JAMES CONMEE (DEFENDANT).....APPELLANT;

AND

THE SECURITIES HOLDING COMPANY AND A. E. AMES AND COMPANY (PLAINTIFFS)..... RESPONDENTS.

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*Mar. 21, 22.
*May 7.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Broker—Stock—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.

C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock, paying them $3,000, leaving a balance of $6,225 according to the market price at the time. A. & Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock, paying $9,000, nearly half the price, and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as security for indebtedness and later drew on A. & Co. for the balance due thereon, attaching the scrip to the draft which was returned unpaid and 475 of the 600 shares were then sold and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares with interest and commission:

Held, reversing the judgment of the Court of Appeal (12 Ont. L.R. 435, affg. 10 Ont. L.R. 159), Fitzpatrick C.J. dissenting, that the brokers had no right to hypothecate the shares with others for a greater sum than was due from C. unless they had an agreement with the pledgee whereby they could be released on payment of said sum; that there never was a time when they could appropriate 300 of the shares pledged for delivery to C. on paying what the latter owed; and that, therefore, they were not entitled to recover.

The bought note of the transaction contained this memo: "When carrying stock for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."

Held, per Davies and Idington JJ., that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer.

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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Per Duff J.—That the shares were purchased before this note was delivered, and it could not alter the character of the authority conferred on the brokers; and that no custom was proved which would modify the common law right and duties of the brokers and their customer in the transaction.

(Leave to appeal to Privy Council was refused.)

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of a Divisional Court (2) in favour of the plaintiffs.

The material facts are stated in the above headnote and fully set out in the several opinions of the judges on this appeal.

C. Millar, for the appellant. The brokers did not execute the order to buy the stock. They cannot be allowed to substitute their personal liability for the security to which appellant is entitled. DosPassos on Stock Brokers (3); *Cox* v. *Sutherland* (4); *Mara* v. *Cox* (5); *Douglas* v. *Carpenter* (6) at page 333.

By placing appellant's order joined to orders from other customers with the brokers in Philadelphia no privity was created between the appellant and the sellers of the stock. *Robinson* v. *Mollett* (7); *Beckhuson & Gibbs* v. *Hamblet* (8).

From the time the stock was purchased it was always pledged by Ames & Co. for more than was due from appellant.

Tilley, for the respondent. Brokers are entitled to be indemnified against loss incurred in properly carry-

(1) 12 Ont. L.R. 435.
(2) 10 Ont. L.R. 159.
(3) 2 ed. p. 206.
(4) 24 Can. L.J. 55; Cout. Dig. 214.
(5) 6 O.R. 359.
(6) 17 App. Div. N.Y. 329.
(7) L.R. 7 H.L. 802.
(8) [1900] 2 Q.B. 18.

ing out the customer's orders. *Duncan* v. *Hill*(1); *Thacker* v. *Hardy*(2); *Forget* v. *Ostigny*(3). And such right is not lost by wrongful termination of the contract by the broker. It is only diminished in amount by the damage to the customer. Dos Passos on Stock Brokers, 2 ed., p. 230. *Minor* v. *Beveridge* (4); *Ames & Co.* v. *Sutherland*(5).

The customer is deemed to be aware of the usual course of dealing and to authorize the broker to act in accordance therewith. *Grissell* v. *Bristowe*(6).

The brokers were not obliged to hold for their customer the particular shares bought. The evidence shews that this is a custom binding on the principal. *Scott & Horton* v. *Godfrey*(7).

THE CHIEF JUSTICE.—As more fully explained by my brother Davies, the plaintiffs (A. E. Ames & Co.), now respondents, allege that on the 28th April, 1902, as stock brokers doing business in Toronto, they were instructed by the defendant, now appellant, to purchase for him in a way sanctioned by the rules and usages of the Stock Exchange, a certain number of shares of the common stock of the Lake Superior Company at the then current market price. Coincident with the giving of the order, a certain amount was paid on account of the price by the appellant, it being then understood and agreed that the money required to complete the purchase was to be provided by the respondents.

(1) L.R. 8 Ex. 242.
(2) 4 Q.B.D. 685.
(3) [1895] A.C. 318.
(4) 141 N.Y. 399.
(5) 9 Ont. L.R. 631; 11 Ont. L.R. 417; 37 Can. S.C.R. 694.
(6) L.R. 3 C.P. 112.
(7) [1901] 2 K.B. 726.

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The Chief Justice.

The two courts below find as facts that the stock was purchased and the mandate properly executed according to usage by the brokers and, on the evidence, as I read it, these findings are fully justified. I am of opinion that there is no error in the judgment appealed from. The brokers having fulfilled their duty according to the general known usages and customs of the Stock Exchange are entitled to recover their commission and the amount they expended necessarily and properly in the course and for the purpose of their employment. *Mollett* v. *Robinson*(1) at p. 94; *Scott & Horton* v. *Godfrey*(2) at p. 736; *Bentinck* v. *London Joint Stock Bank*(3) pp. 120-140-141; *Chase* v. *City of Boston*(4).

I would dismiss the appeal with costs.

DAVIES J.—I agree with the judgment of the appeal court that to a large extent the questions to be determined in this appeal depend upon the appreciation the court forms of the evidence. Substantially the question to be decided is whether or not the plaintiffs have shewn affirmatively that they bought the stock they were instructed to purchase by and for the appellant, and after such purchase held the same for him so that at all times they were ready and able to deliver the stock to the defendant (appellant) had he come to them to redeem it.

I agree with Anglin J., who delivered the dissenting opinion in the Divisional Court, substantially in his statements of the law governing transactions of this kind, and in his appreciation of the evidence, given by the partners of Ames & Co.

(1) L.R. 7 C.P. 84.
(2) (1901) 2 K.B. 726.
(3) (1893) 2 Ch. 120.
(4) 62 N.E. Rep. 1059.

The 300 shares of the stock of the Lake Superior Consolidated Company which appellant instructed his brokers, the respondent Ames & Co., to purchase for him and on which he advanced them the sum of $3,000 as a marginal payment, were purchased by Ames & Co. through their brokers Chandler & Co., Philadelphia, together with 300 other shares of the same stock for other customers by the same order and on the same day. On being advised by their brokers in Philadelphia of the purchase by them of the 600 shares, Ames & Co. remitted to Chandler & Co. $9,000 on the total purchase of the 600 shares leaving a debit balance against them with Chandler in respect of the purchase of $9,375 leaving the whole 600 shares in Chandler's possession as security for the balance. Chandler & Co. in turn, acting within their assumed rights, pledged all of the shares to a bank in Philadelphia as collateral security for monies due by them to the bank.

On 12th December, 1902, Chandler & Co. drew on Ames & Co. for the amount of the balance due to the former firm on the purchase of the 600 shares ($9,375) and interest, and annexed the scrip for the shares to the draft but the draft with scrip annexed was returned unpaid.

Four days afterwards, viz., 16th December, 1902, Chandler & Co. sold the shares except 125 which they returned to respondent, Ames & Co. on the 30th December, at which time the respondent's account with Chandler was ended and closed.

From the time of the purchase by Chandler of the 600 shares until their sale they were continuously pledged by Ames & Co. to Chandler for a greater sum than Conmee owed to Ames & Co. (compare Ames &

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Co.'s account with Conmee, Ex. 1, and their account with Chandler & Co., Ex. 21), with the possible exception of two days just before their sale by Chandler, and there was no evidence shewing the right of Ames & Co. on behalf of Conmee to redeem his 300 shares from the possession of Chandler & Co. or the persons with whom that firm had pledged the shares in Philadelphia on payment of the amount Conmee owed on them.

As a fact Ames & Co. never had the 600 shares purchased by Chandler & Co. in their possession or under their control; they dishonoured the draft drawn on them by Chandler & Co. for the balance of the purchase money of the 600 shares of which Conmee's 300 formed a part, and there was no satisfactory or precise evidence of the existence of a condition of things enabling Ames & Co. to obtain and deliver over to Conmee these 300 shares from Chandler & Co. or their pledgees at any time after their purchase and until their sale on payment or tender of the balance due by Conmee on them.

Mr. Tilley, respondent's counsel, frankly admitted on the argument that unless these 600 shares in Chandler & Co.'s hands or those of their pledgees were counted by Ames & Co. as available shares which they could deliver to any one of their customers for whom they had purchased and were carrying this particular class of Lake Superior common shares, on demand and payment by the purchaser of any balance due by him, he could not under the evidence contend that Ames & Co. had sufficient of these Consolidated Lake Superior common shares to meet possible demands which their customers might make upon them.

From the time of the purchase by Chandler & Co.

of the 600 shares the possession of which were admittedly necessary by Ames & Co. to enable them to discharge their obligations as brokers of their clients until their sale by Chandler & Co. after the dishonour of the draft on Ames & Co., the evidence shews that the shares were either held by Chandler & Co. for "purposes of hypothecation or for security of the debit balance owing by Ames & Co." and that only 125 shares were ever delivered by Chandler & Co. to Ames & Co., namely on December 30th after the sale of the other 475 shares.

Mr. Chandler of the firm of Chandler & Co., when examined, after stating how the shares were held by his firm as above, went on to say:

> The six hundred shares were either deposited in the course of the ordinary transaction of business as collateral security with lenders or carried by us.

He was unable to say which, but he added that

> when deposited by their firm for an advance it would be liable to the lender *for the firm's total indebtedness to the lender.*

Now it seems to me to have been incumbent on Ames & Co. under these circumstances in order to maintain this action and in the face of Mr. Tilley's admission as stated above, to have shewn their absolute right to obtain Conmee's 300 shares from Chandler & Co. or their pledgees at any time on payment of Conmee's balance to them on the purchase of the shares, and Chandler & Co.'s readiness to deliver them on payment of such purchase money.

I can find no satisfactory evidence on that point. The evidence of Mr. Fraser, one of the firm of Ames & Co., was simply in general terms.

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We could always have delivered the stock on payment. We could always make delivery to him of it without buying it.

The next answer he makes throws a flood of light on what he meant by saying the firm could always make delivery of the stock. He is asked:—

While the 600 shares were with Chandler's did you have enough shares to answer the requirements of all your clients without that? A. Well, I don't know.

Now his counsel admits that he had not and on determining whether he could or could not deliver the shares to Conmee if demanded we are relegated to the facts in connection with the purchase and pledging by the Philadelphia brokers of the 600 shares, and the further fact that all the shares held by Ames & Co. were also pledged to cover their indebtedness.

My conclusion from these facts is not so much that there was a subsequent conversion of the stock purchased by Ames & Co. as that they never did legally purchase and *hold* for Conmee as they contracted to do and as in their statement of claim they stated they had done the 300 shares he had contracted with them to purchase and hold for him.

It was contended by Mr. Tilley that the bought note alleged to have been forwarded to Conmee at the time of the purchase of the shares by them had a memorandum on its margin as follows:—

When carrying stocks for clients we reserve the right of pledging the same in raising money upon them in any way convenient to us.

And that this memorandum authorized and justified the pledging of the stock by the brokers in the manner shewn in this case. Without expressing any opinion

whether or not this memorandum was brought to the notice of the defendant so as to form a condition of the contract entered into between him and Ames & Co., I am not prepared to say that its language authorized the pledging by the brokers of the stock for an amount beyond what the purchaser owed the brokers upon its purchase. In my opinion it does not. The language used should be confined to an authority to determine the "most convenient way" they should pledge the stock and not to authorize them to pledge it for amounts which the law prohibited. If brokers desire that the latter power should be given them they must use in their contract clear and unequivocal language on this point.

I take it there cannot be much difference of opinion as to the law regulating the broker's rights and liabilities towards his customer on the purchase of stock on margin.

The broker must at all times have on hand stock sufficient in quantity to deliver to his client upon the payment by the latter of the amount due by him upon the stock.

The purchaser does not rely upon nor does his right depend upon an engagement with the broker to procure and furnish the shares when required but upon the latter's duty and obligation to purchase and hold for the customer the number of shares ordered by the latter subject only to the payment of the purchase price or such part of it as may be unpaid.

While the broker may lawfully pledge the customer's securities for an amount not exceeding the indebtedness of the customer to him any disposition of the securities or mingling of them with other securities pledged which has the effect of depriving the cus-

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tomer of his right to their immediate possession upon payment or tender by him of his indebtedness to the broker will amount to a conversion.

If the broker for his own benefit or convenience chooses to mingle his customer's securities with those of other of his customers or his own and rehypothecates them for a greater amount than the customer's indebtedness to him not retaining in his possession a like amount of similar securities or not having a special agreement with the bank or person with whom he has hypothecated the customer's stock preserving the rights of his customer as they are above stated, he is guilty of conversion.

Clarkson v. *Snider*(1), and the authorities collected in DosPassos on Stock Brokers (2 ed.) pages 257 and 259, especially *Douglas* v. *Carpenter*(2).

In my opinion the appeal should be allowed with costs here and in the divisional and appeal courts, and judgment entered for the defendant upon the issue joined on the third statement of defence, with costs of that issue.

IDINGTON J. concurred with Davies J.

MACLENNAN J.—Appeal by defendant Conmee from a judgment against him at the trial for $4,217.62, affirmed by a divisional court, with a slight variation, Anglin J. dissenting, and afterwards affirmed by the court of appeal for Ontario.

Ames & Co. were a firm of stock brokers in Toronto, when the facts of the case occurred, and their co-plaintiffs, The Securities Holding Co. have, by assignment, succeeded to the rights and interests of Ames & Co.

(1) 10 O.R. 561.

(2) 17 App. Div. N.Y. 329.

The plaintiffs' case is that on the 27th of April, 1902, they were employed by the defendant, as brokers, for commission and reward, to purchase for him 300 shares of Lake Superior Consolidated Stock, of the par value of $100 per share, and to hold the same for him, upon a margin of ten per cent. of the par value, the marginal payment to be added to from time to time on demand, in case of a decline in the market value of the shares. They allege the contract to have been that the marginal payments were to be regarded as payments on account of the purchase money, the remainder of the purchase money being a loan by the brokers to their customer to be repaid on demand with interest, and secured by pledge of the shares, with right of sale on default of payment.

They allege a payment to them on the 27th of April, 1902, by the defendant of the sum of $3,000 on account of margin, and a purchase by them for him on the following day of 300 shares at $30½ per share, equal to $9,150; that a further payment of $1,800 on account of margin was made, but that the shares having afterwards steadily declined in the market, they made frequent demands upon the defendant for further margin, and the same not having been paid, they sold the shares on the 10th of July, 1903, at $2 13/16 per share, and they seek to recover $4,190.89 as a balance due to them from the defendant, for purchase money advanced on his behalf and interest thereon.

It appears to me that the all important question in the case is whether or not the plaintiffs have proved performance on their part of the alleged contract.

What they did, according to the evidence, after receiving the sum of $3,000 from the defendant for margin, was to employ a firm of Chandler & Co., brokers

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in Philadelphia, to purchase, not 300 shares but 600 shares of the stock, at $30½ per share, equal to $18,300, paying Chandler $9,000 on account of the price, and leaving a balance of $9,300 due to that firm, for which sum and interest the latter retained the whole 600 shares in pledge, as their security, continuously from the time of purchase until the following month of November, when the market value of the shares had fallen to $21 1/8 per share.

It is also in evidence that, there being the large sum of $9,300 due to Chandler & Co., that company pledged these shares, along with other shares, to their bankers for a very large sum. And there is no evidence of any stipulation by the plaintiffs with Chandler & Co., if that would make any difference, that the 300 shares alleged to have been bought for the defendant, could be redeemed by or on behalf of the defendant, either from Chandler & Co.'s bankers, or from Chandler & Co. themselves, on payment of the balance of purchase money owing by the defendant to the plaintiff, as upon a purchase of 300 shares only.

What the plaintiffs contracted to do was to buy 300 shares for the defendant, and to advance for him the price, over and above the sum of $3,000, and to hold the shares as security, ready to be delivered on payment of their advance, with interest and commission.

The defendant's right upon such a contract clearly was to require delivery of the shares upon payment of what he owed with interest and commission. He became a debtor to the plaintiffs for an ascertained sum, and upon payment of that sum was to be entitled to delivery of the shares. But the plaintiffs had in the very act of purchase encumbered the shares, not merely with the sum which would have been due to

them on a purchase of 300 shares, namely $6,300, but with a sum of $9,300.

That being so, I think it is clear the plaintiffs did not perform the contract on their part. They had not the 300 shares which they had agreed to buy, at any time ready to be delivered to the defendant on payment of the balance of the purchase money. There never was even a moment when he had a legal right to receive those shares on payment of what he owed. If the plaintiffs demanded them of Chandler & Co., they could not, as of right, have them without paying $9,300, instead of $6,300, which was all the defendant owed. Nor could either the plaintiffs or Chandler & Co. have them while they remained pledged to the bankers of the latter, without paying the bankers' whole claim.

It seems to me too plain to require authority to support the proposition, that while a broker, like any other mortgagee, may pledge his client's shares for an advance, he may not pledge them for more than is due to himself. He can have no right to expose his client's, or his debtor's property, to the contingencies or chances of his own solvency. Nor can it make any difference that he throws in what he deems sufficient countersecurity. It is clear, in my opinion, that if Chandler & Co. had bought 300 shares instead of 600, and if the plaintiffs treating them as bought for the defendant, had paid them the full price, the plaintiffs could not afterwards lawfully have pledged those shares, even with others, for a larger sum than was due to them by the defendant, without a distinct stipulation for redemption on payment of the latter sum. And if the broker could not do that after the purchase, no more could he do it the very moment and by the

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act of purchase. To do so after the purchase would be a wrong and a breach of trust of the plainest kind, and therefore to do so at the moment of purchase and as a part of the transaction must vitiate it as against the client and be a failure to perform his contract with him.

While this position seems to me to be very clear on principle neither is it without authority. See *Clarkson* v. *Snider*(1); *Douglas* v. *Carpenter*(2); *Taussig* v. *Hart*(3); DosPassos 257-9.

The case of *Scott & Horton* v. *Godfrey*(4), relied on by the learned chancellor at the trial, is quite different from the present. There the intention of the parties was that the broker should make a contract between his client and the sellers of the shares, and the action was by the latter against the client. It was as if Chandler & Co. were here suing Conmee. It is not suggested that there was any contract in the present case between Chandler & Co. and Conmee. The plaintiffs' case, as plainly stated in their statement of claim, is that they were to *purchase and hold* the shares for the defendant, and were to advance part of the purchase money. That case, moreover, was tried with a special jury who found the bargain to have been as contended for by the plaintiffs.

I am therefore of opinion that the purchase made by the plaintiffs through Chandler & Co. was not a performance of their contract with the defendant.

Nor is it attempted to be shown that the plaintiffs made any other purchase of shares for the defendant. That is the purchase, and the only purchase, on which

(1) 10 O.R. 561, 568.
(2) 17 App. Div. N.Y. 329.
(3) 58 N.Y. 425.
(4) [1901] 2 K.B. 726.

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their claim is rested, either in their statement of claim or in their evidence. If there was any other purchase, what was its date? Or at what price was it made? There is not even a suggestion of any other.

But then it is said that the plaintiffs always had shares on hand to answer the alleged purchase for the defendant. It may be conceded that if they had bought 300 shares through Chandler & Co., and if they were in Chandler & Co.'s hands subject to a sum not exceeding what Conmee owed, they could appropriate to Conmee any other equivalent number of shares in their possession, subject to the same debt. But if the purchase through Chandler & Co. was imperfect or defective, then they could not appropriate any other shares to the defendant, even if they had any number of them in their possession free and unpledged and unincumbered. Their contract with him was, as they themselves allege, to buy for him, and not to sell to him. They could not buy from themselves, and they do not pretend to have done so. *Robinson* v. *Mollett*(1).

The appeal should, therefore, in my opinion, be allowed, and the action should be dismissed with costs both here and below.

DUFF J.—The plaintiffs claim the balance of moneys paid by Ames & Co. in the purchase of 300 shares of consolidated Lake Superior common stock for the defendant as his brokers. The character of the employment of Ames & Co. in the course of which these moneys are alleged to have been paid is stated in the second paragraph of the statement of claim. I transcribe the paragraph in full:

(1) L.R. 7 H.L. 802 at pp. 815, 836, 838.

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On or about the 27th day of April, 1902, the defendant employed and instructed the plaintiffs, as stock brokers for commission or reward, to purchase and hold for him certain shares of stock (300 of Soo Common) as particularly set forth in the sixth paragraph of the Statement of Claim and requested the plaintiffs to advance to him part of the moneys necessary to enable him to become the purchaser of such shares.

The payment—in point of fact—of the moneys sued for, is not in dispute. The defendant resists the claim upon the grounds, first, that the mandate of Ames & Co. was to acquire for him as his broker 300 shares of the stock referred to and to hold them for him upon the terms that on payment of his indebtedness in respect of their advances he should be entitled to the delivery of the shares, and that this mandate has not been executed; secondly, that if such a purchase was made he is relieved from liability to indemnify Ames & Co. in respect of it by reason of their subsequent wrongful dealing with the subject matter of the purchase.

As I think the defendants ought to succeed on the first ground, I wish to be understood as expressing no opinion whatever upon any of the points involved in the second.

On the day on which Ames & Co. received the defendants' order, they instructed their Philadelphia agents, Chandler & Co. to buy 600 shares of the stock in question. These were bought at 30½ in three parcels (one of 400 and two of 100 each) and the certificates, having transfers executed in blank attached to them, were delivered on the following day. Of the purchase price of the whole 600 shares Chandler & Co. advanced for account of Ames & Co. $9,375.

These 600 shares passed to Chandler & Co. on account of Ames & Co., subject to a charge for the whole

sum advanced by Chandler & Co. They remained subject to that charge. There was no time when Ames & Co. were entitled in law to appropriate 300 of these shares to the defendant so that he could, on the payment of the amount which Ames & Co. had agreed to advance to him ($6,000.00 plus interest and commission) put forth his hand and take the appropriated shares as his own. I do not think, therefore, that speaking of any 300 of these 600 shares, it can, in accordance with the fact, be said that Ames & Co. had purchased them, and were holding them for the defendant, under the terms of their agency,—that the defendant should be entitled to the delivery of them at any time upon the payment of these sums.

I do not, of course, overlook Mr. Tilley's point, that Ames & Co., having other stock which they held for other customers free from any such burden, could at any time have met the defendant's demand. I think this point fails for the want of evidence to support it. Mr. Tilley relies on the evidence of Fraser; but that evidence in substance only amounts to this, that if the defendant had demanded his stock they could on payment of the balance of the purchase money have made delivery of it to him. I have no doubt that is so. I have no doubt, for instance, that, speaking after the event, Fraser could truly say that they could have got 300 shares from Chandler on the payment of the amount of Ames & Co.'s advances; but the statement really affords us no assistance whatever on the point at issue.

Nor, with respect, can I agree with the view taken by Mr. Justice Osler in the court below that the failure on the part of the defendant to set up a wrongful dealing with the stock by Ames & Co. helps the plaintiffs in

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considering the effect to be given to this evidence. It is not a question, in my view, whether Ames & Co. did something analogous to a conversion of the defendant's stock in procuring from Chandler & Co. an advance of a portion of the purchase money on the terms on which it was procured. The advance by Chandler & Co. and the purchase, must, I think, be treated as a single transaction; and the real question put in the form most favourable to Ames & Co. is: Had they as a result of the transaction in question 300 shares of the specified stock which on payment of the sums referred to they were legally entitled to appropriate and deliver to the defendant? To shew that they had was, I think, part of the respondents' case.

I have still to refer to Mr. Tilley's argument based upon the letter informing the defendant of the purchase dated 28th April, 1902, which is said to have been mailed to the defendant at Port Arthur. The letter contains a memorandum in the words:

> When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us.

It is argued that the defendant, having received this letter, by his silence acquiesced in Ames & Co.'s course of dealing. On the evidence I have no difficulty in concluding that the term expressed in the memorandum was not referred to in the conversation which occurred when the defendant gave his order; and it is not disputed that the purchase by Chandler & Co. was complete before the defendant received the letter, if he ever received it. Assuming that it came to his attention, it cannot, I think, with respect to transactions already past be held to alter the character of the authority conferred upon Ames & Co. as a result of what

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happened at the time the order was given: *North-West Transportation Co.* v. *MacKenzie*(1).

To prevent misconception, I should add this. There is no sufficient evidence in this case, of any custom which would have the effect of modifying the reciprocal common law rights and duties of the defendant and Ames & Co. in respect of the matters I have dealt with. The case was argued by both counsel and I have dealt with it on that basis.

Appeal allowed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*

Solicitors for the respondents: *Thomson, Tilley & Johnson.*

(1) 25 Can. S.C.R. 38.