T. C. GLENNIE (DEFENDANT)..... APPELLANT;

AND

McD. & C. HOLDINGS LIMITED (PLAINTIFF) ..... RESPONDENT.

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* Feb. 21, 22, 25.
* April 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Stock-broker and client—Carrying of stocks on margin—Alleged instructions by client to sell—Stocks retained on brokers' advice—Alleged non-disclosure of brokers' personal interest in stocks of same companies—Brokers' duties and liabilities.

The action was to recover a balance claimed as owing by defendant to a firm of stock-brokers (and now vested in plaintiff) for commissions, etc., and moneys paid in the purchasing and selling of stocks for defendant. Defendant claimed that in July, 1930, when prices were declining and he was being pressed for marginal protection, he told the brokers to sell out; that if the stocks had been sold at that time the account sued on would not have arisen; that the brokers advised him not to sell; that it was on their advice that he subsequently put up more moneys and endeavoured to hold the stocks; that, unknown to defendant, the brokers were interested in pools in stocks of the same companies as those in whose stocks defendant's holdings largely consisted, and by reason thereof were not in a position to give defendant independent and disinterested advice. There was conflicting evidence, and much contention as to the implications involved in, and the inferences to be drawn from, what was proved. In answers to questions, the jury found that there was a lack of due skill and care by the brokers; that this was "in not selling stock when requested"; that by reason thereof defendant suffered loss equal to or exceeding the amount claimed against him; that defendant, to the brokers' knowledge, was relying on their advice, and that their advice and their method of handling defendant's account was not disinterested and in good faith. Judgment dismissing the action was reversed on appeal, and defendant appealed to this Court.

Held: There was evidence sufficient to support the jury's findings, which must, therefore, stand; these indicated, that they accepted defendant's evidence that he told the brokers to sell in July, 1930 (at which time a sale would have left him without any debit balance); that the brokers advised him not to sell; and that he acted upon their advice, which was not "disinterested and in good faith." As to the brokers' liability in law: Having undertaken to advise, they owed a duty to defendant to advise fully, honestly and in good faith, and the non-disclosure of their own substantial interest in stocks of the same companies as the stocks of defendant which he wanted to sell, was a breach of duty for which the brokers were liable for any damages consequently suffered by defendant; while there was no evidence that defendant would have taken a different course had disclosure been made, yet, once the interest was shewn to exist, the

* PRESENT:—Duff C.J. and Lamont, Cannon, Davis JJ. and Dysart J. (*ad hoc*).

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burden was on plaintiff to exonerate the brokers and establish that the advice given and the mode of handling the account was not affected by the brokers' very large interest in the pools; the fullest and clearest explanation for the non-disclosure rested upon plaintiff and was not given. The judgment at trial dismissing the action should be restored. (Judgment of the Supreme Court of Nova Scotia *en banc*, 7 M.P.R. 544, reversed).

APPEAL by the defendant from the judgment of the Supreme Court of Nova Scotia *en banc* (1) which court, by its formal judgment, allowed the plaintiff's appeal from the judgment of Ross J. (on the trial with a jury) dismissing the action, and set aside the findings and answers of the jury and the judgment at trial, and ordered judgment for the plaintiff for $136,484.13, with interest. The action was to recover a balance claimed to be owing by defendant to a firm of stock-brokers for work and labour done as stock-brokers for defendant and at his request in and about the purchasing and selling of stocks, shares and securities and for commission and brokerage, and also for moneys paid by the brokers at defendant's request in the purchasing and selling of stocks, shares and securities for the account of the defendant; which claim had been vested in the present plaintiff. The material facts and circumstances of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal to this Court was allowed and the judgment of the trial Judge restored, with costs throughout.

J. L. Ralston K.C. for the appellant.

L. A. Lovett K.C. and *D. McInnes* for the respondent.

The judgment of the court was delivered by

DAVIS, J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia *en banc* allowing the appeal of the plaintiff, McD. & C. Holdings Limited, from the judgment dismissing the action after a trial with a jury before the Honourable Mr. Justice Ross. The Court *en banc* under the judgment appealed from gave judgment for the plaintiff (respondent) against the defendant (appellant) for the sum of $136,484.13 with interest.

(1) 7 M.P.R. 544; [1934] 3 D.L.R. 360. For supplementary judgment as to the effect of the judgment, see said reports at p. 561 and p. 373 respectively; it is also set out in the judgment now reported.

The action was brought by the respondent against the appellant for the sum of $148,484.13 and interest, which the respondent claimed was the balance owing by the appellant to the firm of McDougall & Cowans, stock brokers, for work and labour done by said McDougall & Cowans as stock brokers for the appellant and at his request in and about the purchasing of stocks, shares and securities and for commission and for brokerage, and also for moneys paid by McDougall & Cowans at the request of the appellant in the purchasing and selling of stocks, shares and securities for the account of the appellant. The respondent further claimed that a receiving order under the provisions of the *Bankruptcy Act* had been made on the 5th day of October, 1931, against said McDougall & Cowans and that by judgment of the Superior Court of the Province of Quebec, Bankruptcy Division, dated the 11th day of March, 1932, the property and assets of McDougall & Cowans in bankruptcy, including the claim alleged in the present action, were vested in the respondent. The said judgment in the bankruptcy court had approved a scheme of arrangement, the proposal for which is Exhibit AA/12. Under paragraph 1 (*b*) of this proposal, all the property of McDougall & Cowans vested in the realization company, the present respondent.

The statement of defence alleged, (*a*) that McDougall & Cowans were the confidential advisers of the appellant in connection with the purchase and sale of the stocks, shares and securities; (*b*) that unknown to the appellant McDougall & Cowans were interested in pools in shares of International Nickel Limited and Brazilian Traction Light, Heat & Power Company, which were the stocks which the appellant very largely held, and by reason thereof were not in a position to give the appellant independent and disinterested advice; (*c*) that the said McDougall & Cowans advised the appellant from time to time not to sell his stocks, shares and securities; (*d*) that said McDougall & Cowans failed to sell stocks, shares and securities when intructed so to do by the appellant; (*e*) that the appellant relied upon the advice given by McDougall & Cowans not to sell such stocks, shares and securities; (*f*) that the loss for which the respondent is suing in the present action arose from the sale of stocks, shares and securities, which was wrongful inasmuch as the same could have been resold

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without a loss if McDougall & Cowans' advice to and their handling of the account of the appellant had been disinterested and in good faith.

By an interlocutory order made by Mr. Justice Graham in Chambers, it was ordered that the respondent be at liberty to prove by affidavit (*a*) the facts in connection with the purchase and sale of the stocks, shares and securities; (*b*) the disbursements made by McDougall & Cowans; (*c*) that the stocks, shares and securities were purchased and/or sold at the request of the appellant; (*d*) that the moneys alleged to be paid by McDougall & Cowans were paid at the request of the appellant; (*e*) that the commission and brokerage charges were proper charges; (*f*) that the rates of exchange were at the then prevailing rates, and (*g*) that the appellant was entitled to the credits set out in the statement of claim. The respondent put in evidence at the trial of this action affidavits in compliance with the said order. The particulars of the respondent's claim are contained in Exhibit S/C.

The action came on for trial before Mr. Justice Ross with a jury. The learned trial judge put the entire case to the jury in a series of questions to which, with the answers given by the jury, I shall refer later.

The evidence in this case reveals the course of speculation on the stock market immediately before and after the commencement, in the autumn of 1929, of the period of world-wide depression. The appellant was a lumber operator actually engaged in the woods at considerable distances from the city of Halifax. In March, 1926, he opened a marginal trading account with McDougall & Cowans, stock brokers, of Montreal, through their Halifax office. By January, 1929, his cash deposits had only aggregated $9,482.18, and yet it is admitted that by that date he could have taken out of the market in profits an amount of approximately $600,000. He knew that at the time, but chose to remain in the market rather than sell, with the result that by September, 1931, all his remaining stocks in the account had been forced to sale by his brokers or their bankers; and on October 5, 1931, the brokers, McDougall & Cowans, went into bankruptcy. The appellant's account on their books showed a debit of $148,484.13, and this notwithstanding the fact that the appellant had

actually paid in an endeavour to protect his account amounts aggregating nearly $80,000.

The assets of the brokerage house were in the course of administration by bankruptcy transferred, with the approval of the court, to a joint stock company incorporated and organized for the benefit of creditors. The company then commenced this action as assignee of the alleged indebtedness of the appellant to the brokers to recover the alleged indebtedness of the appellant in connection with the purchase and sale of the stocks and for commissions, interest, etc.

The main defence of the appellant was that, through negligence and breach of duty on the part of the brokers, he had suffered a loss in excess of the alleged indebtedness, and that the one set off the other. Shortly stated, his contention was that after paying in substantial amounts to protect his account in a rapidly falling market (a total of $68,883.86 down to and including July 7, 1930, of which sum $13,096.65 were the proceeds of life insurance, to the knowledge of the brokers) he reached a point about the middle of July, 1930, when he made up his mind to take his loss and sell out his account. He swears definitely that he told Peebles, the manager of the Halifax office of McDougall & Cowans with which he had his account, to sell out the account. It is common ground that the account was not closed out at that time, and it is not in dispute that if the account had been closed out by sale of the stocks in July, 1930 (when the appellant says he told the brokers to sell), there would have been no loss except the amount he had already paid in. The debit and credit would have about balanced, perhaps with eight to ten thousand dollars to the appellant's credit. A summary of the account as at July 15, 1930, shows an equity of $10,494.59; as at July 20, 1930, an equity of $12,699.59; as at July 25, 1930, an equity of $10,832.59; and at July 31, 1930, an equity of $3,318.92. The appellant says that the fact is that he was prevailed upon by the brokers to "hang on" to his stocks, and he did so upon the advice which they gave him, with the result which followed, that he not only lost what he subsequently put up as further margins, $5,000 on July 26, 1930, $4,000 on October 4, 1930, and $500 on April 21, 1931; but incurred a debit

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balance of over $148,000, which amount the respondent seeks to recover against him in this action.

From the opening of the account in March, 1926, the appellant says he purchased from time to time on the advice of the brokers various stocks until he was holding in May, 1929, 24 different stocks. From May, 1929, to January, 1930, he says he sold on the advice of the brokers 17 of these stocks, leaving his account then concentrated in 7 stocks, and that by the end of January, 1930, he had sold on the brokers' advice 4 of these 7 stocks, which left him at that time with his entire account concerntrated in three stocks, Brazilian, Nickel and Radio. No stocks were purchased by the appellant at any time after April, 1930, in which month he purchased on the advice of the brokers, he says, more Brazilian and more Radio. That was the state of the account when in July, 1930, the appellant says he definitely told the brokers to sell but was prevailed upon by their advice not to do so. The appellant now alleges that the advice then given him was tainted by a personal interest on the part of the brokers which they did not disclose to him and which was not at any time before bankruptcy known to him, this interest being that the brokers were personally involved (as a result of pools in which partners of the firm were largely concerned and which accounts were carried by the firm) in a liability of more than eight millions of dollars in the first two named stocks, Brazilian and Nickel. Statements of these pool accounts are shown at pages 238 and 239 of the case. The total figures in Brazilian at July 31, 1930, were $4,161,443.09, and in Nickel on the same date $4,159,273.30. The appellant points to the letter of July 16, 1930, from the brokers to himself, in which they suggest that he reduce his holdings by the sale of Radio, while silent as to Brazilian and Nickel, as a significant piece of evidence in support of his allegation against the brokers.

The respondent, on the other hand, says that the appellant was a competent business man of wide experience with large dealings during several years with other brokers as well as McDougall & Cowans, that he was very familiar with the stock market, its fluctuations and losses, and exercised at all times his own judgment. The respondent says that, when the appellant was told by McDougall & Cowans

in January, 1929, that he could sell out with a profit of nearly $600,000 but preferred to stay in the market, he showed himself to be a man of highly speculative nature and one who did exactly what he wanted to do without reference to the advice of his brokers; that when in July, 1930, he says he told the brokers to sell, he only told them that (if he did) by way of a disgruntled acquiescence in their statement to him that if he did not put up more margin they would have to sell him out. The interpretation put upon his words by counsel for the respondent, without admitting that the words were used, is "Well, sell me out—if you insist upon it—I can't give you the margin you say I must give you to prevent a sale." The respondent says that the appellant not only desired to stay in the market in July, 1930, for he had hopes it would right itself and he could save himself some of his losses, but that the subsequent deposits made by him to the credit of the account on July 26, 1930, October 4, 1930, and April 21, 1931, evidenced his desire to hold his stocks and prevent a forced sale of them on a rapidly falling market. The respondent treats the fact of the heavy obligations of the brokers in connection with the two stocks, Brazilian and Nickel, as evidence that the brokers had great confidence in these two stocks themselves or they would not have been involved in them to the extent they acknowledge they were and that when the brokers advised the appellant from time to time they gave him the same advice that they were acting upon themselves.

It would be useless to detail the mass of evidence given at the trial. Each story taken separately is in itself a convincing story, but when you hear both stories together you realize that the difficulty lies not so much on the facts as in the implications involved in, and the inferences to be drawn from, the proved facts. There is really very little substantial dispute as to the facts. The correspondence between the parties over a period of years, the circulars issued by the brokers from time to time and the different conversations related in the evidence are taken by the parties and interpreted from the different points of view. The difficulty in the case does not lie so much in the facts as in the inferences that may fairly and reasonably be drawn from them. The whole matter was left to the jury

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and on their answers to specific questions the learned trial judge entered judgment dismissing the action with costs.

Bearing in mind that the respondent sued for $148,484.13 as the balance of the account after all the stocks had been sold and the fact that the appellant swore definitely that in July, 1930, when the sale of his stocks would admittedly have left no debit balance, he told the brokers to sell but was prevailed upon to remain in the market, we turn to the questions and answers to the jury which were as follows:

Q. 1 (*a*) Was there a lack of due skill and care on the part of McDougall & Cowans in handling defendant's accounts?

A. Yes.

Q. (*b*) If so, in what respect?

A. In not selling stock when requested.

Q. (*c*) If your answer to 1 (*a*) is in the affirmative, then state what loss, if any, the defendant suffered by lack of such care and skill?

A. $148,000 or more.

Q. 2. Was defendant to McDougall & Cowans' knowledge relying on the latter's advice as to buying and selling stocks?

A. Yes.

Q. 3. Was McDougall & Cowans' advice given to defendant, and their method of handling defendant's account, disinterested and in good faith?

A. No.

It is to be observed that, while counsel for the appellant suggested a slightly different wording for the questions, counsel for the respondent took no objection whatever to the form of the questions though contending that the case should not be given to the jury.

The respondent appealed to the Supreme Court of Nova Scotia *en banc*. Written reasons for judgment were delivered (1). Mr. Justice Graham did not see any sufficient grounds for setting aside the answers to sub-questions (*a*) and (*b*) of the first question. Reading them together he thought the jury found as they fairly might that there was lack of due care in not selling defendant's stock when told to do so. The answers to the second and third questions constituted, in his view, a defence to the action without any support from the answers to the first question. If the brokers in advising the defendant and in doing his business acted in bad faith against his interest, their conduct would be fraudulent and they ought not to recover. He thought the finding in answer to the second question, that the de-

(1) 7 M.P.R. 544; [1934] 3 D.L.R. 360.

fendant acted upon the advice of the brokers, could not be set aside. As to the third question, he could not see how the jury could reasonably find that the brokers advised or acted dishonestly. The fact that the defendant accepted the situation when he found that the brokers had not sold his stock does not necessarily absolve them from liability for loss up till that time, but it prevents him from getting damages which accrued afterwards. The jury in fixing the damages at the amount claimed by the plaintiff and allocating it to a single negligent omission of the brokers, instead of to the general negligence which might be found to be disclosed, were probably confused by the form in which the questions were submitted. In his view, the answer to question 1 (*c*) as set down and allocated should be set aside. Upon the whole, however, Mr. Justice Graham thought the result of the trial to be unsatisfactory, and that it was a case in which the court in its discretion might properly order a new trial.

Mr. Justice Carroll took the view that the plaintiff could only succeed on the appeal if the answers to the questions submitted to the jury could not stand, and the answers could only be set aside if they were such answers as reasonable men could not reasonably find on the evidence. After briefly dealing with the evidence, he reached the conclusion that there was evidence which justified the jury making the answers which they did to questions 1 and 2. The answer to the third question presented some difficulties to Mr. Justice Carroll. He concluded that the proper and reasonable inference for a jury to draw from the evidence, especially where there was no explanation of the non-disclosure, was that the brokers were not disinterested in giving their advice to the defendant and in handling his account. Having regard to the relationship of the parties, he thought that the brokers had disqualified themselves from acting impartially, and that there was lacking that element of good faith which the law requires to be present throughout transactions of this kind. The brokers had withheld from the defendant the fact that they were interested in certain stocks, and that was equivalent to misrepresentation regarding a very essential and material fact. Mr. Justice Carroll did not see the reason for putting question 1 (*c*) to the jury. The defendant was not seeking damages but setting up a defence to the claim, and if the

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jury was justified upon the evidence to give the answers they did, then the defendant had made a good defence. He would dismiss the appeal with costs.

Mr. Justice Doull (with whom Mr. Justice Hall concurred) wrote a lengthy judgment reviewing the evidence, the judge's charge, the answers of the jury to the questions submitted, and discussed the authorities which he thought applicable to the facts. He dealt with one phase of the action which was again pressed before us but which I shall pass over for the moment, that is the question whether or not the brokers had been in a position to make delivery to the defendant of the shares in view of the evidence that these shares had been re-pledged by the brokers to their bankers. Dealing with the answers of the jury, he held that the answer to the first question should be set aside upon the ground that there was no foundation in the evidence of an order to sell, the failure to comply with which would give rise to an action for damages. Nor did the defendant regard the failure to sell as any breach of instructions, because he wrote on October 3, 1930, "I certainly appreciate what you have done for me in carrying the burden through this period of depression," and sent a cheque for $4,000. In any case the defendant revoked any order he had given to sell, for within a few days after the alleged conversation, i.e., on July 26, 1930, he paid $5,000. These acts, in the view of Mr. Justice Doull, undoubtedly ratified the action of McDougall & Cowans in continuing the account. As to the answer to the second question, that the defendant to the knowledge of McDougall & Cowans was relying on the latter's advice as to buying and selling stocks, he thought that if the word "relying" meant that the defendant bought the stocks which he did buy and sold the stocks he did sell because of advice which the brokers gave him, there is evidence to support the finding, although there is a great deal of evidence to show that the defendant was always exercising his own judgment also. There is evidence that the defendant held on after the stocks had badly slumped because of the advice of Percy Cowans, one of the partners. Under the circumstances the defendant was entitled to have disinterested and *bona fide* advice. There was no evidence, however, that McDougall & Cowans were engaged as the defendant's "confidential adviser" or that their

relationship to him was different from that which existed between them and their other clients, and certainly no evidence whatever that they were to do the buying or selling without his orders. Then, as to whether or not the advice given was *bona fide* and disinterested— There was ample evidence that the brokers knew that the defendant was acting, to some extent at any rate, on their advice. It was not in most cases advice given to him individually, and not advice which was paid for. Mr. Justice Doull did not think that any great fault should be found with the advice given by McDougall & Cowans as to buying, and that the defendant did not always follow the brokers' advice as to selling. He thought there was no evidence that the defendant followed their advice at all. He thought the advice given by Mr. Percy Cowans was reasonable advice. He could find no evidence of bad faith on the part of the brokers, and, while he thought it clear enough that the defendant could be successful in the absence of actual fraud or actual bad faith if the brokers were guilty of negligence under the circumstances of the relationship between the parties, he thought that the lack of due skill and care which the jury found to be "not selling stock when requested" precluded the finding of negligence on other grounds. The jury having found as they did, he saw no necessity for sending the case back for another trial, and was of opinion that the defence had failed and that judgment should be entered for the plaintiff for the amount of its claim, which was, as above stated, $148,484.13 and interest.

To summarize these conclusions of the members of the Appeal Court—Graham J. would order a new trial, Carroll J. would affirm the judgment dismissing the action, while Hall J. and Doull J. would set aside the findings and enter judgment for the amount of the plaintiff's claim.

After the reasons for judgment of the members of the Appeal Court were given and filed, counsel for the respondent applied to the Court for a formal order allowing the respondent's appeal and giving judgment for the claimant with costs. The Court reserved judgment on that application and subsequently a supplementary judgment was given and filed in the following terms:

The opinion of the majority of the Court (Graham, J., dissenting) is that the effect of the judgment is that the appeal is allowed.

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Counsel for plaintiff intimated that he was willing that the amount of the claim should be reduced by $12,000 to meet the finding in the judgment of Graham, J.

The amount will be reduced accordingly.

On the same date the Court granted a formal order directing judgment for the plaintiff in the sum of $136,-484.13 with interest. We are without the benefit of the explanation for this conclusion of the appeal, in view of the written reasons for judgment of the several members of the Court. But it is from the judgment of the Court and not from the reasons that an appeal lies.

The defendant appeals. Counsel on each side reviewed the evidence in careful detail, drawing different inferences and finding different implications from the same facts. It must be plain, however, that it was the peculiar function of the jury on the whole evidence to reach their own conclusions, and if there is evidence to support their answers, they must stand.

I now turn to a consideration of the evidence that may be regarded as the basis of the jury's answers. The appellant swore definitely that he told Peebles, the Halifax manager of McDougall & Cowans, in the middle of July, 1930, to sell out his stocks. On July 5, 1930, the appellant remitted to the brokers $10,055.91. On July 16, 1930, Peebles wrote the appellant:

> The anticipated check on my extension to you of the privilege of holding your stocks without marginal protection, came to-day.
>
> I am directed to state when full margin may be expected on your account. It is suggested that the firm has handled your account very generously thrcugh the depression. I am told that 7,000 shares of stock is more than we can reasonably be expected to carry for any account, without marginal protection.
>
> They ask that if you are unable to finance the account further, now you will reduce your holdings, on this rally, which in the case of Radio is nearly ten points.
>
> Kindly let me have your decision at your earliest convenience, as I am required to present my report to the head of the firm.

At this time, on the basis of thirty per cent. marginal requirements, the account stood with $62,000 shortage of margin, and the appellant's equity was $10,494.59. The appellant says that in July, 1930, Peebles began to call him up quite often. The appellant swore:

> * * * I could not put up much more; I was pretty well exhausted financially * * * when he called up that time I told him he would have to sell the account, and told him to sell it. * * * When I told him to sell the account out that day, there was not much more said after I told him to sell out, that I could not put up any more, and

the conversation ended. The receiver was hung up. Very shortly afterwards, I got another call saying it was too bad to sell the stocks now, as they thought they would soon come back * * * He said he thought I should do something as it would only be in my favour to try and help the account out. I told him I didn't like the idea, but at the same time I would think the matter over, and I think I went down to Halifax after that and talked the matter over, and he advised me to try and put up some more and hold the account.

The appellant fixes the date of the receipt of the letter of July 16, 1930, as the time Peebles called him up for more money, and he told him,

"I cannot give you any more"—I told him to sell me out.

On cross-examination as to the payment of $5,000 on July 26, 1930, the appellant swore that Peebles

kept calling me and said I had better hang on and probably it would work out for me the best by supporting the account some and I did not like it. I said I didn't like it. However, I later on agreed to do what I could. I said I will do what I can, I will do my best for you, I will try and get you some more; I don't know how I got it, through the bank or somehow, but I got it for them.

The appellant's son, Don Glennie, swore that he heard his father tell Peebles to sell out, and fixes the conversation between the middle and the latter part of July, 1930.

Peebles, recalled in rebuttal and examined in chief, swore he never received any instructions from Glennie to sell his account, but in the cross-examination he gives the following evidence:

Q. Am I correct in assuming that it is quite possible that there may have been discussions with Mr. Glennie with regard to selling?

A. Yes, he spoke about it very often.

Q. And you discussed it with him?

A. Yes, sir.

Q. And it is possible that in those conversations he may have said, I guess the best thing for me to do is to sell out?

A. He may have suggested that.

Some argument was directed to us on the assumption that there was difficulty in understanding exactly what the jury meant in their answer to the first question—"In not selling stock when requested." It was contended that "requested" was not a word of instruction or direction, and was something different from a finding that the appellant had "ordered" the brokers to sell. I do not think that any such distinction can be made. The learned trial judge in his charge to the jury used the word "requested" in discussing the sale of stocks by a broker when undermargined, and that may account for the jury using the word. In any case the word is more than one of assent,

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and the jury in effect found that the customer told the brokers to sell his stocks and that they did not do so.

Counsel for the respondent argues that even if that finding is well founded, the appellant subsequently cancelled his request, put up more moneys and endeavoured as best he could to avoid liquidation of his stocks on the falling market. There can be no doubt that he did, but that does not answer the appellant's charge that he did so at the insistence of the brokers and upon their advice, and that this advice was neither disinterested nor in good faith, in that the brokers were themselves involved in liabilty at the time in Brazilian and Nickel to the extent of over eight million dollars as mentioned above; and that when the brokers undertook to advise him not to sell, they should have disclosed to him their personal interest in the two stocks in question.

It is contended by the appellant that from July, 1930, onwards there was a consistent and continuous policy or system on the part of the brokers to advise their customers, and in particular the appellant, not to sell out Brazilian and Nickel, and that this policy was prompted by the very heavy interest of the brokers in these two stocks. There is no explicit evidence of this, and the question is whether or not it may be fairly and reasonably inferred from the evidence. There is a letter of August 28, 1930, from the brokers to the appellant stating that it is imperative that they have further support for his account in view of the continuing weakness in the Canadian market.

> If you decide to hold your present stocks, it will be necessary to make a further deposit in your account. If this is not possible at the present time, a reduction of 1,000 shares will be accepted, as a temporary reduction. This has been decided on by the firm, but we will wait a reasonable time for your instructions.

The respondent emphasizes the suggested reduction of 1,000 shares in the account, and the appellant emphasizes the statement of the necessity to make a further deposit in the account. This letter is rather typical of all the correspondence in that counsel find different implications and draw different inferences from the same letter. Then on September 6, 1930, the Halifax office of the brokers sent to the appellant, as they did to their customers generally, a circular letter. In this circular the brokers said that the

reports from Montreal and New York indicated that the turning movement predicted for the stock market was then in progress, and stated that, while financial statements for the third quarter of the year were discouraging and financial publications for the most part pessimistic, the situation in 1921 was almost parallel and writings almost identical with the market conditions and financial literature at the time of the circular, and that there followed during the seven years after 1921 the greatest market in history. The brokers then expressed their attitude on the high grade stocks, which, in their judgment, would make outstanding progress if bought around current prices and held for the better times. Particular reference was made in this circular to Brazilian and Nickel. As to Brazilian, the circular concludes:

> During the present year there should be another surplus to strengthen the equity behind the common stock.

and as to Nickel:

> * * * we believe this company is only on the threshold of its career.

The closing paragraph of the circular states:

> Our recommendations also include Dominion Bridge and Shawinigan Water & Power Co., all of which we believe will sell much higher, subject of course to market fluctuations.

Then on September 25, 1930, Peebles writes to the appellant expressing regret at the pressure he is compelled to put on the appellant "to strengthen your account"—

> * * * with conditions as they are I am afraid every day that my chief will sell your account out and if he decides on that, there is no appeal. The idea of carrying about 6,000 shares of stock for any client without margin is unheard of and there is no protection in your account at present prices.
>
> We were given to understand that you would turn over some funds in August. The fact that nothing came was very embarrassing to me. I have now reported that you expect to make a deposit the first of October.
>
> * * *
>
> If you are not able to raise more funds to support your holdings, it looks as if some of them will have to go at a very bad time. Please keep me posted on your prospects.

Then on October 3, 1930, the appellant writes to the brokers enclosing his cheque for $4,000, and says:

> I certainly appreciate what you have done for me in carrying the burden, through this period of depression, and I always want you to feel that I am trying to do my best to help out. As I get hold of some payments due me I will send you further amounts, and try to hold down until the market improves.

That letter is taken by the respondent as evidence that the appellant was hanging on to his stocks at his own free

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will, and inconsistent with his position in this action that he was over-reached by the brokers and persuaded by them to remain in the market. The appellant, on the other hand, contends that the letter must be read in the light of the non-disclosure to him by the brokers of their substantial personal and adverse interest in the particular stocks held by him.

On October 6, 1930, Peebles writes the appellant as follows:

My head office to-day notified me by wire that they would require a substantial liquidation of your debit balance. The conditions under which we are labouring to-day being so full of uncertainties that the loan in your account is considered unsafe.

Your account requires to-day fifty thousand dollars ($50,000) protection and we are unable to carry the account without a substantial deposit as protection.

At that time the sale of the stocks would have involved a loss to the appellant of approximately $100,000. Obviously alarmed with the situation, he went to Montreal and interviewed Mr. Percy Cowans, one of the senior partners of the firm of brokers, on October 9, 1930. I take the following from the direct examination of the appellant at the trial with reference to this interview:

Q. Tell us the substance of the conversation you had with him?

A. I told him I had come to see him about this account. I told him, had the account been sold out as I directed in July it would have been much better for me, I would not be where I was now; it had shrunk off quite a lot. I told him that I didn't know much about these stocks, I relied on them entirely for information to keep me posted, and I took their advice from the time I started the account to where it was now; and he told me, he said you have good stocks, Mr. Glennie, don't be afraid of those stocks; those stocks, he said, will go higher. He said, I will tell you right now Brazilian will go to $100 per share. He said, as regards Nickel, he said I have been up over the International Nickel plant many times; I know it, he says, all over, I have been through it and I know its resources, and I know what it can make. He took his pencil, and on the counter, right on his desk, and figured up to me what great resources there were in Nickel and what great prospects and what great paying power it had. He said Nickel will go to $100, and he said Brazilian will do the same; and he said I will carry those stocks for you until they come back, because I know what I am talking about when I am telling you about these stocks.

Q. What did you say to that?

A. I said I don't know; I would rely on what he said. He said if you can give us any assistance to help us along it will be much better, but he said I will carry the stocks for you because I know they will come back.

Q. Now at that time you discussed with him a proposition about the bank, about some stocks the bank were carrying?

A. I told him I had some stocks held by the Bank of Montreal; that I owed them an account there.

Q. Yes, go ahead.

A. I told him that the stocks I held would pay off both him and the bank as near as I could tell, and I thought I could get the bank to release the stock provided they paid my account off; so he asked me to go to the bank and get a list of the stock, and I went to the Bank of Montreal in Montreal and got the manager to take a list of the stocks off, and I brought them to Mr. Cowans and he took a list off in his office. He said, these are all good stocks, Mr. Glennie, and it is a shame to sell them now, they will everyone come back. He said, did the bank question you, and I said not at all, but I thought I would hand them over to you and clean up both accounts.

Q. What do you mean by that?

A. Clean his account off, and the bank's both.

Q. You mean by selling the stock?

A. Yes. He said, no, sir, I will not press you for my account, I will carry it for you, and he said take them back to the bank and hand them back to them for I don't want them, or he said they could keep the stock.

Q. What did you say to that, what was your decision and what did you say?

A. Well, I took him at his word and told him I would rely on his advice entirely.

In cross-examination upon this interview the appellant repeats substantially the same statement. In October, 1930, Brazilian was selling at $25, and Nickel at $17.

Mr. Cowans was not called as a witness at the trial, and no explanation is offered for his not being called. The evidence of the appellant as to that interview was uncontradicted. The jury may have thought it significant that no further deposit was made by the appellant except a payment of $500 on April 21 of the next year, 1931.

On February 5, 1931, Peebles wrote to the appellant as follows:

> Not having heard from you since your last visit to Halifax, we are writing to let you know that head office is constantly inquiring as to when we may expect a payment on account from you. While we may hold your stock for some time at present prices, the future chances of holding your account depends, of course, upon the assistance you give us in supporting your stocks in the meantime.

And again on February 18, 1931, Peebles wrote to the appellant as follows:

> The head office is making constant demands upon me for some action on your account, as the absence of any deposits whatever since last fall is creating a very unfortunate impression. I trust that you will be able to make a deposit shortly as I feel that anything you get now would be greatly to your advantage.

Peebles admitted that his firm were advising the holding of Brazilian and Nickel in 1931, based on Mr. Cowans' opinion very largely, and that he did not know when advising the appellant that partners of his firm with others

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were interested in Brazilian and Nickel to the extent of millions of dollars in accounts carried by the firm, as disclosed at the trial.

On November 7, 1930, the brokers sold out all the Radio. The loss represented by the difference between the cost and the amount realized on Radio was $50,090.50. The appellant was then entirely in Brazilian and Nickel.

On May 19, 1931, the brokers sold 1,000 shares of Brazilian at $13\frac{7}{8}$. In April, 1930, these shares had cost 50 to 54. On the same day they sold 1,000 Nickel at 12. The last 1,000 shares of Nickel had been bought on January 28, 1929, at 68.

On May 28, 1931, Peebles wrote the appellant asking for $10,000 as margin.

On September 24, 1931, the bankers of the brokers sold all the then remaining stocks of the appellant—at least the brokers treated part of the shares pledged by them to and sold by the bank on that day as his shares. Mr. Russell Cowans deposed to the sales by their bankers during the month of September, 1931, and stated that

> the proceeds of such sales were apportioned pro rata by McDougall & Cowans to the accounts of those clients who were under the market, and as a result of this apportionment the account of the said T. C. Glennie was credited with the sale price of 560 shares of International Nickel;

and similarly with the sale price of 2,721 shares of Brazilian, which entries appear in the appellant's account of September 28, 1931, and September 26, 1931, respectively. The bankruptcy of the brokers then ensued on October 5, 1931.

It is easy to draw inferences and the court must guard against inferences being drawn that cannot fairly and reasonably be drawn from the evidence, but I think the jury were entitled upon the evidence in this case to make the findings they did. Counsel for the respondent urged upon us that the different questions and answers must be separated and considered singly, and from that point of view he argued, having regard to the charge of the learned trial judge, that all the findings of negligence must be taken to be contained in the answer to question 1, and that the answer to question 3 negatived negligence. But in a complicated case such as this, if the trial judge in his discretion thinks it a fit case for a jury and leaves the

whole case to the jury as was done here, we must read the questions and answers together as far as practicable to ascertain the true meaning and effect of the jury's findings. Treated in that manner and having regard to the evidence, I think the jury's answers clearly indicate that they accepted the appellant's evidence that he told the brokers to sell him out in July, 1930, at which time it was admitted a sale would have left him without any debit balance; that he was advised by the brokers against taking this course; that he acted upon their advice, which was "not disinterested and in good faith"; that in consequence thereof he ended his speculations with a loss in his account of $148,484.13. That, I think, is a fair interpretation of the jury's answers, and, while a jury might well have taken a contrary view of the evidence, there was evidence which, if believed, was sufficient to support the findings.

In considering the answer to question 3, we should recall the language of the learned trial judge in submitting that question to the jury:

> In a word, what defendant says is that there came a time in the negotiations when McDougall & Cowans were acting dishonestly with him; that they were acting in bad faith. Now if you find that McDougall & Cowans were acting in bad faith, you will answer that question "Yes," but let me suggest to you that when you are considering that question you ought to be able to say just at what time this bad faith began; when did McDougall & Cowans commence (to use a somewhat slang expression) to put one over on the defendant? Not when they bought the stocks for the defendant. Not during the whole of 1927 and 1928, and up to the time in 1929 when this defendant had a clear profit of five or six hundred thousand dollars. There was no talk about bad faith then, although during that time McDougall & Cowans held large quantities of Brazilian and International Nickel.
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> * * *
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> In deciding that question of bad faith you can hardly base your finding on any one particular fact in the case, but you must review the transactions between the parties, it seems to me, from beginning to end.

The respondent contends in any event that the appellant subsequently to July, 1930, acquiesced in the suggested concellation of his order to sell and waived his request, relying upon the subsequent marginal deposits made by the appellant: July 26, $5,000; October 4, $4,000; April 21, 1931, $500; and that the damages, if any, should have been assessed at the difference in the value of the stocks between the date of the alleged breach of duty in not selling and the date of the alleged waiver—a difference of only

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a few thousand dollars, apparently covered by the respondent's consent in the Court of Appeal to a reduction of $12,000. But having regard to the evidence of the appellant of the advice he was given by Peebles in July, 1930, and to the uncontradicted evidence of the appellant of the statements made and advice given to him by Mr. Percy Cowans in Montreal on October 9, 1930, and to the letters and circular from the brokers to the appellant subsequently to the middle of July, 1930, the jury was entitled to reach the conclusion that the appellant's course of conduct from and after his request to the brokers to sell in July, 1930, was predicated upon the advice of the brokers. The jury's findings read as a whole indicate that such was the conclusion they reached. The inference the jury drew, it seems to me, was that the subsequent demands, either to liquidate or to put up further margins, were intended to draw out more money from the appellant to support his account rather than to induce the sale of the stocks. That is an inference which I think the jury could very properly draw from the evidence, and, taken with the fact of the non-disclosure at all times of the liability of the brokers to the extent of some eight millions of dollars in Brazilian and Nickel, justifies the conclusion of the jury that the advice given to the appellant was not disinterested and in good faith, and induced the appellant to remain in the market and resulted in the ultimate loss.

The case presents some serious difficulties quite apart from the findings of the jury. One difficulty is whether or not the plea of the appellant was as a matter of law a defence to the claim. The claim is put as the balance due in respect of moneys paid in the purchase of stocks, shares and securities and for brokerage commissions, interest, etc. The appellant admitted the correctness of the accounts.

The respondent contends that the appellant's claim for damages for breach of duty is not a defence in law to the claim but a matter for cross-action. The defence has been dealt with throughout, however, as a proper subject matter by way of defence in whole or in part to the claim. It is always desirable to avoid circuity of action which would result from compelling the defendant to pay the amount of the claim and leaving him to cross-action. Substantially it was one transaction between broker and customer

and the damages alleged arose, if at all, out of negligence or breach of duty by the brokers in connection with the transaction. We cannot give effect to this objection of the respondent as to the form of the action and defence.

A more serious difficulty that presents itself is the absence of an explicit finding of the causal relation between the alleged negligence or breach of duty and the damages assessed. The form of the questions submitted to the jury was not as precise as might be desired but, substantially, the answers, taken as a whole, indicate that the jury, treating negligence broadly as a breach of duty, have ascribed the appellant's loss to the extent of the amount of the debit balance sued upon, to the advice given by the brokers to the appellant.

During the argument the nature and extent of the rights and obligations of brokers to their customers were broadly discussed by counsel but it is unnecessary for us in this case to attempt to lay down any general statement. The customer here requested the brokers to sell. The brokers undertook to advise the customer at that time not to sell, for that must be involved in the findings of the jury. Having so undertaken to advise, the brokers undoubtedly owed a duty to their customer to advise fully, honestly and in good faith, and the non-disclosure to the customer of their own substantial interest in the stocks that he was carrying and wanted to sell was a breach of duty for which the brokers were liable for any damages suffered by the customer in consequence of that breach of duty. There is no evidence that the appellant would have taken a different course had disclosure been made to him, but once the interest was shown to exist, the burden rested upon the respondent to exonerate the brokers and establish that the advice given and the mode of handling the account was not affected by the brokers' very large interest in the pools. The fullest and clearest explanation for the non-disclosure rested upon the respondent and no attempt was made to give any explanation.

I therefore think that the judgment directed to be entered by the learned trial judge dismissing the action ought to be restored with costs throughout.

It is unnecessary, in the view I take of this appeal, to consider the question raised by counsel for the appellant

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at the trial and again on the appeal in the court below and much stressed by him before us, that the respondent could not succeed in the action in any case because it had not established that McDougall & Cowans were in a position at all material times to deliver the stocks to the customer had he tendered payment of the balance of his account. It was contended that the stocks when purchased had been pledged by the brokers to their bankers to such an extent as to deprive the brokers of a compellable title to the particular stocks purchased for the appellant. I should like to say that, without further consideration of this aspect of the case, I should not want to be taken as in agreement with the views expressed on this question in the court below.

Appeal allowed with costs.

Solicitor for the appellant: *J. S. Smiley.*

Solicitor for the respondent: *L. A. Lovett.*