Supreme Court of Canada
R. v. Arnold, [1971] S.C.R. 209
Date: 1970-10-06

Her Majesty The Queen in right of Alberta *(Defendant) Appellant;*

and

Anthony Arnold *(Plaintiff) Respondent.*

1970: March 6, 9; 1970: October 6.

Present: Abbott, Martland, Ritchie, Hall and Spence JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Banks and banking—Customer's overdraft—Letter authorizing broker to forward all proceeds covering sale of stock to Treasury Branch for credit of account—Hypothecation agreements—Customer's objection that sales made without his authority—Verification of account form signed by customer—Whether sales lawfully effected.

The respondent carried an account (designated as a trust account, but actually a current account) at the appellant's Medicine Hat Treasury Branch. On August 13, 1959, when the account was overdrawn by some $3,000, the manager of the branch prepared a letter to a firm of stockbrokers, which the respondent signed. The letter, referring to a share certificate, which was registered in the respondent's name, for 4,500 shares of mining stock, read: "This letter will serve as your full authority to forward all proceeds covering sale of said Stock to the Treasury Branch, Medicine Hat, for credit of my account." On August 14, the manager obtained from the respondent a general hypothecation of all securities lodged in connection with the respondent's account and a specific hypothecation of the shares in question. On the same day, the share certificate for these shares was delivered to the stockbrokers.

The shares were sold by the brokers in various amounts in the period from August 18 to October 1. In each case the proceeds of the sales were forwarded to the Treasury Branch, and in each case the proceeds were deposited to the credit of the respondent in his account. The respondent continued to make deposits and to draw cheques on the account, which from time to time was in an overdraft position, until it was closed on March 10, 1960.

In January 1960, the respondent was advised by the manager that his stock had been sold but that he was not to worry as the Treasury Branch would get it back or make it up to him. On August 3, 1964, the succeeding manager produced the documents

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connected with the account to the respondent, who then signed a customer's verification of account. There was no evidence of any written claim by or on behalf of the respondent against the appellant for restoration of the shares, or for damages for the wrongful sale of them, until a statement of claim was issued on March 31, 1965. The respondent's action for damages was dismissed at trial, but an appeal was allowed by the Appellate Division. The

Court awarded damages on the basis of $21.50 per share, being the highest market value between the times when the shares were sold and the date the action was commenced, less the amounts realized on the actual sales and credited to the respondent's account.

Held (Hall and Spence JJ. dissenting): The appeal should be allowed.

Per Abbott, Martland and Ritchie JJ.: It was true that the letter to the firm of stockbrokers, in itself, was not an authority to the appellant to sell the respondent's shares, but the fact that the letter was obtained and the lodging of the share certificate with the stockbrokers indicated that both parties contemplated that sales of the shares were anticipated in the immediate future. It was significant that the two hypothecations were obtained after the letter was obtained.

There was evidence, which the trial judge accepted, that at the time the verification document was signed the respondent had received his statement of account and had satisfied himself of the disposition of the shares and the credit to his account. This document, when considered in conjunction with the letter of August 13 and the position of the respondent's account warranted the trial judge in concluding that the sales of the shares were not effected unlawfully, without the respondent's authority.

The discretion conferred upon the Provincial Treasurer by the hypothecation documents could be delegated to the branch manager. The latter did not give evidence, but from other evidence it could be inferred that he effected the sales of the shares because he felt it desirable to do so in order to protect the position of the Treasury Branch. If this was so, he had the legal power to do so without notice to the respondent.

Per Hall and Spence JJ., *dissenting*: The appeal should be allowed in part only. In view of the respondent's denial of instructions to sell the shares, and the fact that such instructions were not contained in the letter of August 13, or in either hypoth-

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ecation, the burden of proving them was on the appellant. The only evidence given on behalf of the appellant at trial was given by the successor of the former manager. However, there was other evidence which was available to the appellant and which was most relevant. The appellant's failure to produce any of this evidence justified this Court in drawing the inference that such evidence would have been unfavourable to the appellant and justified the position taken by the Court below in accepting the evidence of the respondent. As held by the Court below, under the terms of the hypothecations the Branch had no right to sell the shares.

As to the matter of damages, a plaintiff whose securities have been converted cannot wait to issue process for their recovery or damages for the conversion until just before the period of limitation lapses and then be entitled to claim damages at the highest value of those securities within the six-year limitation term. The damages must be assessed as in the ordinary action for conversion.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Riley J. dismissing the respondent's action for damages. Appeal allowed, Hall and Spence JJ. dissenting.

H.L. Irving, Q.C., for the defendant, appellant.

A. Webster Macdonald, for the plaintiff, respondent.

The judgment of Abbott, Martland and Ritchie JJ. was delivered by

MARTLAND J.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[2], which allowed an appeal by the respondent from the judgment at trial dismissing his claim, without costs.

The respondent's claim is for damages for what he contends were unlawful sales by the appellant of 4,500 shares of the capital stock of Craigmont Mines Limited, represented by share certificate No. 3934, registered in the name of the respondent, which certificate had been delivered by

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him to the appellant's Medicine Hat Treasury Branch on July 31, 1959. The shares were sold by the appellant through James Richardson & Sons, on the following dates, all in the year 1959, at prices yielding the following net returns, the proceeds being credited to the respondent's account (designated as a trust account, but actually a current account) at the said Medicine Hat Treasury Branch:

1959						
August	18	500	shares for	$	1715.00=$3.43	per share
August	31	500	shares for	$	1479.25=$2.96	per share
Sept.	8	500	shares for	$	1625.00=$3.25	per share
Sept.	11	500	shares for	$	1604.75=$3.20	per share
Sept.	18	200	shares for	$	563.00=$2.81	per share
Sept.	21	300	shares for	$	829.56=$2.76	per share
Sept.	22	500	shares for	$	1382.50=$2.77	per share
Oct.	1	1500	shares for	$	4021.50=$2.68	per share
				$	13,220.56	

[1] (1969), 68 W.W.R. 646, 5 D.L.R. (3d) 341.
[2] (1969), 68 W.W.R. 646, 5 D.L.R. (3d) 341.

The respondent had, in the year 1954, acquired, along with a Mr. Neil McDermid, a number of mineral claims in the Merritt area of British Columbia. They incorporated the Craigmont Company, which went into production in 1960 and commenced to pay dividends in 1963. The respondent received 30,000 shares of escrow stock, and 20,000 shares of free stock, his wife received 10,000 shares of free stock and his daughter 5,000 shares of free stock. Of the 20,000 shares of free stock he gave back 10,000 to the company "to make the Treasury look better." The 30,000 shares in escrow were pooled with the company to assist in further financing. Litigation occurred between the respondent and McDermid concerning these shares, and a settlement was made whereby the respondent retained 15,000 of these shares.

By August of 1959, the respondent held only the 4,500 shares represented by share certificate No. 3934. The respondent, on cross-examination, said:

> Q. Now, this morning the erstwhile director of your company, or of Craigmont, rather, Mr. Clarence Gillis, said he hung onto his because he had faith in it. Did you dispose of yours up to the balance of forty-five hundred because of any lack of faith?
>
> A. No, because I had incurred some debts and I was going to build a house and I had to pay my accounts off.

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> Q. You did it, therefore, through the measure of selling stock to pay off the debts?
>
> A. That is correct.

The respondent moved to Medicine Hat in 1958 and opened the account which is involved in these proceedings with the Treasury Branch. In the summer of 1959 he was building a house there which involved outlays of his own funds as well as mortgage moneys borrowed from the Sun Life Assurance Company of Canada. His account became overdrawn on July 13. He testified that he had an arrangement for an ordinary overdraft. This arrangement appears to have been used for brief interim financing in anticipation of draws of mortgage money.

On August 13, when the respondent's overdraft stood at $3,122.25, Mr. Manning, the manager of the Medicine Hat Treasury Branch, prepared a letter to James Richardson & Sons, with whom the respondent had an account, to be signed by the respondent, referring to the share certificate, No. 3934, which had already been deposited at the Treasury Branch on July 31. It reads as follows:

MEDICINE HAT, Alta.
August 13th, 1959

The Manager
James Richardson & Sons
Medicine Hat, Alta.

Re: Certificate No. 3934
Craigmont Mines Limited

Dear Sir:

This letter will serve as your full authority to forward all proceeds covering sale of said Stock to the Treasury Branch, Medicine Hat, for credit of my account.

Yours truly

(Sgd) Anthony Arnold
Anthony Arnold

Acknowledged:
(Sgd) D. Steedman
James Richardson & Sons

On August 14, Manning obtained from the respondent a general hypothecation of all securities lodged in connection with the respondent's ac-

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count and a specific hypothecation of the 4,500 shares of Craigmont. The share certificate for these shares was delivered to James Richardson & Sons who gave a receipt for it on that date.

After the deposit of the share certificate on July 31 there were no deposits to the credit of the account prior to August 18, by which time the overdraft stood at $3,933.83; On that date 500 of the shares were sold and the proceed's of $1,715 credited to the respondent's account, reducing the overdraft to $2,218.83. On August 31 a further 500 shares were sold for $1,479.25, reducing the overdraft at that time to $1,795.91. Cheques continued to be drawn, and the account continued in an overdraft position, despite a further sale of 500 shares, until a fourth sale of 500 shares, on September 11, produced a credit balance of $202.67.

Further sales were made and further cheques drawn until, on September 23, the credit balance was $236.25. During the period from July 28 to September 23, apart from one deposit of $100, no deposits had been made, other than from the proceeds of the sales of shares. Had those deposits not been made, the overdraft on that date would have been $8,863.75. By September 29, the credit balance had diminished to $25.25. On October 1, further cheques were drawn, including a transfer of funds in the amount of $2,000, apparently to the Imperial Bank. On that date the last 1,500 shares were sold, resulting in a credit to the account of $4,021.50. On October 2, the credit balance was $1,632.26. If the shares had not been sold, the overdraft would then have amounted to $11,588.

Further cheques were paid, reducing the account to an overdraft position on November 25 and December 1, and on January 22 and February 12, 1960. The account was closed on March 10, 1960.

The respondent was absent from Medicine Hat on holiday from December 4, 1959, to January 4, 1960. He says that, on his return, Manning told him that the shares had been sold, that he was shocked by this disclosure, and that Manning said “don’t worry about it, we will get it back for you or make it up to you.” Manning, through physical and mental reasons, was unable to give evidence at the trial.

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The respondent, when asked when he first saw the statement of his account, covering the period from July 3, 1959, to the end of that year, stated he would not have seen it until January, 1960.

Deposit slips, from the possession of the appellant, were filed as exhibits, covering each of the deposits of the proceeds of the sale of shares. These show the source of each deposit as “Richardsons.” The respondent said he did not see these until his examination for discovery. Mr. Klassen, who succeeded Manning as manager of the Medicine Hat Treasury Branch, gave evidence that there are automatic duplicates of deposit slips, which are mailed to clients. He could not, of course, say that copies of the slips in question had, in fact, been mailed to the respondent. The statement of account contains a notation as to a power of attorney to Mrs. Arnold to receive and sign for cancelled cheques. The respondent’s evidence indicates

that she wrote the cheques in most cases, that she picked up the cancelled cheques and looked after the account. She was not called as a witness.

The evidence as to the market value of Craigmont shares only discloses the high and low for each calendar year. For 1959, the high was $5.15 and the low $2.65. The sales made by the appellant, through Richardsons, in 1959 ranged from $3.43 in August, down to $2.68 in October. In 1960 the high and low were, respectively, $6.75 and $3.40. In 1962 the shares attained a high of $21.50.

The respondent said that Manning, and later, Klassen, refused to let him see the records and that it was only after he and two solicitors saw the Superintendent of Treasury Branches, in Edmonton, that he was able to do so, in 1964. Klassen, who became manager of the Medicine Hat Treasury Branch in April, 1962, says that he received from a Vancouver law firm a request, in May, 1963, for copies of documents relating to this transaction. He forwarded to them a copy of the respondent's letter to James Richardson & Sons dated August 13, 1959, and copies of the deposit slips showing the credits of moneys obtained on the sales of the shares.

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In any event, the respondent saw Klassen on August 3, 1964, when the documents connected with this matter were produced to him and they went through them together. On this occasion he signed a customer's verification of account, in the following form:

> The undersigned customer of the Treasury Branch hereby acknowledges receipt of his/their Pass Book or Statement of Account, showing a balance on Aug. 3, 1964, of $ nil, together with vouchers for all debit items against the undersigned appearing therein since the date of the last Statement of Account, and for valuable consideration the undersigned agrees with the said Treasury Branch that he/they will within fifteen days from the date hereof examine the said vouchers and check the credit and debit entries in the said Pass Book or Statement of Account (and especially all debit entries purporting to be represented by such vouchers) and will within said time point out in writing to the said Treasury Branch any errors therein and that from and after the expiration of said period of fifteen days except as to improper charges or errors previously pointed out in writing as aforesaid it shall be conclusively settled as between the Treasury Branch and the undersigned that the vouchers in respect of all such debit items are genuine and properly chargeable and charged against the undersigned, and that the undersigned was not entitled to be credited with any sum not credited in said Pass Book or Statement of Account and that the above mentioned balance is correct, and the correctness of the account is confirmed to date.

(Sgd) A.M. Arnold

There is not before us any record of any written claim by or on behalf of the respondent against the appellant, for restoration of the shares, or for damages for the wrongful sale of them, until a statement of claim was issued on March 31, 1965, alleging, in substance, that he was entitled to damages for the unlawful sale of his shares in the amount of $22 per share, and for loss of dividends totalling $9,000, plus general damages of $100,000.

This action was dismissed at trial, without costs. The following passages from the judgment at trial set forth the views of the learned trial judge:

> An examination of the plaintiff's accounts with the Treasury Branch revealing an inflated overdraft position of the plaintiff with the Medicine Hat

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> Treasury Branch makes it plain that the plaintiff's desire was to lessen his liability to the Treasury Branch and to provide himself with much needed funds for house building moneys and to defray his own personal expenditures.
>
> * * *
>
> None the less, on August 3rd, 1964 (Exhibit 8) the plaintiff signed a Customer's Verification of Account. It is noted that this was signed after the plaintiff satisfied himself of the disposition of the shares and the credit to his account in the Treasury Branch and merely observed that there must have been other shares of Craigmont. He at no time raised the issue now raised in this litigation.
>
> In my view Exhibit 2 and Exhibit 8 are a complete answer to the plaintiff's claim and particularly the allegations in paragraph 6 and 7.

The respondent's appeal from this judgment was allowed. The Appellate Division awarded damages on the basis of $21.50 per share, being the highest market value between the times when the shares were sold and the date the action was commenced, less the amounts realized on the actual sales and credited to the respondent's account. Interest was awarded on the net amount from December 31, 1962, to the date of judgment. Contrary to the view of the learned trial judge as to the facts, it is said, in the reasons for judgment:

> It is clear that as at August 14th 1959 the plaintiff was borrowing and intended to continue to borrow moneys by way of overdraft and that the Manager wanted the hypothecations together with the letter and the share certificate to protect the Branch against the overdraft. It is beyond doubt that the Manager had agreed to overdrawing by

> the plaintiff, although the amount of the overdraft agreed to was not established. It seems a reasonable inference that the overdraft to be permitted would at least equal the value of the security which then amounted to approximately $13,000.00. The overdraft never reached that figure, leaving aside the deposits from the sale by the Branch of the Craigmont shares.

The matter of the letter to James Richardson & Sons of August 13, 1959, is discussed, as follows:

The learned trial judge found that the letter of August 13, 1959 was a "complete answer to the

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plaintiff's claim." His view apparently was that by the letter the plaintiff had authorized the sale of the shares by the Branch. Any such suggestion was repudiated by the plaintiff. With every respect to the contrary view of the trial judge, it is quite clear to me that the letter can bear no such construction. It is an authority to forward the proceeds of sales of shares to the Branch to be credited to the plaintiff and nothing more; it is a document which read with the subsequent hypothecations gave the Branch security on the shares, the certificate for which was in the hands of Richardsons, not the Branch.

The Court went on to hold that the terms of the hypothecation agreements did not authorize the sales of the shares which had been made.

Finally, in relation to the verification of accounts signed by the respondent, it was said:

> There was no evidence as to whether at the time of the execution of this verification the plaintiff received his pass book or statement of account showing no balance in his account or that the pass book or statement of account covered the important period of 1959. There is no evidence that the debit and credit items in that year which I have mentioned were in the pass book or statement of account. What the plaintiff agreed to do by the verification was to "examine the said vouchers and check the credit and debit entries in the said pass book or statement of account" and within the time mentioned to point out in writing any errors therein. It is quite clear that all that could be "conclusively settled" between the plaintiff and the Branch was "improper charges or errors" and the balance in the pass book or statement of account. As there was no evidence at all that the essential details of the 1959 transactions were set out in the pass book or statement of account, it cannot be found that the issues relating to those transactions were settled by the signing of the verification.

With great respect, I am not in agreement with these conclusions. Dealing with the first passage, there is no evidence that Manning agreed to permit the respondent to borrow, by

way of overdraft, up to the value of the Craigmont shares. When asked about his arrangements for his banking business made about August 1, 1959, the respondent said:

> Just an ordinary overdraft arrangement. I was allowed an overdraft.

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When asked if he was in an overdraft position, he said:

> Off and on, yes, for a day or two days maybe, but not much more than a couple of days at any time, or a week at the most.

Up to the end of July 1959, this was generally true, but from July 28 into the second week of September no deposits were made by him. Presumably, by then, the Sun Life advances were at an end. It was on July 31 that the deposit of the share certificate was obtained. When the letter to James Richardson & Sons was obtained, on August 13, the overdraft was approaching $4,000.

Turning to the second passage above quoted, dealing with the effect of the letter to James Richardson & Sons, the learned trial judge did not say that it was a "complete answer to the plaintiff's claim." What he did say was that it, and the verification of accounts "signed after the plaintiff satisfied himself of the disposition of the shares and the credit to his account in the Treasury Branch", were a complete answer to the claim.

It is true that the letter, in itself, was not an authority to the appellant to sell the respondent's shares, but the fact that the letter was obtained and the lodging of the share certificate with James Richardson & Sons indicate that both parties contemplated that sales of the shares were anticipated in the immediate future. It is significant that the two hypothecations were obtained after the letter had been signed. The explanation given by the respondent is that Manning felt that the letter, by itself, did not give adequate security, in that it could be countermanded by the respondent at any time. Accordingly the hypothecations were signed. Thus it is clear that the purpose of the letter was not to assist in the exercise by the appellant of the rights given by the hypothecations. On the contrary, it was the hypothecations which were obtained to protect against the consequences of a countermanding of the letter.

I turn now to the third passage previously quoted. It is said that there is no evidence that the respondent received his statement of account when the verification of account was signed. But Klassen testified that in August 1964, at the

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time that form was signed, they went through the documents which were exhibits in the Court. One of those exhibits was the statement of account. He also said that photostatic copies of those exhibits were furnished to the respondent.

That this evidence was accepted by the learned trial judge is clear from his reasons, when he said that the verification was signed by the respondent after he had satisfied himself of the disposition of the shares and the credit to his account. He also points out that, at that time, the respondent merely observed that there must have been other shares of Craigmont, and that he did not raise the issue later raised in the litigation.

It is in the light of those circumstances that the signing of the verification document, acknowledging the correctness of the account, acquires the significance given to it by the learned trial judge. This document, when considered in conjunction with the August 13 letter, and the position of the respondent's account, which has previously been reviewed, in my opinion warranted the learned trial judge in concluding that the sales of the shares were not effected unlawfully, without the respondent's authority.

It was the view of the Appellate Division that the sales of the shares were not authorized under the terms of the hypothecation documents. The special hypothecation provided that:

> If the Provincial Treasurer considers it desirable for his protection so to do or the Customer fails to fulfil any of the obligations, the Provincial Treasurer may from time to time sell at public or private sale or otherwise realize upon all or any of the securities for such price in money or other consideration and upon such terms and conditions as he deems best, the whole without advertisement or notice to the undersigned or others.

It was the contention of the respondent that this discretion rested solely in the Provincial Treasurer himself. Mr. Hinman, who had been Provincial Treasurer at the relevant times, was called by the respondent to state that he had not, personally, authorized any such sales. However, in cross-examination he said that the discretion conferred by the documents was

delegated to the managers if they acted within the framework of the documents. In my opinion the discretion

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could be delegated. The document did not contemplate that every sale of hypothecated securities required the approval of the Provincial Treasurer himself. This was a power which might be exercised by the branch manager.

In the reasons of the Appellate Division it is said that it had not been sought to establish that the Provincial Treasurer considered it "desirable for his protection" to sell them. Manning, who was the branch manager who effected the sales, did not give evidence. It is, however, possible to infer the reason why the sales were made from the other evidence. There is the fact, already mentioned, that, had the sales of shares not been effected, the overdraft on the day after the last sale was effected would have amounted to $11,588. Furthermore, the record of the sales made shows a steady decline in the value of the shares between September 8 and October 1 from $3.20 to $2.68 per share. In the light of these circumstances I would infer that the branch manager effected the sales of the shares because he felt it desirable to do so in order to protect the position of the Treasury Branch. If this is so, he had the legal power to do so without notice to the respondent.

For these reasons, I would allow the appeal and restore the judgment at trial, with costs in this Court and in the Appellate Division.

In view of the foregoing, it is not necessary for me to express an opinion on the amount of the damages, but, if I had had to deal with that issue, I would have concurred in the views expressed by my brother Spence.

The judgment of Hall and Spence JJ. was delivered by

SPENCE J. (*dissenting*)—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[3], pronounced on April 25, 1969, whereby that Court allowed an appeal from the judgment of Riley J., pronounced on February 15, 1968, dismissing the action of the plaintiff for damages. The judgment of the Court of the Appellate Division granted to the

[3] (1969), 68 W.W.R. 646, 5 D.L.R. (3d) 341.

plaintiff damages in the net amount of $83,529.44. The course of the litigation will be considered in some detail hereafter.

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The plaintiff was a prospector and developer of mining property who in the year 1959 was a resident of Medicine Hat in the Province of Alberta, and who carried several accounts in the Provincial Treasury Branch in Medicine Hat. The plaintiff: had developed Craigmont Copper Mines limited and held copper property in British Columbia and at one time held in his own name, or in the names of his wife and daughter, a very large number of shares in that corporation. Through a variety of transactions, by mid-August of 1959, his share holdings had been reduced to 4,500 shares, represented by Certificate No. 3934 in his name. The plaintiff had been a customer of James Richardson & Sons, Stock Brokers and Investment Dealers, and carried an account in their Medicine Hat office.

The account in the Treasury Branch in Medicine Hat, with which the action is concerned, was an account known as an “investment trust account”, but the plaintiff operated it as an ordinary current account. The account was sometimes in credit, and sometimes in debit.

On August 13, 1959, the plaintiff, at the request of Mr. Stuart Manning, the manager of the Treasury Branch in Medicine Hat, executed a very brief document, which had been drawn up by Mr. Manning, and which reads:

Government of the Province of Alberta
TREASURY BRANCH

MEDICINE HAT, Alta.
August 13th, 1959

The Manager
James Richardson & Sons,
Medicine Hat, Alta.

Re: Certificate No. 3934
Craigmont Mines Limited

Dear Sir:

This letter will serve as your full authority to forward all proceeds covering sale of said Stock to the Treasury Branch, Medicine Hat, for credit to my account.

Yours truly,

(Sgd.) Anthony Arnold
Anthony Arnold

Acknowledged:
(Sgd.)
.....
James, Richardson & Sons

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It is noted that this document was typed on stationery of the Treasury Branch, Government of the Province of Alberta. On that day the document was retained by Mr. Manning, but the very next day, according to the testimony of the plaintiff, here respondent, Mr. Manning requested that he reattend the office and there Mr. Manning pointed out to him that this document was not sufficient for the purposes of the Treasury Branch, because Mr. Arnold could easily substitute therefor another direction, and by such later direction, instruct James Richardson & Sons to pay the proceeds of sales of shares of the Craigmont Mines Ltd., represented by Certificate No. 3934, to some other creditor, or otherwise. At Mr. Manning's request the respondent then signed two hypothecations on forms used by the Treasury Branch. The first of those was a general hypothecation on form T.B. 104 and the second was a specific hypothecation on form T.B. 165 specifically referring to 4,500 Craigmont Mines Limited Certificate No. 3934. The terms of these hypothecations will be dealt with hereafter. At the same time the respondent delivered to Mr. Manning the Certificate, No. 3934, for 4,500 shares of Craigmont Mines Limited which stood in his name. Although there is no positive evidence upon the subject, there is no doubt that the respondent, either then or before, had endorsed this certificate so that the mere guarantee for his signature by the Branch would turn it into a street certificate.

On that same 14th day of August the Treasury Branch delivered the respondent's authorization, dated August 13, 1959, which I have quoted above and a certificate to James Richardson & Sons, and there was produced at trial James Richardson & Sons receipt, dated August 14, 1959, for the said certificate. The plaintiff had testified, and the records of the Branch show, that he continued from that date on to draw cheques on the said account in the Treasury Branch and made deposits thereon, and continued to do so through the balance of

the year 1959, and for some considerable time thereafter, until the account was finally closed out on August 3, 1964.

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James Richardson & Sons made sales of various amounts of shares in Craigmont Mines Limited at varying dates as follows:

August 18, 1959	—	500 shares
August 31, 1959	—	500 shares
September 7, 1959	—	500 shares
September 11, 1959	—	500 shares
September 17, 1959	—	200 shares
September 21, 1959	—	300 shares
September 22, 1959	—	500 shares
October 1, 1959	—	1,500 shares

As I shall outline hereafter, there is no evidence whatsoever as to who gave instructions to James Richardson & Sons to make the sale of those shares. The respondent has testified that he never instructed James Richardson & Sons to make any of the sales; that he never consented to Mr. Manning, or anyone else, making any such sales. In each case the proceeds of the sales were forwarded to the Treasury Branch, and in each case the proceeds were deposited to the credit of the respondent in the said so-called investment trust account. The respondent then left on a vacation, which evidently lasted from early December, 1959, to early January, 1960, and he has testified that upon his return, when he attended the Treasury Branch in Medicine Hat, he was informed by Mr. Manning that Mr. Manning had some bad news for him, and that Mr. Manning said: “I really have, I have sold your stock”, that Mr. Manning, upon the respondent objecting that the sale had been without his authority said: “Well, I have you hypothecated” and “well, the stock was sold—it went into your account and it went out”. And upon the respondent continuing to insist that he did not authorize the sale Mr. Manning said: “Don’t worry about it—we will get it back for you or make it up to you”.

The respondent also testified that in April, 1960, being pressed by another creditor, by name Stratton, for payment he took Mr. Stratton into the Treasury Branch office in order to show that he, the respondent, had no further shares available to discharge his obligation to Mr. Stratton and at that time Mr. Manning called the respondent into his office and asked him

not to be too demanding then “that things were, they would be taking action shortly of getting things settled”.

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During the year 1962 Mr. Manning suffered a serious illness and was replaced as manager of the Treasury Branch by Mr. Herman R. Klassen. The respondent testified that on various occasions he attempted to obtain from Mr. Klassen all the documents and correspondence in reference to his account and that he was unsuccessful in doing so until, with a solicitor and his friend, he attended the Superintendent of the Treasury Branch at the latter’s office in Edmonton, when the superintendent had instructed Mr. Klassen to produce all the material. Mr. Klassen did so shortly thereafter on August 3, 1964, and, at that time, after delivering to the respondent a statement of account, which was produced at trial as an exhibit, and, it would appear, certain cancelled cheques and deposit slips, requested the respondent to sign the usual customer’s verification of account. The respondent commenced this action for damages of conversion of the said shares by a statement of claim dated March 31, 1965.

The aforesaid outline of the factors relevant to this litigation have been made chiefly, although not wholly, from a recital of the evidence given by the plaintiff, here respondent. The reason for this course is that the all-important witness for the defence, Mr. Stuart Manning, did not give evidence at trial on behalf of either the plaintiff or the defendant although he sat in Court during the whole trial. It was explained to the learned trial judge by the then counsel for the defendant, here appellant, that Mr. Manning had suffered a serious illness in the nature of a nervous breakdown, that an attempt to examine him for discovery had proved impossible because of such condition, and that the counsel for the Treasury Branch therefore feared the detriment to Mr. Manning’s health which could be caused were he to attempt to testify. Moreover, the said counsel pointed out that in his view, Mr. Manning could not assist the Court as his illness had caused an amnesia covering the period in question. Therefore, the only evidence given on behalf of the appellant at trial was given by Mr. Klassen, Mr. Manning’s successor as manager, who had not come into the matter until 1962 and who, of course, had no first-hand knowledge of any of the important events preceding that time. This factor, of course, had a material effect on the trial but

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another untoward event occurred. The respondent had, as plaintiff, been examined for discovery. The court reporter who had taken the shorthand notes of such examination died and counsel chose, rather than have a new examination for discovery, to produce and file at trial a document which was titled “Admission of Facts”. The first two paragraphs of that document read as follows:

> The Plaintiff admits that he has signed the documents bearing his signature as described in the Affidavit on Production of the Defendant herein dated the 12th day of June, A.D. 1965 and that he had full knowledge of the contents of the following documents therein described:—
>
> > 1. Letter dated Medicine Hat, Alberta, August 13th, 1959, signed by Anthony Arnold directed to the Manager James Richardson & Sons Medicine Hat giving full authority to sell Craigmont Mines Limited stock under certificate 3934 and to forward all proceeds arising therefrom to the Treasury Branch Medicine Hat for the credit of his account and duly acknowledged by James Richardson & Sons.

This document can only be characterized as astounding as it, in plain words, refers to the letter of August 13, 1959, as giving full authority to sell Craigmont Mines Limited stock while the whole case for the respondent is that there was not in that document, or in either hypothecation or in any instructions given by the respondent to either James Richardson & Sons, or to the appellant, any such authority to sell. That position was taken early in the trial by counsel for the respondent and has been maintained steadily, and that position is the basis for the judgment of the Appellate Division. The so-called “Admission of Facts” under such circumstances, can only be considered as an error. Riley J. gave reasons for judgment dismissing the plaintiff’s claim and in one paragraph of those reasons the learned trial judge stated:

> In my view Exhibit 2 and Exhibit 8 are a complete answer to the plaintiff’s claim and particularly the allegations in paragraphs 6 and 7.

Exhibit 2 was the letter dated August 13, 1959, which I have quoted above, and Ex. 8 was the customer’s verification of account signed by the plaintiff, here respondent, on August 3, 1964,

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so that it would appear the learned trial judge accepted the letter of August 13, 1959, as being authority to sell the shares, and not a mere direction as to the payment of the proceeds of any sale which should be ordered, and also accepted the respondent’s signature to the

verification of account as being a release. The learned trial judge referred to the fact that Manning had not testified in these words:

> It was unfortunate that an original defendant, Stuart Manning, the former manager of the Provincial Treasury Branch at Medicine Hat, through physical and mental reasons, was not able to give evidence, and accordingly the evidence must be scrutinized with the utmost care—much the same degree of care as if a deceased person were involved.

It would appear that the learned trial judge must have had in mind such a provision as appears in the *Evidence Act* of various provinces which requires corroboration of a claim made against the estate of the deceased person. But surely such a principle does not apply, even presuming that we were to consider Mr. Manning as unable to testify as if he had died. When Mr. Manning was not a personal defendant but was an employee of a large financial institution, if it is proper to describe the Provincial Treasury Branch by that indefinite term, Mr. Manning's illness and his inability to testify should not place any additional burden of proof upon the plaintiff. On the other hand, as did the Appellate Division of the Province of Alberta, I lean more toward the acceptance and application of the well-established principle that when evidence is available to a defendant to refute the plaintiff's testimony and that evidence is not produced, then it may be inferred that the evidence would not refute the plaintiff's claim. It may well be, as Smith C.J.A. realized and referred to in his reasons, that Mr. Manning's condition of health should cause the Court to refrain from making such an inference in so far only as his failure to testify is concerned: *Wigmore on Evidence,* 3rd ed., vol. II, p. 166 ff., paras. 286-287. However, in this action, Mr. Manning, although no longer an individual defendant, the action having been discontinued against him, was the manager of the Provincial Treasury Branch at Medicine Hat. As such, he would have had working under his direction a

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staff, some of whom could have been produced. There would have been a file including correspondence far more extensive than any produced, and particularly a record of the instructions given by the Treasury Branch to James Richardson & Sons for the sale of these shares and that company's replies thereto, confirmations and other reports. Moreover, no witness was called from the Provincial Treasury office to give any evidence in support of any action of the defendant based on the provision in the special hypothecation which permitted the Provincial Treasurer, if he considered it advisable for his protection, to sell the securities

pledged. It is impossible to imagine that a manager of a branch of the Provincial Treasury would purport to exercise the discretion given by the document to the Treasurer without reporting in writing at once to the Superintendent of the Provincial Treasury Branches. Smith C.J.A., in his reasons, stated:

> It was not sought to be established that the Provincial Treasurer considered it "desirable for his protection" to sell the shares or that there was other justification for the sale of them, except as already mentioned that it was contended that the plaintiff had authorized the sale and that the letter of August 13, 1959 was evidence of this authorization.

With such a conclusion I agree. Again, no witness was called from James Richardson & Sons except a statistician called by the plaintiff merely to prove the annual range in the sale price of Craigmont Mines Limited shares. Surely that large and well-known investment dealer could have produced from its files the most accurate written evidence as to instructions to sell, including evidence as to who gave such instructions and to whom such sales were reported, thereby confirming or refuting the allegation of the respondent that he never instructed the sale of the 4,500 shares of Craigmont Mines Limited represented by Certificate No. 3934. In view of the respondent's denial of such instructions, and the fact that they were not contained in the letter of August 13, or in either hypothecation, the burden of proving such instructions was on the appellant. I am of the opinion that the appellant's failure to produce any of the evidence referred to, all of which was available to it and all of which was most relevant, does justify the Court in drawing the inference that such evidence

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would have been unfavourable to the appellant and justified the position taken by Smith C.J.A. when he said in giving the chief reasons in the Appellate Division decision:

> Nevertheless I have no doubt that the evidence of the plaintiff just referred to should be accepted. It was in no way contradicted and there appears nothing in his evidence to excite suspicion as to its truthfulness.

I have come to the conclusion that I need not further examine the circumstances which have been dealt with so carefully in the reasons of Smith C.J.A. and I accept the Chief Justice's view, which he expressed in these words:

> Where the overdraft was secured by a hypothecation of shares under the conditions such as existed in this case, it is equally clear in my view that the Branch could not realize upon the security without a demand for payment of the overdraft, when it is a clearly established inference that no time had been fixed for payment of the overdraft. Accordingly I am satisfied that the evidence established that there had been no default in payment by the plaintiff. Hence under the terms of the hypothecations the Branch had no right to sell the shares.

Therefore, so far as liability is concerned, I would dismiss the appeal.

When one considers the quantum of damages fixed by the Appellate Division, however, a very serious question arises. The principle upon which Smith C.J.A. assessed such damages at $96,750, subject to a set-off of $13,220.56 was upon the basis that the defendant, here appellant, was under an obligation to account to the plaintiff, here respondent, at all times for the shares and the appellant should be treated as a trustee wrongfully withholding property which it was bound to deliver. Therefore every presumption should be made against the appellant as a wrongdoer. As a result, the measure of the damages was the highest price which the respondent could have obtained for the shares between the date of their sale by the appellant and the commencement of the action. Due to the meteoric increase in the sale price of the shares in the years following 1960 that price was $21.50 per share and the Chief Justice therefore fixed the damages at 4,500 X $21.50 = $96,750. The $13,220.56 was the total of the various amounts

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credited to the respondent's account by the appellant upon the various sales of the shares. Smith C.J.A. adopted such a measure of damages and relied upon the decisions of this Court in *McNeil v. Fultz et al.*[4], particularly Duff J. (as he then was) at p. 205, and in *Roman v. Toronto General Trusts Corporation*[5] and *Roman v. Crichton*[6]*.* It must be remembered however, that the respondent, on his own evidence, had been informed by Mr. Manning in early January 1960 that the Treasury Branch had sold his shares but he took no action then because he testified Mr. Manning had given him the assurances which I have already outlined in April 1960. Counsel for the respondent submitted that his client failed to take action thereafter because of the attempt, vain for some time, to obtain all the documentation pertaining to the matter from the appellant. The appellant was under no duty to return to the

[4] (1906), 38 S.C.R. 198.
[5] [1963] S.C.R. vi.
[6] [1969] S.C.R. 573.

respondent his shares until the respondent paid to the appellant the sum of moneys which it had realized by the sale of the respondent's shares, and which it had credited to the respondent's account. This sum, as I have said, amounted to $13,220.56, and the respondent never tendered that or any other amount.

The authorities relied upon by Smith C.J.A. were all authorities dealing with the position of a person who was a trustee, or who was under the liability of a trustee, and who had wrongfully refused to deliver trust property to the *cestui que trust.* Surely a plaintiff whose securities have been converted, cannot wait to issue process for their recovery or damages for the conversion until just before the period of limitation lapses, then be entitled to claim damages fixed at the highest value of those securities within the six-year limitation term. I am of the opinion, on the other hand, that the damages must be assessed as in the ordinary action for a conversion. *Mayne and McGregor on Damages,* 12th ed., para. 682, states:

> There is a good deal of authority for taking the time of the conversion as the time at which the market value is to be assessed.

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and, at para. 685, notes the matter as having now been fully considered by the Court of Appeal in the important case of *Sachs v. Miklos*[7]. There, the plaintiff had left with the defendant as gratuitous bailee, a quantity of furniture. Sometime later, the defendant, desiring to utilize the space occupied by the stored furniture, wrote two letters to the plaintiff notifying the latter that he must remove his furniture or it must be sold. Failing to get a reply, the defendant gave the furniture to an auctioneer for sale, realizing a little over 13 pounds net. Several years later, the plaintiff demanded his furniture and failing to obtain the same, sued for damages. Lord Goddard C.J. said, at p. 39:

> It seems to me that in assessing damages for detinue or for conversion (and, for myself, I do not see where the distinction is to be drawn between those two causes of action for this purpose) the damages are not necessarily and in all cases the value of the goods at the date of judgment… On the other hand, the conversion in a case where goods have been sold takes place at an earlier date; namely, when they were sold, so that the conversion took place in this case in July, 1944. The demand for the return of the goods was not made until January, 1946, when the refusal or failure to deliver took place. So that the material date in the action for detinue, no doubt, is the date of the refusal, which was in January, 1946. I think that the matter… The value of the goods converted, at the

[7] [1948] 2 K.B. 23.

> time of their conversion, is one thing: we have the figure of 13 £ odd; but it does not follow that that sum is the measure of the plaintiff's loss. The question is what is the plaintiff's loss, what damage he has suffered, by the wrongful act of the defendants. If that is kept firmly in mind, I think, this case may well become fairly clear when the county court judge has found, one way or the other, whether the plaintiff received the letters—whether he knew or ought to have known in July, 1944, that if he did not remove the goods the defendant Miklos intended to sell them. If he did have that knowledge, then, it seems to me, this great rise in value which has taken place since is not damage which he can recover as flowing from the wrongful act.

I have pointed out that in the present case the respondent knew of the sale of his shares in

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early January 1960. Applying Lord Goddard's tests therefore, I have come to the conclusion that the respondent's damages should be calculated with reference to the price of the shares when he was notified of the conversion. There is no doubt that he could at that time have purchased other shares in their place and have claimed from the appellant the cost of such replacement purchase. It is regrettable that the evidence did not give the market price of the shares at any specific date. As I have said, the respondent did produce the evidence of the statistician which showed that the price range in the year 1960 was from $3.40 to $6.75. If we were to take the average of that high and low price, the result would be $5,071 per share. 4,500 shares at that rate would have sold for $22,837.50 and, in my opinion, the respondent's damages should be assessed at that amount.

The appellant, of course, is entitled to credit for the amounts which it had received upon the sale of the shares and which it had credited to the respondent's account in its' branch. In the result, therefore, the respondent should be entitled to judgment for the sum only of $9,616.94. The matter of interest has caused me some concern. However, on the basis of the reasons aforesaid, the respondent was not entitled to the said sum of $9,616.94 until he claimed damages for conversion of his shares which was not until March 31, 1965, when he issued his statement of claim. Interest of 5 per cent should run on the net recovery of $9,616.94 from that 31st day of March, 1965.

I would therefore allow the appeal to this extent and would direct that the judgment of the Appellate Division should be so amended. The respondent is entitled to retain the costs at trial and in the Appellate Division. In view of the appellant's considerable success in this Court

on the question of quantum only, I would grant to the appellant one-half of the costs of the appeal to this Court.

Appeal allowed with costs, HALL and SPENCE JJ. dissenting.

Solicitors for the defendant, appellant: Clement, Parlee, Irving, Mustard & Rodney, Edmonton.

Solicitor for the plaintiff, respondent: A. Webster Macdonald, Calgary.