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*Feb. 20, 21
*Mar. 23

J. J. HOEFLE (PLAINTIFF)..... APPELLANT;

AND

BONGARD & COMPANY (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Construction—Alleged breach—Whether contract ambiguous—Extrinsic evidence—Conduct of parties—Party not replying to letters from other party which assumed rights consistent with latter's contention as to effect of the contract.

The action was for damages for alleged breach of agreement.

Plaintiff had long been a customer of defendants, a firm of brokers. At the time of the agreement in question defendants had been carrying an account in plaintiff's name on which there was a debit balance of $180.11, but in respect of which they held 500 shares of a mining stock owned by plaintiff. They had also been carrying an account in the name of W., who, though she might herself instruct defendants, had authorized them to accept instructions from plaintiff on her behalf. In W.'s account there was an unsecured debit balance of $687.40, for payment of which defendants were pressing. Defendants held from each of them a "customer's card" authorizing defendants to sell securities without notice whenever they deemed that necessary for their own protection.

On May 18, 1940, plaintiff addressed to defendants a document as follows: "This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of [W.]. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of [W.] without my instructions and consent, and that no further obligation be presumed against me in any way whatever". Defendants transferred plaintiff's account (including the debit balance against plaintiff and said shares) into the account of W. At that time the market value of the shares was approximately equal to the said debit balances now consolidated.

The market price of said shares declined. On May 30, 1940, defendants wrote to plaintiff that at the then market price of the shares W.'s account showed a certain deficit and "no doubt you will wish to adjust this, as well as supply some margin for" the shares. On June 18, 1940, defendants wrote to plaintiff: "We have for some time now been carrying a deficit in the account of [W.] which was occasioned by your request to not sell the [said shares] which you gave to the [W.] account. Had we sold it at the time you deposited this stock as collateral to the account there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard". On July 19, 1940, defendants wrote notifying W. that as she had not responded to their margin calls, they would handle the liquidation of said shares at their absolute

*PRESENT:—Kerwin, Taschereau, Rand, Kellock and Estey JJ.

discretion, looking to her for any remaining deficit. Plaintiff received said letters to him, and a copy of said letter to W.; but made no reply. On July 27, 1940, defendants sold the shares. Plaintiff was notified of this, and wrote to defendants protesting against the sale as being contrary to the agreement expressed in said document of May 18, and asked defendants to replace the shares into the W. account. In May, 1941, he sued defendants for damages. His action was dismissed at trial and the dismissal was affirmed (by a majority) by the Court of Appeal for Ontario, and he appealed to this Court.

Held (affirming the judgments below): The action should be dismissed. Rand J. dissented.

Per Kerwin and Taschereau JJ.: The provision against further "alterations or dealings", in said document of May 18, meant that plaintiff desired to protect himself against the possibility of W. indulging in future trading. On the only reasonable construction of the document, defendants were entitled at any time to sell the shares under their general powers under said "customer's card" signed by W.

Per Kellock J.: When said document of May 18 is brought into relation with the circumstances existing at its date, an ambiguity is produced as to whether the sale by defendants was or was not a violation of its terms. In such case extrinsic evidence was admissible for solving such ambiguity; and did so in defendants' favour: the reasonable inference from plaintiff's failure to reply to defendants' said letters between May 18 and July 27 is that plaintiff put the same construction upon the document of May 18 as he knew they were putting upon it.

Per Estey J.: The effect of the agreement made by said document of May 18 and its acceptance, in the light of the facts and circumstances in evidence, was that thereafter all dealings on the account would be by plaintiff only, acting under his authority from W.; that the shares were held as security for the total of both debit balances, and were subject to the terms of the "customer's card" signed by W., and could be sold as they were sold by defendants. If the document of May 18 be regarded as ambiguous, as it might well be, the subsequent conduct of the parties might be examined to assist in construing it; and in the light of defendants' said letters, which indicated their belief in their right to sell, and the ignoring of them by plaintiff, the effect of said document of May 18 and its acceptance must be taken to be as above stated.

Per Rand J., dissenting: On the proper construction of said document of May 18, the account of W., after plaintiff's account, including the security, was transferred to it, was in its entirety to remain as it was; the prohibition against "further alterations or dealings" extended not only to action by W. but to action by defendants in relation to the security. As to defendants' said letters to plaintiff: that of May 30 contains no reference to sale without consent; that of June 18, written from defendants' head office in Toronto whereas plaintiff's dealings had been with their branch office at Windsor, was evidently, from circumstances appearing in the evidence, written merely on the assumption of a case of ordinary collateral and the usual power of sale, and was not intended to indicate an interpretation of the docu-

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ment of May 18; also, to consider such communications as raising an obligation to reply on pain of an adverse inference is, in the particular situation, a perversion of the rule by which conduct may be shown; the rule that conduct in performance of a contract participated in by both parties may be used to resolve ambiguity, can have no application to the facts here. There was an "alteration" and "dealing" by defendants in violation of the agreement, and plaintiff was entitled to damages. (Rules and considerations in determining damages in such a case, and with regard to the position and conduct of the parties, discussed. Plaintiff should have judgment for the value of the shares at the time of trial plus the amount of a dividend paid on the shares, less the total indebtedness of the W. account with interest thereon).

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing (*per* Riddell and Fisher JJ.A.; Laidlaw J.A. dissenting) his appeal from the judgment of Plaxton J. at trial dismissing his action for damages for alleged breach of a certain agreement. The agreement, together with other facts and circumstances of the case, are set out in the reasons for judgment in this Court now reported. Leave to appeal to this Court was granted by the Court of Appeal for Ontario. The appeal to this Court was dismissed with costs, Rand J. dissenting.

S. L. Springsteen K.C. for the appellant.

G. D. Watson for the respondent.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.—This appeal is concerned with the proper interpretation of a document signed by the appellant on May 18th, 1940, and addressed to the respondent in the following terms:—

> This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

If the meaning of this document is clear, we need not then concern ourselves as to the admissibility and effect of certain evidence introduced by both parties, but it is of importance to understand the circumstances under which the document was given by the appellant and accepted by the respondent.

Bongard and Company is a firm name under which a brokerage business is carried on, with offices in Toronto and Windsor, in the Province of Ontario. The appellant resides in Detroit and for a number of years has carried on an extensive business with the respondent at its Windsor office. Before that, he had been himself connected with a brokerage firm in the United States, and there is no doubt that he is thoroughly familiar with stock exchange transactions. Mrs. Hazel G. Weeks, also residing in Detroit, was a friend of the appellant, whom he introduced to the respondent some years ago, and thereafter Mrs. Weeks traded extensively on the stock exchange through Bongard and Company's Windsor office. By May 12th, 1940, Mrs. Weeks' account with the respondent showed a debit balance of $19,196.27 against which the latter held shares of stock. These shares were sold by the respondent under its general powers and the net result, after these sales and a further debit of $974, was that at the close of business on May 17th, 1940, Mrs. Weeks owed the respondent the sum of $561.77 and interest of $125.63, making a total of $687.40. As of the same date the appellant owed the respondent $180.11, as security for which the respondent held 500 shares of a stock known as San Antonio.

The appellant was the only person who gave evidence at the trial, and, according to his testimony, the respondent made a demand upon Mrs. Weeks for the payment of the amount owing by her and "she at that time was financially quite embarrassed and hardly in a position to take care of it." There was no market in the United States for the San Antonio shares and under Canadian regulations the appellant could not sell them unless he purchased other shares in Canada. Under these circumstances, the appellant told the Windsor Manager for Bongard and Company "that I would make a gesture myself that might satisfy everybody by simply transferring my 500 shares of San Antonio into the account of Mrs. Weeks", and the document of May 18th, 1940, was then written out by the appellant and signed by him.

There is no doubt that this document authorized the respondent to transfer to Mrs. Weeks' account the debit balance against the appellant and also the San Antonio

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shares. This the respondent did, and whether the result was that Bongard and Company had thereby given up its right to claim payment from the appellant of the sum of $180.11, certainly the shares were then held by the respondent as security for the total debit balance of Mrs. Weeks' account, which as a result of the transfer was increased to $867.51.

On May 30th, 1940, the respondent wrote the appellant as follows:—

With San Antonio quoted at $1.35, Mrs. Hazel G. Weeks' account shows a deficit of around $75 and no doubt you will wish to adjust this, as well as supply some margin for the 500 San Antonio.

You will have noticed that since we were obliged to take action on this account and sell out the securities Ventures has been selling at times under $2. Therefore, if Mrs. Weeks is in a position to raise funds there has been plenty of opportunity to repurchase this stock at lower levels than prices which we obtained when selling out this security.

Trusting you may be in a position to supply trading funds again for this account, and with kindest personal regards, believe us

Yours faithfully,

On June 18th, 1940, the following letter was sent by respondent to appellant:—

We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned by your request to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock as collateral to the account there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard.

Will you please give this matter your usual courteous and early attention, and oblige.

On July 19th, 1940, the respondent wrote Mrs. Weeks the following letter:—

As you have not responded to our margin calls, we beg to notify you that we will handle the liquidation of San Antonio at our absolute discretion.

Certainly if this stock approaches a price that will liquidate the deficit in your account we shall take full advantage of it, but this will not prevent us from liquidating the stock, as above stated, at our absolute discretion, and looking to you for any remaining deficit.

Please be governed accordingly.

The appellant admitted that he received the first two letters and that he was aware that Mrs. Weeks had received the one addressed to her. He made no reply and it was only after the respondent had sold the shares on July 27th, that

he complained that the respondent had no authority to sell them. Some time later, this action was brought for specific performance of the agreement of May 18th, 1940, or for damages. The claim for specific performance was definitely abandoned before us but the claim for damages was pressed.

It was argued that as the word "account" in the appellant's authorization to the respondent to transfer "my account in its entirety as it stands to-day" included the San Antonio shares, the word "account" when used in the second sentence whereby the provision or condition upon which the transfer was authorized "that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent" must have the same meaning. I cannot agree. No doubt both the appellant and Mrs. Weeks were hopeful that prices on the stock exchange would shortly become more favourable. The fact that Mrs. Weeks' account showed a debit of $867.51 is no argument against properly construing the words "alterations or dealings" as meaning that the appellant desired to protect himself against the possibility of Mrs. Weeks indulging in future trading as a result of her supplying funds to Bongard and Company or of the appreciation in value of the San Antonio shares. While some time before Mrs. Weeks had authorized the appellant to give instructions to the respondent to buy and sell on her account, she still had the right, which she had exercised from time to time, of giving instructions herself to the respondent.

It was also argued that the only effect of the letter of May 18th, 1940, was to authorize the respondent to add the appellant's debit of $180.11 to Mrs. Weeks' debit of $687.40 and to retain as security for the payment of this sum the San Antonio shares. The respondent could never, it was said, use those shares for any purpose without the appellant's consent, which consent might never be given.

It is impossible, in my view, so to construe the document. While undoubtedly the respondent hoped to retain the appellant (if not Mrs. Weeks) as a customer and both parties expected that the respondent would in the future treat the appellant fairly, if not generously, as it had in the past, the only reasonable construction of the document, in my opinion, is that the respondent was entitled at any time to

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sell the San Antonio shares under the general powers that it had by virtue of the usual Customer's Card, signed by Mrs. Weeks. If it did not have that power, the document was a futile gesture on the part of the appellant.

In this view it is unnecessary to say anything on the questions of evidence referred to at the commencement of this judgment except that even if the document of May 18th were ambiguous the respondent's inter-office correspondence does not bear the construction put upon it by the appellant. The appeal should be dismissed with costs.

RAND J. (dissenting)—The circumstances of the transaction giving rise to this litigation were these. The plaintiff, appellant, was on May 18th, 1940, indebted on a general balance to the defendants, stock brokers, at their branch office in Windsor, Ontario, for $180.11. This was secured by five hundred shares of San Antonio mining stock, then selling on the market at $1.80 a share. At the same time an account was being carried for a Mrs. Weeks which, during a week or so before, in a period of price slump, had been closed out by a sale of collateral which had had an original market value of about $34,000. There remained a debit balance of approximately $675, for which the defendants had only the personal liability of Mrs. Weeks, and it is not suggested that, at the moment at least, any value was placed on that. The plaintiff had had a general power of attorney in relation to the Weeks account, and was evidently desirous both to save Mrs. Weeks the embarrassment of being pressed by her creditors and to give to the latter some tangible assurance that their debt would ultimately be paid. He agreed, therefore, after discussion, that his account and security should be transferred to the Weeks account and a document was signed by him reading as follows:—

Bongard & Company, May 18, 1940.
Windsor, Ontario.

Gentlemen:

This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

Yours truly,

John J. Hoefle.

No restriction was placed on action by the defendants against Mrs. Weeks.

On July 27th, 1940, the defendants sold the shares without the plaintiff's consent for a sum which realized less than one dollar more than what was then due in the consolidated account. The plaintiff protested this action by a letter written on August 8th in which he requested the stock to be restored to the account. On November 14th a further demand was made that the stock be replaced and that a dividend declared in the meantime be credited to that account. In May, 1941, the writ was issued; the statement of claim was delivered in November, 1941, and the trial took place in September, 1943.

Both the plaintiff and Mrs. Weeks had signed the general security form of the defendants, relating to their individual accounts. The question is whether the transfer of the security to Mrs. Weeks' account brought it immediately under that general power to sell or whether the defendants were restricted to a sale with the consent of the plaintiff either by the terms of the memorandum or otherwise.

The first question is whether the transfer of the security is within the language of the memorandum. If it is not, then the terms on which it was made were oral and on the evidence of the plaintiff, which is all we have, his contention is established.

But the respondents agree that it is covered by the memorandum and that the word "account" as used in relation to the plaintiff must be taken to include "security." Obviously the words "in its entirety" go to that scope; and just as clearly "the account of Hazel G. Weeks" carries the same signification. That was the holding of Laidlaw J.A. in the court below and I agree with him that it determines the issue; but, in view of differences of opinion, a somewhat close analysis of the language of the memorandum, though distasteful, seems to be desirable.

The word "account" may refer either to the written record of transactions between the parties, ledger or other form, with its incidents such as security, power of sale, etc.; or to the written record alone. The former needs no elaboration but I should observe that only in this sense could the power of sale given by Mrs. Weeks be connected

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with the plaintiff's security. The scope of the latter is shown by the account actually kept by the respondents. It was as follows:—

BONGARD & COMPANY
80 King Street West
Toronto 2, Canada

To:
Mrs. Hazel G. Weeks

Date	Bot	Sold	Stock	Price	Debit	Credit	Balance
May			* * *				
20	500		San Antonio— Transf'd from J. J. Hoefle a/c		180.11		
			Tax re above transfer		2.50		
			Int. 5½% to May 15th		125.63		125.63
							687.40
							870.11
June 15			Int. 5½%		10.59		880.70
July 15			Int. 5½%		3.98		884.68
27		500	San Antonio	1.80		887.50	
30			Int. 5½%		2.00		Cr. .92

POSITIONS:

May 13th, 1940,
Long: 8900 Ventures
Short: 500 San Antonio

July 30th, 1940,
Flat.

From this it will be seen that, when transferred, the shares of San Antonio were entered in the "bot" column, and that, upon the sale, an entry was made both in the "sold" and in the "credit" columns. The shares themselves and the dealings in them were thus made part and parcel of the account in both aspects and the language used by the appellant was in strict accordance with brokerage nomenclature.

There are, then, the remaining words of the memorandum, "no further alterations or dealings." The word "alterations" in either sense of "account" presents no difficulty. "Dealings" in the "account (including security)" is likewise free from doubt; and, in the aspect of record only, a moment's examination will show it to be equally so. In that sense, "alterations" and "dealings" are correlatives; the former refers to the written entries,

the latter to the transactions giving rise to them. But as the "account" contains the record of transactions in the security as well as in share trading, the scope of "dealings" is likewise fixed.

What the memorandum provides is, therefore, this: there are to be no further alterations or dealings in the "account (including security)"; or, in the second aspect, no alterations in the record, or dealings in the transactions recorded. Apart from the general power of sale, these alternatives equally distribute the entire field.

Now, can it be seriously suggested that "dealings," in its plain and ordinary sense, cannot apply appropriately to transactions in the security? And, if not, what more is there to be said as to the effect of the memorandum? There is said to be ambiguity. I venture to suggest that, if the letters, to which I shall refer later, were not before the court, we would not have heard of ambiguity. But it has been raised and I deal with it.

So far as I understand it, the equivocal word is "dealings", and the equivocation between either trading transactions or security transactions, the answer to which is that it applies to both; or between both and trading transactions exclusively, to which I should say that, if the term can fairly apply to both, which I consider indisputable, the alternative is purely gratuitous.

The opposite view appears to be this: "dealings" is the dominant word; it means "trading transactions": it controls "alterations"; and the latter must, therefore, be limited to accounting changes in relation to trading transactions. But why not the converse? Can we not "deal" with the security? What is there in the words or the context to attribute dominance to the one or the other? If there was the slightest doubt whether "dealings" extends to all transactions—a possibility which I reject—I should have thought, on the contrary, that the ordinary meaning of "alterations," being perfectly clear, and applying to all items, would have determined the sense in which "dealings" was used; that the scope of the former being unquestionable, the latter as a complementary term and conceivably doubtful, would be resolved as equally extensive. But the converse process is used; the doubtful term gives limitation to the certain.

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But the assumption that "dealings" is dominant arises in fact only after we have gone outside of the memorandum and decided that what the parties really intended to do was only to restrict "trading transactions" on the part of Mrs. Weeks. Having so determined that intention, we impose it on the essential words and distort the plain meaning of both of them in the course of doing so. But we must ascertain the intention of parties from the language they have used, not fix the meaning of that language by a predetermination of what they really had in mind.

The inference against the plaintiff is drawn from his failure to reply to two letters sent him by the respondents. The first, dated May 30th, contains not the slightest reference to sale without consent. It is a request for further security and an invitation to further trading. The second, of June 18th, is as follows:—

> We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned by your request to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock as collateral to the account there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard.

These letters, I do not doubt, are in the true tradition of brokers. Both of them were written from the head office at Toronto. It is evident that that office had either overlooked the memorandum of May 18th or had not received it. On August 9th the Windsor branch had wired Toronto: "Frey has Hoefle's letter re Weeks in his personal correspondence". On the 10th this message followed: "Frey has no letter from Hoefle re Weeks account in his personal file. He says must have been sent to you if received here." It seems clear, therefore, that the second letter was not intended to indicate an interpretation of the memorandum: it assumed ordinary collateral and the usual power of sale. Hoefle's dealings had been with Frey, to whom the memorandum had been given and who knew what the arrangement was. Head Office was overreaching itself and could be ignored.

The letters as such are inadmissible. It is only in relation to conduct of the plaintiff evoked by them that they can be offered to the court. But that communications

of this sort can raise an obligation to reply on pain of an adverse inference is, in the particular situation, a perversion of the rule by which conduct may be shown: *Richards* v. *Gellatly* (1): Wiles J.:

> It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded and the absurdity of acting upon it demonstrated.

And in *Wiedemann* v. *Walpole* (2), Bowen L.J., puts the ground of admission in these words:

> Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.

There is no duty on debtors to instruct creditors as to their rights and, while conduct in performance of a contract participated in by both parties may be used to resolve ambiguity, that rule can have no application to the facts here. And it would be exceedingly dangerous to permit an entirely proper disregard of characteristic importunities and impositions to be used as an admission for the interpretation of engagements of the party making them.

That the plaintiff was clear in his understanding of the arrangement is shown by his immediate answer of August 8th to the notice of sale:

> I am just in receipt of copy of your letter of July 29 to Mrs. Hazel G. Weeks, in which you advise the sale of 500 shares of San Antonio, and I presume this is the same 500 shares that I allowed you to place into her account by my letter of May 18, 1940.
>
> If I am correct in this, it seems you have made a mistake in disposing of this stock, as my authorization specifically stated that nothing was to be done with the San Antonio without my instructions and consent, and you accepted it on those terms.
>
> Therefore, I am requesting that you replace this stock into the Weeks account without delay, and that no expense accrue to Mrs. Weeks through your oversight.

The argument on this view is, I think, concluded by the fact that there never was a moment's apprehension of the sufficiency of the security for the $180 balance and that the case for the respondents involves the conclusion, as the letter of June 18th implies, that the moment after the security had been given they could have sold it for the primary purpose of clearing off the Weeks indebtedness.

(1) (1872) L.R. 7 C.P. 127. (2) [1891] 2 Q.B. 534.

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The plaintiff's intention in that case was, in effect, in view of the market, to surrender his property for immediate realization by the brokers to pay another's debt; but he could have brought that about himself without the empty formality of the memorandum: and such an intention would have been a flat contradiction, not only of the receipt taken by him from Mrs. Weeks on May 22nd by which the stock was "to be returned to John J. Hoefle immediately upon its release from my Bongard account," but of every interest and consideration which lay behind his action.

The account in its entirety was, therefore, to remain as it was; the prohibition extended not only to action by Mrs. Weeks but to action by the brokers in relation to the security. There was admittedly a vital alteration in transferring the 500 shares from the "bot" to the "sold" column and in entering the price realized. There was just as clearly a prohibited dealing in the security.

The question remains, then, of damages. The conversion by the bailee here is a breach of a contract and it is the damages resulting from that breach which we are to find.

A preliminary question is whether the sale rescinded the bailment so as to deprive the defendants of their security and this in turn depends upon the nature of the interest which they had in the shares. The transaction contemplated a possible sale with consent and a payment of the Weeks indebtedness out of the proceeds. That, I think, created an interest greater than mere possession and it must be taken to have been equivalent to that of a pledge with a restriction upon the power to sell. In such case, the authorities seem to hold that the conversion does not destroy the interest and that in the damages the debt secured must be taken into account. The principle of this rule is not wholly clear: but the statement of Blackburn, J., in *Donald* v. *Suckling* (1): "that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it," places it where it seems properly to belong, within the general rules governing breaches of contract. There is created an interest coupled with a power under a limitation, but to say that this is a *jus in re* does not carry us much nearer the true basis of determining the contractual result of the

(1) (1866) L.R. 1 Q.B. 585, at 617.

conversion. In that conception the rule must apply whether the debt is that of the owner or a third person. What is recoverable is, then, the value of the interest remaining in the owner, the appellant.

One consideration may be cleared away. It is not a case for any rule of mitigation. The broker is in as good a position as the owner to redeem the situation or to mitigate the consequences: Grose, J. in *Shepherd* v. *Johnson* (1)

The object of damages is to restore the owner as nearly as possible to the same position as if the terms of the bailment had been respected. What he would have done in the intervening time, if the security had remained, is the speculative basis from which the inferences must be drawn. We cannot say that he would have sold at the highest or at the lowest price or that he would have sold at all. But so far as the circumstances permit, they are to be the ground of conclusions of probability: *Williams* v. *Peel River Land and Mineral Company Ltd.* (2) The case is analogous to that of a breach of covenant to re-deliver shares and *prima facie* the defendants are held to have prevented the shares from remaining the property of the plaintiff up to the trial: Best C.J, in *Harrison* v. *Harrison* (3):

> I think the fair rule is, to take the damages at the price of yesterday or to-day. When you had the money, you promised to restore the stock. Justice is not done, if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is,—you have effectually prevented him from doing so.

Owen v. *Routh* (4) treats the rule as absolute.

What, then, was the conduct of the plaintiff in relation to the shares? On August 8th and November 14th, when their price ranged around the point at which they had been sold, he called upon the defendants to restore the security to the account. By that act he affirmed the contract; and, in the statement of claim, among the items of relief sought is an order for specific performance, i.e., restoration. In view of these demands, the plaintiff could not thereafter

(1) (1802) 2 East 211; 102 E.R. 349.
(2) (1886) 55 L.T. 689, at 693.
(3) (1824) 1 Car. [and] P. 412; 171 E.R. 1253.
(4) (1854) 14 C.B. 327, at 339-340; 139 E.R. 134, at 140.

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have complained of action taken by the defendants in accordance with them: he had committed himself to retention. At no time did he make any offer to discharge the Weeks indebtedness. These considerations entitle us to say that the furnishing of the stock at the time of trial, even had the market value dropped, would, subject to costs, have been an answer to the damages recoverable. The risk of the value at the time of trial was taken by the plaintiff.

It is agreed that that value was $4 a share, with a total price of $2,000. There was collected in 1940 a dividend of $250. The total indebtedness of the Weeks account at the time of the sale was $886.68. Interest on this at 5½ per cent. until September 30th, 1943, would be $156, making a total credit of $1,042.68. The balance, $1,207.32, represents the plaintiff's interest in the property, and his loss through the breach of contract.

I would allow the appeal and direct judgment for the plaintiff for that amount with costs throughout.

KELLOCK J.—This is an appeal from the order of the Court of Appeal for Ontario dated February 4th, 1944, dismissing an appeal from the judgment at trial, by which the appellant's action was dismissed. The action was for damages in respect of the sale of certain shares in breach, as it was alleged, of an agreement between the parties. The respondent, a firm of brokers, had for some time prior to the 18th of May, 1940, been carrying two accounts, one in the name of the appellant in which on that date there was a debit balance of $180.11 but in respect of which the respondent held 500 shares of a mining stock known as San Antonio. The other account was in the name of Hazel G. Weeks, in which on the said date there was a debit balance of $687.40, as against which the respondent held no collateral. This last mentioned account, with respect to which the appellant had authority from Hazel G. Weeks to give instructions to the respondent, had immediately prior to the above date been active, but had been closed out by the respondent by forced sales resulting in the debit balance already mentioned. As to both these accounts, the respondent was authorized by the customers in writing, to sell any securities without notice.

On the 18th of May, after some previous discussion between the appellant and one Frey, the respondent's local manager at Windsor, the appellant wrote and mailed a letter to the respondent. This letter, which is the subject of the controversy between the parties, is as follows:

Bongard & Company, May 18, 1940.
Windsor, Ontario.

Gentlemen:

This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

Yours truly,
John J. Hoefle.

The respondent sold the San Antonio shares on the 27th of July following. The appellant's position is that this sale was wrongful. He contends that the words "no further alterations or dealings in the account of Hazel G. Weeks" prohibited the respondent from selling these shares. The respondent's position is as set out in paragraph 7 of the statement of defence,

that the said shares were held by the defendant as collateral security for the debit balance of the account carried in the name of Hazel G. Weeks and subject to the right of the defendant to deal with such collateral as circumstances might require from time to time.

The respondent contends that the words "no further alterations or dealings in the account of Hazel G. Weeks" have no application to the shares, but prohibit the respondent from acting on any instructions from Hazel G. Weeks, if they desired to continue to have any claim upon the shares.

If the language of the letter in question is unambiguous, effect must be given to it and parol evidence would not be admissible with respect to its interpretation. Neither party seeks rectification and each contends that the language is not ambiguous, but is clear in accordance with their respective contentions. Each contended, however, and still contends that if there be ambiguity, the ambiguity should be resolved in his favour, and each introduced parol evidence to that end.

It may be pointed out at once that the appellant was, as he expressed it, "intimately familiar" with the practices prevailing between brokers and their clients. He had

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devoted his entire time for some years to trading in securities and to advising other persons with respect to the same kind of transactions. There were other accounts carried by the respondent with respect to which the appellant was advising the clients, and he had been engaged as an employee of other brokers at an earlier period, in charge of considerable transactions.

The evidence establishes that, after her collateral was sold out, Hazel G. Weeks had no assets in Canada, but she did have certain stocks in Detroit. If she had attempted to realize upon them, to pay what she owed the respondent, however, it would have been embarrassing to her, and the appellant requested the respondent to give her time. It was in these circumstances that the letter of the 18th of May, 1940, was written by the appellant.

It is also to be observed that when the consolidation of the accounts was made, the San Antonio shares at the then market were approximately equal in value to the total of the debit balances in the two accounts before consolidation. It is also a fact that by reason of the regulations of the Foreign Exchange Control Board, while the appellant, prior to the arrangement of the 18th of May, might, upon paying his debit balance to the respondent, have taken delivery of the shares, he could not market them in the United States, as they were not listed on any exchange there, but that if instead of doing that, they had been sold by the respondent, he was not free to take the surplus out of Canada.

When the letter of the 18th of May is brought into relation with the circumstances existing at its date, in my opinion an ambiguity is produced as to whether the sale made by the respondent was or was not a violation of its terms. There are considerations which point both ways. If I had to choose between the conflicting submissions of counsel, apart from extrinsic evidence, I would be disposed to the view that the language used points rather to the prohibition of transactions on the initiative of the named client Hazel G. Weeks, rather than to transactions on the initiative of the broker. Perhaps the difference of opinion in the courts below on the question may be said to support the view that ambiguity exists. This ambiguity is produced by the application of the

language to the circumstances. In the language of Lord Wrenbury in *Great Western Railway and Midland Railway* v. *Bristol Corporation* (1):

> Extrinsic evidence has created the ambiguity, and extrinsic evidence is admissible to resolve it.

Again, at 430:

> The question is not what the parties meant as distinguished from what they have said, but what is the meaning of that which they have said. If the language used be ambiguous, the reader is entitled to be assisted in his task by the guidance afforded by a knowledge of the object which appears, from the circumstances, to be that which the parties had in view. But if it is not ambiguous he has to ascertain the intention from the words and from nothing but the words.

In *Doe dem. Pearson* v. *Ries* (2), Tindal C.J., at 181, said:

> Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties.

Again the same learned judge in *Chapman* v. *Bluck* (3), said:

> There is no better way of seeing what they [the parties] intended than seeing what they did, under the instrument in dispute.

An illustration of the application of the principle is to be found in *Manning* v. *Carrique* (4). Reference may also be made to *Bank of New Zealand* v. *Simpson* (5) and *Charrington & Co. Ltd.* v. *Wooder* (6).

In my opinion, extrinsic evidence was properly admitted in the case at bar, and, when reference is had to it, the ambiguity is resolved in favour of the respondent. On the 30th of May, the respondent addressed a letter to the appellant pointing out that the market price of San Antonio had fallen substantially, leaving a deficit in the account, and saying: "no doubt you will wish to adjust this, as well as supply some margin for the 500 San Antonio". A stock held by a broker in connection with a client's account, with respect to which the broker has no right to sell without the client's consent, does not require margining. The appellant made no reply to this letter.

(1) (1918) 87 L.J. Ch. 414, at 429.
(2) (1832) 8 Bingham 178.
(3) (1838) 4 Bingham N.C. 187, at 193.
(4) (1915) 34 Ont. L.R. 453.
(5) [1900] A.C. 182.
(6) [1914] A.C. 71.

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Mr. Springsteen argues that when the accounts were consolidated on the 18th of May, as the debits were approximately equal to the market value of the shares, if the respondent had the right to sell the shares, it would have done so immediately. The fact that it did not, he argues, indicates that it did not have that right. I think the respondent's conduct in not selling is satisfactorily explained by its letter to the appellant of the 18th of June, 1940, to which again he did not reply. This letter reads in part:

> We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned *by your request* to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock *as collateral to the account* there would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately *if there is to be no further action taken in this regard.*

Not only did the appellant not reply to this letter, but in the witness box he did not suggest that the letter contained any inaccuracy. This letter and the appellant's failure to reply satisfy me that the conduct of the respondent in carrying the account through the falling market subsequent to the 18th of May was due to the appellant's request, to which it was willing to accede owing to its long relationship with him as a customer which extended back to the year 1929. The phrase "as collateral to the account" is also significant, taken with the concluding language of the letter.

Again, on the 19th of July, the respondent wrote Mrs. Weeks and sent a copy of the letter to the appellant, advising that as no response had been made to their margin calls, they would "handle the liquidation of San Antonio at our absolute discretion" and the letter went on to make it clear that they proposed to sell. The appellant admits the receipt of this letter, but again did not reply. I think the reasonable inference from the appellant's failure to reply to the respondent's correspondence subsequent to the 18th of May and prior to the actual sale on the 27th of July, is that he put the same construction upon the letter which he had written them as he knew they were putting upon it.

I do not think that there is anything in what passed between Frey and his employers in the same period which is inconsistent with the view that the respondent considered

it had the right to sell. On the other hand, it would appear from the inter-office communication of the 28th of June, which was put in by the appellant, that he, when approached by Frey, had told the latter that "he was out of money and had no stock" and that the same applied to Hazel G. Weeks.

I would dismiss the appeal with costs.

ESTEY J.—The appellant (plaintiff) alleges that the respondent (defendant) sold 500 shares of common stock in San Antonio Gold Mines Limited in breach of the agreement that existed between them. The relationship of customer and broker had existed between these parties for a period of fifteen years, subject to the terms of the "customer's card", signed by the appellant, and which reads in part as follows:

> Whenever you shall deem it necessary for your protection to sell any or all of the securities or other property which may be in your possession, or which you may be carrying for me/us (either individually or jointly with others), or to buy in any securities, commodities or contracts for commodities, of which my/our account or accounts may be short, in order to close out my/our account or accounts in part or in whole, such sale or purchase may be made according to your judgment and may be made at your discretion on the exchange or other market where such business is then usually transacted, or at public auction or private sale, without advertising the same and without notice to me/us and without prior tender, demand or call of any kind upon me/us, it being understood that a prior tender, demand or call, or prior notice of the time and place of such sale or purchase shall not be considered a waiver of your right to buy or sell any securities and/or other property held by you at any time, as hereinbefore provided.

The appellant resides in Detroit and his business with the respondent had been carried on through the latter's branch office at Windsor, Ontario. On May 18th, 1940, the appellant's account showed a debit balance of $180.11, as security for which the respondent held 500 shares of San Antonio Gold Mines Limited.

He was familiar with the customs prevailing between brokers and customers, and acted in an advisory capacity to more than one of the respondent's customers, including Mrs. Weeks, for whom he had a power of attorney and under which he negotiated transactions on her account with the respondent. Mrs. Weeks also negotiated transactions, independent of the appellant, on her account with the respondent.

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On the same date (May 18th, 1940), Mrs. Weeks, whose account was subject to a "customer's card", had an unsecured debit balance of $687.40. Under the authority of her "customer's card", the respondent had already, in the month of May, sold all of her securities held in this account and thereby reduced her debit balance by an amount in excess of $26,000. The appellant's account was in good shape, but that of Mrs. Weeks showed an unsecured debit balance and the brokers were pressing for payment.

The appellant deposed that Mrs. Weeks:

> * * * had some stocks over there [Detroit] that had likewise been mutilated by that drastic market drop; if she had liquidated them to pay this it would only have added to her financial distress, * * *

He spoke to Mr. Frey, branch manager for the respondent at Windsor, and in part said:

> "Now," I said, "here is what you can do: you can sue this woman if you want to, and that is going to cost you a lot of money to go over there to Detroit to do it and it will be embarrassing financially to everybody."

It was as a consequence of this conversation that the appellant typed, signed, and delivered to the respondent the letter dated May 18th, 1940. This letter reads as follows:

> This will serve as your authority to transfer my account in its entirety as it stands to-day into the account of Hazel G. Weeks. This courtesy is extended only upon the provision that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent, and that no further obligation be presumed against me in any way whatever.

Upon accepting this letter the respondent transferred the appellant's "account in its entirety" to that of Mrs. Weeks.

The market continued to drop, and after repeated requests to the appellant for additional margin had been ignored, the respondent, on July 27th, 1940, sold the 500 shares, realizing sufficient to pay the balance owing and leaving a credit of less than $1 in Mrs. Weeks' account.

Under date of July 29th, 1940, the respondent advised the appellant of the sale, and as of August 8th, 1940, the appellant complained that these shares were improperly disposed of inasmuch as it was done "without my instructions and consent."

The rights of the parties in this litigation are ascertained by the determination of what, if any, change was effected in their relationship, as established under the "customer's card", by the letter of May 18th, 1940. In particular, was the position of these 500 shares, which up to the acceptance of the letter were admittedly subject to the provisions of his "customer's card", and could be sold under the terms thereof by the respondent to liquidate his personal indebtedness, changed or altered by this letter?

The letter makes no reference to the "customer's card" nor the 500 shares, nor does it use the word security, collateral, or any similar term. The mere closing of the account of the appellant, the transferring of his balance and security therefor to Mrs. Weeks' account would not cancel his indebtedness, nor effect a change with respect to the 500 shares.

It was common ground at the trial that the position of the 500 shares was changed by the acceptance of that letter. As to what that change was, there was an entire disagreement. Both parties contended the letter was perfectly plain in its meaning, but here again as to its meaning there was an entire disagreement.

The appellant contends that the letter dated May 18th, 1940, cancelled the right of the respondent to sell the 500 shares under the "customer's card"; that thereafter these shares were held as security for both balances, but on a new and more restricted basis. He contends that when the respondent accepted this letter these shares could not be sold to realize either balance, nor could they be sold for the sum total of these balances; they were held as security for both balances until such time as he gave them permission to sell the shares, or until the balance of the two accounts in the sum of $867.51 was paid; that after the acceptance of that letter, all the respondent could do by way of enforcing collection was to enter suit against the appellant and Mrs. Weeks for their respective balances. No time limit is fixed, and presumably suit could have been entered the next day.

The appellant contends that the phrase "no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent" should be construed to give effect to the foregoing, and therefore prohibit the sale of the 500 shares.

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The respondent's contention is that the two accounts were merged into one, and the 500 shares were then held as security for the total balance of $867.51; that the words "no further alterations or dealings in the account of Hazel G. Weeks without my instructions and consent" prohibited the respondent taking any further instructions from Mrs. Hazel G. Weeks; that thereafter all dealings on this account would be by the appellant, acting under his power of attorney from Mrs. Weeks; that the 500 shares of San Antonio were held as security for the total of both balances under the "customer's card" signed by Mrs. Weeks.

The letter of May 18th, 1940, is written by the appellant, who is familiar with the brokerage business, and, while it is in general terms, there is no surplus of words. He first authorizes the transfer of "my account in its entirety", and both parties admit that this included the ledger account as well as the security therefor. In fact, the account was transferred on this basis. It is then significant to note that, in referring to Mrs. Weeks' account into which his account is to be transferred, and where there is no security, he merely speaks of it as "the account of Hazel G. Weeks". Then, after the merger of these two accounts, and in connection with the prohibition, he says, "that you make no further alterations or dealings in the account of Hazel G. Weeks without my instructions". It therefore appears that, while he prohibited alterations or dealings in the account, he did not prohibit the selling of the securities under the "customer's card", which, after the merger, must be Mrs. Weeks' card; that in fact the prohibition was against the brokers taking further orders with respect to the account from Mrs. Weeks. The omission of any reference to the "customer's card" leads me to conclude that the shares were still held subject thereto.

Then, the words "further obligation" must mean an obligation different from, or other than that which existed theretofore. Again that appears to be admitted, but disagreement obtains with respect to the nature of that further obligation. The appellant contends that this further obligation placed the 500 shares where they were held as security for both balances, but could not be sold and therefore not subject to the "customer's card". The respondent contends that the 500 shares were held subject

to the "customer's card". They agree that the shares were now held as security for both balances, and again it seems to me that the omission of any reference in the letter to the "customer's card" leads to the conclusion that these shares were still held subject to the terms of that card.

In *Bank of New Zealand* v. *Simpson* (1), a case where the contract was arrived at in a somewhat similar manner, the Privy Council held "extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about."

At the trial appellant deposed that he told Mr. Frey, before this letter was given, " 'I don't want you selling my securities to pay her debts.' " That statement, he says, was made during the conversation pursuant to which this letter was given. It would seem to me, if that statement was correct, the thought embodied therein would have been uppermost in his mind as he wrote the letter of May 18th, and it would have been stated therein specifically and clearly. Moreover, when the learned trial judge confronted him with this fact, he replied: " * * * I thought I had made it plain enough. I can see that now that I didn't, * * * "

Further, if the appellant, an experienced broker, intended that letter to take these 500 shares out from under the operation of the "customer's card", he would have said so in language plain, if not emphatic.

If the letter be regarded as ambiguous, as it may well be, the subsequent conduct of the parties may be examined to assist in construing the same.

Re Labrador Boundary (2). *Matthews* v. *Good* (3).

Between the giving of this letter and the sale of the shares on July 27th, there were letters mailed to the appellant asking for more margin and dealing specifically with this account. The first request in writing for margin was under date of May 30th, 1940. There was another letter, dated June 18th, 1940, which reads as follows:

> We have for some time now been carrying a deficit in the account of Mrs. Hazel Weeks which was occasioned by your request to not sell the San Antonio which you gave to the Weeks account. Had we sold it at the time you deposited this stock as collateral to the account there

(1) [1900] A.C. 182.
(2) [1927] 2 D.L.R. 401, at 422.
(3) (1924) 56 N.S.R. 543.

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would have been no deficit, and therefore we feel the fault of an existing deficit is entirely your own and the only fair thing is that we must ask you to make this up immediately if there is to be no further action taken in this regard.

Will you please give this matter your usual courteous and early attention, and oblige.

Under date of July 19th, the respondent wrote to Mrs. Weeks and forwarded a copy of that letter to the appellant. This letter reads as follows:

As you have not responded to our margin calls, we beg to notify you that we will handle the liquidation of San Antonio at our absolute discretion.

Certainly if this stock approaches a price that will liquidate the deficit in your account we shall take full advantage of it, but this will not prevent us from liqudating the stock, as above stated, at our absolute discretion, and looking to you for any remaining deficit.

Please be governed accordingly.

He admits he received all these letters, but that he ignored them, and probably threw them in the scrap basket.

While it is true that subsequent conduct of the parties cannot add to, or alter the terms of a contract, *North Eastern Ry. Co.* v. *Lord Hastings* (1), nevertheless, "where a document is ambiguous, evidence of a course of conduct which is sufficiently early and continuous may be taken into account as bearing upon the construction of the document." *Re Labrador Boundary* (2).

All three of the letters indicate that the respondent believed the usual relationship of broker and customer continued, and particularly the last two definitely indicate no such restrictions upon the selling of the 500 shares as the appellant now contends for. In spite of this, he ignores these letters and does not protest against what he says is an entirely improper interpretation of the letter dated May 18th, 1940. In fact, he did nothing about it until after the respondent advised him that the shares had been sold.

The conduct of the respondent, including the writing and sending of the above quoted letters, is consistent with his contention, and in view of the language of the letter, and the fact that the appellant took no exception to the plain language of the two above quoted letters, leads, in my opinion, to the conclusion that the respondent's contention must be accepted.

(1) [1900] A.C. 260.

(2) [1927] 2 D.L.R. 401, at 422.

The appellant's counsel, in the course of an able argument, pressed that certain statements made by Mr. Frey, in the course of inter-office communications, supported his contentions. These, however, are all consistent with the desire of Mr. Frey to treat the appellant, who had been a valued customer over a period of many years, with every consideration.

An examination of the letter of May 18th, 1940; the dealings between the parties; the conversations leading up to the delivery and acceptance of the letter, and the subsequent letters in which the respondent made it very clear that if the appellant did not provide further margin the shares would be sold, together with the fact of no protest or suggested correction from the appellant, lead me to conclude as above stated, that the respondent's contention must be accepted. It sems to me that the respondent had the right to sell the shares as they were sold, and therefore the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McTague, Springsteen & McKeon.*

Solicitors for the respondent: *Smith, Rae, Greer & Cartwright.*

THE ATTORNEY GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

WESTERN HIGBIE AND ALBION INVESTMENTS LTD. (DEFENDANTS) ..... RESPONDENTS;

AND

THE ATTORNEY GENERAL FOR BRITISH COLUMBIA ..... INTERVENER.

1944
*Oct. 5, 6, 10, 11, 12, 13

1945
*Mar. 23

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Foreshore—Public harbour—Dispute between Dominion and Province as to ownership—Provincial order in council recognizing Dominion's right—Power to pass—Validity of—Whether author-

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.