A. A. BARTHELMES (PLAINTIFF) . . APPELLANT;

AND

JOHN P. BICKELL AND OTHERS (DEFENDANTS) . . . . . RESPONDENTS.

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*Nov. 4.
*Dec. 9.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Broker—Speculation in foreign stocks—Adverse rate of exchange—Dealing in margins—Profit to customer—Right to exchange profit.

In the absence of any agreement to the contrary, or of a custom of the stock market of which he is, or is presumed to be, aware, the customer of a Canadian broker who buys and sells for him, through an agent in New York, United States stocks on margin is entitled to have his profits paid in American currency and so get the benefit of the adverse rate of exchange between the two countries.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment on the trial in favour of the appellant.

In Jan. 1918, the appellant employed Bickell & Co., Toronto brokers, to buy and sell stocks for him on margin. He dealt only in United States securities and carried on transactions for two years through the agents of Bickell & Co. in New York. At the end of that time he ceased operating and his account showed a balance in his favour of some $60,000 which he claimed should be paid in United States currency, the rate of exchange being then 17 per cent against Canada. The claim was refused and the balance was paid, his right to claim the further sum being reserved and he brought action for the amount.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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Slaght K.C. for the appellant, referred to *Robertson* v. *Mollett* (1), at page 829.

Tilley K.C. for the respondent.

THE CHIEF JUSTICE—The question involved in this action is the right of the defendant firm of brokers carrying on business in Toronto, and in New York through their agents there, to discharge itself from liability to the plaintiff who had engaged the firm's services in the purchase and sale of stocks in New York by paying him, when their dealings ended, the balance due to him in Canadian funds without any allowance for exchange upon the admitted balance upon New York where the transactions all took place.

The dealings between the parties were those of principal and agent requiring full accounting and were not in any sense those of vendor and purchaser which might give rise to the presumption of local currency being contemplated by the parties in the discharge of the agent's accountability.

I cannot think, therefore, that it would be possible for the broker's company, in the absence of any special agreement permitting it to do so, to reserve to itself and to withold from its customer the plaintiff the premiums of exchange upon New York upon the admitted balance due such customer. The benefit of such exchange it seems to me legally belonged to the broker's principals and should not, on any principle I know of, be retained by the brokers or agents in addition to their ordinary charges.

The learned trial judge so found and awarded the plaintiff the sum of $10,103.35.

(1) [1874] L. R. 7 H. L. 802.

There is no dispute about the correctness of the amount allowed if the right of the plaintiff to be paid in the equivalent of American currency on the balance due him is correct.

The Appellate Division by a majority of three to two allowed the appeal and dismissed the action. The learned Chief Justice of Ontario with whom Maclaren J. concurred, seems to have based his judgment upon what he held to be "not an unfair inference" under the facts as proved, that the plaintiff, the now appellant, had acquiesced in foregoing his claim to exchange as to the transactions before July 1919, in consideration of his broker's promise to allow the premiums in regard to future transactions.

I am quite unable to draw or to accept any such inference or acquiescence, or that any such compromise ever was reached between the parties. The learned justice of appeal, Hodgins, who concurred in allowing the appeal and dismissing the action did so, however, upon an entirely distinct ground of an agreement or arrangement between the defendants and their New York agents, to which he assumed the plaintiff was a party and bound by, under which

> Canadian speculators might deal in New York market in stocks on margin under circumstances which would obviate the necessity of their remitting money between Toronto and New York or *vice versa*.
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> That method consisted in the maintaining by Miller and Co. of a deposit in the Standard Bank in Toronto consisting of a large amount of money. The results of the purchases and sale of stock in New York were communicated by Miller and Co. to the appellants, who were then authorized by Miller and Co. to draw for the benefit of their clients upon the funds in the Standard Bank, paying in this way their Canadian customers any profits that had been made in trade in New York. This also involved the advantage of enabling buying and selling to be done by clients in Toronto upon the credits of the appellants in New York and not upon their own individual credit, and also

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upon the basis of Canadian dollars, any losses being charged to the appellants. When this arrangement was made, apparently the difference in exchange was nil or trifling. It is said to have been 1 per cent when the respondent's transactions began.

I am quite unable to see how a private arrangement made between the Toronto brokers and the defendants and their New York agents, Miller & Co., can be invoked to prejudice the plaintiff in his dealings with the brokers in Toronto unless indeed there was proof of his knowledge of such an agreement and acquiescence in it. Of such proof, however, I found none and in its absence I cannot see how the private agreement between the Toronto brokers and their New York agents could affect plaintiff's rights in his dealings with his agents or brokers in Toronto.

I am in full accord with the dissenting judgments of Magee and Ferguson JJ. and for the reasons given by them which to me are perfectly satisfactory and convincing I would allow this appeal with costs here and in the Appellate Division and would restore the judgment of Middleton J., the trial judge.

IDINGTON J.—This appeal raises the question of whether or not a man employing a Toronto broker to operate for him in New York and make such investments there as the investor may from time to time direct to be made, is entitled to demand and receive in New York the net profits made therefrom less usual commission the broker is entitled to.

The learned trial judge, Mr. Justice Middleton, held that the appellant having been a very successful investor in that way was entitled to recover from the respondents, who were his brokers, acting through New York agents, his full measure of profits and to a

New York cheque therefor, if payment to be made by cheque, and could not be deprived of his exact measure of profits in New York where earned and held when the account was closed.

The respondents tried to substitute for the New York cheque or draft, to which the appellant was entitled, a cheque on a Canadian bank nominally for the same sum but leaving over ten thousand dollars of said profits in the hands of respondents' New York agents.

Respondents tried an appeal to the Appellate Division of the Supreme Court of Ontario and were successful in obtaining by a majority of three to two a reversal of the learned trial judge's judgment. Hence this appeal here.

I am so clearly of the opinion that the learned trial judge was, upon his finding of facts, right in his law that I fear to prolong the discussion lest I add to the confusion of thought.

Yet I may say that the appellant, a stranger at the time to the respondents, opened his operations by expressly directing an investment to be got in New York and giving a three thousand dollar cheque by way of security for the venture.

Because that cheque was on a Canadian bank, though not a word passed as to the rate of exchange or cost of cashing the cheque or its proceeds in New York, it is contended that the basis was in law thus laid for returning it, and the profits of many dealings with which it had only a remote connection, in depreciated Canadian paper currency and justifying the retention of ten thousand dollars of legitimate profits lying in the hands of respondents' New York agents.

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I cannot assent to any such proposition as being based on law.

I can conceive of such a system as the respondents and their New York agents adopted being the basis of a contract with clients when adopted by them, or any of them choosing to be bound by the operations of such terms of agency.

But any such exceptional system would not bind their clients unless clearly brought home to the minds of such as retained them, and their assent, either expressly or impliedly, got thereto.

So far from that being the case herein it is exceedingly doubtful from the evidence when this system was first adopted by the respondents, and clearly never had been brought home to the mind of appellant until July, 1919, when first set up to him.

As to the question of fact resting thereon I am bound by the judgment of the learned trial judge unless I can find some substantial fact entitling me to rest a dissenting conclusion upon, which I confess I cannot.

Indeed I am, after a perusal of the evidence of the witnesses for respondents thus brought in question, decidedly of the opinion that the learned trial judge correctly appreciated the value thereof.

But for that finding, and my concurrence therein, I might be bound to accept and act upon another appreciation of the facts so far as bearing upon the later transactions.

The result is that in my view of the facts throughout there never existed any basis for the pretensions of the respondents to appropriate the profits of the appellant, or any part thereof, to meet the risks incidental to the operation of its peculiar system.

It is stated in argument that many Toronto brokers acted upon the same system but proof thereof is very scant and, as a universal well-known custom of the market binding on all dealing therein, is very far from being proven.

And when we turn from the abstract to the concrete there is an illustration given in the offer through other agents to claim specific delivery in New York of the securities in question therein refused by the respondents and its agents which I assume was intended as a means of testing the actual contentions of the respondents.

That refusal was unjustifiable. Indeed it is attempted to be met by an explanation which may be correct that the refusal was the result of a mistake.

But if respondents' contentions be correct there was no need for such an explanation for it was part of its rights flowing from the contention set up, if well founded, that any return of New York profits must be answered only by a return of Canadian paper currency, nominally of the same number of dollars as held in New York agents' hands.

In line with such a mode of thought it is rather curious to find in respondents' factum reliance placed upon sub-section 3 of section 15 of the Currency Act, 9-10 Edw. VII., Canada, dealing with the coinage in circulation in Canada.

If this had been taken as the basis of what is in question instead of the depreciated paper currency we might have found something to rest upon for another view than I take.

If the depreciated nominal value of a dollar had been in fact the converse of what it is and very acutely so at the time in question in favour of Canada as

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against that in New York, I suspect the respondent would stoutly have resisted what it now contends for herein, as being most unjust and quite properly so.

In other words if the American dollar had been worth only seventeen per cent less than the Canadian in paper currency and the present appellant had demanded profits based on such a depreciated American dollar and demanded such Canadian dollars worth so much more, I fancy we would have heard a very justifiable outcry against such an unreasonable demand, even if the business had begun as this is said to have begun.

I think this appeal should be allowed and the judgment of the learned trial judge restored with costs here and below.

DUFF J.—*Prima facie* the appellant is entitled to call upon his agents, the respondents, to account for all profits arising through the employment of funds placed by him in their hands for the purpose of trading in shares on his account. This presumptive right of the appellant could only be displaced by proving either an agreement to the contrary or a custom governing the relations of the parties and modifying that presumptive right.

Express agreement to the contrary was negatived by the learned trial judge and that hypothesis may be discarded. The facts from which we are asked to infer such an agreement by conduct are, in my opinion, altogether too meagre to support that conclusion. As to custom I agree with Ferguson J. that a custom such as that relied upon as between brokers in Toronto and New York, assuming it proved, could not affect the appellant's right unless at least he had knowledge of it and this is not asserted.

ANGLIN J.—For the reasons assigned by the learned trial judge and by Magee and Ferguson JJ. A. in the Appellate Divisional Court I am, with respect, of the opinion that this appeal should be allowed and the judgment of Mr. Justice Middleton restored.

The relationship of the parties—that of broker and client—*prima facie* entitles the plaintiff to recover the moneys for which he sues. The broker cannot profit from his client's transactions beyond the usual brokerage commission unless he establishes some special agreement, express or implied, or some custom of the market on which he is employed to deal for the client, so well defined and established that the latter may properly be taken to have contracted subject to it, which entitles him to whatever additional gain he claims. The evidence in this record, in my opinion, does not establish anything of the kind.

The admitted balance of over $62,000 standing to the plaintiff's credit in February, 1920, when his account with the defendant was closed, was the outcome of transactions on the New York market in American stocks. The plaintiff's profits were all earned in New York and were received there by the defendants' correspondents in United States currency. No reason has been shown why he should not receive the full benefit of the moneys thus obtained on his behalf.

The evidence credited by the learned trial judge—and in my opinion the more credible—is that if Barthelmes wished at any time during the period of his dealings with the defendants to obtain delivery of shares in which he was "long" he would have been required to pay for them in United States funds. Why should he be denied the corresponding right of

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being paid on the same basis? The matter in issue has been so fully discussed however in the judgments in which I have already expressed my concurrence that I cannot usefully add to them.

The only circumstance in evidence that would seem to be at all inconsistent with the plaintiff's claim is that although he made his original deposit of $3,000 with the defendants in Canadian funds he was given credit for that entire amount in the first account rendered by them to him of the transactions carried on in his behalf on the New York market. The New York discount on Canadian funds at that time is said to have been one per cent. It is quite possible, however, that the defendants were willing to waive their right to debit the plaintiff with the amount of this comparatively small discount, $30.00, in order to secure his custom. Indeed I am not at all certain that at that time the difference in exchange was not generally ignored in business transactions in Canada. I do not find in this single circumstance—and there is nothing else in the evidence pointing in that direction—enough to warrant the defendants asserting a right to retain exchange amounting to 17 per cent on upwards of $62,000.00 profits made in New York on the plaintiff's account at a time when such exchange was certainly taken into account in other business transactions.

MIGNAULT J.—The appellant claims that he is entitled to be paid in United States money a substantial balance standing to his credit on certain purchases and sales of United States securities made for him on the New York Stock Exchange by the respondents who were his brokers in Toronto, and who, through their agents, Miller & Co., stock brokers and members

of the New York Stock Exchange, purchased and sold these securities on behalf of the appellant. When the account, which had lasted some two years, was closed on February 7th, 1920, the balance to the appellant's credit was $62,445.62. The appellant contended that this sum being really United States money, he was entitled to the value of the exchange which was then 17 per cent. The respondents paid him this $62,445.62 in Canadian money under reserve of his right to claim the value of the exchange. This action was taken to recover this exchange, and the learned trial judge, Middleton J., gave the appellant judgment for $10,105.73, deducting from the appellant's balance the sum of $3,000.00 which he had paid in Canadian money as a margin when he opened his account in January, 1918. In the Appellate Division this judgment was reversed by Meredith C. J. O., and Maclaren and Hodgins JJ., and the appellant's action was dismissed, Magee and Ferguson JJ. dissenting. From the latter judgment the appellant appeals.

The main facts of the case were thus stated by the learned trial judge:—

> The defendants are brokers carrying on business at Toronto. In January, 1918, the plaintiff began trading with them as his brokers, in the purchase and sale of stock, the transactions being almost entirely on the New York Stock Exchange. At this time he deposited with the defendants, as security by way of margin, the sum of $3,000 Canadian currency. The trading continued until February, 1920, when the account was closed by the payment of the amount admitted to be due by the brokers and the handing over of a few shares, the only stock purchased then remaining unrealized, reserving to the plaintiff the right to put forward this claim for exchange.
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> During this period many transactions had taken place, and the course of dealing had generally been profitable to Barthelmes, although on individual transactions he had made a loss. His $3,000 had grown to approximately $60,000.
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> The way in which the business was carried on by Bickell & Co. was that they had an arrangement with Miller and Company, of New York, to purchase and sell for them upon their instructions. An

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account was kept with the Standard Bank at Toronto, and when Bickell desired to make a purchase, a deposit was made to the credit of this account. On a sale being made, Miller would instruct the transfer to Bickell's credit of any balance that might be payable. No money was sent to New York for the individual purchases, and no money was sent from New York for individual sales, and it was arranged that exchange should not be payable as between Miller and Bickell with respect to any of their transactions. The amount involved would not be great because, while the volume of trade would no doubt be very large, the balance ultimately payable either by Miller to Bickell or *vice versa* would be comparatively small. The effect of this arrangement, however, was that the profit which might be made by one customer in respect to his individual trading would be set off against the loss payable by another, and the result would be that an arrangement, perfectly fair as between Miller and Bickell, might be exceedingly unfair as between the Toronto brokers and an individual customer. If the individual customer lost on the transaction so that money would have to be sent to New York, I can see no reason why that customer should not be called upon to pay the exchange incident to the remitting of funds to New York to pay his loss. On the other hand, if a customer made on a transaction, I can see no reason why he should not receive the New York funds, with the incidental advantage by reason of the depreciation of Canadian currency.

In my opinion the arrangements between the respondents and Miller & Co., which were entered into for their mutual convenience, are without effect on any rights which the appellant may have against the respondents. The evidence is that the respondents transmitted by wire the appellant's orders to Miller & Co. in New York, where they were attended to by the latter. But these orders were not ear-marked, so to say, no mention being made of any particular client, but they were sent on with others, and no doubt Miller & Co., in dealing with gains and losses, off-set the one against the other, any settlement with the respondents being of the difference one way or another in the day's trading. It is evident that with the large volume of transactions between the two firms, and the settlement of differences which of course varied from the credit to the debit side, the question of exchange was not important. No doubt also the

respondents required fresh margins from unsuccessful customers, but naturally did not demand any margin outside of the original one from those who, like the appellant, were fortunate in their speculations. If the transactions in question were real ones they were merged into a large number of other transactions, the respondents of course keeping track of those effected by each of their customers. Miller & Co. made the purchases and sales on the stock market in New York and used the stock certificates, all the purchases being on margin, to finance the transactions with their bankers.

No special bargain was entered into between these parties when the account was opened, and the appellant, when he made the first purchase of one hundred shares of United States Steel, paid the respondent $3,000.00 in Canadian money as margin. In July, 1919, there was some conversation between the appellant and Mr. Cashman, one of the respondents, the appellant claiming that he was entitled to the value of the exchange, which Mr. Cashman disputed, but apparently he offered to allow exchange on future transactions, if the account was closed and a new one opened, and if the appellant accepted his then balance, some $40,000.00, in Canadian funds, which he refused to do. The learned trial judge found that this conversation was followed by a continuance of trading without any change in the rights of the parties, the delay being a mere truce and not an abandoning of any right.

The evidence would have been much more complete and satisfactory if the testimony of the member of the firm of Miller & Co., with whom the respondents dealt had been obtained. As the record stands, the different transactions entered into and which involve a very large amount, are shewn by the monthly statements, seventeen in number, which were produced at the trial.

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When the account opened, New York exchange was only 1 per cent. On December 1st, 1919, it was 4¾ per cent and it rapidly increased so that, when the account was closed, it stood at 17 per cent. By reason of this rapid rise, the arrangement between the respondents and Miller & Co. was cancelled early in January, 1920, and subsequently exchange was exacted on money sent to New York. Whether or not the appellant was aware of this new arrangement is one of the facts in dispute.

Generally, the course of dealing between the appellant and the respondents, as demonstrated by the monthly statements, shewed an apparent adverse balance against the former. But inasmuch as the appellant was "long" as to a considerable amount of securities which stood to his credit in the respondents' or their New York agents' hands, but on which a margin only had been paid, the sale of these securities at the market price then prevailing would change this adverse balance into a substantial profit. Or the appellant could, if he preferred, say at the end of any month, pay the balance due on the purchase price of these securities—that is to say the adverse balance mentioned in the monthly statement—and demand delivery of the stock certificates. Whether he would be required to pay this adverse balance in Canadian or United States funds is a point on which Mr. Cashman made two diametrically opposed statements. The learned trial judge preferred Mr. Cashman's first answer to the plain question put to him, that the payment of the balance of the purchase price would have to be made in New York funds. It is hard to believe that any sane broker would have accepted Canadian money at par to be sent to New York. If he had done so, he would have been obliged

to make up himself the amount of exchange, for obviously New York money would have to be provided. What had already been paid, to wit the margin furnished, came out of moneys which the appellant had to his credit in New York, for otherwise he would have been called upon to supply the necessary margin, which never happened after he had furnished the initial margin of $3,000.00.

It is not necessary to examine the monthly statements in detail, and it will suffice to consider the two last ones. Looking at the statement for December, 1919, it begins by an apparent adverse balance carried over from November of $168,330.94, which, with a charge of $932.86 for interest, made the debit amount on December 31st, $169,263.80. On the credit side is the sum of $60,367.50, sale price of five hundred shares of U. S. Rubber at 121, so that the apparent net adverse balance for the month was $108,896.30. However, the appellant was "long" on 1,200 shares of rubber, 100 shares of U. S. Steel, and the amount of $250.00 in liberty bonds. Of course, the apparent adverse balance would be more than wiped out by the sale of these securities as shewn by the statement for January, when they were all sold with the exception of the liberty bonds. Or, if the appellant had desired, on December 31st, to take delivery of these securities, the balance payable in New York, in New York funds, I take it, would be the above adverse balance of $108,896.30.

Examining now the statement for January, 1920, we find the appellant charged with the purchase of 100 shares of rubber at 125 and 100 shares of the same stock at 124, to wit $12,530.00 and $12,422.50. These sums, with the adverse balance of $108,896.30 from

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December, make the total sum of $133,848.80 on the debit side. During January the appellant sold 1,400 shares of rubber and 100 shares of steel, the sale price of which, with a dividend of $125.00 on his steel stock, netted him the total sum of $200,997.50, so that, after wiping out the amount standing to his debit, the appellant had a balance in his favour of $67,148.70, and was "long" with $250.00 in liberty bonds.

The appellant closed his account on February 7th, 1920. He had purchased, on February 3rd, 400 shares of steel and 100 shares of rubber. These he sold, on February 6th, at a loss, so that, as he was charged a New York premium of $623.08 on $3,748.00, his net loss, there was, on the debit side, $54,893.08, and, on the credit side, with $72.50 for adjustments for September, the sum of $117,338.70, leaving a balance in his favour of $62,445.62, which the respondents paid him in Canadian funds, under reserve of his right to claim the premium on New York funds if he was legally entitled to it.

Now it appears by all the monthly statements that the appellant never took delivery of any of the stocks said to have been actually purchased for him (he asserts that at the end he was refused delivery), but settled on the basis of the difference between the purchase and sale prices, being fortunate enough to realize a very handsome profit.

If we could take the appellant as being a speculator on an expected rise of the market after the purchases said to have been actually made for him, but of which he had no serious intention of taking delivery, his profit or loss being the difference between the purchase and sale prices, inasmuch as his speculation was made in Toronto, although the respondents say it was carried out in New York by actual purchases and sales, it

seemed to me on my first consideration of the case that, as it is not shewn that the respondents made any profit on the exchange—which profit they of course could not keep—their only obligation was to pay the appellant the ultimate difference in his favour in Canadian money.

My difficulty, however, on further consideration, is that although, like the learned trial judge, I have very serious doubts whether any real purchases and sales were made, still I must decide this case on the basis that it is common ground with both parties, who no doubt wished to bring themselves within the rule laid down in *Forget* v. *Ostigny* (1), that all these transactions were actually carried out by the respondents, and their agents, Miller & Co., on the New York market. After the initial advance of $3,000.00 in Canadian money, all the purchases were financed in New York by means of moneys standing to the appellant's credit in New York, so that the amount charged as paid on account of the purchases was paid in New York funds, notwithstanding the respondents' assertion that Miller & Co. were credited with it in their bank account in Toronto. The final balance due to the appellant when he closed his account was a balance remaining to his credit in New York where the sale price of his stocks was paid, and not in Toronto. This being the case, the appellant is entitled to this balance in New York funds, just as he would have received New York money, and exactly the same amount of it, had he taken delivery of these stocks in New York, after paying in New York funds what was necessary to complete their

(1) [1895] A. C. 318.

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purchase, and had then sold them in New York on the dates when they were sold for him on the instructions of the respondents. And if it is true, as asserted by the respondents, that Miller & Co. received in Toronto and in Canadian money the margin paid on account of stocks bought for the respondent's clients—but the facts here shew that they must have used moneys standing to the appellant's credit in New York to make purchases for the latter—they would profit to an easily calculable extent by the exchange, if they could pay in Canadian money what they had received in New York funds for the sale of the appellant's securities.

As a consequence I have come to the conclusion that, on the state of facts admitted and indeed asserted by the respondents, the appellant is right in contending that the balance due to him should be paid in New York funds. I would therefore allow the appeal with costs here and in the Appellate Division, and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Barton & Henderson.*

Solicitors for the respondents: *Tilley, Johnston, Thomson & Parmenter.*