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*Mar. 20, 21.
* June 28.

THE TRUSTS AND GUARANTEE COMPANY LIMITED AND DORA MILLER, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HARRY MILLER, DECEASED (PLAINTIFFS) ..... } APPELLANTS;

AND

MEYER BRENNER; AND MALCOLM STOBIE AND CHARLES J. FORLONG, FORMERLY CARRYING ON BUSINESS IN PARTNERSHIP AS STOBIE, FORLONG & COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Bankruptcy Act, R.S.C. 1927, c. 11, ss. 24, 104—"Debts provable in bankruptcy"—Action brought, without leave of court, against assignor in bankruptcy—Costs—Leave nunc pro tunc on conditions—Action against stock brokers for unauthorized sale of shares and unauthorized use of proceeds—Nature of claim—"Breach of trust"—Brokers acting on instructions of unauthorized person—Latter's liability to person for whom he assumed to act, nature of claim against him and measure of damages.

Defendants S. and F. carried on business in partnership as stock brokers. Defendant B's relation with them was that of "customer's man"; he received a share of commissions earned on business he brought to them, which included business of M. S. and F. held stocks on margin for M., who was, unknown to S. and F., too ill to do business. The prices of the stocks were falling, and, acting on instructions given (without M.'s authority) by B. (and with concurrence of M.'s son who acted in concert with B.), S. and F. sold the stocks, realizing, net, $41,822, and (again on unauthorized instructions as aforesaid) used this money in speculative trading, resulting in its loss. Subsequently S. and F. made an assignment in bankruptcy. Later the plaintiffs, representing the estate of M. (who had died), brought action, without obtaining leave of the court under s. 24 of the *Bankruptcy Act*, against B., S. and F., their claims including an accounting; damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust; and, alternatively, an accounting and judgment for the amount of the proceeds of the sales of the stock. At trial, judgment was given against defendants for $41,822 (the sum above mentioned). This judgment was varied by the Court of Appeal, Ont. ([1932] O.R. 245), which held that the liability of S. and F. was a "debt provable in bankruptcy" within s. 104 of the *Bankruptcy Act*, and, leave not having been obtained under s. 24, the action against them should be dismissed, without prejudice to rights of plaintiffs proceeding in bankruptcy; and that there should be a reference to determine the sum recoverable from B. Plaintiffs appealed.

*PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Crocket JJ.

Held: The shares having been sold, even though wrongfully (which might well be open to question on the facts and circumstances), the proceeds, which were traceable, were in equity M.'s property (*Sinclair* v. *Brougham,* [1914] A.C. 398, at 441-2). Having regard to the cause of action asserted, and S. and F. being (as found) innocent of fraud, the charge established against S. and F. in respect of the proceeds of sale was breach of trust; and the claim, being one arising out of a breach of trust (provable in bankruptcy under s. 104), was unenforceable against them except by leave under s. 24. But, under the circumstances, leave to bring action should be granted *nunc pro tunc* (*Blais* v. *Bankers' Trust Corp.,* 14 D.L.R. 277, referred to with approval), and judgment given for said sum of $41,822 against S. and F., subject to conditions imposed (that plaintiffs do not use the judgment except as one determining the amount for which they may rank upon the estate in bankruptcy and then as no more than *prima facie* evidence of that amount); plaintiffs to pay costs of S. and F. throughout.

As to B., there were not sufficient reasons for reversing the trial judge's finding that he acted fraudulently; he was chargeable as having fraudulently brought about the breach of trust; and should be held liable to plaintiffs in said sum of $41,822 (statement of the law in 28 Halsbury's Laws of England, p. 204, par. 407, approved and applied; *Gray* v. *Johnston,* L.R. 3 H.L. 1, at 11, cited).

Cannon J. dissented in part, holding that the plaintiffs' claim, as made and pursued, was such as entitled them to remedy against S. and F., as well as against B., in the present action as brought, and that the judgment at trial should be restored in its entirety, with costs to plaintiffs throughout.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) which varied the judgment of Logie J. given in favour of the plaintiffs.

The plaintiffs were the executors of the estate of Harry Miller, deceased, who died on December 22, 1929.

The defendants Stobie and Forlong formerly carried on business in partnership as stock brokers, under the name of Stobie, Forlong & Company. The defendant Brenner's relation with them was that of "customer's man"; he brought customers to Stobie, Forlong & Co., and received a share of commissions earned on business so brought to them, which included business of Miller. Stobie, Forlong & Co. held certain shares of stock on margin for Miller. The prices of these stocks were falling and, acting on instructions from Brenner (and with concurrence of Miller's son who acted in concert with Brenner), Stobie, Forlong & Co. sold them, realizing, net, $41,822, and (again on instructions as aforesaid) used the money in speculative trading, resulting in its loss. The said transactions

(1) [1932] O.R. 245; 13 C.B.R. 518; [1932] 2 D.L.R. 688.

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(sale of the stocks and use of the proceeds) were (as found by the court) unauthorized by Miller, who was at the time too ill to do business (of which condition Stobie, Forlong & Co. were unaware).

Stobie, Forlong & Co. made an authorized assignment under the *Bankruptcy Act* (R.S.C. 1927, c. 11) on January 30, 1930.

The action was begun in May, 1930, without leave being obtained under s. 24 of the *Bankruptcy Act*. The plaintiffs claimed (*a*) an accounting, (*b*) "damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust," or in the alternative, (*c*) judgment for the amount found due to Miller at the time of the transfer of his account to Stobie, Forlong & Co., or in the alternative, (*d*) judgment requiring defendants to account for the proceeds of the sales of the stock and judgment for such amount. (The statement of claim is set out in full in the judgment of Cannon J. now reported).

Secs. 24 and 104 of the *Bankruptcy Act* provide as follows:

24. On the making of a receiving order or authorized assignment, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor or shall commence or continue any action, execution or other proceedings for the recovery of a debt provable in bankruptcy unless with the leave of the court and on such terms as the court may impose.

* * *

104. Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy or in proceedings under an authorized assignment.

2. Save as aforesaid, all debts and liabilities, present or future, to which the debtor is subject at the date of the receiving order or the making of the authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or of the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment.

3. The court shall value, at the time and in the summary manner prescribed by General Rules, all contingent claims and all such claims for unliquidated damages as are provable by this section, and after, but not before, such valuation, every such claim shall for all purposes of this Act, be deemed a proved debt to the amount of its valuation.

The action was tried before Logie J., who gave judgment for the plaintiffs against the defendants for $41,822 (which was the net sum realized on sale of the stocks as above mentioned). An appeal by the defendants was al-

lowed by the Court of Appeal for Ontario (1), which varied the judgment below, the judgment, as so varied, dismissing the action as against Stobie and Forlong, "but without prejudice to the rights of the plaintiffs proceeding in bankruptcy" as against the said defendants Stobie and Forlong; and directing a reference as to in what sum, if any, the defendant Brenner was liable to the plaintiffs.

Subsequent to the delivery of reasons for judgment of the Court of Appeal, as reported (1), that court delivered a "memorandum" as follows:

In view of the dissatisfaction of the plaintiff with the judgment of the court, herein, as settled, we think it proper to state for the information of all concerned, as well as of any appellate tribunal which may be called upon to deal with it:

We had hoped that the case might be settled on the terms set out in the reasons for judgment, already handed out; but that hope has proved illusory, and all parties are insisting on their legal and strict rights.

We decided:—

1. The cause of action was the liability of an agent or bailee to account to the principal or bailor, for the proceeds of property improperly sold by him;

2. The evidence indicated that Brenner, as agent, was liable in some sum; but that the sum found by the Trial Judge was so found on evidence, some of which, at least, was not admissible against him. Consequently, he was entitled to have the true amount determined by the Master;

3. The brokers were originally liable on the same principle; but they had gone into bankruptcy, and consequently, as no leave had been granted by the court, the action against them was irregular and, in strictness, should be dismissed with costs.

We had hoped that the amount appearing by the evidence before the court, namely, $41,822 and interest, to be the amount due from the brokers would be accepted, and the matter arranged as is set out in [1932] O.R. at p. 253. But dealing with the case and the parties on their strict rights, we do not think that without the consent of the assignee in bankruptcy, we should declare that the insolvents were liable for the sum, which, were the action against them, regular, would seem to be proved—the assignee, representing the body of creditors, may have evidence unknown, overlooked or intentionally left uncalled—their interest in the matter was academic, at the time, whereas the interest of the assignee is actual and substantial. We think the assignee should have an opportunity to contest the claim, if so advised; and, consequently, we decline to adjudge against him in his absence that his estate is indebted in any sum whatever. We leave to the plaintiff to take such steps to establish a claim against the bankrupt estate as he may be advised.

This is his real and only objection taken before us—he is not willing to prove his claim in bankruptcy, but desires to have a judgment binding upon the assignee, which was obtained in an irregular action without his being made a party. This we decline to declare, as it would be an obvious injustice.

There is nothing whatever to prevent the plaintiff proceeding regularly to prove any claim it may have against the bankrupt estate,

(1) [1932] O.R. 245; 13 C.B.R. 518; [1932] 2 D.L.R. 688.

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and this, we think, in the absence of consent of the assignee is the only course for it to pursue; if it is supposed that we allowed the action to proceed, *nunc pro tunc* absolutely and without regard to opposition to the settlement we suggested, it is an error; if it could be suggested that such language as was used was an order to that effect, it is withdrawn, no formal order having been taken.

The plaintiffs appealed to the Supreme Court of Canada.

D. L. McCarthy K.C. and *I. Levinter* for the appellants.

R. S. Robertson K.C. for the respondents Stobie and Forlong.

L. Kert for the respondent Brenner.

The judgment of the majority of the court (Duff C.J. and Rinfret, Lamont and Crocket JJ.) was delivered by

DUFF C. J.—This case has been considered very fully by the Court of Appeal for Ontario. One naturally feels some diffidence in giving effect to views which are not entirely in agreement with that of judges who are so adequately fitted to deal with such matters, but it is, of course, one's duty to act upon one's own conclusions.

There are some findings of fact by the learned trial judge which are important. The initiation of the transactions out of which the dispute arises was a sale of certain shares held by Stobie, Forlong & Co. for Harry Miller. Harry Miller was at that time incapable of doing business. It is not disputed that Stobie, Forlong & Co. were unaware of this, and Meyer Brenner who, as the learned trial judge found, was acting in concert with one Ben Miller, the son of Harry Miller, was aware of it. Brenner's relation with Stobie, Forlong & Co. was that described by the phrase "customer's man." He had an office of his own in the office of Stobie, Forlong & Co. He brought customers to them and received one-half of the commissions which Stobie, Forlong & Co. earned on the business so brought them.

The initial date is the 9th of May, 1928. On that date and succeeding dates, Stobie, Forlong & Co., acting on the instructions of Brenner who professed to be proceeding upon the instructions of Harry Miller, but had no authority from him, sold shares which had been transferred by Harry Miller from E. A. Pierce & Co., his brokers, to Stobie, Forlong & Co. The learned trial judge has found that the amount realized from these sales, over and above brokers'

loans, was $41,822. There seems to me no ground for doubting the liability of Stobie, Forlong & Co. to account for these monies as trust monies. They proceeded on the instructions of Brenner, who was acting without any authority whatever from Harry Miller who was incapable of doing business during the period, to use these monies in speculative trading and, admittedly, the result of these operations was that Miller's credit disappeared. A broker is not strictly an express trustee, but the manner in which equity has treated monies received by a broker from the sales of his client's property may be stated in the words of Lord Parker in *Sinclair* v. *Brougham* (1),

> Equity treated the matter from a different standpoint. * * * the money in their hands was (treated) for all practical purposes (as) trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognized as such by the common law.

In my judgment, the claim against Stobie, Forlong & Co. is a claim arising out of breach of trust and, therefore, unenforceable against them except by leave under s. 24.

It may well be open to question whether on the facts Stobie, Forlong & Co. acted wrongfully in selling the shares originally placed in their hands by Harry Miller himself. The prices of these shares, which were held on margin, were falling and a call had been made. There was apparently no further money available (Harry Miller was in such condition that he could not be approached) and Stobie, Forlong & Co., in ignorance of his condition, acted as already mentioned upon the directions of Brenner with the concurrence of Miller's son, Ben Miller. The shares having been sold, even though wrongfully, the proceeds, if traceable, which is not disputed, were in equity the property of Harry Miller under the principle of Lord Parker's observations quoted above. At common law, Harry Miller could waive the tort and hold Stobie, Forlong & Co. accountable *in assumpsit* for the amount of the proceeds as monies received to his use.

In equity a trustee *de son tort* is accountable just as an express trustee would be in such circumstances.

(1) [1914] A.C. 398, at 441-2.

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The statement of claim, which has been carefully analysed by Riddell J. A., treats these monies as monies held by Stobie, Forlong & Co. for the account of Harry Miller; and the cause of action asserted against all parties is fraud and fraudulent breach of trust in dealing with these monies. Stobie, Forlong & Co. were plainly not guilty of fraud and the only charge alleged and proved against them in respect of these monies is breach of trust, which is clearly established.

In point of law, Brenner's position is not precisely the same. He was not a trustee for Miller. It was not suggested that, even as regards the transactions in question, he was a partner of Stobie, Forlong & Co. The learned trial judge, however, has found that he assumed the responsibility of putting himself forward as acting on Miller's behalf which he knew he had no authority to do. He has also found that during one or two brief lucid intervals in the course of Miller's unfortunate malady he deliberately concealed his operations from Miller. He was not a participant in the physical acts which constituted the wrongful conversion of Miller's money; or, as observed, a partner of those who were. The question is not merely whether in the circumstances Brenner is liable to Miller's estate for his wrongful acts, but whether the estate has a claim against him arising out of breach of trust.

It is a proper inference, if not, indeed, an inevitable one, that had it not been for Brenner's conduct in misleading Stobie, Forlong & Co. they would not have proceeded to deal as they did with Miller's money. In a business sense, Brenner's instructions as coming from Miller were an integral part of the transactions. In the treatise on trusts which is a part of Lord Halsbury's collection, it is said, a

> person renders himself liable for the consequent loss to the trust estate where he knowingly becomes an active party to a fraudulent or improper disposition of the trust property in breach of the trust affecting it. (28 Hals., p. 204, par. 407.)

I think this passage correctly states the law and applies to the circumstances here.

In *Gray* v. *Johnston* (1) it was said by Lord Cairns that, in order to make bankers liable for breach of trust, there must be

(1) (1868) L.R. 3 H.L. 1, at 11.

proof that the bankers are privy to the intent to make the misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.

In the present case, Brenner was not merely "an active party" or "in privity," his was the mind that conceived—he was the person who, acting on an unfounded assumption of authority, in effect directed—the breach of trust; Stobie, Forlong & Co. being throughout the ignorant instrument in the "improper disposition" of the funds.

We do not think there are sufficient reasons for reversing the finding of the trial judge that Brenner acted fraudulently. He industriously concealed the facts from Stobie, Forlong & Co. and, during the lucid intervals of Harry Miller, from him also. He is chargeable as having fraudulently brought about the breach of trust. We have fully considered the evidence and are satisfied it is ample to support the judgment of the learned trial judge in respect of the amount for which the parties are accountable.

As to Stobie, Forlong & Co., we think that there might have been formidable difficulties in the appellants' way if the action had not been directed against both parties, and that the appellants should have leave *nunc pro tunc,* subject to the conditions to be stated. We think the judgment of Beck J. in *Blais* v. *Bankers' Trust Corporation* (1), pronounced twenty years ago, was well decided.

There will be judgment against both parties for $41,822, but the appellants must undertake not to use this judgment against Stobie, Forlong & Co. except as a judgment determining the amount for which they may rank upon the estate of the bankrupt, and then as no more than *prima facie* evidence of that amount. The appellants will pay the costs of Stobie, Forlong & Co. throughout; Brenner will pay the costs of the appellants throughout.

CANNON J. (dissenting in part)—The statement of claim, issued on the 27th of May, 1930, represents:

1. The plaintiffs are the executors and trustees of the estate of Harry Miller, late of the city of Toronto, in the county of York, who died on or about the 22nd day of December, 1929.

2. The defendant, Meyer Brenner, is a stock broker residing in the said city of Toronto, and formerly carried on business either alone or in

(1) (1913) 14 D.L.R. 277.

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association with Stobie, Forlong & Company. The defendants Malcolm Stobie and Charles J. Forlong also reside in the said city of Toronto and prior to their bankruptcy carried on business in partnership as stock brokers under the name of Stobie, Forlong & Company. The said Malcolm Stobie and Charles J. Forlong made an authorized assignment under the Bankruptcy Act on the 30th day of January, 1930.

3. Prior to the 9th day of May, 1928, the late Harry Miller had a brokerage account with the firm of E. A. Pierce and Company and the following stocks were held in the said account:

4,000 Continental Oil of Delaware,
3,000 Dome Mines Limited,
100 Lago Oil & Transport Corporation,
2,500 Marland Oil Company Limited,
200 National Radiator Limited,
13/49 North American Company,
200 Pure Oil Company,
1,000 Texas Pacific Coal & Oil,
100 Hudson Bay Mining & Smelting Company.
1,000 Mining Corporation of Canada Limited,
1,000 Teck Hughes Gold Mines Limited.

4. On or about the said 9th day of May, 1928, the said stocks were transferred to the defendants Meyer Brenner and to the said Stobie, Forlong & Company to hold the same for the said Harry Miller.

5. The said defendant, Meyer Brenner, and Stobie, Forlong & Company duly paid E. A. Pierce and Company the amount required to transfer the stock and the said stock when transferred was placed in the account of the said Harry Miller.

6. The plaintiffs allege and the fact is that at the time of the transfer to the said defendants, the said Harry Miller had an interest or equity in the stocks transferred to an amount in excess of $70,000.

7. At the time of the said transfer the said defendants, according to the record furnished by the defendants to the plaintiffs, also held the following stocks for the said Harry Miller:—

1,000 Wright Hargreaves Mines Limited,
1,000 Mining Corporation of Canada Limited,
3,000 Amulet Mines Limited,
100 Muirhead Cafeteria Limited,
100 Hudson Bay Mining & Smelting Company.

8. In or about the early part of June, 1928, without authority, instructions or consent from the said Harry Miller, in breach of faith and duty, the said defendants, Meyer Brenner and Stobie, Forlong & Company wrongfully, fraudulently and illegally commenced to trade with the said stocks above referred to with the exception of 100 shares of Muirhead Cafeteria Limited and to wrongfully, fraudulently and illegally deal with the same on their own initiative and without the consent or authority of the said Harry Miller, wrongfully, fraudulently and illegally sold and disposed of the said stocks and wrongfully, fraudulently and illegally misapplied the proceeds of the said stocks and converted them to their own use.

9. The plaintiffs allege and the fact is that after the wrongful and fraudulent disposition and conversion of the said stocks were made, there was a credit in favour of the said Harry Miller in a sum approximating

$42,000 plus 100 shares of Muirhead Cafeteria Limited, after allowing for any moneys that may have been owing thereon, which said amount was wrongfully converted by the defendants.

10. The plaintiffs allege and the fact is that the defendants are responsible for the proceeds of the sale of the said stock in the said account, as having made profits or gain therefrom as agents of the said Harry Miller.

11. The plaintiffs allege and the fact is that the said cause of action arose by reason of the fraud and fraudulent breach of trust on the part of the said Malcolm Stobie and Charles J. Forlong and Meyer Brenner.

12. The plaintiffs therefore claim:

(*a*) An accounting from the defendants in respect of all dealings between the said Harry Miller and defendants, Meyer Brenner and Stobie, Forlong & Company and for this purpose that all necessary references be had and accounts taken.

(*b*) Damages for wrongful conversion, breach of contract, fraud and fraudulent breach of trust or *in the alternative*

(*c*) Judgment for the amount found due to the said Harry Miller at the time of the transfer of the said account from E. A. Pierce & Company to the said defendants, or *in the alternative*

(*d*) Judgment requiring the defendants to account for the proceeds of the sales of the said stock and judgment for such amount plus the value of 100 shares of Muirhead Cafeteria Limited or the recovery of the said 100 shares of Muirhead Cafeteria Limited.

(*e*) The costs of this action.

(*f*) Such further and other relief as the nature of the case may require.

The defendant Brenner, by a separate plea, denied that he carried on a brokerage business himself and alleged that he was, in effect, a salesman for the other defendants, admits the transfer of the stocks to the latter, denies all other allegations so far as they relate to him, and states that he did not at any time:

(*a*) Receive or hold any stocks or securities or the proceeds thereof for the late Harry Miller.

(*b*) Wrongfully, fraudulently or illegally sell or deal with any of the said stocks.

(*c*) Wrongfully, fraudulently or illegally mis-apply the proceeds of the said stocks.

(*d*) Convert any of the proceeds to his own use.

(*e*) Make any profits or gains from or through the said stocks.

(*f*) Commit any fraud or fraudulent breach of trust.

6. The said defendant, Meyer Brenner, further alleges that the said late Harry Miller duly authorized and instructed all transactions in relation to the shares and securities mentioned in the Statement of Claim of the said plaintiffs and was duly advised of what was done from time to time and further adopted and confirmed the same.

The defendants Stobie and Forlong denied the allegations in the statement of claim, and further said that any account of the late Harry Miller with the former partnership firm of Stobie, Forlong & Company was an ordinary trading account in which transactions were had from time to time

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by the said late Harry Miller, and the said account was closed in the lifetime of the said late Harry Miller.

In any event, these defendants said, on the 30th day of January, 1930, they made an assignment under the provisions of the *Bankruptcy Act* and one Norman L. Martin was subsequently, under the provisions of the said Act, appointed Trustee of their estate, and all the assets of these defendants thereupon became vested in the said Trustee for the benefit of their creditors. These defendants say that by reason of the said proceedings in bankruptcy the plaintiffs, even if they were otherwise entitled, cannot proceed to recover any remedy against the property or person of the debtors, or commence or continue this action.

This last allegation was, with some hesitation, dismissed by the trial judge, who condemned the brokers to pay the net proceeds of the sale of securities, viz $41,822; but it was accepted by the Appellate Division and the action dismissed with costs as against the brokers, because it was illegally taken after bankruptcy, it being a claim provable in bankruptcy. Sections 24 and 104 of the *Bankruptcy Act*. The finding of fraud against Brenner and the condemnation against him was also set aside and a reference ordered to ascertain the exact damages, if any, that he should pay to the appellants after their claim in bankruptcy should have been disposed of, and any dividend received from the insolvent estate duly credited.

Both parties, on the evidence, are liable. The fraudulent and deceitful conduct of Brenner is clearly shown, as found by the trial judge. The brokers should have kept for, or paid to Harry Miller the net proceeds of his stock, after deduction of their claim, instead of lending themselves to an orgy of speculation with Miller's money, reaping for Brenner, their close associate, and themselves, commissions amounting to $9,485.50, plus interest on large amounts allegedly advanced. The plaintiffs come before the court, expose how they have been defrauded by the joint wrongdoing of the defendants and ask for remedy. Have they, by asking alternative conclusions, waived their right of proceeding in tort? I do not think so. They have made no election and left it to the court to give the necessary order.

The trial judge's findings are as follows:

> But, as I see the case, there was an unauthorized sale, on the instructions of both Ben Miller and Meyer Brenner, by Stobie Forlong of stocks

which the late Henry Miller held with the latter company. That this sale was fraudulent, and was concealed from the late Harry Miller, I can have no doubt; Brenner said so to me. I think both Ben Miller and Meyer Brenner acted as the result of a conspiracy between them to deal with these stocks, in the way in which they were dealt with. It is true that Ben Miller put it on the ground of filial affection, and the danger of disclosure to his father's health, but I can come to no other conclusion than that both of them knew that Mr. Harry Miller could not transact business, and both of them took advantage of that condition in gambling with Harry Miller's money.

Under those circumstances I have no hesitation in finding that there was fraud. Ben Miller had no authority of any kind to authorize, or give instructions for the sale of these stocks by Stobie Forlong Company, or by any one. Therefore, Stobie Forlong having sold the stocks on the instructions of an unauthorized agent, ought to have held the proceeds for Harry Miller, instead of which they misapplied the money, the property of their principal, who was Harry Miller, by permitting it to be used in speculative transactions, and are unquestionably liable for the proceeds.

The only question remaining is whether the claim against Stobie Forlong Company should be proved in bankruptcy or not. Leave was not obtained. I have very grave doubt if such a claim, being in reality for deceit, is provable in bankruptcy under section 104; but I think it is better for the Appellate Division to determine whether the class of action disclosed by the evidence is provable in bankruptcy. It is true that the sale of the stocks might be described as a breach of contract with Harry Miller by Stobie Forlong, but I do not think that the claim arising out of the misapplication of funds is such a demand in the nature of unliquidated damages arising out of a contract as is provable in bankruptcy. I will leave a higher court to correct me if I am wrong in that.

The learned trial judge, not the plaintiffs, directed that the proceeds of the unauthorized sales, of some of the tortious acts complained of in paragraphs 8 and 9 of the statement of claim, should be reimbursed to the victim of defendants' illegal and improper course. The fact that they deliberately took their action after Stobie Forlong's bankruptcy without claiming in bankruptcy and persistently considered, despite the latter's pleading, throughout the trial, that their claim was not provable in bankruptcy, shows that they never elected to make the unauthorized sale their own; they still persist in calling it a fraudulent conversion and they ask that the measure of damages resulting from the fraud be the net value of the securities when they were sold without Miller's knowledge or consent. The learned trial judge thought that they were entitled to what would have been saved from the wreck immediately after the unauthorized sale, if the defendants had not continued their tortious acts by gambling with the proceeds, the property of Harry Miller, when the latter was incapable of trans-

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acting any business. Those are the damages, unliquidated before the trial, but ascertained by the trial judge, representing the loss or *damnum* suffered by Harry Miller when his money was frittered away by the defendants. The latter did not pretend to act by reason of a contract, promise, or even in breach of a trust, but had no possible shadow of an excuse to act as they did: they purely and simply took for their own purposes what did not belong to them.

Under such circumstances, the action against the joint tort feasors should not be defeated by technicalities.

Smith v. *Baker* (1) does not apply. In that case, the plaintiff did not commence any action in law for the tort, but resorted to the Court of Bankruptcy and made a successful application to have the bill of sale declared void. The plaintiffs here, as explained above, do not claim "*exclusively*" the proceeds of the sale, but mention them only as an alternative remedy against those who stole their money. They always treated both the sale and the subsequent transactions as tortious acts, and never acknowledged that Harry Miller had contracted with, or entrusted the defendants with his money. The plaintiffs explained how the transfer of shares had taken place and complained of the fraud through which subsequently a sick man had been victimized by people who knew that he was not capable of protecting his interest.

I, therefore, with due respect, beg to differ from the holding of the Court of Appeal that the demand in tort was waived by the plaintiffs.

In *Smith* v. *Baker* (2) it is said:

> There may be other instances where an act may amount to a conclusive election in point of law to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and confirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law.

In *Rice* v. *Reed* (3), at page 64, Lord Russell of Killowen, C.J., says:

> * * * an application for the proceeds of goods said to have been tortiously dealt with is not conclusive proof of election to affirm the transaction.

(1) (1873) L.R. 8 C.P. 350.

(2) (1873) L.R. 8 C.P. 350, at 355-6.

(3) [1900] 1 Q.B. 54.

At page 65, Smith, L. J., says:

> In the present case the plaintiff sued Soltan in trover, and in the alternative for money had and received. If nothing more had occurred, no court could say that the plaintiff, by suing in the alternative for tort and for money had and received, had waived the tort and elected to affirm the transaction. It is clear that no authority goes so far as that.

At page 66, Smith, L. J., agrees with the dictum in *Smith* v. *Baker* (1) that the question whether a tort has been waived is a matter of fact rather than law.

See also *Keating* v. *Marsh; Marsh* v. *Keating* (2).

As pointed out by Brenner's counsel, "they (the appellants) never elected to confirm sales made by us" (the respondents). There is no evidence that appellants waived their cause of action in tort by proving in the bankruptcy proceedings. And I find, like the trial judge, that, as a matter of fact, the appellants never waived their right of proceeding in tort for unliquidated damages, and they are therefore entitled to a remedy. The plaintiffs have proven their whole case; the defendant Brenner has failed to establish his plea, and, in view of the record, paragraph 6 thereof is a clear sample of bad faith and may be considered as a deliberate attempt to mislead the court. It was not disputed here, nor in the Court of Appeal, that the brokers are liable to the plaintiffs for the amount of the surplus of the proceeds, after deducting their claim against Miller for moneys paid on his behalf to E. A. Pierce & Company.

But Brenner says: If we had not sold the stocks, if the account had remained dormant till Harry Miller's death, the plaintiffs would have lost all the equity and would have suffered the same loss on account of the continued decline of the market prices of their securities. Therefore they are not entitled to damages.

This is sophistry. The case is not to be determined on what might have happened if the defendants had not done what they did. They jointly, illegally and without even colour of right, gambled with Miller's money—the net proceeds of their first unauthorized sale of securities—over and above what was required by Stobie & Forlong for marginal or other purposes. The amount is clearly established, is not even disputed. I believe that the trial judge

(1) (1873) L.R. 8 C.P. 350 at 355-6.

(2) (1834) 1 Montagu & Ayrton's Bankruptcy Reports, pp. 582 and 592.

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TRUSTS & GUARANTEE CO. LTD. ET AL v. BRENNER ET AL

Cannon J.

took the right view of the whole case, refused to be stopped by ingenious but unfounded objections and applied himself to carry out his duty under the following section 15, subsection (*h*), of the *Judicature Act*, R.S.O. 1927, chapter 88:

15. In every civil cause or matter law and equity shall be administered according to the following rules:

(*h*) The Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it shall deem just, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided.

There is no need for a reference or for a retrial of this case before the Bankruptcy Court. The defendants should reimburse what they converted to their own purposes without even trying to consult with the owner thereof, or responsible members of his family; these funds so misappropriated amount to $41,822, as found by the trial judge. His judgment should be restored and the appeal maintained with costs here and before the Appellate Division against the respondents.

Appeal allowed and judgment given in the terms as indicated in the judgment of Duff C. J.

Solicitors for the appellants: *Luxenberg & Levinter.*
Solicitors for the respondent Brenner: *Singer & Kert.*
Solicitors for the respondents Stobie and Forlong: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

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*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.