1910
*Nov. 24.
1911
*Oct. 3.

ROSE A. CLARKE (PLAINTIFF) ..... APPELLANT;

AND

FRANK W. BAILLIE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Broker—Stock carried on margin—Right to pledge.

A broker who carries stock on margin for a customer has a right to pledge it for his own purposes to the extent of the amount he has advanced.

If the broker pledges such stock as security for an amount greater than his advances, whereby he makes no profit and the client suffers no loss, he is not liable as for a conversion provided that on demand of his client he delivers to the latter the number of shares ordered and which he has been carrying for him. Anglin J. dissenting.

Per Duff J.—The broker is not liable under the above conditions if he pledges the stock believing that his arrangement with his client so authorized.

Per Duff J.—The dealings complained of were in accordance with the ordinary practice of brokers in Toronto in respect to stocks being carried "on margin," and the proper inference from all the evidence was that such dealings were authorized by the arrangement between the parties.

Per Anglin J.—The broker must at all times be in a position to hand over the stock to his client and if, as the result of his pledging it, he puts himself in a position where he may not be able to do so, he is guilty of conversion.

Judgment of the Court of Appeal (20 Ont. L.R. 611), affirming that of the Divisional Court (19 Ont. L.R. 545) affirmed. *Conmee* v. *The Securities Holding Co.* (38 Can. S.C.R. 601) distinguished.

(Leave to appeal to Privy Council was refused, 13th Dec., 1911.)

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a Divisional Court(2) by which the verdict at the trial in favour of the defendants was sustained.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 20 Ont. L.R. 611. (2) 19 Ont. L.R. 545.

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The facts are stated in the judgment of the Divisional Court as follows:—

"The plaintiff brings this action to recover damages from the defendants because of their alleged dealings in respect of certain stocks known as the Sao Paulo, and Louisville and Nashville stocks, which the plaintiff engaged them to purchase for her on margin, as the term is. The learned trial judge disposed of the case adversely to the plaintiff, on the ground that she had failed to shew damage. Against this judgment she has appealed to this court.

"Her complaint as to the Sao Paulo stock is that the defendants, without her consent and in breach of their duty towards her, hypothecated it together with other stocks in which she had no interest, for a bulk sum exceeding many times the amount of her indebtedness to them, and that this conduct operated as a conversion. As to the Louisville and Nashville stock she charges that the defendants did not in fact purchase it for her, but, nevertheless, represented to her that they had done so. Ultimately, upon demand, they delivered to her agent for her the shares of the two stocks to the amount ordered by her; but, she says, did not inform her of the facts now complained of; that in ignorance of these facts she paid for and accepted the stocks and disposed of them; that on discovering the facts she considered herself entitled to damages, and accordingly brought this action.

"It is beyond question that the defendants purchased for the plaintiff the Sao Paulo shares in accordance with the terms of her instruction, she paying them a small portion of the purchase money therefor, and owing to them the balance, the defendants being entitled to hold these shares until the plaintiff

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paid them the amount owing in respect thereof. The defendants admit that they borrowed on the security of these shares, and of other stocks a sum of money greatly in excess of the amount owing by the plaintiff.

"As to the Louisville and Nashville stock, on the day of the plaintiff ordering its purchase, the defendants telegraphed instructions to a firm of brokers in New York to make the purchase, and in due course that firm sent to the defendants a bought note for the amount of shares thus ordered, whereupon the defendants represented to the plaintiff that her instructions had been complied with. It was, however, contended before us that if the New York brokers made the purchase of the Louisville and Nashville stock for the plaintiff, they the same day, sold it, and that thereafter no Louisville and Nashville stock was held for her by the defendants or their agents. On this point it may be observed that even if the New York brokers did sell the plaintiff's stock, still the defendants, so far as appears, were wholly unaware of the fact, and acted in perfect good faith in representing to her that the stock had been purchased and was being held for her. However, we think that the evidence shews that the New York brokers purchased for defendants in pursuance of the plaintiff's instructions to them the number of shares ordered for her, and that, although they sold the particular shares so purchased, still they always held either free from hypothecation or hypothecated, the number of shares which the defendants had ordered them to purchase, and on account of which she paid to them a sum of money by way of margin. In this transaction, the New York brokers seem to have known the defendants only, and were carrying for them many other stocks, all of which, including

the plaintiff's Louisville and Nashville shares, were being held by them as security for the whole indebtedness of the defendants to them, being an amount greatly in excess of the plaintiff's indebtedness to the defendants. After the lapse of some months the plaintiff applied to the defendants for both stocks, viz.: the Sao Paulo and the Louisville and Nashville, and at once, upon her paying the amount of the defendants' claim, they were transferred to her order."

Nesbitt K.C. and *Wood* for the appellants. The respondents were bound to purchase and then to carry the shares for the appellant. *Robinson* v. *Mollett*(1), at pages 815, 836, 838; *Johnson* v. *Kearley*(2), at pages 527 to 529; *Parsons* v. *Hart*(3).

Respondents were agents of appellant and when they converted the shares she could demand their value at the market price on that day. *Stubbs* v. *Slater*(4).

Hellmuth K.C. and *Long* for the respondents.

THE CHIEF JUSTICE.—I have no doubt that this appeal should be dismissed. The appellant brought an action to recover from the respondents damages for breach of an agreement to purchase for her certain shares of stock in these circumstances:—

The appellant is a spinster admittedly familiar with the usages and practice of the stock market and the respondents are brokers and members of the Toronto stock exchange. Instructions to purchase on

(1) L.R. 7 H.L. 802.
(2) [1908] 2 K.B. 514.
(3) 30 Can. S.C.R. 473, at p. 480.
(4) [1910] 1 Ch. 632.

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margin a certain number of shares of Sao Paulo and of Louisville and Nashville stock were given verbally by the appellant and when the orders were executed a notice called a bought note was sent to her in each case to inform her that her order was executed and setting forth the conditions subject to which the purchase was made.

The purchase of stock on margin through a broker necessarily involves an advance by the latter of a sum which added to the amount of the margin put up by the customer will be sufficient to enable the broker to pay for the stock. It is proved beyond doubt that to procure this money the broker is entitled, according to the well established usage of the stock exchange both in Toronto and New York, to re-pledge *en bloc* the stock bought by him on margin. To enable this re-pledging to be done in a way most advantageous for both parties and to avoid all misunderstanding as to the authority of the broker, this term was inserted in all the bought notes:—

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

It is admitted that the broker did in the case of each purchase make the necessary advances for his customer, the appellant; but the latter contends that while the broker had the stocks in his possession they were pledged by him to raise a sum of money in excess of what was then due to him by her with respect to each block of stock and that such a dealing constituted a conversion of the stocks to his own use and that he must account for their full value at that date notwithstanding that he acted in perfect good faith.

There can be no doubt, as both parties admit, that

the broker had the right to hypothecate the stock of his client so long as he did not pledge it for an amount in excess of what was due him by the client in connection with the purchase and the trial judge finds as a fact

that the stock which was for a good deal of the time unpledged was never at any time pledged by the respondents beyond the amount due them by the appellant for that portion of the purchase made which they had advanced.

If not sufficient to justify this finding which, of course, puts an end to the plaintiff's claim the evidence is very conclusive that the brokers had at all times control over the stock and could deliver it to the appellant, as they did on her first demand, on payment of the amount due on each purchase. When she did ask for delivery of the stocks the certificates were partly in respondents' vaults and partly in the possession of their agents in New York, subject to their order; and her directions with respect thereto were immediately complied with and the stocks were never at any time dealt with by the brokers to the damage of the appellant and to the profit of the respondents. On the contrary it is clear on every line of the evidence that the brokers acted with the utmost good faith, in strict accordance with the usages and customs known to the appellant and with reference to which she is properly presumed to have made her contract.

I would dismiss with costs.

DAVIES J.—I am of opinion that this appeal should be dismissed upon the ground that there was no evidence whatever that the plaintiff (appellant. had sustained any loss by reason of the alleged conversions of her stock of which she complains.

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The respondents were brokers and had purchased stock for the appellant on the margins advanced for the purpose by the appellant. They had pledged this stock so purchased together with other stock of other clients with one of the banks not only to raise the difference between the margins put up by the appellant and the purchase price of the stocks, but also to cover their general indebtedness to the banks which was, of course, much greater than the sum owing to them upon the appellant's stock. The appellant contends that the manner in which the pledge was made constituted in law a conversion of her stock and entitled her to recover the damages she claimed.

The facts proved shewed that the alleged conversion was in accordance with the ordinary practice of the respondent brokers in their dealings with the banks respecting the hypothecation by them of stocks of their customers, and that although they had hypothecated the appellant's stock or shares together with other stocks for a sum of money greatly in excess of the amount owing by the plaintiff on her stock, the moment she demanded her stock her demand had been complied with and her stock duly transferred to her, accepted by her and then sold by her. The alleged conversion by the improper manner of hypothecating the shares brought no profit to the brokers nor any loss to the appellant. It was not till long afterwards that plaintiff brought her action.

On the ground, therefore, that although the brokers were not under the terms of their contract with the appellant as I construe it justified in pledging her shares in the manner they did, yet as they delivered the shares to the appellant immediately she demanded

them and that she did not suffer any damage whatever from the alleged impropriety I think this action cannot be sustained.

Owing to some observations made in the reasons for judgment of the Court of Appeal I think it desirable to say that further argument of the question of the legal meaning of the foot-note to the bought and sold notes of the brokers under which they claimed the right to hypothecate these shares for a larger sum than was due to them upon the shares by their owner has not tended to weaken or alter the opinion I expressed with regard to its meaning in the case of *Conmee* v. *Securities Holding Co.*(1), namely, that its language does not justify the broker in pledging the shares for a sum greater than that due from the customer to him.

I would dismiss the appeal with costs.

IDINGTON J.—The respondents contracted with the appellant to purchase and carry for her certain stocks. In the course of the business she claims they had pledged or hypothecated such stocks in such a way that she is entitled to charge against them the then market value of said stocks, though much depreciated in value when she received a transfer to her of said stocks or the like stocks and disposed of them, and hence suffered loss.

I am somewhat at a loss to know exactly on what legal grounds the claim is put.

If we are to treat the stocks in question as transferable in such a way that they can be looked upon as chattels susceptible of conversion for which an action

(1) 38 Can. S.C.R. 601.

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of trover would lie and this as if such an action, we are met with the legal difficulty that it has always been competent for the court in an action of trover to stay the proceedings for damages upon a delivery up of a chattel.

That is what has happened by the act of the parties, and how can damages rest on that ground ?

It has sometimes been competent for the owner of the chattel wrongfully converted, to waive the tort and sue for price or proceeds of goods and recover. This option could only be exercised upon the complete abandonment of any right to, or interest in, the chattel, which is impossible on the facts here.

In either of such alternatives as I present, the property in the thing in question is presumed in law to have become by the judgment of recovery, vested in the wrongdoer or party meddling with another's property. Hence no such ground of action is conceivable here.

Again, trusteeship is spoken of as a possible ground. How it can be invoked in such a case or made to operate is unexplained. Even if so a trustee having power of disposal pretending to exercise it by a circuitous method so that he ultimately becomes apparent owner as result of such transactions, has been held bound at the option of the *cestui qui trust* to account upon the footing of his alleged sale or whilst being tentatively held thereto to have the property put up for sale and the chances of a better bid being got given the *cestui que trust.* See *Ex parte Hughes* (1) (1802), and *Ex parte Lacey* (2) (1802).

Short of some such situation as that, I know of no legal principle upon which the courts have ever acted

(1) 6 Vesey 617.

(2) 6 Vesey 625.

to charge a trustee or agent improperly dealing with the trust estate with the value thereof; unless same or part thereof, debited has been lost as the result of such improper dealing.

The evidence in this case falls short of anything in any of these conceivable cases.

I am also unable to understand how our decision in the *Conmee Case*(1) has any bearing on the issues raised herein.

I would not for a moment say a word to weaken what we held in so plain a case as that was. Yet even if appellant had before accepting delivery to her of the stocks in question, made her alleged discovery of the facts herein relative to the pledging or hypothecation of the stocks in question and sought to make respondents responsible therefor, I would not be quite sure that she had brought herself within the said decision.

The hypothecation or pledging of the property of another beyond what that other authorizes, may have in many ways serious results that are not apparent in this case where no damages are shewn to have in fact resulted from the act complained of.

Again it is claimed as to the stock bought in New York that in fact there never was a purchase of that stock. The learned trial judge found that there was in fact such a purchase. The Divisional Court in appeal therefrom, also found there was such a purchase.

Though not expressly dealing with the point the Court of Appeal for Ontario must also be taken to have held the same way.

It is too late for us to reverse such findings of fact on such conflicting evidence as exists herein.

(1) 38 Can. S.C.R. 601.

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The utmost that can be said with a full assurance that we are not infringing upon the rule as to concurrent finding of fact by courts below is this, that the stock alleged to have been purchased in New York, passed by reason of some sort of understanding between the respondents and their New York agents, into a body of mingled securities pledged or hypothecated for a very large balance due from respondents to their New York agents in respect of similar transactions.

Now I am not at all prepared to hold that a broker in Toronto retained to buy stocks in New York, has completely executed the business entrusted to him, when he has by the same act of buying so called, so bound the alleged purchase as to subject it to the common charge (exceeding his advance in the purchase) covering it and many others.

It is idle to speak of the other securities being ample, or the personal credit of the broker in New York being ample, so long as the charge exceeds the value of the stock presumed to have been bought.

Nor am I disposed to stretch the implied authority, which may exist as suggested in the Court of Appeal, even if known and so recognized amongst brokers in Toronto, as to be binding upon each other or members of the Stock Exchange, to cover the duty arising towards a person ignorant thereof, when the broker is retained merely to purchase in New York, even when coupled with an agreement to advance part of the price.

I think this case must be disposed of by strict attention to the nature of the contract between the parties and the consequences of some breach thereof. In doing so I desire not to be misunderstood as accept-

ing without limitation either what has been held in the court below, or been contended for here and probably there, and hence my taking trouble to explain (by what I have said) in advance, what I am about to say.

The contract seems accurately stated in the following evidence of one of the respondents:—

249. Q.—The contract was that she was to pay 15% or 20% of the par value of the stock, and you were to pay the balance to purchase it, and the stock was to be pledged to you for the amount you put up, and she was to keep her margin up according to the fluctuations of the market,—was that the contract between you? A.—Yes, that is the contract; there was no written contract.

I do not think such a contract warrants the broker acting upon it either pledging or hypothecating the stock purchased pursuant thereto, for any greater sum than he has advanced together with the interest and commission due him.

Nor, to guard myself by repeating what I have said already relative to New York, do I think that if the purchase and this unwarranted pledging or hypothecating are, as they may be in a given case such as that of the dealing in Sao Paulo stock in question, part and parcel of the same transaction, that the broker has executed his contract to purchase.

It is not clear exactly how that was in this case. It is tolerably clear, however, that in the many changes involved here there must have been a time when the contract of purchase was executed by the terms of the pledge or hypothecation having been so expressed as to enable the shares in question to have been as of right withdrawn upon payment of the sum due from appellant to respondent.

It is, moreover, absolutely clear that the stocks were on demand of the appellant freed from any

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charge and immediately transferred to her upon her paying the amounts due.

The purchase the respondents were retained to make must then at all events have been fully executed, and I fail to see how thereafter she can, under the circumstances, now be heard to say the contrary, especially in the absence of any tender back of that which she got.

Now assume for argument's sake, that the respondents exceeded in any way by unauthorized pledging or hypothecating the limits of their legal rights, and even have thereby improperly jeopardized the appellant's property and her interests in question relative thereto, how can she on the facts claim she was damnified ? No damage is shewn. No case is made shewing such damages. If her pleadings might cover nominal damages that is not what has been thrashed out in the long drawn out contest.

And if it ever was open to the appellant to rest upon such a case, the facts have been so held by the courts below, and the nature of the contest has been throughout so entirely distinct from such a consequence, that I do not think we can now reverse on such technical grounds, all that has passed in the courts below.

Although a case may be conceivable of transactions of such magnitude as to effect by such methods as in question the value of the stocks in the market, no evidence here shews such results to have taken place.

I may remark that though I have used purposely in order to cover briefly all points of view, the terms pledging or hypothecating as possibly conceivable relative to what was done, I by no means overlook the widely different legal meanings of the words, and in

some cases, legal results, of improperly dealing with property subject thereto, or made the subject thereof.

In common parlance, and as used for convenience sake in argument the terms are loosely treated as interchangeable, though not so.

It so happens here I simply have to solve a legal problem arising in this case which must be solved in the same way, whether or not the thing known as stocks herein, or the evidence thereof, can be properly spoken of as subject matter of a pledge.

In the absence of fraud and having regard to the good faith of respondents, however mistaken in my view of their legal rights, I see no conceivable ground of action beyond breach of contract.

One question yet remains and that is the minor one of the one-half per cent. interest charged beyond the rate the brokers were paying. The contract is not clear, but the conduct of the parties makes it clear. She was told from time to time what interest was being charged. Unless the relation of principle and agent excludes the right to charge more than paid, the contract, or that and the conduct of the parties, forbids complaint.

The relation created by this contract is not one purely of principal and agent. It involves much more and thereby to my mind excludes in the absence of any countervailing facts and circumstances reducing it to that simple relation the application of the principles of law prohibiting an agent from making a profit unassented to by the principal.

I think the appeal must be dismissed with costs.

DUFF J.—I think the appeal should be dismissed. I should not have thought it necessary to add anything

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to the reasons given by the learned judges who have dealt fully with the questions involved in the court below were it not for the difference of opinion in this court and the circumstance that the decision of the Court of Appeal (it is argued) is in some way inconsistent with the decision of this court in *Conmee* v. *The Securities Holding Co.*(1).

There are several grounds upon which I think the plaintiff's action must fail.

The evidence shews very clearly, I think, that both in New York and Toronto there is a well understood and well defined usage among brokers who buy and carry stocks for customers "on margin" to repledge or hypothecate such stock *en bloc* for the purpose of raising the funds necessary to meet the obligations incurred by them in the transactions they have executed or undertaken to execute.

It was stated at the trial by Mr. E. B. Osler that this practice is advantageous to the customer because it enables the broker to borrow money at a lower rate. That it is a reasonable practice is shewn, first, by the fact of its general adoption in the two places mentioned, and secondly, by the circumstance that in the State of Massachusetts almost without exception and on the London Stock Exchange in the vast majority of cases such transactions are treated as executory agreements for the sale by the broker to the customer at the price at which the stocks are purchased plus a charge for interest and the broker so long as he carries the stocks is entitled to deal with them as owner. In *Bentinck* v. *London Joint Stock Bank*(2) the subject was dealt with by North J. who sums up the evidence given in that case at pp. 140 and 141 thus:—

(1) 38 Can. S.C.R. 601. (2) [1893] 2 Ch. 120.

Now the evidence as to "contango" transactions is this—I am only giving a short *résumé* so far as it is now material—when a client directs a broker to buy stock for which the client is not himself finding the money to pay at the time, the money is provided by the broker, and he borrows the money for the purpose. This is done sometimes, no doubt, by a pure and simple loan; but in a very large majority of cases, amounting, according to the evidence of Mr. Grant, the official assignee of the Stock Exchange, to sixteen-twentieths of the whole business on the Stock Exchange, and, according to Mr. Powell's evidence, to nineteen-twentieths of the whole business, the thing is done by the broker finding the money on "contango," and then what happens is this: he is treated, not as the mortgagee or pledgee of the shares for the money which he advances, but he becomes by contract the purchaser of the shares out and out, and they become his own property. The shares are not yet transferred to him—he does not acquire any legal interest in them; but, as between the client on whose account he has bought them on the one hand, and himself on the other, when he finds the money on "contango" he becomes the absolute owner of the property, subject, however, to a contract made at the same time, or part of the same contract, that he is to re-sell to the client a like amount, not the same identical shares, but a like amount of similar shares, usually on the next account day, although a later day may be fixed by arrangement, at a price larger than that for which he gave his client credit on the first occasion; because the enhanced price is to cover interest upon the money in the meantime. Therefore, in fact, these "contango" transactions, although they are constantly treated as loans of money, even by persons who are thoroughly familiar with the business, although they are popularly spoken of, even on the Stock Exchange and by members of the Stock Exchange, when they come before the Court, as loans, yet, when the transaction is regarded from a legal point of view, it is not a loan on the client's security, but is a sale by which the broker becomes entitled to the security as his own, although he is subject to a contract to re-sell to the client, not the same, but an equal amount of similar shares or stocks at a future date. In all these transactions, therefore, when money is borrowed from a stockbroker on "contango" or "continuation," whether the money is obtained from the dealer or from other stockbrokers, or from bankers, the result is the same: the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date. This being the nature of the business between the parties, the reason why these "contangos" or "continuations" are often called loans is quite clear; but this does not alter the legal position of the parties con-

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cerned in them, or prevent the shares held by the brokers under such circumstances from being their own and available by them.

According to the practice among brokers in Toronto and New York with reference to stocks so carried the powers of the broker over the stocks are much more restricted than those thus indicated. The evidence of Mr. Osler makes it plain that while the broker may pledge his securities *en bloc* he is, according to the practice in Toronto, bound to do so in such a way — that is to say, he is bound so to maintain the ratio between the loan and the value of the securities lodged — as to be able at any time on payment of the amount owing by a particular customer to procure delivery of any pledged shares which may be the property of that customer. His primary obligation, in a word, is to maintain such control over his hypothecated securities as to enable him at any time to carry out his contract with his customer; but subject to that he may pledge his customer's security with others *en bloc* for the purpose of getting the necessary funds to carry out his obligations. It appears to me to be a question of fact whether or not the agreement between the plaintiff and the defendants was entered into with reference to this practice. I do not think the law assigns such legal incidents to an arrangement by a broker to carry stocks "on margin" for a speculator as to exclude such a practice. I am quite willing to concede that in the absence of any such custom and in the absence of any express agreement to the contrary the relation between the customer and broker in such transactions would be in substance that of mortgagor and mortgagee subject to some modifications necessary to suit the peculiar necessities of the case. Here, however, we have such a cus-

tom, and I think the effect of the evidence is that in Toronto at all events it would be impracticable for brokers to carry out such transactions without resorting to the methods mentioned. There are some observations of Parke B. in *Foster* v. *Pearson*(1), at pages 858, 859 and 860, not without a bearing upon the point.

The judgment in the case of *Haynes* v. *Foster*(2) is treated in the argument for the defendant as establishing that it is a sort of *legal incident* to the character of a bill-broker that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connection with the evidence, and that all that was intended was this, that, in the absence of evidence as to the nature of such an employment, a bill-broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had therefore no right to mix bills together and pledge the mass for one entire sum. In truth, *a bill-broker is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing.* It may differ in different parts of the country, it may have powers more or less extensive in one place than in another; what is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place. A great body of evidence was adduced in the present case to prove that it was the course of dealing in the city of London for bill-brokers to raise money for their employers, by pledging the bills of different proprietors for one entire advance; and there is nothing unreasonable in such a practice.

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It remains to consider whether there is any difference between the case of *Foster* v. *Pearson* and that of *Stevens* v. *Foster*.

The question was not left to the jury in the same way in the latter as in the former case. It was put on the ground that the jury might infer from the usage proved, and its general notoriety, that the customer employed the bill-brokers with reference to that usage, and therefore authorized them to deal with the bills as they in fact did; and the jury were satisfied with the evidence, and did draw the inference that Messrs. Wood & Poole had authority as between them and their employers to pledge the bills in the manner in which it appears that they did.

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(1) 1 C.M. & R. 849.
(2) 2 C. & M. 237.

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> So far as the usage tends to shew an authority to pledge bills in a mass, and not separately, its reasonableness is hardly disputed; and that question has also been already disposed of. It was proved to be the prevailing practice, and it is enough for us to say the jury were warranted in drawing the inference which they did, especially as the plaintiff was himself a bill-broker.

These observations were in effect adopted in *London Joint Stock Bank* v. *Simmons*(1), by Lord Macnaghten at page 225, and by Lord Field at page 228.

It is then, I repeat, a question of fact whether the contract was or was not entered into with reference to the usages referred to. I agree with the Court of Appeal that the proper inference is that it was. The appellant was, admittedly, familiar with transactions in the stock market. In each of the bought notes sent to her there is an intimation in these words:—

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

This, she says, was not brought to her attention, but, I think, a person who, having instructed a broker to buy stocks and carry them, receives a notice of this kind and does not read it, must be taken in respect of subsequent dealings to assent to any reasonable terms it may contain to the same extent as if he had read it and taken no exception to it. Now, in my view, this intimation is a plain warning that the arrangement with the broker involves the right to use the stocks purchased as security in accordance with the reasonable practice in such transactions among reputable brokers in Toronto and New York; and I do not see how after reading it and acquiescing in it the client could be heard to object to the use of them in the same way in which stocks carried "on

(1) [1892] A.C. 201.

margin" were being generally dealt with. I do not think ordinary people reading such a notice would take it to refer only to the broker's interest as mortgagee; that I think is too much of a lawyer's refinement. I think most people would assume that it meant something more than the mere statement of the fact that the broker would exercise his legal right to hypothecate his own interest in the securities referred to.

But assuming the plaintiff's rights to be regulated by the rules governing the relations between mortgagor and mortgagee, without reference to any special course of dealing, I cannot understand upon what ground she can recover in this action. The proposition upon which her case rests must be this: that a mortgagee of shares in an incorporated company making a sub-mortgage to secure a sum larger than the actual amount of his mortgage debt comes *ipso facto* under an obligation to pay the mortgagor the full market value of the shares at the time, and this although the mortgagor has acted in entire good faith and without profit to himself or loss to the mortgagor. I do not know upon what legal principle any such liability can be based. If the mortgagee makes a sale or as in *Ex parte Dennison*(1) hands over the stocks to somebody else to make a sale or does that which is equivalent to a sale he must, of course, account for what he receives or ought to have received; if he improperly uses the mortgaged property in such a way as to make a profit out of it he may be accountable for the profit. But if a mortgagee holding land under an absolute conveyance subject to a collateral agreement for redemption should submortgage or

(1) 3 Ves. 552.

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otherwise encumber the property (without disclosing the mortgagor's interest) for a larger amount than the mortgage debt, would anybody argue that the mortgagee must account for the full value of the land at the date of the sub-mortgage ? If so, upon what principle could the contention be based ? If one take the case of a pledge of chattels, that case is covered by distinct authority. It has long been settled that a repledge for more than the debt of the pledgor does not expose the pledgee to an action for conversion. Even a trustee using the property of his *cestui que trust* is accountable, generally speaking, only for the property or for the profits he has made or for the loss occasioned by his breach of trust. I do not think it has ever been suggested that a trustee in good faith leasing property he had no power to lease or mortgaging property he had no power to mortgage assumes *ipso facto* the obligation of a purchaser of the property at the option of his *cestui que trust*.

A very different question arose in *Conmee* v. *Ames* (1), and I refer to it only because some language of mine has been cited as shewing that the memorandum on the bought note was not to be given effect to. In that case it appeared to me there was no evidence of any general practice which would affect the transaction under consideration. The point upon which it appeared to me, rightly or wrongly, that the decision must turn was that the plaintiffs, the brokers (who were suing the principal for a payment alleged to have been made on his account), had on the facts proved failed to establish that they had executed his mandate. I thought also that the

(1) 38 Can. S.C.R. 606.

memorandum in the bought note (on the same terms as that referred to above) not having been brought to the defendant's notice could not be held to govern the rights of the parties in respect of transactions completed before the bought note was despatched by the broker. That view has no possible bearing upon the questions arising in this case.

ANGLIN J.—The plaintiff sues to recover moneys paid by her to the defendants—her brokers—on account of the purchase price of certain shares of stock and interest thereon and for commissions; also for damages for breach of duty as her agents and for misrepresentation and deception and for the conversion of her shares.

The transactions were what is known as purchases on margin. The understanding, as deposed to by the defendant Wood, was that the brokers should take transfers of the stocks in such manner that, while the property of the plaintiff, they would be under the broker's control, *Caswell* v. *Putnam*(1); and that they should carry them for the plaintiff, having the right, however, at any time to call upon her to pay the balance due upon them and to take them over. As an incident to such a contract the brokers had the right to re-pledge the plaintiff's stock, always preserving, however, her legal right upon payment of the balance owing by her to obtain delivery of her securities. *Conmee* v. *Securities Holding Co.*(2), at pages 609, 613; *Rothschild* v. *Allen*(3). Shares were eventually delivered by the defendants to the plaintiff on her de-

(1) 120 N.Y. 153. (2) 38 Can. S.C.R. 601.
(3) 90 App. Div. N.Y. 233.

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mand which corresponded in number and demonination with her orders to them. When she demanded and received these shares, however, she was ignorant of the brokers' dealings with her property in the interval which form the basis of her present action.

She prefers her claim on allegations that the defendants never bought for her the shares for which she paid them; that, if they were bought for her, at least some of such shares were re-sold by the brokers' agents without authority; and, if this be so, that all of them were pledged by the defendants for their own general indebtedness, much greater in amount than what was owing to them by her, and without any provision for the release of her property on payment of the balance which she owed in respect of it; and that the amount charged her for interest was greater than the brokers themselves paid for the moneys which they borrowed and was a secret profit to which, as agents, they were not entitled.

I am not satisfied that the plaintiff has established her charge that the brokers did not buy for her all the shares she ordered them to purchase. The purchases of Sao Paulo stock are fully proven. There is some confusion in regard to the purchase of the Louisville & Nashville Railway stock. The evidence of it is decidedly halting, and, had the finding been that this stock had not been bought for the plaintiff, I would have thought it at least equally satisfactory; but I am unable to say that there is no evidence to support the holding of the provincial courts that 100 L. & N. shares were purchased for the plaintiff in New York by the defendants' agents, the Randolphs.

It is no doubt the case that the identical shares of L. & N. which were so bought were not kept on hand

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by the defendants or their agents. But they were not bound to keep these identical shares on hand. *Nourse* v. *Prime*(1). Subject to the question of hypothecation, with which I shall presently deal, their obligation would have been fulfilled if they kept on hand a sufficient number of L. & N. shares to answer the claims upon them of the plaintiff and of all other persons entitled to receive such stock from them. *Caswell* v. *Putnam*(2); *Conmee* v. *The Securities Holding Co.* (3). Upon the evidence in the record, however, the finding that this obligation was fulfilled in regard to the L. & N. stock cannot, in my opinion, be sustained.

It is admitted that, on the day on which they received the certificates for the 100 shares of L. & N. said to have been bought by them for the plaintiff, the Randolphs delivered it through the clearing house to Gates & Co. in part fulfilment of a contract previously made for a sale to them of 400 shares of L. & N. After this delivery the Randolphs held either 450 or 550 shares of L. & N. (it is not very clear which is the correct figure)—all of them under hypothecation to various lenders for large sums of money. The defendants failed to produce the Randolphs' "box-book" which alone would have shewn any other unpledged shares. There is no evidence that any of the pledged shares belonged to the Randolphs themselves or could have been appropriated by them to the defendants' account without disregarding prior rights of some of their other customers. When it appeared that the L. & N. shares alleged to have been so purchased for the plaintiff were not held for her but were immediately delivered to a purchaser from the Randolphs—if it were not so with-

(1) 4 Johns. Chy. 490; 7 Johns. Chy. 69.

(2) 120 N.Y. 153.

(3) 38 Can. S.C.R. 601.

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out that evidence—the burden was upon the defendants to shew, as something peculiarly within their knowledge, that they or their agents had on hand or under their control other L. & N. shares which they could rightly appropriate to the plaintiff's account. *Dickson* v. *Evans*(1), at pages 59, 60; *The King* v. *Turner*(2), at pages 210-211; *Elkin* v. *Janson*(3), at page 661; Taylor on Evidence, 10th ed., p. 292. There is no such evidence in the record. The witness Abrey, Randolphs' representative, very carefully refrained from committing himself to this statement. He, no doubt, indicated the position correctly when he said, not that the defendants actually had 100 L. & N. shares in the hands of the Randolphs, but that "they were *long* by the records." The transfer to Gates & Co. of the shares said to have been bought for the plaintiff was, upon the evidence before us, unjustifiable. It was a distinct appropriation of them which rendered the defendants liable to account to her for their value; and to that liability it is no answer that a like number of similar shares was subsequently acquired by the defendants and was accepted from them by the plaintiff in ignorance of what had taken place. *Langton* v. *Waite*(4). As to the 100 L. & N. shares the plaintiff's case is, in this aspect of it, if anything, stronger than was that of the defendant (appellant) in *Conmee* v. *The Securities Holding Co.*(5).

It is fully established—in fact it is admitted—that the defendants hypothecated all the plaintiff's shares for their own general indebtedness, much greater in amount than the balance due by the plaintiff in re-

(1) 6 T.R. 57.
(2) 5 M. & S. 206.
(3) 13 M. & W. 655.
(4) L.R. 6 Eq. 165, at p. 173.
(5) 38 Can. S.C.R. 601.

spect of such shares, and that at certain times they had not on hand shares available to answer her claim without resorting to those so hypothecated. They had no stipulation or agreement with their lenders under which they had a legal right to the release of the plaintiff's stock on payment of the amount she owed to them or of any smaller sum. They endeavoured to establish by evidence of brokers and others that it is the invariable custom of banks and trust and loan corporations from which such loans are procured by brokers to release the stock of a client pledged by his broker at any time upon payment of the amount of the balance due in respect of such stock by the client to the broker.

In the case of the pledges of the Sao Paulo shares the agreements between the lenders and the brokers were in writing. They contain no such term and in my opinion as to them this evidence of usage or custom was not admissible. It would vary written agreements or add to them a term inconsistent with the rights which they purport to give the lender.

In the case of the L. & N. shares, assuming that they were bought and carried for the plaintiff, the terms of the hypothecation of them are not in evidence. It does not appear whether the arrangement for it was verbal or in writing. But the pledge was for general indebtedness and there is no evidence that there was any stipulation which would give either to the defendants or to the plaintiff a legal right to the release of her shares on payment of the amount which she owed.

I am not satisfied that the evidence in the record establishes such an invariable custom or practice as the defendants contend for on the part of the lenders

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from whom they borrowed. But if such a usage were established it would fall short of a reservation in favour of the plaintiff of the legal right to redeem her stock on payment of the amount due by her in respect of it; and to that legal right and nothing short of it she was entitled. The brokers could not require her to rely upon any loose understanding or mere obligation of honour between themselves and their lenders. Neither could they require her to rely upon their own personal security. She was entitled to have her shares in such a position that they would be her security and would be at all times available to her on payment of the amount which she owed in respect of them. *Douglas* v. *Carpenter* (1), at pages 333-4. See also the remarks of Lord Wynford in *Rothschild* v. *Brookman* (2), at pages 195-6.

It is common knowledge that the business of stock-brokers in this country is conducted in a manner more closely resembling that which prevails in the United States, and particularly in the State of New York, than that which obtains in England. Many customs and usages of English brokers are unknown in Canada; and many practices prevalent in our markets, which have come to us from the United States, would not be recognized on the London Stock Exchange. For this reason, and also because of a dearth of English authority (see R. 70 of the London Stock Exchange, Stutfield, 3rd ed., p. 45), I have drawn for authorities, perhaps more freely than is usual in our courts, upon American sources.

The hypothecation of the plaintiff's stocks for the brokers' general indebtedness, in the absence of auth-

(1) 17 App. Div. N.Y. 329. (2) 5 Bli. N.S. 165.

ority for it from her, was in my opinion unjustifiable, and, so far as such intangible property can be the subject of conversion, should be deemed a conversion of it. It was an exercise of dominion over the shares—the assertion of an interest in them inconsistent with the right of the plaintiff, consistent only, in the absence of authorization from the plaintiff, with ownership of the shares by the defendants.

Either because the securities should be regarded as negotiable; *Baker* v. *The Nottingham and Nottinghamshire Banking Co.*(1); *Colonial Bank* v. *Cady* (2), at pages 277-8; *London Joint Stock Bank* v. *Simmons*(3); or because, as against the pledgees, whose good faith is not questioned, the plaintiff was estopped from denying the authority of the brokers to pledge the securities as their own; *Bentinck* v. *London Joint Stock Bank*(4); *McNeil* v. *Tenth National Bank*(5); the hypothecation gave to the pledgees an enforceable lien or a special property in the stock greater than that which the brokers had authority to confer. The evidence in the record and the position taken by the defendants sufficiently establish a custom of stock-brokers and bankers to deal with securities such as those in question as transferable by delivery when indorsed in blank. The elements necessary to establish an estoppel against the plaintiff appear to be present. It has not been even suggested on behalf of the defendants that their pledgees would not have been legally entitled to hold the plaintiff's securities as against her for the full amount

(1) 60 L.J.Q.B. 542.
(2) 15 App. Cas. 267.
(3) [1892] A.C. 201.
(4) [1893] 2 Ch. 120.
(5) 46 N.Y. 325.

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of the loan as collateral to which they were hypothecated, or for so much of it as they pleased, unless a right of redemption on payment of the balance due by her to the defendants was a provision of the loan implied by custom. On the contrary, they assert a right to so deal with the plaintiff's stocks, based either on a special contract with her evidenced by a memorandum at the foot of the "bought note" sent to her, or upon an alleged custom, which they sought to prove, and which they contend confers on brokers carrying stocks on margin this extraordinary privilege.

I adhere to the views which I expressed in *Ames & Co.* v. *Conmee*(1), at pages 168 *et seq.*, that the hypothecation of a client's stock by a broker for his general indebtedness without authority from the client is unjustifiable, and that the memorandum at the foot of the "bought note" given to the plaintiff—which is the same as that considered in *Conmee's* case—is not evidence of such authority. This note was in the following terms:—

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

It is clear that nothing was said about any such provision when the brokers took the plaintiff's orders. Miss Clarke denies that this memorandum ever came to her notice. But assuming that it did and that the brokers might thus add a term to the contract, upon a proper construction of the memorandum having regard to the fact that it was prepared by the brokers themselves, while it might authorize them to pledge the plaintiff's stock for an amount not greater than that due by her in any way most convenient to them-

(1) 10 Ont. L.R. 159.

selves, there is nothing in it to confer on them a right to pledge it for a greater amount or to mingle it with other securities in a bulk pledge. *Conmee* v. *The Securities Holding Co.*(1). Neither is there anything in it to warrant the broker giving to his pledgee the right to dispose of the stock without notice either to himself or to his client. Yet we find that this was a stipulation in the pledge of the plaintiff's Sao Paulo shares to the National Trust Company; and there is a similar provision in the draft form of pledge used by the Dominion Bank with which the Sao Paulo shares were also hypothecated. It does not appear whether in the pledge of the L. & N. stock there was or was not a similar provision.

Failing to establish an express agreement by the plaintiff authorizing such pledges of her stocks as the defendants and their agents made and the attempted inference of such an authority from the memorandum on the "bought note" above alluded to being also unsuccessful, the defendants sought to establish that there is a universal custom of members of the Toronto Stock Exchange to so deal with their clients' stocks held on margin without express authority from the clients and that this custom was binding upon the plaintiff either because she was actually aware of it, or because, though not so aware, having employed members of the Toronto Stock Exchange, she should be deemed to have contracted subject to it. In the first place the evidence in my opinion falls short of what would be necessary to establish the custom. But, assuming that it was sufficiently proved, the attempt to bring home actual knowledge of it to the plaintiff absolutely failed.

(1) 38 Can. S.C.R. 601, at p. 609.

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Without such knowledge it is not a custom which would bind her. *Kirchner* v. *Venus*(1), at page 399. It "is so entirely in favour of (the brokers') side that it is fundamentally unjust to the other side," and, "if sought to be enforced against a person ignorant of it," would be held "unreasonable, contrary to law, and void"; its effect, if admitted, would be to change the intrinsic nature of the plaintiff's contract. *Robinson* v. *Mollett*(2), at pages 818, 836-8; *Johnson* v. *Kearley* (3), at page 530; *Lawrence* v. *Maxwell*(4). It follows that the hypothecation of the plaintiff's stocks by the defendants and their agents for their general indebtedness was a distinct breach of the defendants' contract with the plaintiff and also of their fiduciary duty to her. *Conmee* v. *The Securities Holding Co.*(5), at page 609-10. It was a "conversion" of her property; *Strickland* v. *Magoun*(6), at page 116.

It is well established that where a broker, who is under agreement to purchase and carry stock for a client, sells that stock without authority, leaving himself without other stock of the same kind available to satisfy his client's claim upon him, he becomes liable in equity, at the option of his client, to account to him for the proceeds of the sale, or the value of the shares as upon a conversion thereof to his own use, and he cannot escape that liability by purchasing and tendering to the client the same number of similar shares. *Langton* v. *Waite*(7), at page 173; *Taussig* v. *Hart* (8), at page 429.

Where a broker lends his client's stock to another

(1) 12 Moo. P.C. 361.
(2) L.R. 7 H.L. 802.
(3) [1908] 2 K.B. 514.
(4) 53 N.Y. 19.
(5) 38 Can. S.C.R. 601.
(6) 119 App. Div. N.Y. 113.
(7) L.R. 6 Eq. 165.
(8) 58 N.Y. 425.

broker he will in equity be held guilty of a similar conversion of it and the rights of the client are the same as if the stock had been sold, the broker being held accountable for its value at the time of the conversion. *Ex parte Dennison*(1).

The broker, who, without authority so to do, mingles his customer's securities with others and rehypothecates them for a greater amount than the customer's indebtedness to him, neither reserving the customer's right to obtain his securities on payment of that indebtedness nor retaining in his own possession a like amount of similar securities, available for delivery to his client, is in my opinion likewise guilty of a "conversion" of such securities. *Douglas* v. *Carpenter*(2); *Strickland* v. *Magoun*(3); *Rothschild* v. *Allen* (4).

The broker in such a transaction appropriates the client's stocks for his own purposes and pledges them as his own. I can see no difference in principle between such an appropriation and that which takes place upon the wrongful sale or loan of stocks similarly held.

It is urged, however, that the recovery of the client should be confined to the actual damage which he can shew that he has sustained as the result of the wrongful hypothecation of his stock, and that, where such stock, or a like amount of other stock of the same kind is delivered to him upon his demand, he has suffered no damage and can at best have but a nominal recovery. No doubt this would be the case if the sole right of the client were to maintain a common law ac-

(1) 3 Vesey 552.
(2) 17 App. Div. N.Y. 329.
(3) 119 App. Div. N.Y. 113.
(4) 90 App. Div. N.Y. 233.

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tion of trover and conversion. *Hiort* v. *London and North Western Ry. Co.*(1).

At common law, and if the relationship of the client to the broker should be regarded merely as that of pledgor and pledgee, re-hypothecation by the pledgee for a larger amount than that of his claim against the pledgor, though unlawful, is deemed not so repugnant to the contract as to be equivalent to a renunciation of it and an extinguishment of the pledgee's right of detainer; and the pledgor cannot maintain an action of detinue without having paid or tendered the amount of the pledgee's claim against him. *Donald* v. *Suckling*(2), at page 616. It is to be noted, however, that, in this case, as stated by Mellor and Blackburn, JJ. the re-pledging would be inoperative as against the original owner, and would confer upon the defendant no greater right than the original pledgee had: pp. 610, 611. If such an action were maintained at common law, it would be on the ground that the contract had been terminated and the pledgee would thus lose his security or its value, although not in a position to recover his advances.

A premature sale by a mere bailee or pledgee was also held at common law not to terminate the bailment nor to destroy the interest or special property of the bailee in the goods pledged, and, therefore, although a conversion, to be insufficient without tender to the bailee of the amount of his claim to support an action of detinue; and for the conversion only actual damages could be recovered, and, if there were not such damages, only nominal damages—if indeed the action would lie at all. *Halliday* v. *Holgate*(3); *Johnson* v. *Stear*(4).

(1) 4 Ex.D. 188.
(2) L.R. 1 Q.B. 585.
(3) L.R. 3 Ex. 299.
(4) 15 C.B.N.S. 330.

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But even at common law, an action in assumpsit for money had and received would lie for the proceeds of securities wrongfully sold by the bailee or agent (not a pledgee), the owner electing to treat the wrongdoer as his agent in the transaction, and adopting the sale and claiming its proceeds as money had and received to his use. *Marsh* v. *Keating*(1), at page 600. In *Bonzi* v. *Stewart*(2), it was held that the principal of a factor, who had raised money on the security of his principal's goods without authority, might claim it as money had and received to his own use. Tindal C.J. said:—

> Messieurs Bonzi were at liberty, *at any time when they found their factors had wrongfully raised money on their goods,* in taking the account between themselves and their factors, to abandon their goods altogether, and to treat the money so wrongfully borrowed by the factors on the pledge of the goods, as money had and received to the use of themselves.

The Chief Justice adds that this is but an application of the principle laid down by the House of Lords in *Marsh* v. *Keating*(1).

A stock-broker buying on margin and carrying stock for a client is something more than a mere pledgee; he is also his client's broker or fiduciary agent. His position is not dissimilar to that of a factor who, in the ordinary course of business, is entrusted with the possession of his principal's goods or the documents of title thereto.

> Now as between principal and factor, there is no question whatever that that description of case * * * has always been held to be within the jurisdiction of a court of equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor—as the trustee for the particu-

(1) 1 Mont. & Ayr. 592.

(2) 4 Man. & Gr. 295 at pages 303-4, 325; 5 Scott, N.R. 1, 26.

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lar matter in which he is employed as factor—sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the courts of equity have assumed jurisdiction. *Foley* v. *Hill*(1).

The stock-broker holding the stocks of a client, bought by him upon margin, as collateral security for moneys advanced by him to make the purchase, is neither merely a broker, nor merely a pledgee of the stock. He holds towards his client a fiduciary relation similar to that which exists between the factor and his principal; in his capacity as a pledgee he cannot divest himself of his character as an agent; having assumed the position of a quasi-trustee, the client is in equity entitled to hold him to it and to the consequent obligation to account on that footing. *Haight* v. *Haight & Freese Co.*(2); see also *Marvin* v. *Brooks*(3), at page 81. Indeed an accounting on this basis seems to be exigible in equity from a broker-pledgee although no fiduciary relationship existed in regard to the securities in question. *Ex parte Dennison*(4). Where there is a relation of quasi-trusteeship between the parties, the equitable jurisdiction to compel an accounting undoubtedly attaches.

It is familiar law that if a trustee's breach of trust consists in a sale of stock, the *cestui que trust* may in

(1) H.L. Cas. 28, at pp. 35-6.
(2) 112 App. Div. N.Y. 475; 190 N.Y. 540.
(3) 94 N.Y. 71.
(4) 3 Vesey 552.

bankruptcy proceedings at his option prove for the proceeds of the sale or for the value of the stock at the date of bankruptcy. *Ex parte Gurner*(1). So, in an action against a trustee who has wrongfully sold real property, the *cestui que trust* has the option of compelling the trustee to purchase other lands of equal value to be settled upon the like trusts, or of taking the proceeds of the sale with interest, or the present estimated value of the lands sold after deducting any increase of price by subsequent improvements. Lewin on Trusts, 11th ed., p. 1138.

In the case of a wrongful sale of his stock by his broker, if the client, who had intended to hold it, upon demand receives from the broker shares of the same kind and to an equal amount at par value, though he did so in ignorance of the broker's misconduct, he cannot shew that he is any worse off than he would have been had the shares been kept for him by the broker always ready for delivery. From that point of view he has sustained no damage, and were it not for the fiduciary position of the broker he might have no redress. But in equity his right, upon learning of the wrongful sale, to hold the broker accountable for its proceeds or for the value of the securities at the time of sale, as upon a conversion thereof to his own use, appears to admit of no doubt. Like results follow where the broker lends the client's stock. Why should the consequences not be the same where he appropriates the securities by hypothecating them for his own indebtedness to an amount greater than is due him from his client? Certainly not merely because, on demand by the client, ignorant of what has transpired, he has de-

(1) 1 Mont. D. & DeG. 497.

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livered to him shares of the same kind and of a like amount at par value. If that would suffice to discharge the broker guilty of wrongful hypothecation, it should also suffice where he has effected a wrongful loan or sale. Nor is the fact that the client has not shewn that the broker has made a profit by his misdeed a sufficient reason for his not being held so accountable.

Where a broker entrusted with his client's securities sells or lends them, the authorities establish that in equity he must account for their value at the date of the "conversion." Where he appropriates them by unauthorized hypothecation, the client should have the same remedy. In each case alike the personal responsibility of the broker has been unlawfully substituted as the client's security in lieu of the property with which the broker has wrongfully dealt. In each case, instead of fulfilling his mandate, which required him to hold the stock or shares for his client, or, if he parted with their possession, to do so only in such manner that upon payment of the amount due by him the client could obtain them as of legal right from the holder, the broker, using them for his own purposes, has put them out of his control. In the one case the client is asked to trust to the broker buying in shares to replace those with which he has parted; in the other, to his doing that, or redeeming the shares which he has pledged. In each case the client is subjected to the risk of the broker's insolvency.

The broker, who hypothecates his client's stock for his own purposes for a sum larger than that due by the client, substitutes as security to the latter, at least to the extent of the excess, his personal responsibility in lieu of the stock to which the client is en-

titled. If the broker, remaining solvent, by redeeming the stock and delivering it to the client on demand, could fully discharge himself, the temptation to commit the breach of duty involved in so dealing with stocks in his hands might, in many cases, be irresistible; can he but succeed in concealing his wrongdoing until the client applies for and takes over the stock or directs its sale, he escapes all liability for his misdeed. On the other hand, should he become bankrupt, and disaster to the client ensue, the broker will probably be little troubled by the claim of the latter for damages against what will in many cases be a practically worthless estate.

In wrongful sale — in wrongful loan — in wrongful hypothecation, there is involved an appropriation by the broker of his client's property for his own use.

While I appreciate the distinction which is drawn between a disposition of a pledge by a bailee effected wholly without authority, which suffices to terminate the contract of bailment and to disentitle the bailee to repayment of his advances, and a disposition merely in excess of the bailee's authority to do an act of the same class — such as a sale effected prematurely or without requisite notice, or a repledge for a greater amount than is due to the original pledgee — which is not so repugnant to the contract of bailment that it puts an end to it; *Halliday* v. *Holgate*(1); *Donald* v. *Suckling*(2); and is, therefore, held not to destroy the bailee's right to repayment of his advances or, in the case of the broker-pledgee, to indemnity; *Minor* v. *Beveridge*(3); the difference ends there. Its hypothe-

(1) L.R. 3 Ex. 299. (2) L.R. 1 Q.B. 585.
(3) 141 N.Y. 399.

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cation for a larger amount by a broker, holding with a right to repledge to cover his own advances, imperils the security of his client and involves an appropriation of it by the broker for his own use quite as much as would its pledge merely for the amount of the excess if the broker had no right to pledge at all; indeed, in the former case the title of the broker's pledgee, if dependent on estoppel, will probably be more readily established. The vital distinction, however, between the repledge by a broker holding a client's securities as the defendants held those of the plaintiff and the repledge by a mere common law pawnee is that in the former case the broker confers on his pledgee a good title for the whole amount of his advances as against the broker's client, whereas in the latter, the title of the sub-pledgee is limited to the interest of the original bailee.

In a case of sale the broker may directly take advantage of the rise and fall in the stock market to make illicit profit; indeed, he may use his client's stocks to help to bring about fluctuations in prices for his own benefit at his client's expense. In a case of hypothecation the opportunities for direct advantage may not be the same. But, although on a loan of the client's stock the broker has not this advantage, he is held accountable for the market value of the stock at the time he wrongfully lends it. *Ex parte Dennison*(1). Moreover, by pledging his client's stocks in bulk with securities of his own or of other clients, the broker may be enabled to raise a much larger sum of money than if all these stocks were pledged separately. With the additional moneys so obtained — moneys part, or it may be the whole, of

(1) 3 Ves. 552.

which rightfully belong to the client — the broker may be enabled to reap advantages and to make profits which it would be difficult to estimate and almost impossible to trace directly to their source. He may be enabled on his own account to deal, to an extent not otherwise possible, in marketable securities, profiting by their fluctuations in value, and perhaps affecting the market price of his client's securities to his detriment. Upon principle as well as for reasons of policy I think that, in the case of the stock-broker, the wholesome rule which entitles the client to hold him accountable for the market value of his securities at the time of their conversion should be held equally applicable to the cases of a wrongful hypothecation, a wrongful sale and a wrongful loan of such securities. I know of no situation in which a quasi-trustee has greater opportunities, if so inclined, to derive improper advantage from the possession and control of the property of his *cestui que trust,* than that in which the broker carrying stocks on margin for a client finds himself. In order, as far as possible, to protect their customers against the risks to which they would be exposed, were brokers at liberty with practical impunity to deal with their securities as those of the plaintiff were dealt with in this case — in order to protect brokers themselves against the temptation of making, it may be, large illicit gains by committing such a wrong with a minimized risk of personal loss, I think that the drastic but salutary rules which govern the relation of trustee and *cestui que trust* should be applied in all their rigour.

The very difficulty — amounting to a practical impossibility — of an accounting on the basis of the

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profits which the defendants may have made by the use of the money obtained by their illegal hypothecation of the plaintiff's securities affords another and a cogent reason for treating them as having become purchasers of those securities when they so dealt with them and for holding them accountable for their fair value at that time. "This seems to me to be a simple mode of effectually doing justice between the parties." Having used the plaintiff's securities as proprietors, the defendants' "proceedings, I think, entitled (her) to elect, and (she) has elected, to treat them as purchasers." *Marriott* v. *The Anchor Reversionary Co.* (1), at pages 186, 188.

Having regard to the fact that the financial result to the plaintiff would in all likelihood have been the same as it is had her stocks not been wrongfully pledged by the defendants, it may seem a hardship to hold them so accountable. But this observation is equally applicable where the broker sells and afterwards replaces his client's stock. "This is the risk to which such transactions are subject," *Ex parte Dennison* (2), at page 553; and the law applicable to them is "a law of jealousy," *Rothschild* v. *Brookman* (3). I cannot but think it deplorable that it should be held to be the law of Canada that if a broker, carrying stock on margin without authority, uses his client's shares as his own — pledges them for his general indebtedness — substitutes for them his personal responsibility as security to his client, the latter has not the right, upon discovering the facts, to elect to adopt his agent's appropriation of his property and to hold him chargeable with its value at the time of its con-

(1) 3 DeG. F. & J. 177. (2) 3 Ves. 552.
(3) 5 Bli. N.R. 165, at p. 190.

version. The effect of such a decision must be greatly to encourage breaches of duty by these quasi-trustees and to foster amongst an important body of fiduciary agents a disregard of the fundamental distinction between *meum* and *tuum* in dealing with the property of their principals.

In the case of a sale the proceeds usually represent the value of the securities; but, if not, the client's right is to an account of the actual market value. *Taussig* v. *Hart*(1). In the case of an hypothecation, as in that of a loan, the value must be determined by the market price at the time. If, as in the factor's case (*Bonzi* v. *Stewart*(2)), the right of the client adopting the broker's misappropriation should be restricted to claiming credit for the moneys raised upon his securities as against the broker who has so mingled these securities with others that it is not possible to determine how much of the moneys lent to him have been obtained on the pledge of them, it may fairly be held that a portion of the advances equal in amount to the full value of the client's securities was obtained by their hypothecation. In my opinion, therefore, the defendants and their agents by pledging the plaintiff's shares for their general indebtedness without providing for their release on payment of the balance owing by her, and without holding under their own control other shares of the same description available to answer her claim, made themselves accountable to her for the market value of such shares at that time.

That right the plaintiff did not lose by her subsequent acceptance of the shares tendered to her by the

(1) 58 N.Y. 425, at p. 429.

(2) 4 M. & Gr. 295, at pp. 303-4, 325; 5 Scott N.R. 1, at p. 26.

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brokers in satisfaction of her claim, or by her dealing with them as owner, in ignorance of what had transpired. Without knowledge there cannot be ratification or condonation. *Johnson* v. *Kearley*(1), at page 524. The defendants are, of course, entitled in an equitable accounting to credit for the value of the shares at the time they were so accepted. But they cannot insist on the plaintiff's returning, or tendering a return of such shares before suing for such accounting. If, in circumstances such as those of this case, a broker had this right, he might put a client, who had innocently parted with shares so taken over, in a position of serious difficulty; he might effectually deprive him of his right of action. The broker, whose misconduct has led to such a difficulty, cannot complain if his client elects to retain the securities giving him credit in the accounting for their market value when received.

This case may also be dealt with on the basis which commended itself to Magee J. in *Hutchinson* v. *Jaffray & Cassels*(2). Concealing the facts which entitled the plaintiff to take the position that her indebtedness was wiped out and that she was in fact their creditor, and falsely representing to her that they held and were carrying her stocks according to her mandate, the defendants obtained from her several payments of large sums of money and eventually of the entire residue of the purchase price of the stocks, with interest on the balance from time to time unpaid. Moneys so obtained by misrepresentation — paid in mistake of material facts concealed by the payee from the payer — are recoverable. The law will not permit persons holding a fiduciary position to retain them.

(1) [1908] 2 K.B. 514. (2) 1 Ont. W.N. 481.

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The brokers receive the full benefit to which they are entitled in respect of their claim for indemnity by having the balance of the original purchase price unpaid by the client offset in the accounting against the value of the converted property for which the client receives credit. To that they have an equitable right (*Minor* v. *Beveridge*(1)), but to nothing more.

The present action concerns 50 shares of Sao Paulo stock bought on the 26th of April, 1906 — (all the S.P. stock held by the defendants except 10 shares was hypothecated for their general indebtedness on the 30th of April); 50 shares of S.P. stock bought on the 26th September, 1906— (all the defendants' S.P. stock was hypothecated for their general indebtedness on the 29th September); and 100 shares of L. & N. railway stock said to have been bought on the 25th August, 1906, and hypothecated in like manner, if it was not wrongfully sold, as I think it was, on the very day of its purchase. As to the latter stock the defendants are accountable for the full price charged to the plaintiff for it. The market prices of the S.P. stock on the 30th April and 29th September are not in evidence, but there are general statements that, when the plaintiff's Sao Paulo shares were hypothecated, the market prices did not differ materially from the prices at which they were purchased for her. The defendants having failed to prove that at the respective dates of their conversion the market prices of these shares were lower than at the respective dates of purchase, they are accountable in the case of these stocks also for the full prices charged to the plaintiff. For these sums she should be given credit — in respect of the

(1) 141 N.Y. 399.

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first lot of S.P. shares on the 30th April, 1906, and in respect of the second lot, on the 29th September, 1906. She is chargeable with interest on the balance of the purchase price of the first lot unpaid between the 26th and the 30th April, and in respect of the second lot on a like balance from the 26th to the 29th September, at the rates shewn in the defendant's accounts in which she appears to have acquiesced. No interest is chargeable against her in connection with the L. & N. transaction. She is chargeable with the purchase price of these several stocks and is entitled to credit for all moneys paid by her to the defendants for principal, interest and commissions, including the original marginal payments and the final payment of the 3rd of June, 1907. Upon the sale of the first lot of Sao Paulo she was credited with the proceeds. That credit must stand. She took delivery from the brokers on the 3rd of June, 1907, of 50 shares of Sao Paulo and 100 shares of L. & N. The defendants are entitled to credit for the market value of these shares at that date. The plaintiff is entitled to interest at 5% on any balance from time to time standing to her credit on such accounting and upon the final balance, which would stand to her credit after the payment of the 3rd of June, 1907, from that date until this action was brought; and to interest on her claim thus ascertained until judgment.

Appeal dismissed with costs.

Solicitor for the appellant: *W. C. Mackay.*

Solicitors for the respondents: *Malone, Malone & Long.*