the respondent, were certainly not gaming contracts as between the parties to them. They were real transactions: the shares purchased and sold were in every case delivered, and the price of them paid or received, as the case might be. All this is not in dispute. The appellant having entered into these contracts as agent for the respondent, the latter was *primâ facie* bound to indemnify the former against any liability incurred in respect to them. He was, on the other hand, exclusively entitled to the benefit of them. If the shares purchased increased in value the result was a gain to the respondent and did not involve any loss to the appellant. If, on the other hand, the shares decreased in value, while the respondent sustained a loss no gain resulted to the appellant. In neither contingency, therefore, did the respondent's gain involve a loss to the appellant. His remuneration was in any event a fixed commission of ¼ per cent. It would be, of course, an abuse of language to apply the term "bet" to such a transaction. Their Lordships cannot think that it is any more legitimate to speak of it as a gaming contract between the appellant and the respondent.

In the courts below much stress was laid on the fact that the respondent was known to the appellant to be a bank clerk with a small salary and possessed of little other means. This was regarded as bringing home to him the knowledge that the respondent had in view not investment but gambling. The other circumstances mainly relied on were that the respondent never asked for nor received delivery of any of the shares purchased;

that the purchase-money was raised by a loan procured by the appellant; that the respondent was not in a position to furnish the whole of the purchase-money, and, in fact, only provided the appellant with a small margin.

It may well be that the appellant was aware that in directing a purchase to be made the respondent did not intend to keep the shares purchased, but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as "gambling on the Stock Exchange"; but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its resale. Such dealings are of every-day occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint-stock company. Nor, again, do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This, also, is an every-day commercial transaction. For example, a merchant who has to pay the price of a cargo purchased before he resells it obtains in ordinary course the means of doing so by pledging the bill of lading.

Much stress was laid on the fact that the respondent never asked for delivery for any of the shares purchased, and that the appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract.

In the Act passed by the Dominion Parliament in 1888 (51 Vict. ch. 42) with a view of putting down what were then known as "bucket shops," it is provided (sec. 1) that: "Every one who . . . with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, . . . or of any goods, wares or merchandise makes . . . any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery; and every one who acts, aids or abets in the making or signing of any such contract or agreement is guilty of a misdemeanour."

A proviso was, however, added in the following terms: "but the foregoing provisions shall not apply to cases where the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase-money or any part thereof."

Their Lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that, where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.

In the present case, the respondent might at any time on tendering the balance due in respect of any of the shares purchased have required the appellant to deliver them to him. As has been pointed out, he received the dividends upon them, and any increase in their value enured exclusively for his benefit, whilst if there were a diminution of value the loss was exclusively his.

It is unnecessary to inquire whether, in pledging the securities of his clients for a lump sum to raise the moneys which he was authorized by them to raise instead of obtaining separate loans

on their several securities, the appellant was acting within the authority conferred upon him, for it does not seem to their Lordships to have a material bearing upon the question whether the contract sued on was a gaming one.

The decisions in the English Courts are of course not authorities upon the construction of the article of the Canadian Code. But the words of the English statute relating to gambling contracts (8 & 9 Vict. ch. 109) do not differ substantially from those found in the Code. That statute renders null and void all contracts by way of gaming and wagering. The English authorities may, therefore, be referred to as throwing light on the question what constitutes a gaming contract.

The case of *Thacker* v. *Hardy*, 4 Q.B.D. 685, in the Court of Appeal in England, was very similar to that under consideration. The plaintiff was a broker who purchased and sold stocks and shares on the Stock Exchange for the defendant by his authority. He sued the defendant for commission and for an indemnity in respect of certain contracts into which he had entered pursuant to the defendant's instructions. The defence was founded upon 8 & 9 Vict. ch. 109, sec. 18.

Lindley, J., held, and his judgment was affirmed by the Court of Appeal, that the plaintiff was entitled to recover.

Bramwell, L.J., said:—"The bargains made by the plaintiff upon behalf of the defendant were what they purported to be; they gave the jobber a right to call upon the broker or the principal to take the stock, and they gave the broker the right to call upon the jobber to deliver it," 4 Q.B.D. at p. 690.

He further said:—"I will assume that that was the nature of the bargain between the parties, and that by its terms the principal would be entitled to call on the broker to resell the stock, so that, instead of taking and paying for it, the principal would have to pay only the differences. In my opinion that bargain does not infringe the provisions of 8 & 9 Vict. ch. 109, which was directed against gaming and wagering; for the principal might take the stock which has been bought for him, and hold it as an investment," 4 Q.B.D. at p. 691; A.C. 1895.

He points out, too, that there is no gaming and wagering in a transaction of the kind now in question. The passage is as follows: "The broker has no interest in the stock, and it does not matter to him whether the market rises or falls; but when a transaction comes within the statute against gaming and wagering, the result of it does affect both parties. In the case before us, the broker does not wager at all."

Cotton, L.J., laid down what in his view was of the essence of a gaming contract in these terms: "The essenee of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way, A. will lose, but if it turns out the other way he will win. But that is not the state of facts here. The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of gaming and wagering was absent from the contract entered into between the parties," 4 Q.B.D. at p. 695.

Even where a person is employed to enter into gambling contracts upon commission, it has been held by the Courts of this country that, if he makes payments in pursuance of such employment, he can recover such payments from his principal; that the implied contract of indemnity is not, in such a case, in itself a gaming or wagering contract, and is therefore not null and void. The intervention of the legislature was considered necessary in order to invalidate such contracts, and by the Gaming Act, 1892, any promise, express or implied, to pay any person any sum of money paid by him in respect of a contract rendered null and void by 8 & 9 Vict. ch. 109, or to pay any sum by way of commission or reward for any services in relation thereto, is rendered null and void.

With regard to the plea of prescription, the facts stand thus. After the transactions which gave rise to the debit balance against the respondent were closed, he, in October, 1885, sent to

the appellant $100 as margin for the purchase of ten shares in the Bank of Montreal. He received notice in February, 1886, that these shares had been sold at a profit at $150, and he acquiesced in this sum as well as the $100 which he had sent in the previous October being placed to the credit of his general account. The learned judge who tried the case came to the conclusion that under these circumstances the plea of prescription could not prevail. This view was concurred in by the Court of Queen's Bench, and their Lordships see no reason to differ from the decision thus arrived at.

For the reasons which have been given, their Lordships think that the judgments of the Courts below ought to be reversed, and that judgment should be entered for the appellant for the sum claimed, with costs in both the Courts below.

As regards the costs of this appeal, inasmuch as the appellant was allowed to prosecute it, notwithstanding the small amount at stake, upon the ground that it involved a question of wide general interest, especially to those following the appellant's calling, their Lordships think that the appellant should, under the peculiar circumstances, bear the costs of the appeal on both sides.

They will humbly advise Her Majesty in accordance with the opinion they have expressed.

Budd, Johnsons & Jecks, solicitors for appellant.
Simpson & Co., solicitors for respondent.

Note:

GAMING.

For a contract to be a gaming and wagering contract there must not only be no intention on the part of either party to deliver, or take delivery of the commodities, but also no obligation on either to do so; there must be an agreement or understanding that all the buyer has to do is to receive from or pay to the seller the difference between the price of the bargain and the price at some future date. *Thacker* v. *Hardy*, 4 Q.B.D., p. 695.

Option dealings, made in the ordinary course on the Stock Exchange are not gaming and wagering contracts. But if it

were found that there was a tacit understanding that the bargains should not be enforced, but that differences only be payable, they would be void. *Buitenlandische Bankvereeniging* v. *Hildesheim*, 19 T.L.R. 640.

Frequent attempts have been made to enable brokers to carry on an illicit business and yet be able to sue for the enforcement of their contracts. For a time this was accomplished by contracts purporting to be for ordinary sales and purchases and specifying that actual delivery might be demanded. However, since the case of *Universal Stock Exchange* v. *Strachan*, the law is that notwithstanding the ostensible terms in writing the Court will examine to see if there is a secret understanding that the stock should not be delivered or called for. If there is found to be such a secret understanding the contract is void: *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166. In re Gieve, [1899] 1 Q.B. 794.

[IN THE COURT OF SPECIAL SESSIONS OF QUEBEC.]

Present: His Honour Judge Choquet.

Queen v. Louis Dowd.

Criminal Law—Gaming in Stocks and Merchandise—Criminal Code of Canada, section 201, *paragraphs* (*a*) *and* (*b*).

Held, A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under section 201, paragraphs (*a*) and (*b*), of the Criminal Code of Canada, nor as accessory under section 61.

Montreal, March 30, 1899.

Per Curiam:—The accused is charged with having on the 9th of September last, at the city of Montreal, acted, aided and abetted with a person at present unknown, with the intent to make gain or profit by the rise and fall in the price of stocks, goods, wares or merchandise, made or signed, or authorized to be made or signed, a contract or agreement, oral or written, purporting to be for the sale or purchase of one thousand bushels of wheat in respect of which no delivery was made or received, and without the *bonâ fide* intention to make or receive such delivery; and that for three weeks preceding the 15th September last, at the said city of Montreal, the said Louis Dowd did act, aid and abet with persons at present unknown, with the intent to make gain or profit by the rise and fall in the price of stocks, wares, goods or merchandise, make, sign or authorize to be made or signed contracts or agreements oral or written purporting to be for the sale or purchase of shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased was made or received, and without the *bonâ fide* intention to make or receive such delivery.

The preliminary hearing took place before Mr. Lafontaine, J.P., and the accused was committed to stand his trial before the Court of Queen's Bench on the above charge. The accused having made option to have his trial under the Speedy Trials Act, I have to decide if he is guilty or not.

The offence mentioned in sec. 201, paragraphs *a* and *b* of the Criminal Code, requires three essential elements: (1) having an intent to make gain or profit; (2) making or signing contracts purporting to be for the sale or purchase of certain commodities; (3) absence of a *bonâ fide* intention to make or receive delivery of such commodities. These three elements must co-exist in order to constitute an offence under the provisions of that section.

The evidence adduced before me shews that the contract in question was entered into by the accused acting as a broker for two parties, a buyer and seller. He was correspondent for an American firm, the Municipal Telegraph and Stock Company of Albany, and he placed orders received by him with them, and it was immaterial to him whether this company who accepted his orders were actually contracting parties as principals or merely brokers like himself, but having special facilities for dealing in Chicago and New York. The accused had no interest beyond his commission, which remained the same no matter what fluctuations occurred in the market value of the commodities being dealt in. His customer here paid him a cash deposit to guarantee him against loss, and to pay his commission in advance. He was not interested in the event in any way.

The main element of the offence, that is to say the intention to make gain or profit by the rise or fall in price, is not proven. On the contrary, it is shewn conclusively, in my opinion, that no gain was contemplated by him as the result of any prospective fluctuation in price. The only interest of the accused is shewn to have been his commission based on the par value of the commodity dealt in, a fixed and determined sum.

It has been contended on the part of the prosecution that the accused is in any event liable as an accessory, under article 61 of the Criminal Code. There is nothing in the record to shew that the Municipal Telegraph and Stock Company were acting as principals, or were in any way interested in the result of the speculation entered into by the informant, and even supposing such proof existed, Mr. Dowd is not shewn to have had any guilty knowledge of such intention on the part of either of the contracting parties by whom he was employed. The *mens rea* is lacking; nor does there appear to have been such an identity of interest between him and the Municipal Telegraph and Stock Company as to lead to a presumption of such guilty knowledge as to render him liable for aiding and abetting.

The accused is accordingly acquitted.

McCoun & England, for the complainant.
Rielle & Bond, and *J. L. Perron*, for the accused.

Notes:

See *Note* to *Forget* v. *Ostigny*, *supra*.

[IN THE PRIVY COUNCIL.]

FORGET AND ANOTHER v. BAXTER.

Stockbroking Transactions—Civil Code (Quebec) art. 1233—Authority to Stockbrokers is on Stock Exchange Terms.

In an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases of shares for private speculation on his account:—

Held, 1, that these transactions were "commercial matters" within art. 1233, Civil Code, which the plaintiffs might prove by oral evidence.

The defendant in giving authority to the plaintiffs to do business on the Stock Exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the Stock Exchange, and, therefore, to have authorized the sale of his shares on failure to supply them with the requisite funds.

APPEAL from a decree of the Court of Queen's Bench (April 28, 1898) affirming a decree of the Court of Review at Montreal (Nov. 6, 1897), which had reversed a decree of the Superior Court, Montreal (March 18, 1897), whereby the respondent had been adjudged to pay $7,491.88 to the appellants with interest and costs.

The facts of the case are set out in the judgment of their Lordships. It will been seen therein that the appellants' case was that they had entered into various stock transactions for the respondent, of which some disclosed profits in the respondent's favour and others, namely, those in Atchison Railway shares and Canada Cotton shares, shewed a loss; and that they sued to recover the balance.

Upon the issues it lay upon the appellants to prove the receipt of orders from the respondent for the purchase or sale of each stock mentioned in their statement, and the actual purchase or sale by them on behalf of the respondent in accordance with such orders.

Before Pelletier, J., in the Superior Court, Mr. Forget, one of the appellants, was called as a witness to prove verbal orders from the respondent. It was objected that the question was il-

legal; "and an attempt to prove by verbal testimony the purchase or sale of merchandise or stock involving a sum exceeding fifty dollars without a commencement de preuve par écrit and without any evidence of delivery in writing."

The judge ruled that the appellant might prove by his own testimony and by verbal evidence the whole of the transactions mentioned in the account. He gave judgment for the appellants, holding that the transactions had been proved, for that parol evidence in support of appellants was admissible, as the respondent had supplied a commencement of proof in writing by admitting that he had for several years dealt with the appellants as his stockbrokers for the purpose of similar transactions.

The Court of Review held that this admission did not constitute a commencement of proof in writing sufficient to let in verbal testimony. The Court of Queen's Bench affirmed this judgment.

Blake, Q.C., and *Horace Archambault* (Attorney-General for Quebec), for the appellants, contended that the respondent's authorization to the appellants to buy and sell on his behalf the stocks in question and the purchase and sale thereof by the appellants pursuant to such authority were commercial matters within the meaning of art. 1233 of the Civil Code of Quebec, and were provable by oral testimony. Art. 1235 of the Civil Code, sub-s. 4, does not apply, for the shares in question are not "goods" within its meaning. The relations also between the appellants and respondent were not those of seller and buyer, but of principal and agent. Even under that subsection, the respondent's acceptance and receipt of the shares are provable by oral testimony. If a commencement of proof in writing is required, it is to be found in respondent's admissions involved in the receipt of contract notes as to the relationship between him and the appellants, and in his admission that the appellants paid him money on September 22, 1891, on account of stock transactions. So also were

other admissions made by the respondent as to other payments made to him by the appellants; and also an offer of settlement made by him. Also admissions that he signed and delivered to the appellants promissory notes mentioned in the declaration. This is sufficient commencement of proof in writing to let in oral evidence of purchase and sale by appellants as stockbrokers on respondent's behalf of shares bought and sold before such payments and the making and delivery of such notes. Reference was made to 9 De Lorimier's Civil Code, art. 1233, p. 537.

McMaster, Q.C., and *Goldstein*, for the respondent, contended that the rulings of Pelletier, J., gave carte blanche to the respondent to prove by his own testimony and by verbal evidence the whole of the transactions mentioned in the account. This was illegal, as there was no commencement of proof in writing. There were no orders in writing from the respondent. It was illegal that they ever existed. The respondent denied their existence. The appellants, who alleged that they had rendered contract notes and statements of accounts to the respondent either by mail or messenger, did not either serve the respondent with a subpœna duces tecum or his solicitors with a notice to produce them or any other documents of a like nature. As regards the argument on the other side that they were entitled to recover on the respondent's admissions, (1.) said to be contained in the receipt of contract notes and statements without protest, (2.) in his giving or promissory notes and making payments on account, and (3.) in his making an offer of settlement, it fails on each ground. As to (1.) there was no proof that they were received; (2.) the promissory notes were given without reference to any particular transactions: they were signed for the appellants at their request without explanation or any consideration and for their convenience; they could not be construed into an acknowledgment of an account not closed or a waiver of a right to proof of the transactions charged; (3.) no writing was produced in support of an alleged offer of settlement, nor was there any acceptance. Under these circumstances the appellants

have failed to make any legal and sufficient proof of the transactions set forth in their account of any indebtedness of the respondent to them. Moreover, the appellants ought not to have effected any sales of the respondent's shares without his authorization, or without putting him in default to receive them. The appellants as pledgees should have followed the procedure prescribed by arts. 1971 and 1972 of the Civil Code, instead of selling at their own option and when they liked.

Blake, Q.C., replied.

The judgment of their Lordships was delivered by

Sir Henry Strong. The appeal is from a judgment of the Court of Queen's Bench in the Province of Quebec affirming a judgment of the Court of Review which reversed a judgment of the Superior Court in an action brought by the appellants against the respondent. The action was instituted to recover the sum of $7,491.88 alleged to be due to the appellants, who are stockbrokers in Montreal, by the respondent in respect of certain stock transactions in which the respondent had employed the appellants as his brokers to buy and sell shares in certain railway and joint stock companies in Canada and the United States. The respondent pleaded several defences, by some of which he denied the allegations of the appellants in their declaration. By another plea the respondent set up the defence that the transactions in question were gaming contracts, and as such illegal under art. 1927 of the Civil Code of Quebec. This defence, however, failed, and was not insisted upon either in the Court of Queen's Bench or on the present appeal.

The particulars of the appellants' demand are stated in an account produced as an exhibit in the action. It is a summary of twenty-two detailed statements of transactions in the purchase and sale of shares alleged to have been carried out by the appellants on account of the respondent between June 1, 1891, and October 3, 1894. Three only of these transactions

have been made the subject of controversy on this appeal. On September 22, 1891, the appellants purchased on behalf of the respondent 100 shares of the stock of the Atchison Topeka and Santa Fé Railway Company, which were sold on October 3, 1894, at a loss of $4,125 and interest. Another hundred shares of the same railway stock were bought September 25, 1891, and in the first instance debited to an account "in trust" which the appellants had opened with the respondent distinct from his personal account. These shares were, on September 14, 1892, transferred by the respondent's directors to the personal account, and on October 3, 1894, were sold at a loss of $4,034.55 and interest. One hundred shares of the stock of the Canada Cotton Company, sold by the appellants for the respondent on December 8, 1891, and a like number of shares bought on December 28, 29, and 31, 1891, and January 5, 1892, at a resulting loss of $1,150, form the third disputed item in the account.

Mr. Rodolphe Forget, one of the appellants, was the principal witness on their behalf. He proved the mandate from the respondent to make the sales and purchases in question, that expressed authority was given for each separate transaction, that in every case the shares were actually purchased and the scrip delivered, and that, so soon as a transaction was completed, bought and sold notes, in which the terms of the purchase or sale were fully set forth, were made out, signed by the appellants, and, after press copies had been made in a book kept by them for that purpose, at once forwarded to the respondent.

The same witness also deposed that on September 15, 1892, there being then the 100 shares of Atchison Stock included in the "trust" account, the respondent ordered these shares to be transferred to his personal account and charged accordingly, which was done. The witness also stated that on December 13, 1893, and February 16, 1894, after all transactions of purchase and sale, except the sales in October, 1894, had been closed, th respondent gave the appellants on account of his liability to them four promissory notes dated October 10, 1893,

November 4, 1893, December 13, 1893, and February 16, 1894, for the several amounts of $1,200, $1,200, $1,100, $1,100 respectively, and that the two latest of these notes, which were given in renewal of the earlier ones, remained at the date of the action in the appellants' hands unpaid, and were never discounted or made use of by them. Further, it is shewn by the accounts, which are proved in detail by Rodolphe Forget, that at various times, from February 3, 1892, to November 4, 1893, cash payments were made by the respondent to the appellants. These payments, as well as the promissory notes, can only have been on account of the transactions now in dispute. For if those transactions were thrown out of the account the respondent would have been creditor, not debtor, of the appellants. The witness also stated that after the sale of the 200 shares of Atchison stock, the respondent, upon being told on the same day that the appellants had sold it, expressed no disapproval, but on the contrary said, "I will pay you the balance." It is also proved by the same witness that since the last account was rendered to him on September 12, 1895, the respondent "a good many times" acknowledged his indebtedness to the appellants and promised to pay it, that on the last occasion of his doing so he came to the appellants' office and wanted them to accept a settlement of $1,000 every three months; and generally the witness stated that the respondent never complained that his instructions had not been followed, but that he was always satisfied. In conclusion, Mr. R. Forget swore that, after having taken communication of the Exhibit 1, he persisted in saying that the account was correct, and that there was due by the respondent $7,491.88, the balance there shewn.

The evidence of the appellants' book-keeper confirmed that already stated so far as it related to the delivery to the respondent of the bought and sold notes, and of the general statement of accounts.

The appellants also called the brokers in Montreal, from whom they had purchased the Canadian shares included in the

account, and who proved the correctness of these transactions, and also a member of the firm of Lounsbery & Co., of New York, the brokers through whom they had purchased the American shares included in the statement on account of the respondent. This witness in particular proved the purchase of the Atchison Railway shares in September, 1891, and verified an extract from the books of his firm which was put in as evidence by consent.

Pelletier, J., before whom the cause was heard in first instance, gave judgment for the appellants, holding that the transactions between the parties were "operations of commerce," that there was a sufficient commencement of proof in writing, and that therefore the oral evidence verifying the details of the account and proving the admissions of the respondent was good legal proof. This judgment was reversed by the Court of Review, one Judge (Davidson, J.) dissenting to this extent, that he thought the appellants were entitled to recover $2,200, the amount of the current promissory notes. An appeal from this latter judgment was dismissed by the Court of Queen's Bench, Blanchet, J., dissenting: except as to the lot of 100 Atchison shares bought in September, 1891, he thinking the evidence insufficient to prove that these shares were bought by the appellants on behalf of the respondent.

The points argued on the hearing of the appeal before their Lordships may be classed under two distinct heads. The first question was whether oral evidence could be admitted, and the second whether, if properly admitted, it was sufficient to prove the appellants' demand. Art. 1233 of the Civil Code of the Province of Quebec is as follows:—

"Proof may be made by testimony (1.) of all facts concerning commercial matters."

"(6.) In cases in which the proof in writing has been lost by unforeseen accident or is in the possession of the adverse party or of a third person without collusion of the party claiming and cannot be produced; (7.) In cases in which there is a

commencement of proof in writing. In all other matters proof must be made by writing or by the oath of the adverse party."

The admissibility of a party to an action to give evidence on his own behalf depended at the time the enquête in this cause was taken on the Provincial Act, 54 Vict. c. 45, the second section of which enacts as follows:—

"The following clauses are added to art. 251 of the Code of Civil Procedure, 'Any party to a suit may give testimony in his own behalf in every matter of a commercial nature and in such case be examined, cross-examined and treated as any other witness. He may also be subpœnaed and treated as a witness by the opposite party and in such latter case his answers may be used as a commencement of proof in writing. The default by a party to tender his own evidence cannot be construed against him.' "

The onus was upon the appellants to prove, first, a mandate from the respondent to act for him in the several transactions which they claim to have carried out on his behalf; and, secondly, the due execution of that mandate. It appears to their Lordships that they have discharged this onus. If it be necessary to shew commencement of proof in writing so as to satisfy paragraph (7.) of art. 1233, that is to be found in the deposition of the respondent, in which, when called on behalf of the appellants, he admits that the appellants were stockbrokers, and that he employed them as his agents to transact his business; that they bought and sold "something" for him, and that he gave them instructions to do "something" for him on the markets in New York, Montreal, and other places. This is sufficient as a commencement of proof to entitle the appellants to shew by oral evidence, or to use the language of the code by testimony, what the particular transactions were which the respondent commissioned the appellants to carry out on his behalf. But there is a broader ground for admitting proof by testimony in this case, namely, that the transactions in question are commercial matters within the provision contained

in paragraph 1 of art. 1233. Neither in this nor in any other article of the code is there to be found any definition of the meaning of the term "commercial matters." It cannot be doubted that the business carried on by the appellants as stockbrokers was of a commercial nature, nor that the purchases and sales of shares by the appellants for the behoof of the respondent in the ordinary course of that business were operations of commerce. It does not appear to their Lordships that the fact that the respondent was not himself a dealer trading in shares, but that his object in buying and selling through the agency of the appellants was that of private speculation only, in any way detracts from the commercial character of these transactions as regards the appellants. Unless such a construction is adopted, very great inconvenience, if not actual obstruction, must result in the despatch of business according to the methods in general use, for it must be often impossible to obtain the strict literal proof required in ordinary civil matters. Their Lordships are, therefore, of opinion that the execution by the appellants of the respondent's commissions constituted "commercial matters" within art. 1233 which it was open to them to prove by oral evidence.

For the same reason, namely, the commercial character of these transactions, Mr. Rodolphe Forget was a competent witness for the appellants under s. 2 of the Act 54 Vict. c. 45.

That the evidence was sufficient to establish a primâ facie case their Lordships can have no doubt. The learned Judge before whom the witnesses were examined accepted and acted upon their testimony, and there is no ground for supposing that they were not in all respects trustworthy. As regards the three transactions in question, authority to purchase the Canada Cotton Company's shares is proved beyond doubt.

Some questions have been raised as to the two purchases of 100 shares each of the Atchison Railway stock. One of these purchases is entered in the account as having been made on September 22, 1891. Rodolphe Forget says that on

September 21, 1891, the appellants were ordered by the respondent to purchase these shares, which they did through their New York brokers, Lounsbery & Co. Mr. Lounsbery, one of the firm who was examined as a witness for the appellants, produced an extract from the books of his firm, which shews that there was a purchase for the appellants' account of 100 shares of this stock on September 18 at the same price as that charged in the appellants' account. Some difficulty has been raised upon this discrepancy in dates. Even if the case had depended altogether as to this item on the evidence of the witnesses Forget and Lounsbery, their Lordships do not think this inconsistency in the dates would create any serious difficulty. It is clear that one and only one lot of 100 Atchison shares was purchesed by the appellants through Lounsbery & Co., in September, 1891, at the price of 46⅜. This was ascribed to the respondent at the same price, according to the notice given by the appellants on September 22. The explanation given in paragraph 28 of the appellants' case is a possible one; but, whatever may be the true explanation, it is possible to doubt that as between the appellants and the respondent the latter had ordered 100 shares to be bought before September 22, and became entitled to these shares on September 22, and was justly debited with the price. Even if the difficulty were more substantial, it would be countervailed by the accounts delivered to and never disputed by the respondent, and his payments and other admissions of liability. The item relating to the 100 shares charged as having been transferred from the trust account to the respondent's personal account on September 15, 1892, has also been objected to as insufficiently proved. Mr. R. Forget deposes that the account in this respect is correct; that on the date in question the appellants held 100 Atchison shares in the respondent's trust account, which on that day, "per his order," were transferred to the personal account. By this he plainly means that these shares, with the amount due in respect of the price paid for

them and the commission, were simply transferred from one account to the other. This, without further particulars, was amply sufficient as primâ facie proof.

Then there is very full evidence of the respondent's admissions that the account Exhibit No. 1, comprising a detailed statement of all the transactions and bringing down the balance to September 25, 1895, was correct. Mr. Forget says the respondent admitted its correctness "a good many times," and that after all the Atchison shares had been sold he promised to pay the balance. It is also in proof that after receiving the account shewing the balance claimed the respondent went to the appellants' office and proposed a settlement by the payment of $1,000 every three months. Further, the giving of the promissory notes and the payment of the two sums of $100, though of an earlier date than the rendering of the account of September 25, 1895, were all on account of the balance due by the respondent, which was due only by introducing into it these disputed transactions. In their Lordships' view these admissions proved by a witness who was considered worthy of credit by the Judge in whose presence he was examined were amply sufficient to make out a primâ facie case which was not in any way displaced by the respondent. It was contended on behalf of the respondent that secondary evidence of the bought and sold notes, and of the final account delivered to the respondent, was not admissible inasmuch as no notice to produce was given. This objection does not seem to have been made at the trial, when, if it was sustainable, the omissions might have been remedied, and their Lordships are of opinion that it cannot be maintained, not only for that reason, but also for the reason that art. 1233, paragraph 6, authorizes the reception of oral proof in cases where the written proof is "in the possession of the adverse party" without adding any requirement of a notice to produce or a subpœna duces tecum in such a case. It was asserted by counsel for the appellants in answer to the objection, that it was not the practice in the Quebec Courts to give

such notices, and, as no text of either the Civil Code or the Code of Procedure establishing such a procedure could be referred to nor any authority produced upon the point, their Lordships are of opinion that they cannot give effect to such an objection derived from the practice of the English Courts not shewn to be applicable in the Province of Quebec.

The objection based on the sale of the 200 Atchison shares which were sold by the appellants on October 3, 1894, and the proceeds carried to the respondent's credit in account entirely fails.

It is not suggested that the shares have at any time afterwards commanded a higher price, or that the respondent has suffered loss in any way by the sale. The absence of right to sell can only be made of avail to the respondent by treating the sale as a departure from and a destruction of the contract in toto, thereby relieving the respondent from his liability to pay the purchase-money. What has been argued at the bar is that the appellants were pledgees of the shares, and could only make them available for their debt by following the procedure prescribed by arts. 1971, 1972 of the Civil Code. The answer of the appellants is that the respondent has employed them as brokers to operate on the Stock Exchanges, and that the rules of the Exhanges are imported into the contracts, and that one such rule is that if the employer fails to supply his brokers with the requisite funds they may sell the shares purchased for him and reimburse themselves. That is the view taken by the dissentient Judge, Blanchet, J.

The same learned Judge adds that the appellants could not have been in the position of pledgees, because at the time of the purchases they were not creditors, but debtors, of the respondent. That view was not examined during the argument, and the decision may be more safely rested on the wider ground.

It is true, as observed by the learned Judges of the Court of Review and by Ouimet, J., in the Queen's Bench, that no

special usage of the Stock Exchange of New York was alleged in the pleadings or proved in evidence. But that the practice is as stated by the appellants seems to have been taken as undisputed. Ouimet, J., himself states it, and treats it as having no legal effect unless specially imported into the contract betweent employer and broker. Their Lordships think it a sounder principle to hold that when one employs a broker to do business on a Stock Exchange he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the Stock Exchange.

Any doubt which might arise from the circumstance that the practice of the New York Stock Exchange was not put in issue is removed by the respondent's own mode of treating the sale. Rodolphe Forget states first in chief and afterwards in cross-examination what happened. The appellants asked the respondent for money many times; they kept a man running to his office nearly every day for it; failing to get it, they sold the shares and advised him the same day; he was pleased, and said, "I will pay you the balance."

The respondent gave evidence afterwards, and took no notice of Forget's statement, which stands uncontradicted. The inference must be that the respondent knew that the appellants had acted within the terms of their employment.

Their Lordships will humbly advise Her Majesty to reverse the judgments of the Courts of Queen's Bench and the Court of Review with costs in both Courts, and to restore the judgment pronounced by Pelletier, J., in the Superior Court.

The respondent must pay the costs of this appeal.

Rowcliffes, Rawle & Co., solicitors for respondent.

S. V. Blake, solicitor for appellants.

Notes:

The general law in respect of wagering contracts has been summed up in Dos Passos, 2nd edition, Vol. I, page 645, as follows: —

1. Where a contract is made for the delivery or acceptance of securities at a future day at a price named and neither party at

the time of the making of the contract intends to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract is void either by virtue of statute or as contrary to public policy.

2. That in each transaction, the law looks primarily at the intention of the parties, which intention is a matter of fact for the jury to determine.

3. That the form of the transaction is conclusive and oral evidence may be given of the surrounding circumstances and conditions of the parties to shew their intention, and that a contract purporting on its face to be a contract to sell, is a mere gambling device, although the contract is in writing under seal.

4. That option contracts, viz., "puts," "calls" and "straddles" are not *primâ facie* gambling contracts.

5. To make a contract a gambling transaction both parties must concur in the illegal intent.

6. The defence of wagering must be affirmatively pleaded and the burden of proof is upon the parties asserting the same.

7. In construing a contract that construction is to be preferred which will support it rather than one which will avoid it.

8. A broker who makes contracts with third persons in behalf of his client with the understanding between the client and the broker that the former shall never be called upon to pay or recover more than differences, can recover the amount paid out for his client in the transaction together with his commissions.

9. A broker who advances money to his principal to pay losses incurred in a stock wagering transaction can recover the same either on a note or otherwise.

10. A bill of exchange or promissory note given upon a stock jobbing transaction is valid in the hands of a party who took it before it was due for value and without notice of the illegal consideration.

11. But such a bill is void in the hands of the original parties or in the hands of a person who takes it after it is due or without notice of the facts.

See *Notes* to *Boultbee* v. *Gzowski, supra.*

[IN THE SUPERIOR COURT OF QUEBEC.]
(COURT OF REVIEW.)

MORRIS v. BRAULT.

Held, 1. Where a broker enters into a transaction on the stock exchange for the purchase or sale of goods on behalf of a customer, and the transaction takes place in the ordinary course of business, the broker's sole interest being his commission, he is entitled to recover from the customer the amount of the loss resulting from the operation.

2. The broker's claim is not restricted to the amount of margin in his hands, but, in the absence of any contract to the contrary, includes the entire loss.

3. A contract does not fall under the head of gaming contracts merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value, and with the intention of realizing a a profit by its resale.

4. Where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery of the goods to the broker by transfer of warehouse receipts is delivery to the principal, just as much as if it had been made directly to himself.

SIR M. M. TAIT, A.C.J.:—The plaintiff inscribes for revision a judgment of the Superior Court at Sherbrooke, rendered on the 24th day of February last, by which his action was dismissed.

He sued, as broker, for the sum of $885.20, representing commission earned and money paid out in connection with the sale and purchase of a quantity of cotton on the New York market.

The plaintiff acted for the defendant in several previous transactions in the purchase and sale of produce and cotton. He furnished him with the usual bought and sold notes. Accounts were rendered of these transactions, on some of which the defendant made a loss and on others a profit, and he paid his loss and received the benefit of his profit as the case might be.

The plaintiff had no interest whatever in them beyond the amount of his commission as broker.

On the 25th of October, 1900, the plaintiff, through his New York agents, sold for defendant 100 bales of cotton at the price of $4,420, to be delivered in the month of January following.

According to the rules of the New York Cotton Exchange, the goods had to be delivered on the last day stipulated in the contract, which was the 31st of January, 1901. On the 28th of said January the plaintiff, under instructions from defendant, bought cotton to fill this contract at a price of $5,800, this making a loss of $1,380. Plaintiff had in his hands belonging to defendant $540, so that plaintiff in making this purchase had to pay out the difference, amounting to $839.75. Adding to this $15 for commission and 45 cents for war taxes payable on the contract of 28th January, in New York, we have a total of $855.20, for which judgment is now asked, although, by the conclusions of his declaration, plaintiff claims $30 more.

The plaintiff asserts that all the transactions referred to in his declaration, including this one, the loss upon which is now sought to be recovered, were real and legitimate transactions carried out by him as a broker and agent for defendant, and that he is entitled to recover.

The defendant meets the action with two pleas. By the first, he denies in effect that plaintiff acted as his broker. He says plaintiff speculated with him; that he put money in the plaintiff's hands to speculate with upon margin upon variations in the price of grain, pork and cotton; that on the 25th of October, 1900, plaintiff, then having in his hands money belonging to defendant, informed him that he had sold this cotton to be delivered on or before the 31st of January, 1901. He further pleads that any losses he made were to be paid by means of the money so deposited in the plaintiff's hands; that according to the by-laws and customs of the New York Cotton Exchange, and the custom of trade known to the plaintiff, when the rise in the price of cotton and the costs reached a figure sufficiently high so that the difference was equal to the sum deposited in plaintiff's hands, it was the plaintiff's duty to have immediately

bought enough cotton to cover the sale of the 25th of October, 1900, unless he had received a new advance of margin or instructions from the defendant to the contrary; that if plaintiff did not buy, it was at his own risk and peril, and he could not hold the defendant responsible beyond the amount which he had belonging to him in his hands; that after the 1st of January, 1901, plaintiff could have bought cotton without losing more than the amount deposited; that on the 15th of January, 1901, he instructed plaintiff to purchase cotton at the price of $.096 or less, and for several days after this order, the price of cotton was below this price, and that if plaintiff had bought cotton at this figure, as instructed, he would have had enough money to cover the loss.

By the second plea, defendant alleges that all the transactions plaintiff entered into for him were illegal and only gambling transactions.

The sold note of the cotton in question furnished to the plaintiff by his New York agents, Messrs. T. M. Robinson & Co., is filed as paper No. 63 of the record, and it contains a statement that all orders for the purchase or sale of cotton are received and executed with the distinct understanding that actual delivery is contemplated, and that the party giving the orders, so understands and agrees.

A sold note was furnished to the defendant, a copy of which is filed as paper number 17 of the record. Each of these notes is dated October 25th, 1900, and the quantity of cotton sold and the price correspond.

Mr. J. C. Robinson, of New York, testifies that this sale was made to his personal knowledge.

The bought note is also produced, by which it appears that on the 28th of January, 1901, Messrs. J. M. Robinson & Co. purchased the 100 bales of cotton from H. Hentz & Co. for the price of $5,800. This note is stamped with the war revenue stamp of the United States.

The same witness testifies that this was an actual purchase of the cotton by them on plaintiff's account, and that it was

delivered to the party to whom they had so previously sold it, on the 25th of October; that they actually received the warehouse receipt for it, which was turned over to this party; that neither the sale nor the purchase was fictitious. The high price paid is accounted for by the fact that there was wild excitement on the Exchange that day, there being an advance of two cents and over per pound, which was something hitherto unknown. A photograph of the board used in the Stock Exchange for publishing the transactions on that day is produced, and this very transaction is shewn on it.

The witness also produces the contract slip which was given immediately on the completion of the sale at the Exchange. He says in re-examination that if the parties had desired to have the cotton delivered in Sherbrooke it could have been done as quickly as the railroads could have carried it.

The defendant was examined in discovery and was called upon to produce the bought and sold notes, the statements of account and letters received from the plaintiff, but he was unable to do so, because, as he says, they were accidentally destroyed by his wife. He, however, produces the checks which he gave to him in connection with the various transactions, and he says he gave plaintiff instructions for all transactions he entered into for him.

Copies of the papers which the defendant could not produce have been produced by the plaintiff, and there is no doubt whatever that they should be received as proof of the destroyed originals.

The defendant seems to have had some doubt as to the genuineness of these transactions, so he entered into a correspondence with the superintendent of the New York Cotton Exchange, and in answer to his inquiries, was informed that the transactions in cotton referred to in his letter, including the one in question, were made at the prices and the dates mentioned by him.

It appears to me to be proved beyond all controversy that the plaintiff, acting as the broker of the defendant, bought and sold for him the cotton in question on the dates and at the prices mentioned, and that the transaction was an ordinary and legitimate transaction, carried out according to the usual rules of the Stock Exchange, and was a real one which involved the obligation to deliver the cotton, and that it was actually delivered in accordance with the contract.

In his formal judgment, the learned Judge of the first Court stated that he was called upon to decide the following questions: (1) whether the contract of the 25th of October was a gambling contract prohibited by law; (2) supposing that it was, whether the broker lost all recourse against his client for advances made in connection with the contract; (3) whether the responsibility of the client is limited to the amount of the deposit or margin in the hands of the broker.

The learned Judge found in favour of the defendant on all these questions, and he likewise found against the plaintiff as to his pretension that the defendant after the conclusion of the transaction had acknowledged his debt and held that even if this acknowledgment could be held proved it produced no effect upon the principle "*quod nullum est nullum effectum.*" His final *considérant* is that plaintiff has failed to prove the essential allegations of his declaration.

As leading to the conclusion that the transactions constituted gaming contracts, within the meaning of article 1927, and that plaintiff should have been aware of this, the Judge refers to the following circumstances: that both plaintiff and defendant lived in Sherbrooke, the population of which was comparatively limited; that plaintiff was formerly a practising advocate, but for some years has been doing business as a broker; that he is a man of intelligence, that defendant was a clerk in a hardware store, with limited means and a wife and eight children; that he owned immovable property, but it was mortgaged for its value; that instead of speculating in ironware, which was the

only business he was presumed to know, he purchased, through plaintiff, corn, pork and cotton in Chicago and New York; that he had not, and never contemplated having a warehouse, and never gave instructions for delivery.

It appears to me, that we should judge rather from the nature of the transactions themselves, than from the circumstances just stated whether they constituted gaming contracts. I do not know why a man of limited means, living in a city of limited population, may not speculate in the Chicago and New York markets as well as a rich man living in a large city. If the transactions are real and made through a broker, and are carried out in the same way in each case, I should think the legal effect of them would be the same.

Except that the dealings were in produce and cotton in this case, I can see no distinction between them and the transactions in question in the two well-known cases of *Forget* v. *Ostigny*, and *Forget* v. *Baxter*. In both of these it was formally pleaded that the transactions were gaming contracts. The plea was fought out in the *Ostigny Case* and was overruled, and, no doubt, owing to this fact, it was not pressed in the *Baxter Case*.

The broker's relation to his clients in these cases and his mode of doing business were just the same as plaintiff's in the present case. Mr. Forget bought and sold stocks in different joint stock companies on margin furnished by them, covering a part of their value. He received and gave delivery according to circumstances and pledged stock that he held for the purpose of raising money to cover the balance of the price. His sole interest in the matter was a fixed commission, and, of course, interest upon the amounts advanced. The transactions were real and he was responsible for carrying them out.

It was held in that case that: "Where shares in joint stock companies were purchased and sold by a broker for a customer, the remuneration of the broker being a fixed commission, and in every case the shares purchased and sold were delivered to or by the broker, and the price of them paid or received, as the

case might be, the fact that the contracts were entered into by the customer in furtherance of a speculation, that he never asked for delivery to him of any of the shares purchased, and that he furnished the broker with only a small portion of the money required for purchases, the broker obtaining the rest by pledging the shares, did not constitute such purchases and sales gaming contracts within the meaning of article 1927 of the Civil Code, so as to deprive the broker of an action against the customer for the balance due on the transactions."

Lord Herschell remarked: "It may well be that the appellant was aware that in directing a purchase to be made the respondent did not intend to keep the shares purchased but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as 'gambling on the stock exchange;' but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its re-sale. Such dealings are of everyday occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint stock company. Nor again do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This, also, is an everyday commercial transaction. For example, a merchant, who has to pay the price of a cargo purchased, before he re-sells it obtains in ordinary course the means of doing so by pledging the bill of lading.

"Much stress was laid on the fact that the respondent never asked for delivery of any of the shares purchased and that the

appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it, is, no doubt, an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract."

After referring to the Act of the Dominion Parliament 51 Vict., ch. 24, Lord Herschell goes on to say: "Their Lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal, just as much as if it had been actually made to himself."

I find plaintiff's position in this case to be exactly the same. It was not necessary for defendant to have a warehouse in Sherbrooke or anywhere else to make these transactions real. He was not bound to deliver the cotton in question until the last day of January, 1901. What he had to do, was to buy cotton on or before that date and deliver it to the party to whom he had sold it. The evidence stands uncontradicted that he did buy it through plaintiff on the 28th of January, 1901, and that the cotton represented by the warehouse receipt thereof was delivered to the purchaser in accordance with the contract of the 25th of October previous.

According to my view the language of Lord Herschell, in the *Ostigny Case*, is applicable to the present one.

There are two other points to be mentioned. The defendant claims that according to the rules of the New York Cotton Exchange his loss is limited to the amount of margin which he had in plaintiff's hands, and the learned Judge of the first Court finds in his favour on this point. I am unable to come to the same conclusion. I do not think the defendant has made out that there is such a rule. Then again, defendant states that on the 15th of January, 1901, he wrote plaintiff instructing him to buy 100 bales of cotton at $9.55 or $9.60 or less if he could.

The plaintiff swears that he never received such a letter. The learned Judge does not find the proof sufficient to establish the reception of it, and I entirely concur with him.

As I believe that the cases of *Forget* are on "all fours" with this case, I am of opinion that the judgment should be reversed and that defendant should be condemned to refund the amount that plaintiff, his broker, has had to pay out on his account on this transaction, and that plaintiff should therefore have judgment in his favour for the sum of $855.20 with interest and costs of both Courts.

The formal judgment, after reciting the pleadings, continued as follows:—

Considering that it is well established by the evidence that in respect of the purchases made for the defendant through the agency of the plaintiff he has had delivery of the goods sold, and that such delivery was made to the brokers acting for the defendant by the transfer of warehouse receipts, representing the goods;

Considering that in these time-bargains or sales for future delivery it appears, moreover, to have been fully understood that the goods sold would have to be delivered at a specified time, and that the brokers representing the defendant knew that they were in fact responsible for such delivery and that the defendant was also, as he was bound to accept delivery of the goods which he bought through the agency of his brokers, and that this obligation to accept delivery on the one side and to make delivery on the other renders these operations incapable of being considered as gaming contracts, or, otherwise, that these contracts produce obligations of which the creditors are able to demand execution;

Considering the fact that the defendant did not have the intention of accepting delivery of the goods which were bought on his account, and that he did not mean to close these operations beyond settling the difference between the buying and the selling price, does not change the nature of the operations which

were real, and produced reciprocal obligations on the part of the brokers who bought and sold as well as on the part of those whom they were representing;

Considering that the defendant is not able to escape from the responsibility which results from these transactions by saying that the sale (time-bargain) does not bind him because he did not have the goods which he sold;

Considering that in commercial matters the sale of the property of another is valid;

Considering that in these time-bargains the defendant has done only what all merchants do, who frequently make sales of goods of which they have not possession at the time but which they know they are able to procure, and hope to be able to procure at a price that will give them a profit on the transaction;

Considering that in the ordinary course of trade the merchant who buys or sells goods that he may not be able to apply to his own use, or of which he may not be able to take personal possession, will not be permitted to escape from his obligations by alleging, as the defendant has done in the present case, that his transactions were not real because he did not intend to take delivery of the goods that he bought, or make delivery of the goods that he sold;

Considering that it is established by the evidence that commercial matters of the greatest importance are created by the transfer of certificates representing goods sold or purchased;

Considering that the defendant, who admits having authorized, on the 25th October, 1900, the sale (time-bargain) of one hundred bales of cotton deliverable in the month of January following, was bound to make such delivery, and to procure the cotton which he then did not have; and that when the plaintiff, on the 28th January, 1901, purchased for the defendant one hundred bales of cotton for the purpose of making delivery of that which the defendant had sold, as aforesaid, on the 25th

October, he did no more than to execute the order which the defendant had entrusted to him on the 25th October, 1900, and that he had the right to make the sale in the manner he did, so as to escape from the personal obligations which attached to him as the result of this transaction;

Considering that the defendant has not proved that he had given, on the 15th January, 1901, instructions to the plaintiff to purchase for him one hundred bales of cotton at the price of 9 60/100 cents, as is pretended, and that he has not proved that the letter which he said he wrote to him on that day, was received by the plaintiff—who denies having received it;

Considering that the defendant has not proved his grounds of defence, and that the plaintiff has established his claim to the amount of $855.20;

Considering that there is error, etc., set aside, etc., and maintain the action of the plaintiff, etc.

Judgment reversed.

Brown & Macdonald, for the plaintiff.
Panneton & Leblanc, for the defendant.

Note:

When a broker sues a client to recover the amount of differences and brings action against his principal for such loss he must shew that the stock was actually purchased by himself or by his agent under his direction at its fair market price on the day of purchase and that he actually paid the purchase money therefore; that he notified his principal of the purchase and requested him to receive the stock and pay the price paid for it with reasonable commissions; that at the time of this notice he was in the condition to deliver the stock by having it in the proper indicia of title actually in hand or in the hands of his agent; that on the failure of the principal to recover the stock he, after reasonable time and notice to that effect to the principal directed it to be sold and that it was sold by his agent either at public sale or at a sale merely made on the stock exchange, where

such stocks are usually sold at a fair market value on the day of sale. Having shewn this, he was entitled to recover the amount, if any, of the resulting loss.

In a transaction so conducted there is nothing illegal or contrary to public policy, it is but the proper execution of a legitimate business for the purchase of valuable commodity. The usage or custom of the particular business of buying and selling stocks on orders may be introduced in evidence for the purpose of shewing the manner in which an order received may be performed, but not implied, and authority to execute it in a mode which the law would regard as unreasonable: *Rosenstock* v. *Tormey*, 32 Md. 69.

See next case.

[BRITISH COLUMBIA.]

B.C. Stock Exchange, Limited v. Irving.

Stock Exchange—Broker and Principal—Payment of Differences—Illegality—Criminal Code, sec. 201.

Defendant instructed the plaintiffs to sell shares in The C. T. Co. for him, who asked for cover and defendant paid $600.00; no time was fixed for delivery; plaintiffs asked defendant for more as shares were rising, and finally called for $2,400.00, which defendants refused to pay. Plaintiffs then, as they alleged, purchased the shares to satisfy their own liability and sued for amount paid.

Held, by Drake, J., dismissing the action, that as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal.

Action for $637.50 tried before Drake, J., at Victoria on 21st October, 1901.

Bradburn, for plaintiffs.

W. J. Taylor, K.C., for defendant.

Nov. 1. Drake, J.:—This action is brought by the plaintiffs to recover $637 money alleged to have been paid by the plaintiffs at the defendant's request to Downing, Hopkins & Co., Seattle brokers, in respect of the purchase of 300 Continental Tobacco shares at 62⅝. The plaintiffs are a company incorporated in this Province. The defendant instructed them to sell 300 shares of the Continental Tobacco Company. The plaintiffs asked for cover, and the defendant paid them $600.00, that is $2.00 a share. No time was fixed for the delivery of the shares or closing the transaction. The plaintiffs called upon the defendant from time to time for more money as the shares were steadily rising, and on or about the 29th day of May they called for $2,400.00, which the defendant refused to pay. They thereupon alleged that they purchased 300 shares in the market at 62⅝ a share in order to satisfy the defendant's liability. The defendant when he sold the shares sold 100 at 52, and 200 at 51⅝. The plaintiffs never asked the defendant for the scrip which he sold, and they purchased without notifying him of their intention so to do, and without asking him to deliver the scrip.

The mode of business as alleged by the plaintiffs was that on

receipt of an order from clients they instructed their agents in Seattle, Messrs. Downing, Hopkins & Co., to buy or sell as the case might be, and that the prices of the New York market were the governing prices for all transactions.

A good deal of evidence was given about the commission which they alleged they charged for transacting business, in order to substantiate the fact that they were not principals in the business transacted.

They have made no claim for any commission and have not sued for it, but merely for money alleged to be paid on the purchase of 300 Continental Tobacco Company's shares at $62.87 per share.

From the evidence of Mr. John Nicholles for the plaintiffs it appears that the rule is that if the margin is exhausted the trade is closed. "We have," he says, "to close the trade on the exhausted margin to protect ourselves from loss"—unless the trader re-margins—this is continually repeated, and it is difficult to see what claim he can have for further funds when the margin is exhausted. And he further says, "we never have any scrip delivered to us to sell. We settle the differences according to the fluctuation of the market." And again, "we would have closed the transaction on his, *i.e.*, the defendant's account at any time by his paying us the difference, or a receipt by him of the difference according to the rise or fall of the market without handling the shares at all." This evidence clearly indicates the nature of the business transacted, and that it was dealing with differences only.

The plaintiffs produce a sold note which is as follows:—

B. C. STOCK EXCHANGE, LIMITED.
Correspondents Downing, Hopkins & Co.,
Victoria, B. C., May 6, 1901.

Mr. Irving,
Dear Sir,
We have this day sold for yr. acct. & risk 200 Con. Tobacco 51⅝
Exhausts at $54⅜
Margin $ Stop loss 56⅜
J. N.

All sales are made in accordance with market prices of the property at the time of the order on the New York Stock Exchange and quotations thereof authorized by said Exchange.

Yrs. resply.,
B. C. Stock Exchange, Ltd.,
pr. J. N.

No evidence was given to shew what was the market price at New York on the day they alleged they bought 300 shares, viz., 25th May.

The plaintiffs claim that they actually sold the 300 shares as instructed by the defendant, how, when or to whom is not disclosed. If they in fact sold, the purchaser would be entitled to demand delivery of the stock, but here the time is left open and no day fixed for a settlement, and from the continual demand for cover made by the plaintiffs it is evident that they treated the sale not as an actual one, but as one for which the defendant might be responsible to pay if the shares rose in the market, until the margin was exhausted, and that closed the deal. The contract says "Stop loss at 56⅜," but instead of doing so they continued until the shares rose to 62⅝. This case as far as the facts are concerned is on all fours with *Thacker* v. *Hardy* (1878), 4 Q.B.D. 685, Lord Justice Lindley in his judgment says "the plaintiff was employed to buy and sell on the Stock Exchange, and everything he did was perfectly legal unless it was rendered illegal by reason of the object they had in view. If gaming and wagering were illegal I should be of opinion that the illegality of the transactions in which the plaintiff and defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming in a Court of law, any indemnity from the defendant in respect of the liabilities he had incurred. Gaming and wagering contracts under the English law cannot be enforced, but they are not illegal. *Fitch* v. *Jones*, (1855), 5 El. & Bl. 238."

This is the point in this case, are gaming and wagering contracts under the Dominion Law illegal? Section 201 of the

Criminal Code says "Everyone is guilty of an indictable offence who with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company . . . makes any contract oral or written, purporting to be for the sale or purchase of any such shares of stock . . . in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery." And that is followed by a protecting clause for the broker, that if the broker received the delivery of the thing sold there is no offence, although he retains or pledges the same as security for the advance of the purchase money. This Act is aimed at the exact contract which was made in this case. The law has made gaming and wagering contracts illegal, and the evidence of the plaintiffs discloses that no stock was ever delivered or intended to be delivered, and the intent was to make a profit from the fluctuations of the stock market. The Privy Council in *Forget* v. *Ostigny* (1895), A.C. 318 at p. 325, point out that the decisions of the English Courts are not authorities upon the construction of the Canadian Code, but throw light on what constitutes a gaming contract, and cite Lord Justice Cotton's view of what a gaming contract is. He says the essence of gaming and wagering is that one party is to gain and the other to lose upon a particular event which at the time of the contract is of an uncertain nature, that is to say, if the event turns out in one way A. will lose, if it turns out the other way he will win.

That is the fact here. As far as the defendant knew he was dealing with these plaintiffs. He put up a margin to cover them from loss if the stock rose. If the stock had fallen they would have paid him the difference. But the plaintiffs say they had no interest in the deal beyond their commission; but they have never asked for commission or charged commission, and no reference is made to it in their sold note. But even if they had I think that the transaction is so tainted with illegality that they cannot recover. This Court is not to be made use of for carrying out unlawful bargains; and as both parties are in the wrong, I give judgment for the defendant without costs.

See *Notes* to *Forget* v. *Ostigny, and Forget* v. *Baxter, supra.*

[NOVA SCOTIA.]

SAWYER v. GRAY.

Where a stock broker sells shares on his own account and not in the ordinary course of business to a customer with whom he has had previous dealings as a broker, and who may, therefore, rely on his judgment, it is his duty to communicate the fact to the purchaser. The absence of such a communication is sufficient ground to set aside a verdict.

WILKINS, J., now (August 5th, 1872) delivered the judgment of the Court:—

The writ in this cause, which was tried before his lordship the Chief Justice, and in which the jury found for the defendant, contains, *first*, a count founded on an alleged employment by plaintiff of defendant, being a stock and share broker, to purchase stock as therein alleged; *secondly*, the common counts in assumpsit. The defendant pleaded, to the whole writ, *first*, "never indebted;" *secondly*, that he did not enter into the alleged agreement; *thirdly*, that defendant was owner of certain shares in the Nash Brick & Pottery Company, and offered a certain number of these shares to plaintiff for $550, which plaintiff accepted and paid for; that said shares were duly transferred on the books of the said company to the plaintiff, and that he has subsequently treated the shares as his own, attended meetings, etc., as holder and proprietor thereof; concluding with an averment negativing plaintiff's allegation, "that the $550 was received by him under the agreement stated in the writ. The fourth plea need not be noticed, because it does not materially differ from the third. The learned Chief Justice put the case to the jury mainly on the question whether of vendor and vendee, or of principal and broker, in which the parties at the time of the contract stood to each other. The plaintiff's counsel having contended that the defendant had not proved under his third and fourth pleas that the shares had been duly transferred, and having also contended that the $50 paid by plaintiff to defendant

in excess of $500 for the shares had not been accounted for by the defendant, his lordship reserved those points for the consideration of the Court. A rule granted to set aside the verdict as against law and evidence, and on the points thus reserved, was argued before us in this present term.

In the conflict of evidence reported as to the actual contract between the parties, it must be taken that the jury have shewn by their verdict that they adopted the defendant's statement, and concluded that the shares in question were sold to the plaintiff by the defendant in his private capacity, and not as a stock and share broker. That raises the primary question,—can the plaintiff under the facts rescind the actual contract by his own act without express repudiation or demand, and have recourse to his count for money had and received? I entertain no doubt that he can (notwithstanding the long interval between the contract and action brought), seeing that, while he has derived no benefit whatever from the contract, he has done nothing under it to the prejudice of the defendant, or to alter his position in relation to it from what it was when it was entered into.

The plaintiff's particulars, which may be applied to the money count, inform defendant that one branch of the plaintiff's claim is for $550 cash paid by cheque. The third plea not only may be applied, but being a plea to the whole declaration, is necessarily applied to the money count, and says for answer to the plaintiff's allegation, "You, the defendant, have in your hands $550 of my money;" "I received your money for shares in the particular company which I offered to you and you accepted, and I have duly transferred them to you in the books of the company, and you have since then treated them as your own, etc." The defensive allegation thus made cannot be separated into parts, but forms as a whole, the alleged matter of defence, and must be proved as a whole. It admits receipt of money and seeks to void it by the matter thus stated. Involved in it is an allegation that the shares offered and accepted were duly transferred. Among the documents produced at the trial and received without opposi-

tion, is a registered by-law in these words: "No transfer of any share or shares shall be held valid unless the same shall have been in the first place offered to and refused by the company, and in all cases the share or shares of every stockholder shall be liable to the company for all debts in any wise incurred by such stockholders to the company, all transfers to be subscribed by the parties in the company's books.

Viewing this, as we must view it, in connection with the third plea, the plea in effect contains an allegation that this by-law was complied with by the defendant in relation to the shares sold. But that allegation is not proved. It is observable that the vendor of these shares alone could perform the condition of this by-law, on the performance of which the validity of a transfer is by it made to depend, for the offer to and refusal by the company must precede the transfer. To the plaintiff's independent claim on the money counts there is, beside the special plea above considered, no plea except "never indebted." Of that, of course, the sole effect would be a defensive allegation that the defendant never received from the plaintiff $550,—a fact which is not in controversy. It was, therefore, indispensable for the defendant to prove his third plea.

But there is a view of this case which, independently of all that has been observed, would make it our duty to send it back for re-trial. The defendant is proved to have been at the time of the transaction in question a stock-broker, and to have acted as such, and with this very plaintiff, in matters of business unconnected with the present case. In this state of things it was, of course, that plaintiff reposed confidence in the defendant; and it was most probable, if not a matter of course, that when the subject of negotiation between the parties was, as in the case before us, the purchase of stock, the plaintiff, unless in the most distinct and precise manner informed to the contrary by the defendant, should consider that he was dealing with the latter in his character of agent, and not as a private individual. Now after a careful examination of the evidence given by the parties, I am of opinion that by the defendant's own shewing he did not

in this transaction by his language so guard the plaintiff from misapprehension as to prevent deception on the point adverted to, and did not make such disclosures in relation to the mode in which he had become owner of the stock sold, and the price he paid for it, and what he knew to be the estimation of its value by some other persons than himself, which his position relatively to the plaintiff, and the exigencies of good faith demanded. See Storey's Agency, sec. 21, which, assuming plaintiff to have been under an impression that defendant was acting for a third party, is very suggestive. The plaintiff says, and he is not contradicted by the defendant, "I asked the market price," (referring to this very stock) "he said they were selling at par." That very day the defendant (who did not communicate the fact to the plaintiff), had purchased stock in this company at a large discount.

The defendant entertaining indeed, as he says, an opinion that the stock would pay 14 per cent.—an opinion of the grounds of which plaintiff knew nothing—and asserting in contradiction of the plaintiff's assertion to the contrary, "the plaintiff did not employ me as a broker," does not pretend that in making the contract he used language to the plaintiff stronger or fuller of information than this: "He wanted to invest in a company that would pay a higher dividend. I said I would sell him some shares in the company." Again, he says in very general terms: "He bought from me. He knew the exact position of the company." This bold general language contrasts very strikingly with the full and detailed narrative of negotiation and conversation given by the plaintiff. Considering the antecedent business transactions of the parties, and the position of the defendant at the time of the contract, relatively to the public and to the plaintiff, I think it was proper and necessary in order to disabuse the personal confidence of the plaintiff in the defendant, which the former possibly and probably felt, that the defendant should have used to the plaintiff some such language as this: "Understand that, in regard to this stock, I am not acting for a third party and for you, as I have acted, but for myself alone, in view of my own interests as owner of the stock,

and as desirous to sell it in the best market. I consider it a good investment, but I will not conceal from you that some do not estimate it as highly as I do, for I have lately purchased the same stock at a discount of 25 per cent. Do not, therefore, rely as you have been in the habit of relying, on my judgment; use your own, or that of your friends." I think the mere consideration alone that such language was not used, a sufficient ground for our making the rule absolute.

Notes:

Where a broker is employed to act as a broker, he cannot act as a principal. This view is strongly laid down in the leading case of *Robinson* v. *Mollett*, L.R. 5 H.L. 802.

The facts were that the broker did not buy as instructed, although they sent bought notes to their principals specifying certain quantities of tallow as having been purchased for him. They had in reality both before and after the order bought in their own name from various persons quantities of tallow larger than the amount ordered by the client, purposing to allot to him the quantity which he desired. The client rejected the tallow and suit was brought to recover differences. The brokers attempted to set up a custom which they proved to exist for tallow brokers to make contracts in their own names without disclosing their principals and also to make such contracts so as to include the order received with other orders they may have on hand or in any quantities at their convenience and passing to their principals a bought note for the specified quantity ordered by them. It was shewn that this custom was unknown to the defendant.

Lord Justice Mellor said in his judgment: "It appears to me to amount to a custom for the broker in the tallow trade in London to do something entirely inconsistent with the character of a broker, viz., to convert himself from an agent to buy for his employer into a principal and sell to him. It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer; nor can a broker employed to purchase become himself the seller without distinct notice to the principal so that the latter may object if he thinks proper. A different rule would give the broker an interest adverse to his duty. Though a custom of trade may control the mode of performance of a contract, it cannot change its intrinsic nature. See also *Thacker* v. *Hardy*, 4 Q.B.D. 685; *Ex parte Rogers*, 15 Ch. D. 207.

[IN THE HIGH COURT OF JUSTICE FOR ONTARIO.]

KERR V. MURTON.

Dealings on Margin—Obligation of Broker to Sell.

There is no obligation on a broker, in the absence of the customer's order, to sell shares during a falling market, after he has demanded further margins, and received no reply from his customer; and therefore if he does not sell the stock under such circumstances, he is not liable for any loss that may arise to the customer.

THIS was an action to recover a balance due on two stock transactions, under the circumstances mentioned in the judgment, and was tried before TEETZEL, J., at the Toronto non-jury sittings on April 28th, 1904.

Joseph Montgomery, for the plaintiff.
R. W. Eyre, for the defendant.

The authorities referred to are mentioned in the judgment.

June 18. TEETZEL, J.:—The plaintiff is a broker carrying on business in Toronto, though not a member of any stock exchange.

I find upon the evidence that early in September, 1902, the defendant authorized the plaintiff to purchase for him ten shares of Dominion Coal Company stock, and twenty shares of Baltimore & Ohio Railway Company stock, and the defendant paid $350 as margin or part payment.

The principal defences relied upon were that the purchases were not real but bucket-shop transactions, and if there was any purchase of the shares, the stock so purchased was never specifically set aside or bought for the defendant.

The plaintiff employed a member of the Toronto Stock Exchange to buy the ten shares of coal stock, and he placed the order for the railway stock with his correspondents in Buffalo, who employed a New York correspondent, a member of the Consolidated Stock Exchange, to buy the stock.

The evidence satisfies me that each of the blocks of stock was actually purchased on the stock exchange on behalf of the defendant, and that the stock in each case was held for the defendant, who could have obtained delivery thereof, upon payment of the balance of the purchase price, and, therefore, in my opinion, the case is not governed by any of the authorities cited by Mr. Eyre, and the defendant is liable to pay the balance of the purchase money and commissions claimed by the plaintiff.

I was in some doubt at the trial as to whether the plaintiff should not have sold the Dominion coal stock early in March when it would have realized considerably more than when it was sold by the plaintiff on May 28th. During March the price of Dominion coal stock was declining, and continued to do so until the plaintiff effected a sale. On March 13th, March 27th, May 4th and May 13th, the plaintiff wrote the defendant, who lives in Guelph, asking for a remittance on account of margins on the coal stock, but the defendant never replied to these letters, and on the latter date the plaintiff drew on the defendant for $100 at three days' sight on account, but the draft was refused.

I can find no authority which imposes an obligation upon a broker to sell shares during a falling market, after he has demanded further margins and received no reply from his customer. On the contrary it appears to be settled that in the absence of an order by the customer there is no such duty on the part of the broker, and, therefore, if he does not sell the stock under those circumstances he is not responsible for any loss which may arise to the customer. See Dos Passos on Stockbrokers, p. 199; *Brass* v. *Worth* (1863), 40 Barbour 648; Lewis' Law of Stocks, p. 136.

There must, therefore, be judgment for the plaintiff for $301.28 and interest from May 28th, 1903, with full costs.

The defendant counterclaimed to recover back the $350 and interest and also for damages; but I find that his counterclaim entirely fails, and must be dismissed with costs.

Notes:

Duty to Sell.—A broker is bound to follow his client's instructions to sell implicitly and to sell at the price named as soon as such price is reached, or if the instructions be to sell at the market price to sell at once, upon receipt of the instructions: *Galigher* v. *Jones*, 129 U.S. 193.

A broker must carry out instructions received in respect of time, price, number of shares and place to the very letter and must not only act in the utmost good faith, but must exercise reasonable skill, caution and prudence: Lindley on Company Law, 5th edition, page 511; *Smith* v. *Bouvier*, 70 Pa. St. 325.

The fact that a client's margins have become exhausted does not alter his right to instruct a sale, and this principle has been carried to the length in some jurisdictions that a broker must follow instructions to sell and invest the proceeds in the purchase of other shares, even though the balance due to himself at the time for advances is greater than the value of the stocks ordered to be sold: *Galigher* v. *Jones*.

Authority to sell exists until countermanded or revoked either expressly or by implication, but in this as in all other matters in connection with the relation between broker and client, regard must be had to the usage and course of dealing between the parties. Should the broker fail to follow instructions to sell as and when directed, the margins placed in his hands may be recovered by the client in an action of assumpit: *Jones* v. *Marks*, 40 Ill. 313.

The fact that a stop order or other order in writing to sell has been placed with broker, does not prevent either of the parties from giving verbal evidence to shew that the written order was modified by a subsequent verbal arrangement or understanding: *Clarke* v. *Meigs*, 10 Bosw. (N.Y.) 337.

It has been held that a broker cannot sell stock upon credit as that is not in the usual course of business, and where it is apparent that the ordinary course of dealing is to sell for cash only, a broker will be responsible to his client for any loss resulting from a sale upon credit: *Wiltshire* v. *Sims*, 1 Campbell 258; *Baring* v. *Corie*, 2 B. & Ald. 137; *Brown* v. *Boorman*, 11 Cla. & Fin. 1.

Apart from such usage or course of dealing, there is no duty on the part of a broker selling stock to obtain payment for his client.

If, on the other hand, a broker sells stock which his client refuses to deliver, the broker may buy the necessary stock in the market at the market price and recover the loss, if any, from his client: *Bailey* v. *Carduff*, 59 Pac. Rep. 407.

"A stop order" is an order which directs a broker to sell stocks or buy them in, as the case may be, at a certain price. On receipt of a stop order, a broker must sell or buy when the specific price is reached. He, himself, however, is not permitted to make the price, but it must be made by some third person, and it would seem that if a broker is unable to sell at the specified price, he may sell at the next figure below it: Dos Passos, 2nd edition, Vol. I., page 303, and see *Smith* v. *Bouvier, supra.*