

76, 1936

In the Privy Council

No. of 1935.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

BETWEEN:

J. A. ALLEN, Trustee-in-Bankruptcy
of the Estate of L. S. Clarke, and
L. S. CLARKE in his capacity as a
Trustee

(Plaintiffs) Appellants

—and—

F. O'HEARN AND COMPANY

(Defendants) Respondents

RECORD OF PROCEEDINGS

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For the Appellants.

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17 Victoria Street,
London, S.W. 1.

For the Respondents.

In the Privy Council

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IN THE SUPREME COURT OF ONTARIO

BETWEEN:

J. A. ALLEN, Trustee-in-Bankruptcy
of the Estate of L. S. Clarke, and
L. S. CLARKE in his capacity as a
Trustee

Plaintiffs

—and—

F. O'HEARN & COMPANY

Defendant

10

*In the
Supreme
Court of
Ontario.*
No. 1.
Statement
of Claim
24th January,
1934.

No. 1.

AMENDED STATEMENT OF CLAIM

(Writ issued the 27th day of September, 1933)

1. The plaintiff, J. A. Allen is an Authorized Trustee in Bankruptcy duly appointed Trustee of the Estate of L. S. Clarke. The said L. S. Clarke had been operating Brokerage Offices in the Cities of North Bay and Sudbury in the Province of Ontario up to the date of his Assignment for Benefit of Creditors on the 28th day of February, 1933. The Defendant, F. O'Hearn & Company are Brokers with Head Office in the City of Toronto and with various Branch Offices throughout the Province of Ontario and elsewhere.

2. The said L. S. Clarke and the said defendant, F. O'Hearn & Company, had been jointly operating brokerage offices at North Bay and Sudbury up to the date of Assignment of the said L. S. Clarke dated the 28th of February, 1933. Stocks and securities for money were purchased and sold from time to time for customers of the said offices at North Bay and Sudbury by the defendant herein, and certain of the said shares and securities were retained by the defendant in its Toronto office or elsewhere under its control, as margin for the said sales and purchases. The said L. S. Clarke and the defendant, F. O'Hearn & Company, shared commissions and wire charges in connection with said transactions. The defendant, F. O'Hearn & Company was duly advertised on the windows and elsewhere in the places of business at North Bay and Sudbury. At the present time the said defendant is in absolute possession and control of the offices at North Bay and Sudbury which were previously operated by them in conjunction with the said L. S. Clarke.

*In the
Supreme
Court of
Ontario.*
—
No. 1.
Statement of
Claim.
24th January,
1934.

—continued.

3. During the month of November 1932 one L. S. Bayne, General Manager of the North Bay office above referred to, arranged and agreed with the defendant to acquire 300,000 shares of stock in Peninsular Petroleum for the purpose of drafting the same out directly to the purchasers thereof. Pursuant to the said arrangement, the defendant forwarded to North Bay a necessary supply of drafting envelopes for the purpose of having the names of purchasers filled in and returned to the defendant.

3(a). The said L. S. Bayne in making the said arrangement and in giving the order or orders for the purchase or acquisition of the said shares of stock in Peninsular Petroleum was acting contrary to the express instructions of the said L. S. Clarke, and without any authority express or implied, and the said arrangement and acquisition of the said stocks was not in the ordinary course of business of the said L. S. Clarke or within the general or ostensible authority of the said L. S. Bayne as General Manager of the North Bay office as the defendant well knew. 10

4. The defendant, in breach of the aforementioned arrangement, demanded payment from L. S. Clarke personally for the said shares, and contrary to the agreement, and without justification, refused to deliver the stock out to purchasers, and, in spite of express instructions to the contrary, wrongfully charged the clients' account with the price of the said stock. 20

5. Because the said L. S. Clarke did not make payment in cash for the said shares, the defendant wrongfully presumed to dispose of certain stocks and securities which they knew belonged to clients of the brokerage offices at North Bay and Sudbury.

6. On or about the 19th day of November, 1932, the defendant company obtained from one Charles M. Kaatz, of the City of Toronto, an amount of 500,000 shares of Peninsular Petroleum Limited stock which stock the defendant agreed to hold as security for the amount owing to them in connection with the purchase of the 300,000 shares of Peninsular Petroleum Limited stock as above set out. The plaintiffs crave leave to refer at trial to the Agreement between the said Charles M. Kaatz and the Defendant dated the 19th of November, 1932. 30

7. The defendant well knew that the arrangement or transaction with regard to the shares of stock in Peninsular Petroleum hereinabove referred to, was a separate and distinct transaction and that the defendant was not entitled to charge the marginal account of the said L. S. Clarke with the defendant held for the customers of the said L. S. Clarke with the amount alleged to be due on account of the said transaction in the shares of Peninsular Petroleum, and the defendant agreed by implication from its course of conduct and by an express oral agreement entered into 40

on or about the 19th day of November, 1932, that the account in connection with the purchase of Peninsular Petroleum stock would be kept and dealt with by them as an account separate from the margin account of the said L. S. Clarke on account of his customers and all other accounts.

*In the
Supreme
Court of
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—
No. 1.
Statement of
Claim.
24th January,
1934.

7(a). In breach of the said agreement the defendant proceeded from time to time to dispose of the stocks and other securities placed in its hands by the plaintiff L. S. Clarke, and held by it on the marginal account of the said L. S. Clarke on behalf of and in trust for the customers of the North Bay and Sudbury offices as the defendant well knew.

—continued.

10 8. After the said L. S. Clarke protested against the defendant's action in charging the brokerage account with the purchase price of the said shares of Peninsular Petroleum, and against the defendant selling clients' securities, the defendant agreed to advance the sum of \$10,000.00 to L.S. Clarke to restore the clients accounts, which had been depleted by its action, but the said sum was never paid and eventually the actions of the defendant in charging the general brokerage account with the purchase price of the Peninsular Petroleum Limited Stock, and in selling the clients' securities, compelled L. S. Clarke to go into bankruptcy, and an assignment for the benefit of his creditors was made on the 28th of February,
20 1933.

9. On or about the 11th day of March, 1933, the plaintiff, J. A. Allen as Trustee for the said L. S. Clarke, in order to avoid dangers of a fluctuating market and for the purpose of preserving values and assets for customers and creditors, agreed with the defendant that all shares and securities held by the defendant in connection with its joint enterprise with the said L. S. Clarke, should be liquidated, said stocks and securities and the proceeds from the sale of said stocks, and the equity in the Grain Account carried by the defendant to be paid into a Trust Account in the Canadian Bank of Commerce at Toronto to be disbursed by cheques
30 drawn by the defendant and countersigned by the plaintiff J. A. Allen. In breach of the said Agreement the defendant paid out to itself moneys necessary to totally pay up amount which it claimed in connection with the purchase of Peninsular Petroleum Limited stock as above set out. The defendant presumed to pay over to the plaintiffs an amount which it claimed was a surplus in its hands to the credit of the L. S. Clarke Estate.

10. The plaintiff L. S. Clarke sues in his capacity as a trustee to assert any right or rights vested in him against the said defendant for or on behalf of the said clients and customers of the said L. S. Clarke whose shares were wrongfully disposed of by the said defendant as alleged in this
40 Statement of Claim.

Record.
*In the
 Supreme
 Court of
 Ontario.*
 —
 No. 1.
 Statement of
 Claim.
 —concluded.

THE PLAINTIFFS THEREFORE CLAIM:

1. A Declaration that the defendant and L. S. Clarke were partners in connection with the operation of the Branch Offices at North Bay, Sudbury and Toronto.
2. An Accounting in connection with all transactions between the defendant and the said L. S. Clarke and the defendant and the plaintiff J. A. Allen herein in connection with the brokerage business carried on by the defendant and the said L. S. Clarke jointly in the Cities of North Bay, Sudbury and Toronto or elsewhere.
- 2(a). In the alternative a Declaration that the defendant held the securities in question in trust for the clients and customers of L. S. Clarke or for L. S. Clarke as Trustee of such clients and customers and that the defendant had no right to charge the Trust Account with the purchase price of the said 300,000 shares of Peninsular Petroleum stock. 10
3. Damages because of,—
 - i. Failure of the defendant to draft out 300,000 shares of stocks of Peninsular Petroleum Limited.
 - ii. Failure to recognize and preserve the rights of customers to shares and securities properly margined or paid for. 20
 - iii. Failure to deposit and retain proceeds from sale of stocks and equity in Grain Account.
 - iv. Damages for wrongful sale of the shares and securities held in the account of L. S. Clarke with the defendant.
4. A Declaration that the total moneys received from sale of stocks and securities following Agreement with the plaintiff J. A. Allen dated the 11th of March, 1933, were held in trust for the plaintiff J. A. Allen and customers and creditors whom he represented.
- 4(a). An accounting by the defendant for all securities and moneys received by it as Trustee and judgment for such sum as may be found due to the plaintiffs on taking such account. 30
5. Costs of this action.
6. Such further or other relief as to this Honourable Court may seem meet.

The plaintiffs propose that this action be tried at the City of Sudbury in the District of Sudbury.

DELIVERED at North Bay this 24th day of January, A.D. 1934, by
 J. H. McDONALD, Solicitor for the Plaintiffs.

AMENDED STATEMENT OF DEFENCE

In the
Supreme
Court of
Ontario.
—
No. 2.
Statement of
Defence.
8th February,
1934.

1. The Defendant admits the statements contained in paragraph 1 of the Statement of Claim herein but denies all the other allegations contained therein except as hereinafter specifically admitted.

2. The Defendant operated a private telegraph wire which connected with various brokerage offices in towns and cities in the Province of Ontario north of Toronto, and by an arrangement with the said L. S. Clarke mentioned in the Statement of Claim the said L. S. Clarke was entitled to
10 make use of the said private telegraph wire for the purposes of his brokerage business in North Bay and Sudbury and the Defendant acted as brokers for the said L. S. Clarke in a large number of transactions to be executed on various stock and grain exchanges of which the Defendant was a member or had trading privileges.

3. From February 7th, 1931, until January 31st, 1932, in consideration for the use of the said telegraph wire by the said L. S. Clarke, the said Clarke bore a portion of the expenses of the said wire, which portion amounted to One Hundred and Twenty-five (\$125.00) Dollars per month and after the said 31st day of January, 1932, the Defendant bore the entire expenses
20 of the said wire.

4. With the exception of transactions carried out on the Standard Stock and Mining Exchange all business transactions carried out as aforesaid between the said L. S. Clarke and the Defendant were done upon the basis of the usual brokerage charges and no commissions were shared as between the said L. S. Clarke and the Defendant. With respect, however, to the transactions carried out on the Standard Stock and Mining Exchange the Defendant allowed the said L. S. Clarke half of the commissions, pursuant to the rules of the said Standard Stock and Mining Exchange.

5. On or about the 29th day of January, 1931, the said L. S. Clarke and
30 the Defendant entered into an agreement in writing whereby the said L. S. Clarke appointed the Defendants to act as brokers and it was a term of the said agreement, amongst others that the Defendants might, whenever they deem it necessary, sell any or all of the securities or any other property which might be in their possession or which they might be carrying for the said L. S. Clarke, in order to close out the accounts between them in whole or in part, without notice, and that they might pledge all securities, etc. carried on the account of the said L. S. Clarke and the Defendants crave leave to produce the said agreement at the trial of this action.

6. The Defendant did not know the names of the customers of the said

*In the
Supreme
Court of
Ontario.*
No. 2.
Statement of
Defence.
8th February,
1934.

—continued.

L. S. Clarke for whom he gave instructions to buy and sell from time to time, and carried out all transactions in connection with this account for and on behalf of the said L. S. Clarke, pursuant to the said agreement referred to in paragraph 5 herein.

7. If the Defendant was advertised in the windows and elsewhere in the places of business in North Bay and Sudbury in any way that would imply a partnership between the said L. S. Clarke and the Defendant, the Defendant is not aware thereof and in fact there was no partnership existing at any time between the said L. S. Clarke and the Defendant.

8. If the Defendant has now possession of the offices at North Bay and Sudbury mentioned in paragraph 2 of the Statement of Claim, these were taken over by the Defendant or on its behalf subsequent to the bankruptcy of the said L. S. Clarke, and in no way pursuant to any prior agreement or relationship that might have existed between the said L. S. Clarke and the Defendant. 10

9. With reference to the allegations in paragraph 3 of the Statement of Claim the orders for purchases totalling three hundred thousand (300,000) shares of Peninsular Petroleum stock as alleged therein, were given to the Defendant in the same manner as all other orders for the purchase of stocks and there was no special arrangement or agreement as to drafting such stock directly to the purchaser, and the said L. S. Clarke was personally liable for the said shares in the same manner as for all other shares purchased by the Defendant on his account. 20

9(a). The Defendant denies that any arrangement or agreement was made with L. S. Bayne on his own behalf as alleged in paragraphs 3 and 3a of the amended Statement of Claim and all orders taken from L. S. Bayne were taken from him as general manager of L. S. Clarke and in all such dealings the said Bayne was acting with the expressed or implied authority of L. S. Clarke in the ordinary course of business of the said L. S. Clarke with general and ostensible authority of the said Bayne as general manager of the North Bay office and if at any time the said Bayne did not have authority to act on behalf of the said L. S. Clarke as alleged in paragraphs 3 and 3a of the amended Statement of Claim, the Defendant had no knowledge thereof and at all times the said L. S. Clarke held out the said Bayne as his general manager having full authority to act on his behalf in all matters pertaining to the purchase and sale of stocks and securities. 30

10. Any refusal to deliver the said Peninsular Petroleum stock, pursuant to the orders of the said L. S. Clarke was by reason of the fact that the said L. S. Clarke failed to put up sufficient money to cover the price of the said stock. 40

11. All stocks sold or disposed of by the Defendant on the account of the said L. S. Clarke were done properly and in accordance with the agreement with the said L. S. Clarke.

*In the
Supreme
Court of
Ontario.*

12. Any agreement that may have been entered into between the Defendant and one Kaatz as referred to in paragraph 6 of the Statement of Claim was entered into at the request of the said Clarke and for the purpose of assisting the said L. S. Clarke in meeting his obligations to the Defendant.

*No. 2.
Statement of
Defence.
8th February,
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-concluded.

10 13. There was no agreement nor any conduct from which any such agree-
ment could be implied, as alleged in paragraph 7 of the Statement of Claim,
and any stocks sold on account of the said L. S. Clarke by the Defendant
were sold in the usual course of business and the Defendant never knew
the names of the customers of the said L. S. Clarke on whose account the
said L. S. Clarke may have ordered such stocks to be purchased, and the
Defendant was at all times entitled to charge the marginal account of the
said L. S. Clarke with the amount due on account of the transaction in
the shares of Peninsular Petroleum and the Defendant at no time agreed to
keep the Peninsular Petroleum account separate in such a way as to re-
lease the general marginal account of the said L. S. Clarke from the terms
20 of the agreement mentioned in paragraph 5 herein or otherwise.

14. The Defendants deny any agreement as alleged in paragraph 8 of the Statement of Claim, and if there was any such agreement there was no consideration therefor.

15. The Defendants deny that they failed to comply with the arrangement mentioned in paragraph 9 of the Statement of Claim.

15a. The Defendant denies any knowledge of any trust as alleged in paragraphs 7a and 10 of the amended Statement of Claim herein and denies any notice, either actual or constructive, of such trust, that would in any way render the Defendant responsible as alleged.

30 16. The Defendant therefore submits that this action should be dismissed with costs.

DELIVERED at Toronto, this 8th day of February, A.D. 1934, by Fennell, Porter and Davis, 357 Bay Street, Toronto, Solicitor for the Defendant.

TO: J. H. McDonald, Esq.,
North Bay, Ontario,
Solicitor for the Plaintiffs.

IN THE SUPREME COURT OF ONTARIO.

ALLEN VS. O'HEARN

In the
Supreme
Court of
Ontario.
—
No. 3.
Opening
Proceedings
at Trial.
5th April, 1934.

- TRIED BEFORE THE HON. MR. JUSTICE KINGSTONE at
North Bay, Ont. without a Jury.
—J. C. McRuer, K.C., J. H. McDonald and F. A. Brewin, Counsel for
the Plaintiff.
—D. H. Porter, Counsel for the Defendant.

April 5, 1934.

HIS LORDSHIP: Well, Mr. McRuer, what is this action about? I
have not read the record. 10

MR. McRUER: I think probably it might be of advantage to your
Lordship and possibly shorten our time if I gave your Lordship rather a
thorough outline of the action, because there are some intricacies in con-
nection with it.

L. S. Clarke is a resident of North Bay, and prior to 1931 carried on
business here as a contractor, and in the Clarke Lounsbury company,
which was a company that did a certain amount of lumbering business,
and business of that sort.

The O'Hearn Company, the defendants, carried on a general broker-
age business in Toronto, and were members of the Standard Stock and 20
Mining Exchange in Toronto. In January, 1931, they opened up nego-
tiations with Clarke to open a brokerage office in North Bay and one in
Sudbury, for the purpose of doing a general brokerage business in these
two places. Clarke after some negotiation with them agreed to do this,
and carried on business here as a correspondent here of F. O'Hearn and
Company. He was not a member of any mining exchange, but placed his
orders through O'Hearn and Company, who would execute them on the
appropriate exchange. Practically all the orders were mining exchange
orders. There was some small business done in New York, and some small
business done in grain. 30

The negotiations, I should tell your Lordship, to open the business in
North Bay and Sudbury were carried on to a certain limited extent with
one L. S. Bayne, who had had some previous connection with the broker-
age firm of Stewart, McNair & Company, who had operated offices both
here and in Sudbury.

In November, 1932, Bayne, contrary to Clarke's specific instructions
became involved in a transaction in what is known as a penny stock called
Peninsular Petroleum—for short it is known as Pen Pete in the corres-
pondence. There are certain dates in November that will become rather 40
important in the trial.

Bayne, it appears, had been buying this stock for a man of the name

of Barkell, whom Clarke had forbidden Bayne to do business with.

HIS LORDSHIP: What were the relations between Bayne and Clarke?

MR. McRUER: Bayne was the Manager of the North Bay office. The Sudbury office was managed by a man named Woods. And I should tell your Lordship that on the books of F. O'Hearn & Company the two offices were kept separately. There was an agreement entered into, I should also tell your Lordship, which was in writing, and which will be put before your Lordship, in connection with the offices when they were

10

opened.

HIS LORDSHIP: That agreement sets out the exact relationship between Clarke and the defendant O'Hearn?

MR. McRUER: I cannot say that it does exactly. It is a sort of general brokerage agreement that was used. I do not know that it is comprehensive of the whole relationship. Clarke was doing business here on margin, and he purchased stock for clients—we say to the knowledge of O'Hearn and Company on margin—and carried these margin accounts with O'Hearn and Company, bona fide margin accounts for clients both here and in Sudbury. The Sudbury accounts were kept separately on the

20

O'Hearn books from the North Bay accounts; and when calls for margin were made, they would call Sudbury for margin, or they would call North Bay for margin.

When Bayne became involved in this purchase of Peninsular Petroleum stock for this man Barkell, he carried these deals through a secret account that he had under the name of Smith and Greenwood on Clarke's books. He had power of attorney to sign cheques for Clarke. Clarke was engaged in his other business, in the Clarke Lounsbury Company, and was not giving any close detailed attention to the management of the office. He trusted Bayne.

When they came down to November, 1932, several purchases of Pen Pete were being made. On November 4th a cheque of L. S. Clarke's, which was signed by Bayne as his attorney, had not been honoured, and Mr. Gardner of the O'Hearn Company called Bayne on the telephone in reference to this cheque, and Bayne had given him some assurance that it would be honoured at once. Then we say that Gardner agreed with Bayne to "draft out" Peninsular Petroleum stock from the O'Hearn Company at Toronto. Then Clarke's general account would not be chargeable with it.

HIS LORDSHIP: Is that an expression used in brokerage—

MR. McRUER: I do not think so, any more than it just means this; that they would send the stock out from O'Hearn and Company with draft attached to the ultimate purchaser, whose name Bayne would supply them with. And pursuant to that arrangement we say that they sent up to North Bay 53 drafting envelopes for Bayne to fill in the names, send them back to O'Hearn, and then O'Hearn when they received the stock from the clearing would place it in them and send it to the ultimate purchaser.

*In the
Supreme
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No. 3.
Opening
Proceedings
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—continued.

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—
No. 3.
Opening
Proceedings
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—continued.

Bayne then placed on the 8th and 9th of November orders with O'Hearn and Company that he says he had received from parties in New York. On the 8th, approximately 78,000 shares of this Peninsular Petroleum stock at something about 11 or 12 cents a share. On the 9th he went on and placed orders to the extent of 246,000 shares of this Peninsular Petroleum stock.

On the afternoon of the 9th, Gardner then seeing the large orders that had come through, telephoned to Bayne about it. The evidence we will submit is that Gardner asked him, "How are we going to get paid for this?" Bayne said, "You agreed to draft this out to the customers." Gardner said he did not make any agreement for any amount like that. 10

Then they refused to draft out the stock, and they called Clarke on the telephone—it was the first Clarke had heard of the transaction—and they proceeded to charge the margin account which was carried for other clients with about \$49,000, the purchase price of these shares.

I may say, my Lord, that these shares are not margin shares. We will submit evidence to show that any stocks under a dollar were not carried as margin.

Our contention is this; that the customers who dealt with Clarke used Clarke as their agent to place orders through O'Hearn. He was agent for undisclosed principals. O'Hearn carried their stock and their margin account in trust for those undisclosed principals; and that when this extraordinary transaction came along, that was not a margin transaction, that was different from margin transactions, in which they sought to hold Clarke, the agent, personally liable; O'Hearn could not charge the customers' general margin account with this debt of \$49,000. 20

Clarke protested that they could not charge the customers' account with this amount of money; and he went to Toronto and entered into an agreement that they would segregate this. He arranged with someone to put up 500,000 shares of Peninsular Petroleum, a man by the name of Kaatz, as security for the transactions that took place on the 8th and 9th of November; and a written agreement was entered into whereby this was lodged with O'Hearn and Company as security for the purchase price of 300,000 shares, which in round figures was the amount purchased on these two days. 30

O'Hearn and Company actually transferred on their books the purchase of the 300,000 shares to a special account; and showed that amount, and the 500,000 shares lodged as collateral security "long" to that account.

Then they proceeded to liquidate Peninsular Petroleum stock in retirement of this specific indebtedness, and they liquidated 126,000 shares, and the market went out of this penny stock completely—it went away to nothing. 40

Then they carried that along in that account, rendering Clarke at the end of December, the end of January statements of the special account, showing these shares carried "long." And on the 8th of February they

transferred the whole thing back into the customers' margin account, and notified Clarke that they were proceeding to sell the shares in the margin account.

HIS LORDSHIP: How did the account stand at that time?

MR. McRUER: It was well margined if this indebtedness of \$90,000 had not been debited to the account. I should say that on the 25th of January Clarke consulted a firm of solicitors and had them write a letter to the O'Hearn Company, notifying them that they should not charge this indebtedness against his customers' margin account; that the account they held was for individual customers, and he sent them a list of the customers for whom they were carrying shares, with a specific statement what shares they were carrying for those customers. And it was over the head of that that they sold out these shares on the customers' account.

The result of that was that Clarke was forced into bankruptcy. Because they had refused to draft out the stock to the ultimate purchasers and look to them, they sought to look to Clarke for it, and having sold out his customers' accounts, he could not account to his customers for the shares that they had bought through him on margin; and Clarke made an assignment on—I think it was the 28th of February.

Then they proceeded again after the assignment to make another sale on March 6th, and then on March 11th, Mr. Allen, the trustee, finding himself in the position of a trustee, and that the O'Hearn Company had a claim against the estate, at any rate, for the full purchase price of the margined stock—we do not dispute that, that he had a right to indemnification out of the shares that they held, and that if he had to pay up O'Hearn and Company he had a right to be indemnified out of those shares. He did not want to speculate in stocks. They were mostly mining stocks, and at that time—it was on the very day, March 11th, that there was a moratorium on in New York, the stock exchange was closed there—he thought he should protect the interests of the creditors, and consented to a sale of the stock on condition that the proceeds would be paid into a joint account in the Canadian Bank of Commerce—that is, all that was realized on the stock should be paid in to a joint account in the Canadian Bank of Commerce with O'Hearn and himself, to be checked out by cheques signed by both, so that O'Hearn's contention that they were entitled to debit this account with the \$49,000 Peninsular Petroleum deal—their rights would be protected in that way until there should be some settlement of the case. But O'Hearn's paid in only the equity. They indemnified themselves for the full amount of all that was owing to them in respect of Peninsular Petroleum and everything else, and paid in the surplus to the joint account, and not the proceeds. Mr. Clarke protested against that, but with no result.

Then this action was brought. It has always been in these brokerage transactions, and the priorities and the trusteeship that exists, a question of what all the rights of the parties are, and their priorities. In order that no question should arise as to the right devolving on the trustee in bank-

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—continued.

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--concluded.

ruptcy to sue, Clarke is added as trustee for the clients who had shares deposited, or who had purchased shares on margin through O'Hearn and Company, so that all the rights could be decided in this action. And, of course, it is important for the trustee to have a proper declaratory judgment.

HIS LORDSHIP: I have to decide the principle, and there will be a reference as to the amount I suppose. I do not have to go into all these figures?

MR. McRUER: I think if your Lordship makes the declaratory judgments the matter can be worked out either in a reference or by agreement as to what the rights are afterwards. 10

HIS LORDSHIP: Approximately how much is involved in this case?

MR. McRUER: Well, it is about \$49,000. That was the purchase price of the Peninsular Petroleum. And these questions arise as we go along: Should O'Hearn's have known that this was a transaction out of the ordinary course of business? Should they have been on their guard when they got orders from a manager of an office for a penny stock amounting to \$49,000 in two days? And the question arises whether there is any liability on Clarke to pay for this. Clarke takes the position; first, that he is not liable to pay for it at all, or through the trustee; second, the position that if he is liable, the customers for whom he traded and was trustee are not chargeable with it, and he wants the trust fund restored. He has a strong feeling in regard to his trusteeship. 20

Broadly that is the scope of the action, my Lord.

Plaintiff's
Evidence.
No. 4.
Extracts from
Examination
for Discovery of
Elly Marks.
5th April, 1934.

MR. McRUER: I think there are some matters that can be established by the examinations for discovery in the matter of form at the opening. I may say that the firm of F. O'Hearn and Company is not a limited company. It is a partnership composed of Mr. Richardson, Mr. Marks and Mr. Gardner. Those names will be referred to from time to time.

I am reading first from the examination of Elly Marks: 30

1. Q. Mr. Marks, you are a member of the partnership of F. O'Hearn & Company? A. Yes.

2. Q. And the other partners are Mr. Richardson and Mr. Gardner? A. Yes.

13. Q. Who is the senior member of the firm? A. T. A. Richardson.

17. Q. At any rate there was no general supervision or duties of supervision given to any one member? A. Mr. Gardiner is more the office manager at the present time and has been for some reasonable time.

34. Q. But you had no personal knowledge of the matter further than that? A. I knew he was to get half the commission; the regular correspondents' commission. 40

35. Q. What are your arrangements or what were your arrangements with regard to commission with him? A. He was to get half the

commission on stocks traded in on the Standard Mining Exchange, but not on the Toronto Stock Exchange. There is a card I believe would set that out.

38. Q. You couldn't allow commission, for instance, to a man who was not trading as a broker? A. No.

39. Q. For instance, if someone came in to make a large purchase from you you were not permitted to allow him a commission? A. No.

47. Q. But to get back to my former question, your expectation when Clarke started up in business there was that he was starting up there
10 as a broker and correspondent of your firm to take orders from parties that wished to buy and sell shares of stock? A. Oh, naturally. He was doing a general brokerage business.

48. Q. And it included transactions on margin? A. Margin—both ways.

53. Q. I know, but he would get instructions from you as to what the marginal requirements were? A. Probably he would get them as a rule, what marginal requirements would be expected.

54. Q. On various stocks? Some stocks would have greater margin requirements than others and some stocks you wouldn't deal in on margin
20 at all? A. That is true.

56. Q. From the files I have a letter here that does say something about margin, dated June 1st, 1931. You might be able to look at that and tell me whether you recognize the signature? A. Yes, I recognize the signature.

57. Q. Whose is that? A. I think it is Gardner's. The marginal requirements I believe sometimes varied, as in that letter.

58. Q. And as they varied you would notify Clarke? A. We would, yes. The terms might vary according to our banking arrangement.

88. Q. Can you say it is Gardner's or is there any doubt about it?
30 A. There isn't much doubt in my mind. It is Gardner's.

103. Q. You had correspondence, of course, with Clarke from time to time and you were familiar with the letterheading he used and bill-heading? I show you one, which is a copy of a letter addressed to you? A. Yes.

104. Q. You are familiar with that letterhead? A. I have seen them.

105. Q. Well, you knew they were in use throughout the time you were doing business with him there? A. It wasn't my department to see them.

40 106. Q. But you did see them? There would be correspondence going back and forth between you all the time? A. They were not sent personally to me.

107. Q. With your firm? A. Oh, no doubt.

163. Q. I show you a document. This is a sample, is it not, of your

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Plaintiff's
Evidence.
No. 4.
Extracts from
Examination
for Discovery of
Elly Marks.
5th April, 1934.

continued.

*In the
Supreme
Court of
Ontario.*

drafting envelope? A. It would be one that would be used around this time that was got out.

Plaintiff's
Evidence.
No. 4.
Extracts from
Examination
for Discovery of
Elly Marks.
5th April, 1934.
—concluded.

—EXHIBIT 1—Letter, June 1, 1931, F. O'Hearn & Company to L. S. Clarke, Sudbury.

—EXHIBIT 2—Sample of drafting envelope.

No. 5.
Extracts from
Examination
for Discovery of
T. A.
Richardson.
5th April, 1934.

MR. McRUER: I wish to read from the examination of T. A. Richardson the following questions:

1. Q. Mr. Richardson, you are a member of the partnership of F. O'Hearn & Company? A. Yes.

2. Q. And you were a member of the partnership in January, 1932? 10
A. Yes.

9. Q. What arrangement do you say you made? A. We were to give them a regular service of wires for quotations of stocks and handling of securities and we were to treat them as correspondents.

10. Q. What do you mean by a regular service of wires and quotations of stocks? A. Well, quotations on stocks, the selling price of stocks and commodities, changes in the price market.

11. Q. What was the object of quotations? What were you arranging that for? A. So as to enable them to do business and know what 20
stocks were selling at.

12. Q. Did they run a board? A. Yes, they had a board room.

17. Q. And you would send out quotations over the wire which these offices would get simultaneously to put on their boards? A. Yes.

18. Q. And when you say you were arranging with Mr. Clarke in regard to the quotations and wire that is what you refer to? A. Yes, so that he could carry on his own end of it.

19. Q. He would carry on business and announce the quotations and put them on the board, and so on? A. Yes.

20. Q. And of course you also made arrangements with him, I take it, that you would do business on margin? A. We were to carry his 30
account for him here and any marginal business he wanted.

21. Q. So that the trades that were made with customers in North Bay or Sudbury would be carried in the account here and the securities deposited here? A. Yes, except those that were taken up for cash.

22. Q. I see in the file a large number of copies of letters sending down securities to F. O'Hearn & Company? We have reams of them here. You would have the originals on your files, no doubt? A. Well, I expect so.

31. Q. Did you send out wires for the purpose of conveying information to customers as to what was expected of certain stocks? A. We 40
didn't make a practice of that. If we investigated some particular old

established concern we might recommend a stock of that kind, but we were usually very particular as to what we did recommend.

32. Q. Quite so, but when you had made an investigation and were satisfied that a stock could be advantageously dealt in you would send out wires to Clarke's office at any rate for information to the customers? A. It would usually be in the form of an analysis, something that we would say we thought was good looking.

33. Q. And these, I suppose, would be posted on the board? A. I think so. They do in our own office anyway.

10 34. Q. That is what you would expect to be done with them in the Clarke office? A. Yes, I think so. They would use them to obtain business or bring it to the attention of his customers.

35. Q. When you made your arrangement with Clarke, as you have told me, was it your understanding that he was going to open an office there to do business with customers in North Bay and Sudbury? A. Yes.

36. Q. And that he would receive orders from them to purchase stocks on margin and those orders would be filled through your office? A. Yes, the regular general brokerage business.

20 37. Q. And on the transactions that took place on the Standard Stock Exchange you would allow him half commission? A. Yes.

48. Q. Just taking my illustration then, the Wright Hargreaves that was deposited by the Sudbury customer would be used by you to implement if necessary margin for the North Bay office or for some customers in North Bay? A. We looked on it as all L. S. Clarke. We were just doing business with Clarke.

49. Q. You were doing business with Clarke, that is true, but you knew at the same time that he was your correspondent there and he was doing business with the public generally? A. Yes.

30 97. Q. Peninsular Petroleum was a stock that was dealt with for cash; it wasn't margined stock? A. No, it wasn't margined stock.

103. Q. And the idea in sending the drafts out was that the name should be filled in up there to parties to whom the drafts were to go? A. Yes, that is what I gathered, but I think Gardner had asked him to forward the names down here so that we could get the drafts out more quickly as soon as the stock was received.

104. Q. I would have thought that was the natural way to do it? A. That was very unusual. I mean we had never been asked for anything like that. It was only on account of these heavy purchases and we thought
40 we would help Clarke.

108. Q. Do you remember an interview in which an agreement with Kaatz was signed? A. Well, I was present at the time that that took place. I didn't know who Mr. Kaatz was but Clarke had been carrying on negotiations with these people that were connected directly or indirectly with Peninsular Petroleum.

109. Q. I show you an agreement dated the 19th November, 1932.

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Plaintiff's
Evidence.
No. 5.
Extracts from
Examination
for Discovery of
T. A.
Richardson.
5th April, 1934.
—continued.

This would be ten days after the last purchase. Is that your signature?
A. Yes.

140. Q. Of course you realized that that collateral had come from customers in North Bay or Sudbury? A. That was Clarke's affair; it wasn't ours.

141. Q. You realized that? A. Why, certainly. Of course we had no idea what amount of money he might have had of his own in there. We had no way of telling that.

145. Q. Before we leave the Kaatz agreement, as far as that is concerned you are not complaining that the terms of it were not carried out? A. Well, he deposited the shares. 10

146. Q. And you have no complaint to make in that regard? A. In what way?

147. Q. In any way? I just want to clear that up? A. Well, all I know is he agreed to deposit the shares under certain conditions, and he did.

148. Q. And as far as that goes you are satisfied? A. Well, it was Clarke's agreement; it wasn't ours.

149. Q. Well, you were parties to it. He is agreeing to do certain things? A. Well, he was depositing the shares for Clarke which indirectly was more protection for us. 20

150. Q. And as far as that agreement goes you are satisfied that the terms of it were carried out? A. Insofar as he deposited the shares, yes.

151. Q. Or any other way? A. Well, what other way do you mean?

152. Q. I do not want you to suggest some other way they were not carried out or anything like that, that is all? A. I know the essential thing was he was putting up these shares for Clarke, and apparently he did. 30

176. Q. Then you told me when you got the letter of January 25th, which is Exhibit 7, you were also furnished with some lists of the customers at North Bay and Sudbury? A. There was some list came in.

177. Q. I show you a list that is produced by Mr. Porter as one of your productions?

MR. PORTER: I think that came with the letter.

178. Q. Is that the list that came with the letter? A. It may be. I think it is.

200. Q. I see that Kaatz didn't get the 500,000 shares of Peninsular Petroleum stock that was lodged with you pursuant to the agreement until the 22nd March, 1933? Look at this and tell me if that is the receipt? A. That is the receipt for the 500,000 shares. 40

202. Q. I show you a memorandum that is on it "300,000 shares Pen Pete November 8 and 9." There is something written below it. What is that? A. "Transfer SPL, also 126, sold 16th." I imagine that is thousands.

203. Q. Whose handwriting is that in? A. Gardner's.

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—EXHIBIT 3 —Agreement dated November 19, 1932, between Charles M. Kaatz and F. O'Hearn & Company.

Plaintiffs'
Evidence.
No. 5.
Extracts from
Examination
for Discovery of
T. A.
Richardson.
5th April, 1934.

—EXHIBIT 4 —Letter January 25, 1933, L. S. Clarke to F. O'Hearn & Company.

—concluded.

—EXHIBIT 5A—List of Sudbury accounts enclosed in Exhibit 4.

—EXHIBIT 5B—List of North Bay accounts enclosed in Exhibit 4.

—EXHIBIT 6 —Copy of letter of January 30, 1933, F. O'Hearn & Company to L. S. Clarke in reply to Exhibit 4.

10 —EXHIBIT 7 —Memorandum referred to at question 202 of Mr. T. A. Richardson's examination.

MR. McRUER: Now, from Mr. Gardner's examination, my Lord:

1. Q. Mr. Gardner, I understand you are one of the partners of F. O'Hearn & Company? A. Yes.

2. Q. And from Mr. Richardson and Mr. Marks I rather gathered that one of your particular duties was more or less to oversee the book-keeping and accounting departments? A. Yes.

3. Q. And you have been a partner of F. O'Hearn & Company for how long? A. Since October 1929.

20 21. Q. I see the card is dated on the top the 29th January, 1931. That would apparently fix the date that the card was signed? A. Yes.

22. Q. Then at the time this card was signed, Mr. Gardner, and delivered to you, Mr. Clarke was opening an office in North Bay and in Sudbury? A. Yes.

23. Q. To carry on business there as a local broker? A. Yes.

24. Q. And you opened accounts in your books for L. S. Clarke? A. Yes.

25. Q. What accounts were opened? A. One account opened for North Bay I think, a Canadian account, and one for New York stock account.

26. Q. That is for the North Bay office? A. Yes.

27. Q. North Bay office Canadian account and New York account? A. Yes.

28. Q. And a grain account? A. And there will be a grain account, Canadian account and an American account.

Plaintiffs'
Evidence.
No 6.
Extracts from
Examination
for Discovery of
Albert
Gardner.
5th April, 1934.

*In the
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Plaintiffs'
Evidence.
No 6.
Extracts from
Examination
for Discovery of
Albert
Gardner.
5th April, 1934.
—continued

29. Q. So that for the North Bay office there would be four accounts? A. Yes.
30. Q. And the Sudbury office? A. I think the same.
45. Q. Now just let us get the accounts that you carried for L. S. Clarke as they show in the ledger; The first account, how would you describe that? A. L. S. Clarke North Bay—New York account.
46. Q. Oh, I see; I didn't see the "New York" in there. Then something here marked "New York margin account." Is that anything different? A. No, I don't think so.
47. Q. That is the same. Then the next is "L. S. Clarke Canadian margin North Bay"? A. Yes. 10
48. Q. And then you have "L. S. Clarke North Bay special account"? A. Yes.
49. Q. "Canadian," and marked "N. A." What does the "N.A." stand for? A. "N. A." is their call letter on the telegraph.
50. Q. That is the one that had to do with Peninsular Petroleum? A. Yes.
51. Q. We will come back to that, Mr. Gardner, later on. Then there is "L. S. Clarke, Sudbury, New York"? A. Yes.
52. Q. "L. S. Clarke, Sudbury, Canadian"? A. Yes. 20
53. Q. "Sudbury margin account," that is just a continuation, is it? A. Yes.
54. Q. You didn't keep any separate account for cash transactions and margin transactions? A. No. They all went in together.
55. Q. Then let us get the course of dealing that was carried on, Mr. Gardner: You had, Mr. Richardson told us yesterday, wires connecting your office with both the Sudbury and North Bay offices? A. Yes.
56. Q. And there were board rooms in the Sudbury and North Bay offices? A. Yes.
57. Q. And you sent out over these wires quotations? A. Yes. 30
58. Q. And those quotations were sent out for the convenience of customers who might visit the Board rooms? A. Yes.
59. Q. And then when purchases were made through L. S. Clarke a wire would come through over your private wire for the order? A. Yes.
60. Q. That order would come into your wire room I take it? A. Yes.
61. Q. And would be transmitted from there to your floor man? A. By the order clerk.
62. Q. And you keep a record of those orders do you? A. Yes.
63. Q. So that we would be able to get the original orders in connection with the Peninsular Petroleum deal on the 8th and 9th November? A. Yes sir. 40
64. Q. Do you keep a record of what is transmitted from your office to the floor of the Exchange? A. No. I think after about a month or so they destroy them.
65. Q. Have you them in this particular transaction? A. No.

66. Q. Or were they destroyed? A. They were destroyed.

67. Q. And then, just to follow out the course, if the transaction was a margin transaction either cash or collateral would have to follow the order? A. I don't quite understand that.

68. Q. If it was a margin transaction, I am just taking an order that comes through Clarke? A. Yes.

69. Q. At North Bay, as a broker, from a customer who comes in and wants to make a deal on margin. Then you have told me how the order was transmitted over the wire and so on? A. Yes.

10 74. Q. But then if the account didn't require margin, or whether it required margin or not, when you made the purchase of stock that was required pursuant to the order you would charge Clarke's account with the purchase price? A. Yes.

75. Q. And then the stock would be delivered to you? A. Yes.

76. Q. And then held in that account as security for the unpaid balance? A. Yes.

77. Q. And Clarke did from time to time send down securities as collateral? A. He must have, yes sir.

20 78. Q. Well your records would show what came in as collateral at different times? A. Yes.

79. Q. And this would also be held in the account? A. In the account.

80. Q. As collateral for the general balance? A. Yes.

81. Q. And of course you contemplated and understood that Clarke was going to take orders from customers on margin when he started up in business up there? A. Yes.

87. Q. Then you were present in the office in the early part of November when the Peninsular Petroleum purchase was made? A. Yes.

30 88. Q. The large buying was on the 8th and 9th of November, was it not? A. The heavy buying, yes, it was Mr. McRuer.

89. Q. Just how many shares were bought on those days? Have you a record of that? A. Yes. On the 8th there were 78,000 bought; on the 9th there were 247,000.

91. Q. Now just so I can get it on the record, you are producing the buy slips in respect to Peninsular Petroleum for the 8th and 9th November, that is what these documents are? A. You have the 8th and I have the 9th here.

92. Q. I will not encumber the record with these at the moment; you will be leaving these with Mr. Porter, will you? A. Yes.

40 93. Q. They show by a stamp of some sort in the left hand corner the hour that the order was placed? A. Entered, yes.

94. Q. Is that the hour that it comes in? A. Yes, the hour that it came in.

100. Q. Just prior to the 9th you had had a cheque from Clarke for \$7500 that had been returned N.S.F.? A. It wasn't actually returned,

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Mr. McRuer, it was reported by the bank unpaid and the bank held it over the next day.

101. Q. When was that? A. I think it was on a Friday, November 4th.

102. Q. And did you communicate that fact to the North Bay office? A. Yes.

103. Q. By wire? A. By telephone.

104. Q. And whom did you speak to there? A. Mr. Bayne.

105. Q. And what did he say about it? A. He said to have the bank hold it over and it ought to be paid the next day. 10

106. Q. And was it paid the next day? A. Yes.

107. Q. Well was it paid in Toronto the next day? A. At North Bay.

108. Q. It went through to North Bay? A. Yes.

109. Q. It was held in the bank at North Bay, was it? A. It was at North Bay, they telegraphed the bank here in Toronto and they told them to hold it.

110. Q. And was it at that time that you had a talk with Bayne about drafting out stock? A. Yes sir.

111. Q. When you were speaking on the long distance 'phone in connection with this cheque? A. Yes. 20

112. Q. And what was your conversation with him in reference to the drafting out? A. He wanted to know if I would send him some of our draft forms, that he wanted to send some drafts out and if I would send the draft forms up to him at North Bay he would fill in the names and return them to me and by this time we would have stock in from our clearing and be able to send the drafts out for him, get some money for him.

113. Q. It was Peninsular Petroleum stock that he was referring to? A. Yes. 30

114. Q. That was to be handled in that way? A. Yes.

115. Q. And you agreed to do that? A. Yes sir.

116. Q. And you sent a quantity of draft forms? A. Yes.

123. Q. And then, completing the manner in which you expected the transactions would be handled with the drafts, you said he was to fill in the names on the drafts and send them back to you? A. Yes.

124. Q. And you would have the stock from the clearing by that time? A. Yes.

125. Q. And you would then put the certificate, I take it, in the drafting envelope and send it through the Bank of Commerce, your bank? A. Yes. 40

126. Q. To the party at the place indicated on the draft by Bayne? A. Yes.

127. Q. Then when the draft would be accepted and the stock taken up your account with the Bank of Commerce in Toronto would be duly credited with the proceeds of the draft? A. Yes.

128. Q. They were sight drafts? A. I don't know how they were marked, Mr. McRuer.

129. Q. Well your intention would be of course to draw at sight? A. Yes.

130. Q. You weren't going to send stock out on a time draft? A. No. "Demand" I think they call it.

131. Q. Well it was Friday the 4th you had this long distance conversation about the drafts? A. Yes.

132. Q. And did you send them out that day? A. Yes.

10 133. Q. Have you a copy of a covering letter? A. I don't think there was any letter covering it at all.

134. Q. Any wires or anything of that sort referring to it? A. No.

135. Q. And I am advised that it was fifty-three drafts that were sent out? A. I don't know the number, Mr. McRuer.

138. Q. You were going to deal evidently with Peninsular Petroleum differently to other stock transactions? A. At that time, yes sir.

20 139. Q. And then you had no further communication with Bayne in regard to Peninsular Petroleum between that time and the afternoon of the 9th November when I believe you called him on the telephone? A. I don't think I had, no.

140. Q. None that you recollect? A. No.

141. Q. And as far as your recollection goes you would say you hadn't any? A. That is right.

142. Q. Then if the drafts were sent out that day they would arrive on Saturday the 5th I suppose at North Bay? A. Yes.

30 143. Q. And do you know what time of day it was on the Friday that you had the conversation over the long distance 'phone? Would it be after the bank closed? A. Yes, I would think around four o'clock. I mean time enough for the Bank of Commerce at North Bay to wire back to Toronto and Toronto to get in touch with us.

144. Q. So that quite probably the drafts were not sent out that day? A. I think they were though, Mr. McRuer, I don't know.

145. Q. Sunday would be the 6th, Monday the 7th, and heavy buying apparently started on the 8th? A. Tuesday.

146. Q. Tuesday the 8th, yes? A. Yes. They bought 78,000.

147. Q. 78,000 on that day. And then the buying continued on Wednesday the 9th? A. Yes.

40 148. Q. And you didn't communicate with Bayne or with Clarke on Tuesday? A. I have no recollection of it.

182. Q. And notwithstanding the fact that you had had this transaction that you have told me about in regard to drafting the shares out, the Peninsular Petroleum shares, 78,000 were purchased on the 8th? A. Yes.

183. Q. Through you. And 197,000 on the 9th before you spoke to Bayne? A. Yes.

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184. Q. Without any other communication with Bayne than you have told us about? A. Yes.

185. Q. And you wrote no letters about it in the meantime? A. No sir.

186. Q. When you did learn of the large amount of buying that was going on you felt that it was something that Mr. Clarke probably didn't know about? A. Yes.

189. Q. But you had no conversation with Mr. Clarke? A. No.

190. Q. And you didn't write any letters in reference to it? A. No.

191. Q. Everything that was said was said over the telephone? A. Yes.

208. Q. But you hadn't limited the amount that you were agreeing to send out on drafts? A. No sir.

209. Q. Well then you had an interview, hadn't you, with Bayne and Clarke or one of them later on? A. Yes. They came down.

210. Q. About how long would that be afterwards? A. I think it was on the 19th when they brought that Kaatz agreement in.

211. Q. That is dated the 19th? A. Yes.

212. Q. And have you any recollection of what was said when this agreement was brought in? A. I think Mr. Jenner came in with Mr. Clarke and Mr. Bayne Saturday morning. (Produces a paper).

218. Q. They came down on the 19th A. Yes.

219. Q. And do you remember any conversation that took place on the 19th? A. Well on this Mr. Jenner I think took part in the conversation, or led the conversation, said that he brought this agreement in, and Clarke and Bayne were there and they were to give 500,000 shares as collateral.

220. Q. Well now, Mr. Gardner, Mr. Richardson was present at this time, wasn't he? I note he signed this agreement? A. Yes.

221. Q. Do you recollect him being there? He told me yesterday that the agreement had been drawn in a draft form first? A. Yes.

222. Q. And was revised? A. That is right.

223. Q. And then this was the draft form; was it submitted to your lawyer? A. Which?

224. Q. The agreement for revision? Do you remember? A. I think Mr. Porter was there at the time the draft was brought and I think Mr. Porter sent that over to us through Mr. Jenner.

225. Q. Well then you were going to tell me what was said about the five hundred thousand shares? A. I don't remember very much about the conversation other than in a general way in line with the agreement.

227. Q. Then I believe at that time the Pen. Pete. transaction was separated from the general account? A. Not at that time, sir.

228. Q. How long? A. It was at that time Mr. Jenner requested that it be transferred for a matter of accounting. Mr. Jenner requested

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that it be transferred to a separate account for a matter of accounting to Kaatz under the agreement.

229. Q. Well at any rate it was arranged that it should be transferred to a separate account? A. Special account, yes.

230. Q. And how long afterwards was that done? A. I could tell better by looking at the ledger.

231. Q. Yes? A. (Refers to same). Around December 6th.

232. Q. Just turn up the special account, will you, please? Now in looking at your ledger there is an account "L. S. Clarke, North Bay, special account." The first entry in that is November 19th, 500,000 Pen. Pete. received and "38" after it. What does that "38" represent? A. The folio.

233. Q. The folio in the share register or something? A. Yes.

234. Q. And do you have any other document that shows for what account the 500,000 shares was received? A. You mean here?

235. Q. Well it is entered in your security register? A. Yes.

236. Q. Would it show in the security register for what account it was received as collateral? A. Yes sir.

237. Q. Do you know what entry was put in the security register?
20 A. I do not, no.

238. Q. Then the next entry is the 21st November, 2000 Pen. Pete. Is that a sale? A. Seven and three-quarters, yes.

239. Q. That is a sale? A. Yes.

240. Q. And there was another sale of 2000 and another sale of 1500? A. Yes.

241. Q. And then on November 30th there is an interest charge, is it? A. Yes, An interest credit.

248. Q. Well I don't follow that. Then on December 6th there is 310,500 Pen. Pete. and 126,000 Pen. Pete. N A — "N. A." referring to
30 what? A. North Bay.

249. Q. "86" referring to what? A. Folio.

250. Q. Folio 86? A. Yes.

251. Q. And the debit to the special account is \$49,045.62? A. Yes.

252. Q. Well I have read those wrong; I shouldn't have read the 126,000 in there? A. That is a sale.

253. Q. There is a transfer from the North Bay account of 310,500? A. Yes.

254. Q. And on the same day there was a sale of 126,000? A.
40 Yes. That is a transfer for sale.

255. Q. Then on December 31st there was an interest charge of \$191.06; January 31st there was an interest charge of \$238.02? A. Yes.

256. Q. And on February 28th an interest charge of \$216.20? A. Yes.

257. Q. And then the last entry is 679,000 Pen. Pete. What is that? A. Regular account, folio 31, credit \$40,490.84.

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258. Q. So that there was a retransfer of all the Pen. Pete. then back to the regular account on the 28th February, is that the case? A. Yes.

259. Q. Of course you didn't get any authority from Mr. Clarke to retransfer that to the regular account? A. No, I don't think we did.

260. Q. But you had had a letter from him at that time specifically pointing out to you that it was not to be regarded as part of his regular account, and I refer you to the letter of January 25th which is Exhibit 6 in this matter? A. Yes.

261. Q. Now you made some sales for Clarke's account. Could you by looking at the ledger tell me when the sales were made? I meant the sales when you sold out to cover margins? A. I think February 7th the first, sir. (Produces a document) 10

262. Q. If this is a record of them I might just look at that? A. Yes.

263. Q. On February 7th you sold a quantity of stock as set out in this document that we will have marked as Exhibit 16 and this is a copy of a wire, is it, that was sent to L. S. Clarke, N A, and "S. B." meaning "Sudbury"? A. Yes.

264. Q. North Bay and Sudbury respectively. 20

EXHIBIT 16 Statement of sales of stock made to cover margins.

At the end of the month did you send Clarke a copy of the special account? A. At the end of February?

265. Q. No, the end of December, and January and February? You look at the ledger to determine that. Was there anything on the ledger to tell whether that had been sent? A. Well that is the date that the statements go out. (Indicating)

266. Q. So that apparently at the end of the months of November and December statements were sent out indicating a balance owing on the L. S. Clarke special account and a quantity of Pen. Pete held as collateral security? A. Yes. 30

267. Q. In December for instance it would be 679,000? A. Yes.

268. Q. And the debit balance at the end of the month was \$40,036.56? A. Yes.

271. Q. Did you send any confirmation to Mr. Clarke of the transfer of the balance in the special account back to the general account on the 28th February? A. I don't know, sir.

273. Q. And were there any other sales made to cover margins after the 6th February? There were I think? A. Yes.

274. Q. Could you give me a record of those? A. On February 28th. (Produces a document.) 40

275. Q. You show me what is a copy of a wire apparently of February 28th.

EXHIBIT 17 Copy of telegram February 28th.

And then was there another later wire than that? A. That was about the time the custodian came in.

296. Q. You say as a matter of accounting. As a matter of fact the whole thing was separated at that time and an indebtedness was shown by Clarke in respect of the Pen. Pete. amounting to some forty odd thousand dollars? A: Yes.

297. Q. And until the 28th February you carried it on your books as a separate account? A. Yes.

10 298. Q. And at least on two occasions rendered monthly statements of it as a separate account? A. Yes.

299. Q. And you didn't show any other collateral security held for that account except the 500,000 shares of Pen. Pete? A. No.

300. Q. And it was agreed that the 500,000 shares of Pen. Pete. should be as security for that account only, you weren't to be able to use the 500,000 shares as security for any other account? A. No.

301. Q. Except in respect of the Pen. Pete. deal? A. Yes.

302. Q. That is what your agreement says? A. Yes.

20 309. Q. Well now I don't want to go over a lot of correspondence in a formal way; you had a good many letters from Clarke on the same letter paper, for instance, as that letter Exhibit 6? A. Yes.

310. Q. And you were quite well aware that Clarke was carrying on business there as a broker? A. Yes.

311. Q. And stating himself to be "Correspondent F. O'Hearn & Company"? A. Yes.

315. Q. I noticed, I thought, one or two other communications with you that had it on. Well at any rate it was well known to you that that was the way he was carrying on business at any rate? A. Yes.

30 316. Q. And he was also sending down to you from time to time shares to be transferred to clients? A. Yes.

327. Q. It was quite out of the ordinary, for you to make an arrangement to draft out a stock like Peninsular Petroleum stock? A. It was, yes.

328. Q. It was what you called a cash stock, wasn't it, you didn't deal with it on margin? A. No.

329. Q. And you had never made arrangements with Bayne to draft out any other stock besides the Peninsular Petroleum stock? A. Not unless maybe an odd item in the regular run of business. I hadn't made it personally.

40 330. Q. But you had never made arrangements like a wholesale bundle to be drafted out except this? A. No.

331. Q. And it was you who sent up the drafts? A. I had them sent up, yes.

332. Q. So whatever drafts were sent up were sent up under your directions? A. Yes.

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333. Q. This memorandum I show you is in your handwriting, is it, Mr. Gardner? A. Yes.

334. Q. "300,000 Pen. Pete. November 8th and 9th transfer special . . ." What is the next item? A. "Also 126 sold 16th."

335. Q. That would be 126,000? A. Yes.

336. Q. That was a direction by you to transfer these items to this special account? A. I presume it was, Mr. McRuer.

337. Q. There is no date on it? A. No. Was it not attached to anything.

MR. PORTER: No.

338. Q. And I notice opposite "November 8th" you have "78" and opposite "November 9th" "247"? A. Yes.

339. Q. Those would be the amounts purchased on that day? A. Yes.

EXHIBIT 18—Above mentioned memorandum in the handwriting of witness.

340. Q. What was the reason for restricting the transfer to the special account to the stock that was purchased on the 8th and 9th? A. I don't know any reason.

341. Q. It looks as though there must have been some particular reason why you were dealing with those two days' purchases separately from all others? A. Well, I think that is the stock that Clarke got I had trouble with.

—EXHIBIT 8—Correspondent's contract card, referred to at about question 21 of Mr. Gardner's exam.

—EXHIBIT 9—List of stocks sold on or about February 7th, 1933, referred to at about question 263 of Mr. Gardner's examination.

—EXHIBIT 10—List of stocks sold on or about Feb. 28, 1933, referred to at about question 274 of Mr. Gardner's examination for disc.

LESLIE STAFFORD CLARKE, Sworn.

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MR. McRUER: My Lord, Mr. Clarke has been through a very serious illness.

BY MR. McRUER:

Q. Do you feel you want to sit down? A. Thanks very much.

Q. Mr. Clarke, how old are you? A. Forty-seven this year.

Q. You have lived in North Bay how long? A. Since 1907.

Q. Around about 1931 what business were you carrying on here?

A. I was a Civil Engineer, and carried on civil engineering for a number of years, and started in the lumber business in 1913.

Q. Did you carry on the lumber business up until 1931? A. Yes.

Q. Under what name? A. Under the name of Clarke & Lounsbury Limited.

10 Q. Who first approached you in regard to going into the brokerage business? A. Mr. Bayne, I think.

Q. Had you had any previous experience in the brokerage business? A. No sir.

Q. Who was Mr. Bayne? A. Mr. Bayne had been with Stewart McNair in the brokerage business in North Bay.

Q. And they had closed up? A. And they had closed up.

Q. After Mr. Bayne approached you did you see any members of the firm of O'Hearn & Company? A. Yes.

Q. Whom did you see? A. I saw Mr. O'Hearn, Mr. Richardson, Mr. Marks, Mr. Gardner.

20 Q. Did you have discussions with all of them before you finally decided to open up here? A. I had discussions with Mr. O'Hearn and Mr. Richardson, some with Mr. Marks, but I am not quite sure about Mr. Gardner.

Q. Did you have any discussion about your experience in the brokerage business? A. Oh, yes.

Q. With whom did you discuss that? A. With Mr. O'Hearn and Mr. Marks probably, and definitely with Mr. Richardson.

30 Q. What did you tell them about your previous experience? A. I did not tell them anything, except that I had never been a broker, which was definitely known.

Q. That was definitely known? A. Yes.

Q. Had your business been known to them? Did you tell them what your business was? A. Oh, yes.

Q. What did you tell them your business was? A. A lumber business, specialized lumber.

Q. Then, where did you see any of these gentlemen? A. In Toronto at their office.

Q. You went to the O'Hearn office in Toronto? A. Yes.

Q. As a result of the discussion you had with Bayne? A. Yes.

40 Q. And what was the business that it was being suggested you enter into in North Bay? A. The brokerage business.

Q. What nature of business? A. General brokerage business.

Q. Did you have any discussion with them about margin business? A. Oh, yes.

Q. What was said about margin business? A. I don't just recollect, but we went into the matter pretty thoroughly at the time.

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Q. Tell us if you recollect anything in the discussion, your best recollection of it? A. Well, I don't recollect just what was said, but I asked just what margin was required on certain stocks and so forth.

Q. And did you make any arrangements with them about carrying a margin account? A. Oh, yes.

Q. What was the arrangement made? A. The arrangement that was made was that they would carry margin accounts for customers along the lines of the Standard Exchange regulations.

Q. Did you discuss opening more than one office? A. Mr. Richardson suggested that Sudbury might be also a good place, if not a better place, than North Bay. 10

Q. And what arrangements did you make about Sudbury? A. We discussed then possible managers for Sudbury office, and I selected Mr. Fred Woods whom I had known for a number of years, as manager for the Sudbury office.

Q. And what arrangements did you make about the trading at the Sudbury office? A. The same as North Bay.

Q. And was there any discussion about prospective customers? A. Yes.

Q. What was said about that? A. Well, I told members of F. O'Hearn & Company, certain men I knew, particularly in North Bay—about certain customers that could be probably interested in the market. I probably mentioned names even in that connection. 20

Q. Well then you signed I believe the card that was put in, and that was read? A. Yes.

Q. About the 29th of January, 1931? A. Yes sir.

HIS LORDSHIP: That is Exhibit 8?

MR. McRUER: Yes.

Q. Then what sort of an office did you open up here? A. Just took over Stewart McNair's office. 30

Q. Just the office that had been run by Stewart McNair. And how about Sudbury? A. The office had been run by Moysey & Company.

Q. Did you have a board room? A. Yes.

Q. In both offices? A. In both offices.

Q. In the first place, what name did you have on the office? A. "L. S. Clarke, Correspondent F. O'Hearn & Company. Stocks, Bonds and Grain," as far as I can recollect.

Q. Do you know whether your offices were visited by any members of F. O'Hearn & Company after you opened and had the name put on the window in this way? A. Oh, frequently. 40

Q. Who was here from that company? A. Mr. Marks quite frequently in North Bay, and Mr. Richardson on two or three occasions, possibly more.

Q. In North Bay? A. Yes.

Q. Do you know if either of these gentlemen ever visited the office in Sudbury? A. I don't know.

Q. When they visited the office when you were carrying on here, did you have any discussion about the business you were doing? A. Oh, yes.

Q. Or customers' accounts? A. Yes.

Q. Anything of that sort. Generally what was your discussion in that regard? A. Oh, just a general discussion in regards to stocks, and the possibilities of them.

Q. Possibilities of different stocks? A. Yes.

10 Q. And did you receive from the O'Hearn office communications about stocks? A. My manager did, yes.

Q. And what wire connections did you have? A. Both a wire from Toronto to Sudbury—

Q. Pardon? A. A wire from Toronto to Sudbury, and North Bay with a loop in.

Q. You had direct wire connections between the office at Sudbury and the office at North Bay? A. Yes.

Q. Did you get over the wire from O'Hearn & Co. quotations for your board room? A. Yes.

20 Q. Hourly or daily, or what quotations? A. If the market was active, frequently minute by minute—every half minute, sometimes more frequently.

Q. Did you have a man in the board room chalking them up when the market was active? A. Yes.

Q. Was this going on at times when members of the O'Hearn company visited your office? A. Oh, yes, certainly.

Q. Then when you got going, how was your margin business done, Mr. Clarke? A. Well, a customer would come in and order stock on margin, that could be margined, and put up his money, and the money would be sent down to F. O'Hearn & Company as required.

30 Q. You told me that your arrangements were understood to be according to the rules of the Standard Stock Exchange? A. Yes.

MR. McRUER: You have a copy of the rules that you are producing, Mr. Porter?

MR. PORTER: I do not think that I have got that back from you.

MR. McRUER: I have another copy I can file, at any rate. I asked them to send it back. I think it went back to your office. It might not have reached you personally.

MR. PORTER: The rules have been changed recently.

HIS LORDSHIP: Is this since the amalgamation?

40 MR. McRUER: No, my Lord, this is before the amalgamation—as they were at the time of these transactions.

HIS LORDSHIP: Are you putting that in? These are the by-laws and regulations, are they?

MR. McRUER: The general by-laws, rules and regulations of the Standard Stock Exchange, my Lord.

I am referring to By-law 38, my Lord:

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No. 7.
Leslie S.
Clarke.
Examination
5th April, 1934.

—continued.

*In the
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“No member, and no firm or Company represented by a member shall purchase on a marginal basis for the account of a client any security selling for less than \$1.00 per share, provided that the Board of Directors may from time to time exempt any specified security or securities from this limitation.”

And By-law no. 41, my Lord,

“An agreement between a member (or a partnership represented by a member) and a customer, authorizing the pledging of securities, either alone or with other securities carried for the account of the customer, either for the amount due thereon or for a greater amount, or to lend such securities, does not justify the member (or his partnership or company) in pledging or loaning more of such securities than is fair and reasonable in view of the indebtedness of such customer.”

MR. PORTER: My Lord, I may say this, that there is nothing in the pleadings that raises any question as to the rules of the exchange, or that the rights of the parties in this case depend in any way on a possible breach of the rules, or that the rules affected any of the agreements there may be between the parties. If my friend is producing these rules for the purpose of arguing perhaps later that the contract was varied as the result of them, anything of that kind, I submit that is not quite—

HIS LORDSHIP: I will take them subject to objection.

MR. McRUER: I think it is completely answered in this, my Lord, that my friend pleaded the agreement of January 29th, which in the first line refers to the rules of the Exchange.

HIS LORDSHIP: I am not going to refuse to take this exhibit. I will take it subject to objection.

—EXHIBIT 11—Rules, and regulations of the Standard Stock and Mining Exchange.

MR. McRUER: Q. So I may clear it up; did you ever hear of Peninsular Petroleum being made an exception to this rule that stocks under a dollar were not to be traded in on margin? A. Oh, no.

Q. Then you did, I understand, a considerable marginal business through O'Hearn & Company? A. Fair amount.

Q. They had a seat on the Standard Exchange? A. Yes.

Q. And at the time the difficulty arose in regard to the Peninsular Petroleum stock, you had a great many transactions for customers, both in North Bay and Sudbury, on marginal account with O'Hearn & Company? A. Yes.

Q. When the customers traded through your office at North Bay on margin, you took a buying order at North Bay, I take it? A. Yes.

Q. And that order then would be transmitted where? A. To Toronto.

Q. The customer would place the margin with you? A. Yes.

Q. And then what was done with the margin? A. It was sent to Toronto.

Q. And if there was collateral security, it would be sent to Toronto?
A. Yes.

HIS LORDSHIP: Q. I suppose what you mean by that is this; a customer would come in and buy a certain stock for which he would pay a certain sum of money, but would not pay all cash. You would purchase that stock through O'Hearn & Company in Toronto, or would you? A. Yes.

10 Q. And then he would deliver as collateral certain other stocks, or how did you work it? A. It might be done in many ways. He might have a cash balance in his account.

Q. Quite so. I am speaking of a man coming into your office for the purpose of buying some stock without having the cash to pay for it, and not having any account with you at that time. A. It would depend a great deal on the individual, of course.

MR. McRUER: Q. Opening an account, Mr. Clarke—a man comes to your office in North Bay and has had no transaction with you before, and he wants to buy, we will say, 100 shares of Wright Hargreaves and
20 does not want to pay for it outright; what is the transaction? A. The transaction, that he would put up the margin.

Q. Put up the margin in what? A. In the form of cash or cheque.

Q. That is, for a part of the purchase price of the stock? A. Yes.

Q. If he had other stocks to put up, did you handle those? A. Yes.

Q. Then it was either cash or collateral? A. Yes.

Q. And the order then is sent through to O'Hearn & Company? A. Immediately wired through.

Q. And then what becomes of the cash or collateral? A. It lies in the account in North Bay or Sudbury office to protect them.

30 Q. How do you margin the account with O'Hearn & Company then? A. Just exactly that way. There are so many stocks lying there. We require a certain amount of margin. If the stocks go down, the managers in the different offices, Sudbury and North Bay, they would ask the customer for a little more margin.

HIS LORDSHIP: Q. After this customer had bought from you and paid cash and given collateral, did you send that cash to O'Hearn & Company, or keep it yourself? A. It would depend on the condition of the account. It might lie in the bank for two or three days, but not very often; for the simple reason it was just as well down drawing interest.

40 MR. McRUER: Q. Tell us what you did with it. A. Of course, I didn't do it. The managers did it.

Q. The managers will be called. They can tell us what they did with that. The account with O'Hearn & Company was carried in your name? A. Yes.

HIS LORDSHIP: Q. Would you notify O'Hearn & Company when a customer came in to buy from you, that a customer named John

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Smith, or whatever his name was, had bought so many shares? A. No, my Lord.

MR. McRUER: Q. The individual customer's name was not transferred to O'Hearn & Company? A. No.

HIS LORDSHIP: Q. They had nothing to do with that. That was your arrangement with them, that any of these stocks that were bought, were bought in your name in Toronto? A. Yes.

MR. McRUER: Q. Can you tell me as to whether or not the members of the O'Hearn firm knew that you were trading for customers generally on margin? A. Oh, naturally. 10

Q. And had you conversations with them? A. Oh, yes, several.

Q. And when customers would be taking up stocks, how did you get the transfers made? A. The managers would order up a certain stock; the stock might probably come up with draft, with the balance that was owing on the draft, and the stock would then be turned over.

Q. Who had the stock transferred to the customer's name? A. That would be done through some transfer agent.

Q. To whom did you give instructions for it? A. O'Hearn & Company.

Q. We have a number of those letters, my Lord. And when O'Hearn & Company required further margins for Sudbury, to whom did they apply? A. Sudbury. 20

Q. And the monthly statements in the two offices, were they rendered separately? A. I think so.

Q. We have a number of those too. Well then, Mr. Clarke, we come to the Peninsular Petroleum transaction. At the time this Peninsular Petroleum transaction took place in November, 1932—

HIS LORDSHIP: Is this transaction going to take some time to discuss? 30

MR. McRUER: Yes, my Lord.

HIS LORDSHIP: You would rather perhaps that it go over till tomorrow. I am not going to sit late.

MR. McRUER: Then it is better perhaps to adjourn at this point

—Court adjourned at 5:00 p.m. until 9:30 a.m.

—April 6, 1934. On resuming at 9:30 a.m.

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MR. McRUER: Q. Mr. Clarke, we were going to deal with this Pen. Pete transaction. There was I understand some trading in this stock known as Peninsular Petroleum in the Fall of 1932? A. Yes.

Q. Through your office at North Bay? A. Yes.

Q. And was it marginal trading? A. No sir. 40

Q. Or cash trading? A. Cash.

Q. And it was a stock, as Mr. Marks told us in his examination for

discovery, that was not a marginal stock? A. Absolutely not.

Q. Then did you have any discussion with Bayne in regard to trading in this stock, getting along to about the beginning of November? A. Very much prior to that, in the month of October, early part of October.

Q. Did he tell you for whom he was trading in this stock? A. No, except for clients here.

Q. Did you learn later, or during that time, for whom he was trading? A. Yes, Mr. McRuer. I came in from either Montreal or Toronto, and found out he was drafting some of the stock to New York.

10 Q. That he was drafting it to New York? A. Yes, through the bank.

Q. By that you mean that he was drafting it out from L. S. Clarke & Company? A. Yes.

Q. Did Bayne have power of attorney to sign your name? A. Yes.

Q. And cheques? A. Yes.

Q. And on drafts? A. Yes.

Q. And how did you learn that he was drafting this stock out to New York? A. From the bank manager of the Royal Bank, Mr. Morrison, Mr. McRuer.

20 Q. And when you learned that, what action did you take? A. I raised Cain about it.

MR. PORTER: This is surely not evidence.

HIS LORDSHIP: I do not think that this conversation between Mr. Bayne and this witness is evidence. How is that evidence against these defendants?

MR. McRUER: Because, my Lord, we have pleaded that Bayne entered into this transaction with O'Hearn & Company without authority, and we are showing, and have shown already, that it was a transaction out of the ordinary course of business. Gardner has already admitted that

30 it was a very unusual thing for them to draft out a penny stock. Bayne's authority, his implied authority, only extends to do things in the ordinary course of business. Eliminating any express authority is the purpose for which I am tendering the evidence, and that is set up in the pleadings.

HIS LORDSHIP: That may be so, but does that give you the right to give conversations between Bayne and the witness?

MR. McRUER: To show the lack of authority, that is all. It is not to bind them by anything other than to show the relationship between Bayne and Mr. Clarke in respect to that.

HIS LORDSHIP: I suppose he could say in a general way, without

40 going into long conversations as to what took place, that Bayne had no authority to do certain things, Mr. Porter?

MR. PORTER: Subject to my objection. I do not propose to press my objection any further.

HIS LORDSHIP: You are pretty close to the border line as to hearsay evidence.

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MR. McRUER: Sometimes evidence is hearsay in one respect, and in another respect it is evidence to prove another fact.

HIS LORDSHIP: I will take the evidence subject to your objection.

MR. McRUER: It is not as if we had a jury, my Lord.

Q. When you say you raised Cain— A. Yes, I spoke to the bank quite severely.

Q. Not what you said to the Bank; but what did you say to Bayne?

A. Then I went directly to Bayne, and I asked Bayne what he meant by drafting out penny stock, or any stock, to New York. He said the drafts had already been paid. I said, "Don't dare do that any more; it is too dangerous a practice to do." That is putting it in a very brief manner.

Q. That would be about what time? A. Oh, probably about the fifteenth to twentieth of October. I am not sure of my dates.

Q. About then, at any rate. That is your best recollection. Then, Mr. Clarke, what happened next in regard to the Peninsular Petroleum transaction? A. The next thing that happened was a call from Mr. Marks at about half past four in the afternoon of Wednesday, November 9th.

Q. Wednesday, November 9th? A. Yes. 20

Q. That is the next you knew of the Peninsular Petroleum transaction? A. Yes.

Q. Had you learned for whom Bayne purported to be dealing before the thing was all over—at the time of this drafting discussion? A. There were several names in connection with the drafts. I have forgotten who they were.

Q. Did you ever hear of a man of the name of Barkell? A. Yes.

Q. You heard of Barkell? A. I met him.

Q. Where? A. In North Bay.

Q. Did you have anything to say to Bayne about dealing with Barkell? 30

MR. PORTER: The same objection, my Lord.

HIS LORDSHIP: Yes.

MR. McRUER: Q. What did you say to him about that? A. I asked Bayne if he had any stock, and he said yes. So I said to Mr. Bayne, "I don't want his trading in this office at all."

Q. Then you told me that your first knowledge of the trading of the 8th and 9th of November was at four o'clock? A. Four-thirty.

Q. On the afternoon of the 9th, when you were called by Mr. Marks? A. Absolutely. 40

Q. And what did Mr. Marks say to you? A. I have just forgotten the conversation, just what he said.

Q. I don't mean the exact words of it, but what is your recollection of the purport of the conversation? A. I think, Mr. McRuer, that Mr. Marks said, "You are doing quite a bit of business today." And I said, "How?" knowing the market was dead.

Q. Was the general market dead at that time? A. Absolutely.

Q. He said, "You are doing quite a bit of business today," and what else? A. He told me the amount of shares of Peninsular Petroleum that had been bought by Mr. Bayne, and of course I was—

Q. You said he told you the amount. Do you remember what amount he told you? A. Over 300,000 shares. I assumed it was on that day. I didn't know it was over two days. And, of course, I was stupefied with the amount. I could hardly realize that that amount of stock would be bought in one day.

10 Q. Did he tell you at what price it was bought? A. No.

Q. And what else did he say about it? A. I don't remember. I was so anxious to get in touch with Mr. Bayne, to find out just what had been done, I don't really remember the last part of the conversation.

Q. Did you get in touch with Bayne? Immediately.

Q. And did you ascertain what had been done? A. He came right over to my office.

Q. Did you send for him to come to your office? A. I called him, telephoned him, and asked him to come.

Q. That is not a brokerage office? A. No.

20 Q. He was at the brokerage office? A. No. I am across the street, up this way.

Q. The Clarke & Lounsbury office? A. Yes.

Q. You cannot give us the conversation that took place between you and Bayne. I do not think that is admissible, my Lord, in that instance? HIS LORDSHIP: No.

MR. McRUER: As a result of that conversation did you get in touch with any of the members of the O'Hearn Company? A. No.

Q. That day? A. No. It was half past four or later when Mr. Marks called me.

30 Q. So it would be past business hours by the time you had got through with Bayne? A. Yes.

Q. Later on did you get in touch with them? A. Yes.

Q. What did you do? A. I think I telephoned—I am not quite sure—I think I telephoned Mr. Marks or Mr. Richardson, who was out of town on that particular day.

Q. Mr. Richardson was out of town? A. On that particular day.

Q. On the day you telephoned? A. On the day Mr. Marks telephoned.

Q. That would be the 9th? A. Yes.

40 Q. And then you say you telephoned either Mr. Richardson or Mr. Marks later? A. I think so, yes—not that day. It might have been later.

Q. Did you go to see them? A. Not till some days later.

Q. Then what was your conversation with Mr. Marks or Mr. Richardson on the telephone? Do you remember that? A. I don't remember, sir.

Q. You did go to Toronto to see them? A. Oh, yes.

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Q. And whom did you see at Toronto? A. I saw both Mr. Marks and Mr. Richardson and Mr. Gardner.

Q. All three? A. Yes.

Q. Where? A. In Toronto, in their office.

Q. And what did you say to them? A. I saw Mr. Gardner first, and I asked him about the drafting arrangement.

Q. Just go ahead and tell us. You have not been allowed to tell what Bayne told you. Did you tell them what Bayne had told you? A. Absolutely.

Q. What did you tell Mr. Gardner that Bayne had told you? A. I told Mr. Gardner that Bayne had told me that they had agreed to draft the stock out. 10

Q. To draft it out from where? A. From their office; that he was to fill in the drafts. He had the drafts there.

HIS LORDSHIP: Q. You say you saw Gardner and told him what Bayne had told you? A. Yes.

Q. What was it you said to Gardner that Bayne had told you? A. That Gardner had agreed to draft out this stock.

MR. McRUER: Q. What stock? A. The Pen Pete stock.

Q. The Peninsular Petroleum stock? A. Yes. 20

Q. Draft it out to where? A. New York.

Q. To whom? A. To several parties.

Q. The purchasers? A. Yes.

Q. Did you tell him what Bayne had said as to how the transaction was to be carried on? A. I did.

Q. What did you tell him? A. I told him that the drafts were there, their own drafts.

Q. Their own drafts were where? A. In North Bay, and Bayne had told me that they were to be filled out—the names were to be filled in. 30

HIS LORDSHIP: Q. Whose drafts? The O'Hearn drafts? A. The O'Hearn drafts, your Lordship.

MR. McRUER: Q. You told him that the drafts were there in North Bay. Did you tell him how many drafts? A. About fifty.

Q. Had been sent up to North Bay for that purpose? A. Yes.

Q. And what did Gardner say? A. He refuted the thing altogether, and said it must have been some other deal.

Q. And was any other person present when you and Gardner had this conversation? A. I don't think so.

Q. You had it with Gardner first? A. Yes. 40

Q. Then did you have a conversation with Marks and Richardson later on? A. I think so, undoubtedly so.

Q. On the same day? A. I would think so, yes.

Q. And what was the nature of your conversation with them? A. Very much the same as my conversation with Gardner.

Q. Do you remember any discussion with Marks in reference to the

drafting out arrangement? A. I think I do. It is a long time ago.

Q. Unless you are clear about it— A. We had a discussion, but I couldn't say just what.

Q. Did he admit, or did he not admit, that there had been an arrangement to draft out Peninsular Petroleum stock? A. He didn't admit it at all; in fact, he refuted it.

Q. That there had been any arrangement to draft out Peninsular Petroleum stock? A. Absolutely.

10 Q. Did he explain why some fifty odd drafts had been sent up to North Bay? A. I don't know whether Mr. Marks did explain.

Q. But Gardner said it must have been some other deal? A. Some other deal.

Q. Now, just before I get past this stage of it; there was some evidence in the examinations that were read that one of your cheques for \$7,500 about November 4th had not been paid. A. Mr. Gardner told me that. That was my first knowledge of it.

Q. That was your first knowledge of it, when Gardner told you. Had you ever had a cheque returned for non-payment? A. Never in my lifetime.

20 HIS LORDSHIP: How much was that cheque?

MR. McRUER: \$7,500, my Lord.

Q. Well then, Mr. Clarke, what efforts did you make to get the Peninsular Petroleum paid for that had been purchased? A. Prior to my going to Toronto Mr. Stronach, who was Secretary-Treasurer of the company, whom I had never met before, and Mr. Lyons, who was a representative or an agent for the company, drove up here to see Mr. Bayne.

HIS LORDSHIP: Q. What company? A. Peninsular Petroleum Company.

30 MR. McRUER: Q. You had never met these gentlemen before? A. Never in my life, no.

Q. We do not want what conversation took place between them, but did you make efforts to try to get the people who Bayne said had been purchasing the stock in New York to take it up from O'Hearn & Company? A. Absolutely.

Q. And were those efforts unsuccessful? A. Unsuccessful.

HIS LORDSHIP: I do not understand these drafts that were made and sent to your firm, and the names filled out for this stock. Did you say you did not take up these drafts? I am not quite clear about that.

40 MR. McRUER: Shall I explain?

HIS LORDSHIP: Yes.

MR. McRUER: It is this, my Lord. Bayne's evidence will be that he arranged with Gardner that this Peninsular Petroleum stock—and it is consistent with what Gardner has already said—should be drafted out by O'Hearn & Company on these drafts to the purchaser directly without

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going through Mr. Clarke's office, that they would furnish them with the name.

HIS LORDSHIP: Then these drafts came to the purchasers?

MR. McRUER: No, the drafts were sent up in a bundle to Bayne, to fill in the names. Then the evidence will show that after the last of the 300,000 shares had been purchased, Gardner called up, and he repudiated the drafting arrangement. Then they called on Clarke to pay for this stock, and that is one of our complaints.

HIS LORDSHIP: These names that appear on these drafts were filled in by Bayne. The parties did not have anything to do with them at all. Is that so? 10

MR. McRUER: No. Bayne says he had the arrangement with these parties, and the arrangement was it was to be drafted out by O'Hearn & Company to these parties, but the whole thing was repudiated by Gardner before Bayne ever got a chance to complete it. When it was not drafted out, then Bayne says they were unable to finance the transaction, and the whole thing fell through. The market broke, as a matter of fact, in the interval. The material for drafting was sent up, but the whole thing broke on the afternoon of the 9th and was never carried out.

Q. Then, Mr. Clarke, did you see a bundle of drafts that were sent up? A. I saw one. 20

Q. You saw the sample. Bayne can tell us about those. After your efforts to get the matter ironed out and get the stock taken up, did you go to Toronto? A. Yes sir.

Q. Did you see the O'Hearn Company? A. Yes sir.

HIS LORDSHIP: Q. When was this? A. A week later perhaps, your Lordship.

MR. McRUER: I think we can fix the exact date by the date of the Kaatz agreement.

WITNESS: Probably. 30

MR. McRUER: Which is the 19th of November, my Lord.

Q. And did you have any discussion with the members of the O'Hearn Company as to the effect that this transaction was to have on your clients' accounts? A. Not at first; it was not mentioned at first.

Q. I mean on the 19th when you went? A. No.

Q. On the 19th? A. It was not mentioned.

Q. Not mentioned at first? A. No.

Q. Did they at any time suggest up till that time that it was to be charged against your clients' account? A. Not at that time, no.

Q. Then what discussion did you have with them? And whom did you see to begin with? A. I saw Mr. Richardson, Mr. Marks and Mr. Gardner. Mr. Bayne had made arrangements with the directors of F. O'Hearn & Co., to put up certain collateral, which Mr. Jenner brought up. 40

Q. To put up certain collateral? A. Yes.

Q. For what? A. For the Pen Pete transaction, part of which had already been sold out?

Q. Some of the Pen Pete that had been purchased on this transaction had already been sold? A. Yes.

Q. Can you tell me about what the total amount was—the total purchase price of the two days' purchases of Peninsular Petroleum? A. 15.8, if I remember rightly.

Q. We have it I think at \$49,000? A. Practically \$50,000.00.

10 HIS LORDSHIP: Q. Was that the total amount of the Pen Pete purchases, \$49,000? A. Yes, on the 8th and 9th.

MR. McRUER: That is the amount that was transferred to the special account, my Lord, that we read about.

HIS LORDSHIP: What amount was it?

MR. McRUER: It is in round figures \$49,000. I think it is forty-nine thousand six hundred and something, my Lord. We will come across it in the accounts again.

Q. This was what was known as a penny stock? A. Yes.

Q. Had you ever had any transactions comparable to the purchase of \$49,000 worth of penny stock in North Bay in two days? A. Never.

20 Q. Well then what discussion did you have with the members of the firm leading up to the Kaatz agreement? A. Nothing very much until Mr. Jenner appeared with the agreement.

Q. Until the agreement was brought in, that had been arranged by Bayne before you got there? A. Yes. I was in O'Hearn's office when the agreement was brought in.

Q. Did you have any discussion at that time about the account and what was to be done with it? A. Absolutely.

Q. What was said?

HIS LORDSHIP: Is this on the 19th of November?

30 MR. McRUER: The 19th of November, my Lord, I am referring to.

WITNESS: Yes, this half million shares were put up as collateral. It was agreed by F. O'Hearn & Co. generally that this Pen Pete account should be segregated from the clients' account altogether.

HIS LORDSHIP: Q. Should be segregated from the general clients' account? A. Yes.

MR. McRUER: Q. Did they agree to that? A. Oh, yes.

Q. Who agreed to that? A. All agreed.

Q. Who was there? A. Mr. Gardner, Mr. Marks, Mr. Richardson, and I was there.

40 Q. And the agreement in regard to the collateral, the Kaatz agreement, was signed when? A. On that day, in the afternoon of Saturday, November 19th.

Q. And the five hundred thousand shares delivered as collateral? A. I never counted them.

Q. You saw shares delivered there that day? A. Yes.

Q. I see by the agreement the second recital is, "AND WHEREAS

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“there have been transactions between Leslie S. Clarke and
“the parties of the second part hereto in connection with a stock
“known as ‘Peninsular Petroleum’; on November 8 and 9, 1932 for
“the purchase of three hundred thousand (300,000) shares of the said
“stock;”

why were the two dates, the 8th and 9th mentioned specifically? A. Be-
cause those were the two days that the approximately 300,000 shares were
bought.

Q. That was? A. Those were the two dates on which this ap-
proximately 300,000 or 310,000 shares were bought. 10

Q. Then these 500,000 shares that were deposited were lodged there
as collateral for the purchase price of the 300,000 shares purchased on these
two days? A. Absolutely, collateral security.

Q. And there are certain terms of the agreement; the price at which
it is to be sold, and so on? A. Quite.

Q. Was that negotiated by you, or by O’Hearns with some other
body? A. That was negotiated by Jenner.

Q. Who was representing Kaatz?

HIS LORDSHIP: Q. By whom? A. Mr. Jenner, a lawyer, repre-
senting Kaatz or the directors of the company, I don’t know which. 20

Q. Whom was Jenner acting for—Kaatz? A. Either Kaatz or the
directors of the Peninsular Petroleum.

Q. He was not your solicitor? A. Oh, no.

Q. Did you have any solicitor at that time? A. Not at the time, no,
your Lordship.

MR. McRUER: Q. Well, independently of this purchase of 300,000
shares of Peninsular Petroleum, how was the customers’ account, margin
account, with O’Hearn & Company—what was its condition? A. I didn’t
look at it, but I think it was properly margined.

Q. Any suggestion that it was not properly margined? A. Never. 30

Q. And after this transaction that you have told us about, by which
the Peninsular Petroleum transaction was to be segregated from that ac-
count, did O’Hearn & Co. give you any money? A. Yes, they did.

Q. What did they do? A. They gave me a cheque for three thou-
sand dollars.

Q. They gave you a cheque for three thousand dollars on your gen-
eral account with them? A. Yes, I judge so.

Q. On that date, on the 19th? A. Yes, the afternoon of the 19th.

Q. I believe the 19th was a Saturday? A. Yes.

Q. Who was it who gave you the cheque for \$3,000? A. Mr. Gard- 40
ner and Mr. Richardson.

Q. Was anything said about the agreement to segregate this account
from the general clients’ account—as to how that agreement was to be con-
firmed? A. Yes, Mr. McRuer. They were to write me a letter. It was
so late on Saturday afternoon that everyone had gone.

Q. But they did not write you the letter? A. The letter never arrived.

Q. Did you get later monthly statements of the account from O'Hearn and Co. that indicated it had been segregated? A. Well, I had seen them. I didn't get them personally. They came to my managers.

Q. I show you what is apparently an auditor's statement that is sent out for confirmation. Is this something that you would receive periodically from O'Hearn & Company? A. I couldn't say.

Q. That comes under Bayne? A. Yes.

10 Q. That is Bayne's signature? A. Yes.

MR. McRUER: These are produced by my friend, my Lord.

HIS LORDSHIP: Are you putting them in, or are you waiting till Mr. Bayne goes in the box?

MR. McRUER: I think it is useful to put them in now. There is no doubt about their being sent out and signed by Bayne.

This one is dated December 31, 1932. It is not an auditor's statement. It is a statement from F. O'Hearn & Company to L. S. Clarke,—

20 "Dear Sir: Our auditors, Messrs. Gunn, Roberts & Co., Chartered Accountants, 705 Excelsior Life Building, Toronto 2, are now making "their regular examination of our accounts. In connection therewith "kindly verify the correctness of the statement below as at the close "of Business December 31st, 1932. Noting any exceptions. Your "prompt compliance by signing the confirmation at the bottom of "this form and mailing direct to our auditors will be much appreciated. "A stamped addressed envelope is enclosed for your convenience. "Yours very truly, F. O'Hearn & Co."

"Canadian Special Account," is the heading of it. It is addressed to L. S. Clarke, North Bay, "914." "Ledger Balance Debit \$40,036.56. Long, 679,000 Pen Pete."

30 "The statement of my account, as summarized above, is correct. L. S. Clarke. (Signed) L. J. Bayne, N. R. Mulligan."

Q. You did not see that? A. Not at the time.

Q. But you identify Bayne's signature on it.

HIS LORDSHIP: Are you putting all these in together?

MR. McRUER: Yes, my Lord. The rest are only important for what they do not contain. The rest of the pages contain a statement of the Canadian account—that is, L. S. Clarke, North Bay, Canadian Account, which shows a ledger debit balance of \$35,540.30, and the stocks that are held for that account.

40 HIS LORDSHIP: That is the general—

MR. McRUER: That is the general account, yes, my Lord. And a similar one for Sudbury.

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—EXHIBIT 12—Statements of various L. S. Clarke accounts on the books of the defendant, sent for confirmation and auditing purposes.

MR. McRUER: Q. You said you had seen the monthly accounts that were sent up. Are these accounts what you refer to (handing accounts to witness)? A. Yes.

Q. They were the usual O'Hearn monthly account? A. Yes.

Q. And this one for the month of December shows "L. S. Clarke, "Canadian Special Account, Dec. 6, 310,500 Pen Pete," and so on? A. Yes.

Q. Those are the accounts that you say you saw? A. Yes. 10

Q. That indicated that the segregation had been made? A. Quite.

Q. And the same thing for January? A. I am not sure whether I saw the January ones.

Q. We will put those in in the meantime.

—EXHIBIT 13—Monthly account of defendants to L. S. Clarke.

HIS LORDSHIP: What is this you are putting in now?

MR. McRUER: The monthly statement for December, the usual monthly statement. The other was for confirmation by the auditors.

Q. Now, Mr. Clarke, can you tell me what the object of this segregation was? A. So that the other clients' accounts would not be interfered with, Mr. McRuer. 20

MR. PORTER: I think he should confine himself to anything that was said, my Lord.

MR. McRUER: Q. Was that made clear at the time? A. Absolutely.

Q. Between you and—

HIS LORDSHIP: Q. Did you say that was made clear to Gardner? Whom was that made clear to? A. Me.

Q. That the other clients' accounts would not be interfered with? A. By F. O'Hearn & Company to me. 30

Q. Which member of the company? A. All.

MR. McRUER: Q. Was that at the time that the three of you were present on the 19th? A. Yes.

Q. Then will you let me have a copy of a letter of the 21st of January, 1933? We do not seem to have the original. (Letter produced).

Q. Then, Mr. Clarke, you wrote to F. O'Hearn & Co. on the 25th of January, 1933. That letter is Exhibit 4 in this trial? A. Yes.

Q. That is your signature? A. That is my signature.

Q. The opening sentence is, "I have your letter of the 21st instant." Is this a copy, which my friend produces, of the letter of the 21st instant that you refer to? A. Yes. 40

—EXHIBIT 14—Letter January 21, 1933, defendant to L. S. Clarke.

MR. McRUER: This letter is from F. O'Hearn & Co. to L. S. Clarke, marked "Personal," and "Registered," and reads as follows: (reads letter).

Q. In reply to that letter you wrote this letter which is Exhibit 4, in which you state,

"Since at least February 1931 you, of course, have always been aware that the stock brokerage business carried on at North Bay and Sudbury is a brokerage business not for the purpose of buying and selling stocks for myself, but for the purpose of buying and selling stocks for local customers."

10 Was that a fact, that they had been aware of that? A. Oh, yes.

Q. "Your monthly statements in which you have charged half commissions on various transactions clearly indicates your understanding of the capacity in which I have dealt with you."

Had they rendered monthly statement charging half commissions on the transactions? A. I couldn't say as to that, Mr. McRuer. Bayne will be able to say.

Q. Bayne was looking after that.

HIS LORDSHIP: Q. This letter was written by you, not by Bayne.

A. Yes sir.

20 MR. McRUER: Q. But there had been no doubt about your arrangement that you were to have half commissions trading on the Standard Stock Exchange? A. Oh, none.

Q. "You state in your letter that you decline to make any further deliveries of stocks held by you representing transactions of the North Bay and Sudbury offices unless you receive the market price for same. At the same time you require me, within two weeks, to furnish certain cash to you in part satisfaction of the monies for which you claim I am indebted to you."

Had you requested them to deliver stock. A. Yes.

30 Q. For customers? A. Yes.

Q. I show you a letter dated January 21st, 1933. Is that your signature? A. That is.

Q. Addressed to F. O'Hearn & Company? A. Yes.

Q. "With further reference to ours of the 18th inst. Mr. A. T. Smith is pressing for delivery of his stocks to be shipped against a draft of \$2300., being the balance he owes on his stock. You can make draft with securities attached direct to Mr. Smith at North Bay or through our office here.

40 "You may follow the same procedure with regard to the 1,000 shares of Wright-Hargreaves which we asked for recently. Draft, as mentioned in our letter, may be made on Mrs. H. Shepherd, North Bay who is the owner of this stock."

—EXHIBIT 15—Letter January 21, 1933, L. S. Clarke to F. O'Hearn & Company.

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Q. I show you a letter dated January 19, 1933. Is that the 1,000 shares of Wright-Hargreaves that was referred to? A. Yes.

Q. "Kindly ship street certificate for 1,000 shares of Wright-Hargreaves on draft for \$890. and oblige."

—EXHIBIT 16—Letter L. S. Clarke to F. O'Hearn & Co. January 19, 1933.

Q. To come back again to your letter, Exhibit 4, in which you refer to the fact that O'Hearn & Co. had declined to make further deliveries of stock,—

"In your letter you made no mention of two facts which I would like 10
"to recall to you; first, that the marginal accounts which are held by
"you apparently in my name, but to your knowledge held for the cus-
"tomers, are all properly margined;"

Was that a fact? A. Yes, I think so.

Q. No complaint that these accounts were not properly margined, if the Pen. Pete. deal was left out of the picture? A. None whatever, as far as I know.

Q. And from the time that you had agreed to segregate the Pen Pete transaction until the 21st of January, had O'Hearn & Company been making any claim against the margin account to you? A. No. 20

Q. No threats to sell against it? A. No, I don't think so.

Q. "Secondly, that the amount which you claim to be owing by me
"represents an alleged debit balance in respect of transactions aggre-
"gating about three hundred thousand shares of one stock—Penin-
"sular Petroleum, which is not a stock traded on margin, and which
"transactions occurred during the first two weeks of November, 1932.
"In connection with the Peninsular Petroleum transactions, you will
"recall that at the time certain negotiations occurred, looking to the
"adjustment of the monies you claim to be owing on these transac- 30
"tions, you agreed with me that the Peninsular Petroleum account
"would be kept and dealt with by you as an account separate from
"the marginal accounts and all other accounts."

You swear that is a fact? A. Yes.

Q. "I am enclosing herewith a list of the accounts of customers of
"the Sudbury and North Bay offices, showing in each case the stocks
"which you hold and to delivery of which those customers are entitled
"upon payment of the comparatively small debit balance which may
"be owing in the respective accounts."

Now, the list is produced, which is EXHIBIT 5A and 5B. Was this the list that was sent them? A. I am pretty sure it is. 40

Q. It is produced by them, at any rate, as the list that came in this letter. And you had a correct statement prepared showing the name of each customer? A. Yes.

Q. At North Bay? A. And Sudbury.

Q. And each customer at Sudbury, with the number of shares of stock that O'Hearn & Company were carrying for those customers? A. Yes.

Q. Each stock for each customer? A. Quite.

Q. Then on February 6th did you send this telegram? (handing telegram to witness) A. Yes.

Q. To O'Hearn & Company? A. Yes.

Q. This is a telegram from L. S. Clarke to O'Hearn & Company produced by my friend, dated Feb. 6, 1933, "Have advice from Toronto
10 "that according to regulations the approximate three hundred thousand
"shares Peninsular Petroleum stock bought for me being a cash stock
"should have been offered for delivery by draft or otherwise within 48
"hours after purchase am also advised that it was illegal for you on ac-
"count of this to sell any part of this stock or to hold up customers margin
"accounts stop investigation being made immediately as to whole matter
"and writs will follow."

—EXHIBIT 17—Telegram Feb. 6, 1933, L. S. Clarke to F. O'Hearn & Company.

Q. On February 6th they made the first sale from your margin ac-
20 count? A. I don't remember the date.

Q. We have a wire here which is Exhibit 9 in this action, which is apparently dated February 7. I do not know whether the sale was made on the 6th or 7th. At any rate, you got a wire then,

"Owing to your account not being sufficiently margined we have
"today sold the following stocks for your account."

You got that? A. Yes.

Q. And then they made another sale on the 28th, which is shown in Exhibit 10? A. About that date, yes.

Q. I show you a copy of a wire dated Feb. 28th. That would be your
30 advice as to the sale that was made that day? A. It would be the advice to my office.

Q. And the confirmations that are attached are the regular confirmations from O'Hearn & Company that were sent up to you.

HIS LORDSHIP: This is a wire from O'Hearn & Co. to Clarke?

MR. McRUER: Yes, my Lord.

Q. Is that right? A. Yes.

MR. McRUER: The wire is really copied on part of Exhibit 10, but I want to put it in on account of the confirmations being attached because of something I will discuss later on.

40 —EXHIBIT 18—Copy of telegram dated Feb. 28th, 1933, defendant to L. S. Clarke, with confirmation of sales attached.

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Q. Then you made an assignment, Mr. Clarke? A. Yes.
Q. When? A. About March 1st, I think.
Q. Was it on February 28th or March 1st? A. I couldn't quite tell
you.

Q. Either one of those dates. I can show that by the trustee. What
was the reason for your having to make an assignment? A. On account
of this Peninsular Petroleum purchase, Mr. McRuer.

HIS LORDSHIP: Q. On account of what? A. On account of
the purchase of Peninsular Petroleum and the sale of my customers'
accounts. 10

MR. McRUER: Q. Did you give O'Hearn's any authority to make
any of these sales on Feb. 6th or Feb. 28th? A. Absolutely not.

Q. You were always protesting against it? A. Absolutely.

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CROSS-EXAMINED BY MR. PORTER:

Q. M. Clarke, when you entered into negotiations with O'Hearn &
Company to act as correspondent, they asked you for some references and
for some information about your financial worth, did they not? A.
Absolutely.

Q. And I produce to you a letter, January 21, 1931. Is that your
letter? A. Yes. 20

Q. Your signature? A. It is.

Q. And attached to the letter are, first of all, a business history of
Mr. Robert Forde, one of your employés? A. Yes.

Q. A business history of Charles E. Norton, another employé? A.
Yes.

Q. A business history of L. J. Bayne; a business history of W. J.
Wilshire; a business history of Mr. Fred Woods and finally, a financial
statement of L. S. Clarke. Correct? A. Yes.

Q. And the letter reads as follows:

"I beg to advise that in our proposed North Bay office I shall employ 30
"the following:—

"Mr. L. J. Bayne, North Bay, as Manager,

"Mr. Chas. Norton, as operator,

"and in the branch office at Sudbury I shall employ the following:—

"Mr. Fred Woods, Sudbury, As Manager,

"Mr. A. J. Wilshire as bookkeeper,

"Mr. Robt. Forde, as operator.

"Attached you will find financial statement covering my net worth,

"put up in a conservative manner, and business history of myself, and

"also those of Mr. Woods, Mr. Wilshire, Mr. Forde, Mr. Bayne, and 40

"Mr. Norton.

"I beg to advise also that the initial capital for the purpose of transacting this business in Sudbury and North Bay will be \$20,000.00."

—EXHIBIT 19—Letter dated Jan. 21, 1931. L. S. Clarke to F. O'Hearn & Company with business history of L. S. Clarke's employes attached.

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Q. When you mention the capital for the business of Sudbury and North Bay, I do not see anything in this letter to suggest in what portions that capital is to be allotted. That \$20,000 I take it, was the total amount of capital for the whole business; is that correct? A. Yes sir.

10 Q. There was never any information given to O'Hearn, was there, as to the financial standing of one of these businesses as opposed to the other, or any statement to show that one had so much money, and the other had less, or anything of that kind? A. Oh, I think so.

Q. Have you got any of those statements? A. I think my managers rendered those statements, naturally.

Q. He has sent financial statements from time to time as to the standing of these two offices? A. No, I mean with reference to the division of the capital between the two offices.

20 Q. I have not seen them yet. You will remember I asked you about them in your examination for discovery, and nothing was forthcoming then? You recall that, don't you? A. I don't think I do, Mr. Porter.

Q. You don't recall it? A. I don't recall it.

Q. Do you know of any time when any further information was given to O'Hearn & Company as to any separate way of dividing this capital between the two offices? A. I think Mr. Bayne might answer that better than I could.

Q. You don't know? A. I am not quite certain.

30 Q. Then I notice by the financial statement that you have a surplus (according to this statement which you say is conservative) of \$109,393.76, and there is also a note at the foot of the statement that of your assets, \$55,000 was in cash? A. Yes sir.

Q. That was the situation at the time you opened the brokerage offices in North Bay and Sudbury? A. Quite.

Q. As a matter of fact, you had considerable reputation in North Bay and Sudbury as a man of financial worth and substance, did you not? A. Oh, I wouldn't say that.

Q. You were a man of financial substance, were you not? A. Yes, possibly.

40 Q. You do not say this statement is not true in every respect? A. No.

Q. It is true and was true at that time? A. Yes.

Q. These statements given as part of Exhibit 19 of the different people you proposed to employ, were statements that showed that these

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different men were men of good business record; is that correct? A. So I understood.

Q. Bayne, for instance—the record of Bayne is as follows,

“Mr. Bayne was employed by the Imperial Bank of Canada, and held the position of Accountant in the North Bay Branch for a number of years. He resigned from this position and took a position with Gamble-Robinson of Canada, Limited, as bookkeeper and accountant and was highly regarded by this concern.

“When Stewart-McNair & Company opened an office in North Bay he was employed as bookkeeper by this firm. In 1929 when Stewart-McNair saw fit to cut down expenses by decreasing their staff and letting their Manager out, Mr. Bayne was employed as manager and he carried the business there quite satisfactorily.

“He is a married man and well known in North Bay and has a very good connection.

“Any Bank in North Bay, I am sure, would give Mr. Bayne a recommendation.”

And your signature appears under that statement. A. Absolutely.

Q. Then you appointed Mr. Bayne as your manager, as you informed them in this letter. And as manager for your North Bay office, Mr. Bayne, I understand had power of attorney to sign cheques? A. Yes.

Q. You have said that already. He was the man who gave instructions to O'Hearn & Company to buy stock and sell stock? A. Yes.

Q. He is the man who had all the direct dealings with O'Hearn & Company from the time that the business commenced? That is correct? A. Yes.

Q. As a matter of fact, any direct communications that you ever had with O'Hearn & Company about the business, about the North Bay office, were very few up to the Pen Pete transactions? A. Absolutely.

Q. And there was nothing during this whole period from February, 1931, till November, 1932, which occurred, which caused you to inform O'Hearn & Company that you did not have the most absolute and complete confidence in Bayne as the manager of the North Bay office? Is that correct? A. No.

Q. Is that correct? A. (No response.)

Q. That is correct. And as far as you were concerned, your position with reference to O'Hearn & Co., there was never any change—that is, you never said or did anything to lead them to believe that there was any change, or any material change in your financial condition during the period that the business was carried on up to November, 1932? Is that correct? A. I did not write them to that effect.

Q. Did you ever tell them that things were getting bad, and that you were having to contract your resources? A. Oh, yes, we all knew that business was bad.

Q. I am asking whether you had any conversations with them? A. Absolutely.

Q. When? A. Frequently in 1932.

Q. With whom? A. With Mr. Marks and Mr. Richardson.

Q. What did you say? A. I don't remember what I said. Business was bad for all of us.

Q. You were telling them about your brokerage business, were you?
A. Not generally, no.

Q. Mr. Marks tells me that late in 1931 he had a conversation with you in which you told him about some big contracts you had in Kirkland Lake, involving a sum of perhaps a quarter of a million dollars. A. No
10 sir, not in 1931.

Q. When was it? A. In 1932.

Q. What month? A. Probably June or July.

Q. You told Mr. Marks about these. They were substantial contracts, weren't they? A. Yes.

Q. That was in connection with your business as a contractor? A. Yes.

Q. It had something to do with laying sidewalks or something of that kind? A. General construction.

Q. A municipal contract, and it would mean a large sum of money
20 for you, would it not? That was your expectation? A. Yes.

Q. And that was what you told Marks? A. Not necessarily—it would not mean a large sum of money the first year.

Q. The whole impression given by the conversation was that you were one of the people who were in on the big things that were going on even at the time of the depression, wasn't it? Wasn't that a natural impression for a man to get from the conversation you had with him at the time? A. I don't think so.

Q. Was there anything you said that would lead him to believe otherwise? A. Yes.

30 Q. What was it? A. My timber business was not as good as it was.

Q. But nevertheless apparently the contracting business was looking up? A. It looked that way.

Q. And that was what you told him? A. Not exactly.

Q. You mentioned some figures? A. I may have mentioned.

Q. You mentioned some large figures to him? A. I didn't say so.

Q. Did you? A. I wouldn't say I did.

Q. You won't swear you did not? A. I won't swear I did not, no.

40 Q. Will you say you did not mention a figure in the neighbourhood of \$250,000. as being involved in the contracts that you expected to enter into? A. Not in 1932.

Q. Did you mention something about some Kirkland Lake bonds that you might have to take? A. Absolutely.

Q. And that was the way it arose with Mr. Marks; that you wanted him to find out what these bonds were worth. Is that so? A. Right.

Q. And he gave you the information, did he? A. I think so.

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Q. And they were worth somewhere around 95? A. I don't think so.

Q. The discount might have been five or six points, something like that? A. They were not, Mr. Porter.

Q. What were they worth? A. I don't remember.

Q. At any rate, the bonds represented a substantial amount, didn't they? A. Nowhere near 95.

Q. Well, the bonds that you were expecting to get as part payment of the contract that you were entering into represented a substantial amount of money, didn't they? A. They would, yes. 10

Q. And then we have heard that you signed a certain document at the time you commenced your business relations with O'Hearn & Company. That was put in as Exhibit 8; and there was no other document you signed when you commenced your business relations with O'Hearn & Company? A. Not that I remember of, Mr. Porter.

Q. Was there any arrangement between you and O'Hearn & Company for sharing the profits of the business? A. Absolutely.

Q. What was that arrangement? A. That we would halve the commissions.

Q. That is, with any stock that was dealt in on the Standard Stock and Mining Exchange you would get half the commission? A. Yes. 20

Q. Except International Nickel? A. No, it was on the Standard Exchange then.

Q. It was then, but later it was not. But as to all other stocks that were dealt in, whether they were on the New York Stock Exchange, Toronto Exchange, or any other exchange, there was no sharing of commissions as far as you were concerned? A. I am not quite sure about the New York Stock Exchange. I am sure of the Toronto Stock Exchange.

Q. There was no sharing of commissions? A. No.

Q. O'Hearn & Company had a seat on the Toronto Stock Exchange? A. I don't know that. 30

Q. They had connection with the New York Exchange? A. They had, yes.

Q. And had seats on various grain exchanges? A. Perhaps, yes.

Q. Then they were doing a big, widespread business, as far as you knew? A. Well, I couldn't say that they were.

Q. You don't know? A. No.

Q. Then, was there any agreement between you and O'Hearn & Company whereby they would share any of your losses? A. No.

Q. So that the only profit sharing, if you could call it profit sharing, was that you would have half of the commissions on the Standard Stock and Mining Exchange? A. Yes. 40

Q. And that would be allowed whether or not your business was running at a profit, or whether your business was running at a loss—wouldn't it? A. Naturally.

Q. And, as a matter of fact, in dealing with your clients you had oc-

casation to charge them what you called an over-riding commission on stocks that were not dealt in on the Standard Stock and Mining Exchange? A. I think so.

Q. And the amount of that over-riding commission was entirely a matter for you to decide? A. I would not say that.

Q. Perhaps you and your clients? A. I would not say that.

Q. There may have been some clients you did not charge any over-riding commissions to? A. I couldn't tell you.

HIS LORDSHIP: What do you mean by an over-riding commission? What is the significance of that?

MR. PORTER: Shall I ask this witness to explain it?

HIS LORDSHIP: Yes.

MR. PORTER: Q. What do you mean by an over-riding commission, Mr. Clarke? A. Where you are handling a stock for nothing you might charge a customer a small commission for the handling of the stock, where there is no commission allowed by F. O'Hearn & Company.

HIS LORDSHIP: Q. That is according to the Standard Stock Exchange? A. No, that would not be on the Standard.

Q. That is purely— A. It would probably be in New York, I imagine, more.

MR. PORTER: I think it simply means this, my Lord. Isn't the meaning of an over-riding commission as you are using the term that, with exception of stocks dealt in on the Standard Stock and Mining Exchange, you would have to pay O'Hearn & Company the full commission that was allowed on the purchase and sale of stocks on the various exchanges on which they dealt?

WITNESS: I would imagine so, yes.

Q. That is your understanding? A. Yes.

Q. So when you put in an order to buy some stock, say on the Toronto Stock Exchange, on behalf of one of your clients, and O'Hearn & Company sent a bill to you for it, it would show the price of the stock involved in the transaction plus the full commission? A. Quite.

Q. And when you sent your bill out to your client afterwards, he would have to pay you some additional commission? A. I would think so. I couldn't answer that.

Q. Otherwise you would not make anything out of the transaction at all? A. Sometimes you did not.

HIS LORDSHIP: Q. That was optional with you? A. Your Lordship, it was a matter that I did not do myself. It was done by my managers.

Q. By Mr. Bayne? A. Yes, and Mr. Woods.

MR. PORTER: Q. Then there was a private wire over which you had certain rights; isn't that so; between O'Hearn & Company and your office, and some other offices in different parts of the North Country? A. Not mine.

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Q. Perhaps some other brokerage firms in other towns in the North country? A. F. O'Hearn & Company.

Q. F. O'Hearn & Company may have had some branch offices in the North country. It was a private wire from their office in Toronto which went through North Bay and Sudbury and other points in the North. That is right, isn't it? A. I think so.

HIS LORDSHIP: Has this got anything to do with this question we are considering here? I do not want to spend a lot of time on it.

MR. PORTER: There is an allegation in the pleadings that there was a partnership between these parties. I want to make absolutely sure. 10

HIS LORDSHIP: A partnership to the extent I suppose that they shared the commissions on the sale of stocks on the Standard Mining Exchange.

MR. McRUER: They were interested as partners in this transaction.

MR. PORTER: If that can be considered a partnership—

HIS LORDSHIP: Do not argue that now, but to that extent only.

MR. PORTER: I think that is established probably sufficiently clearly now.

Q. Now, Mr. Clarke, you say you did not take such a very active interest in the management of this business? A. No, never. 20

Q. Either in North Bay or Sudbury? A. Neither.

Q. Before I go any further, there were one or two letters here that you might be able to recognize. This is one dated February 4, 1931. Do you recognize Mr. Bayne's signature on that letter? A. Yes.

Q. And that letter reads,

"Please find enclosed cheque for \$5,000, \$2500 to be credited to our "North Bay branch and \$2500 to our Sudbury branch, and oblige."

The letter is headed, "L. S. Clarke, Stockbroker, North Bay, Ontario."

—EXHIBIT 20—Letter L. S. Clarke to defendants dated February 4th, 1931. 30

Q. Then there is a letter of November 24, 1931 from L. S. Clarke per N. K. Mulligan. You recognize that? That is one of the employés in the office at North Bay. That is a letter to F. O'Hearn & Company reading,—

"We are forwarding herewith cheque for \$2500. Will you kindly "credit this to account of L. S. Clarke, Sudbury?"

—EXHIBIT 21—Letter L. S. Clarke to F. O'Hearn & Co., November 24, 1931.

MR. McRUER: My friend took the trouble to read the letterhead on the first one. I draw to your Lordship's attention that it is, "L. S. 40 Clarke, Correspondent, F. O'Hearn & Company, Toronto." In the ex-

aminations we referred several times to the type of letterhead that was used and the way it was carried on.

MR. PORTER: Q. Now, before the Peninsular Petroleum transactions that you have mentioned in 1932, did you ever have occasion to confirm any orders that Mr. Bayne had given to O'Hearn & Company, or interfere in any way with O'Hearn & Company as to anything Bayne did? A. I don't think so.

Q. Then in September, 1932, were there not some rather heavy transactions in Peninsular Petroleum in your office, orders given through
10 O'Hearn & Company? A. Yes.

Q. And in September and October, 1932, there was quite an interest, rather a general interest, in Peninsular Petroleum in North Bay. Is that correct? A. There might have been in the fore part of October, not so much the latter part.

Q. In September and October there was quite a good deal of interest stimulated? A. Yes.

Q. Didn't you personally have a good deal to do with stimulating this interest? A. No sir.

Q. I understand there was a pool carried on in your office? A.
20 Yes.

Q. By Mr. Bayne? A. Yes.

Q. That you were a member of the pool? A. I was a subscriber.

Q. A subscriber up to the extent of 20,000 shares of Peninsular Petroleum? A. Quite.

Q. And there was some sort of pooling agreement which contained the signatures of the different members of that pool? A. Quite.

Q. And your name appeared well to the fore, or at the top of those names? A. Did it? I don't remember that.

HIS LORDSHIP: A pool for the purchase of this Pen Pete?
30

MR. PORTER: Yes, my Lord.

Q. And various men of North Bay, responsible men, became interested in that pool? A. Yes.

Q. Friends of yours? A. Undoubtedly.

Q. And business associates—perhaps not associates—but people whom you dealt with in a business way? A. Acquaintances—Acquaintances or friends.

Q. And some of them may have come into the pool as a result of your connection with it? A. I doubt that.

Q. What makes you think they came in? Who persuaded them to
40 come in? A. Just to try and make some money I suppose.

Q. Who persuaded them to get into this particular pool? A. I did not.

Q. I suppose it was a private matter. It was not the sort of thing that was broadcast, that the pool was in operation, was it? A. I don't know.

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HIS LORDSHIP: Q. Who got up the pool? Who started it? A. I couldn't tell you.

MR. PORTER: Q. Who got you into it? A. It was Bayne.

Q. He was your manager? A. My manager.

Q. And during the month of September did you meet Barkell? A. I think that I met him about September.

Q. As a matter of fact, was not Barkell a frequent visitor to the North Bay office of your brokerage firm? A. I believe so, but I was not there a great deal of the time.

Q. You met him there on several occasions? A. Half a dozen 10 occasions, possibly.

Q. You knew he was the sponsor of the Peninsular Petroleum stock? A. I think he was the representative of the company.

Q. And he talked to you about the Pen Pete stock? A. Oh, not very much, no.

Q. Did you know that he was the source of most of the information? A. No, I don't think so.

Q. About this stock? A. I wasn't sure of that, no.

Q. Where did you get any information about this stock? A. Oh, 20 generally.

Q. From whom? A. From other people and others, Mr. Bayne.

Q. Your manager—you knew that he was very closely in touch with Barkell? A. Yes, up to a certain point.

Q. Would it be fair to say from what you know now that Barkell was in your brokerage office in North Bay almost constantly for a considerable period in September and October, 1932? A. From what I know now, I would say he was there quite frequently.

Q. And interviewing your clients? A. Possibly.

Q. Was there any other person connected or associated with Peninsular Petroleum Company that gave you any information about the 30 stock? A. None.

Q. So you got your information from Bayne and from Barkell, and any other information was general information from outsiders? A. Yes, newspapers and so on.

Q. The direct source, the man who was connected with the company, was pretty well parked in your office? A. I wouldn't say that.

Q. Well, that was the nearest thing you had to any real inside information about Pen Pete, wasn't it? A. Yes.

Q. Barkell? A. Possibly more Bayne than Barkell.

Q. Did you ever have any conversation with members of the firm of 40 O'Hearn & Company about Peninsular Petroleum stock during the months of September and October, 1932? A. I think I did once, yes.

Q. Do you remember when that occasion was? A. Possibly towards the end of September, Mr. Porter.

Q. Do you remember what you said? A. I merely asked them about it.

Q. And what did they say? A. Oh, it was just a penny stock.

Q. They had no particular information? A. No.

Q. Do you remember telling them that it was a very good speculation? A. I wouldn't tell them it was a good speculation.

Q. Do you deny that you did? A. I am pretty sure I did not.

Q. Are you prepared to swear you did not? A. No, I am not prepared to swear I did not.

Q. Do you remember telling them, or some members of that firm, that there was a heavy short interest in Pen Pete stock? A. No, some members of that firm told me so.

Q. Who was the members of that firm who told you that? A. The statistician, Mr. Brookes, told me.

Q. How did he happen to get that information? A. I asked him.

Q. You asked him to get some information? A. I asked him whether he knew anything about it.

Q. You asked him to get some information for you, and you say that is the information he obtained? A. Yes.

Q. You do not know where he got the information? A. Naturally not.

20 Q. You did not ask him? A. No.

Q. Did not want any more authority? A. No.

Q. And did you also tell them something about the properties that this company was interested in, properties in South America? A. I may have told them what I had heard about it.

HIS LORDSHIP: Q. What is this stock? Is it an oil stock? A. It was originally an oil stock.

Q. And the oil was supposed to be where? A. In Alberta and such places.

30 MR. PORTER: Q. There was some talk of an interest they had in some South American property, wasn't there? A. Yes.

Q. Did you inform members of O'Hearn & Company of those facts or that information? A. I might have.

Q. I am informed by Mr. Richardson that you used to come in and boost Pen Pete to him. Do you say that is a fair way of putting it? A. I would say it was not a fair way of putting it.

Q. You never did that? A. No, I would say not.

Q. Did you ever tell him that in your opinion you thought it would go to 25 or 50 cents a share? A. I wouldn't say that, that I did say that.

40 Q. Did you ever tell anyone that? A. No, I don't think so.

Q. Did you ever tell anybody that you thought this stock was due for a big rise? A. I might have possibly said that it might go up, just like any other stock.

Q. Did you give any definite figures about how high it might go up? A. No sir.

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Q. Do you know a Mr. Knight in North Bay? A. Do I know him?

Q. Yes. A. Yes, indeed.

Q. Did you ever tell him once that this stock might be a \$5.00 stock?

A. No. I don't think I ever said such a thing to Mr. Knight.

Q. Did you ever mention to Mr. Marks that you had thoroughly investigated certain American interests? A. I certainly did not.

Q. That were interested in Pen Pete? A. I certainly did not.

Q. People who had considerable means? A. I had not investigated; therefore, I would not say I had.

Q. Did you ever tell him anything about some American people who were interested? A. I might have. 10

Q. As a matter of fact, you did have some information about some American people, wealthy, well-known American financial interests? A. No, I did not.

Q. Did you ever mention the directors of the A & P Company as being some of the people who were showing interest in this stock? A. I don't think so.

Q. Did you ever have any such information? A. I heard it.

Q. And you say you did not pass that on to Mr. Marks? A. I said I don't think so. 20

Q. You do not swear you did not? A. I am pretty sure I did not.

Q. And Mr. Gardner also informs me that you mentioned the A & P directors, that they were buyers, and running a pool in the Pen Pete stock. A. I don't think I discussed it with Mr. Gardner.

Q. You don't think so? A. No.

Q. But there again you are not prepared to swear that you did not? A. No. I am not prepared to swear I did not, because we discussed different stocks at different times. I went there for information, not to give it.

Q. Did you ever mention to Mr. Gardner that the Standard Oil Corporation had offered \$30,000 to purchase a right-of-way through some of the property of the Pen Pete company? A. I don't think so. 30

Q. There again you are not prepared to swear you did not? A. I don't remember having that information.

Q. Would you say the attitude of O'Hearn & Co. was favourable to this stock, or unfavourable; or whether they showed much interest in this Pen Pete stock in any conversation you had with them in reference to it?

A. Oh, it was only a penny stock.

Q. They did not show any particular interest one way or another?

A. Not particularly, no. 40

Q. As a matter of fact, did they ever suggest to you that you had better be careful with this Pen Pete stock? A. Not to me.

Q. Did they to Bayne? A. I understand so.

Q. And as a matter of fact, did you ever hear of a certain telegram that was sent to Bayne in September—on September 14th, 1932, to this effect,

“Would certainly watch your step on Pen Pete?”

A. I saw that day before yesterday.

Q. Do you know whether or not Bayne received that message? A. I couldn't say.

Q. From what you found out yesterday? A. I would say so.

Q. You think he did? A. Yes.

Q. So the attitude of O'Hearn & Company with reference to Pen Pete stock was rather adverse, was it? That is the way it looks, isn't it?

A. It looks that way from the telegram.

10 Q. I did ask you the general question as to heavy purchases commencing in September, starting on September 3rd, 1932. Have you gone over these figures at all lately? A. No, I have not.

Q. Are you familiar with them? A. I am not.

Q. Let me just put it this way. Perhaps you are sufficiently familiar with them. You might not be able to recognize these figures up to the nearest decimal point, anything of that kind. I am informed that on September 6th, 1932, there were orders from your office to O'Hearn's office for 45,000 shares of Peninsular Petroleum. Would that be more or less correct as far as your recollection and knowledge goes? A. I don't know.

20 Q. Did you know that the purchases were pretty heavy at that time? A. They may have been.

MR. McRUER: You have a statement of those.

MR. PORTER: I have them all here. Are you satisfied if I put these in?

MR. McRUER: Surely.

HIS LORDSHIP: Can you put them in through this witness? He does not know.

MR. PORTER: My friend is prepared to admit them.

30 MR. McRUER: It is their statement. I think it is better to have it in a statement than have it strewn all over the record.

MR. PORTER: I do not think there is any question as to these figures. Then I will put in as Exhibit 22 a statement of the purchases of Peninsular Petroleum stock by L. S. Clarke, North Bay, and I just point out generally the extent of these purchases.

MR. McRUER: That is for what dates?

MR. PORTER: Starting on September 3rd, 1932.

MR. McRUER: And to what date?

MR. PORTER: And goes right up to November 30, 1932. Some of these must be sales.

40 HIS LORDSHIP: A statement of purchases and sales?

MR. PORTER: Yes.

HIS LORDSHIP: Were they made through O'Hearn & Co?

MR. PORTER: It is a statement of transactions in Peninsular Petroleum made through O'Hearn & Company by L. S. Clarke. I will just give the totals for each day, to give an indication of the volume of these transactions.

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—EXHIBIT 22—Statement of transactions in Pen Pete made by L. S. Clarke & Co. through O'Hearn & Company.

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MR. PORTER: Sept. 3rd was a small one, 3500.

HIS LORDSHIP: What was the price? Is the price shown?

MR. PORTER: Yes. 5-1/2c, 6-7/8c, 8c, 9c, 9-7/8c, 14, 15, 20 and so on.

On September 6th there is 45,300 shares.

September 7th, 64,500.

September 8th, 76,500. 10

September 10th, 40,000.

September 12th, 22,500.

September 16th, 21,500.

September 19th, 20,500.

There are various other purchases, the 14th and 15th.

The 14th was 16,500 and the 15th, 7,000.

16th, 21,500,

17th, 14,000,

19th, 20,500,

21st, 2500. 20

And smaller purchases on the 22nd, 23rd, 24th, 26th and 27th. On the 28th, 22,000; September 29th, 30,000; September 30th, 18,200.

Then in October—the early part of October they are not so heavy, but on October 26th they begin to be a bit heavier, 30,700; October 27, 6,000; October 28th, 2,000, and so on.

Then on November 1st, 45,000; November 4th, 94,000; November 5th, 25,500; November 7th, 9,900; November 8th, 78,000; and the big day, November 9th, 247,000.

This statement also shows the prices from day to day.

Q. During the months of September and October you knew some fairly heavy transactions were going through, didn't you? A. Not as heavy as that by any means. 30

Q. As heavy as the ones I have read over to you? A. No.

Q. Is this a surprise to you now? A. Yes, it is even now.

Q. During September and October did you know that on several occasions there were some large cheques sent from your firm to O'Hearn & Company to meet these purchases? A. I imagine there would be, I don't know.

Q. Some single cheques amounted to somewhere around 50,000 dollars. A. I didn't know that. 40

Q. And during the Peninsular Petroleum transactions in September and October, every call by O'Hearn & Company for money to pay for these stocks was always promptly met by your North Bay office, wasn't it? A. I think so.

Q. And in spite of the advice of O'Hearn & Co. which was given on

September 14th, "Would certainly watch your step on Pen Pete," these orders apparently still came through. A. I didn't get that advice.

Q. Do you also remember during this period having a conversation with Mr. Woods, who was your manager in Sudbury, with reference to dealings in Peninsular Petroleum? A. I may have.

Q. Do you remember a discussion about Barkell? A. I don't think so.

Q. And that Mr. Woods expressed some distrust in Barkell? A. Oh, I wouldn't say so.

10 Q. You don't remember that? A. No.

Q. You do not swear that did not take place? A. I would not swear it did not, no.

Q. And also Mr. Woods rather indicated that you were not supervising— A. Oh, no, he never.

Q. —your offices sufficiently. A. He never made a statement like that.

Q. Did he point out certain things that he was contending with in his Sudbury office that he thought you should give your personal attention to? A. No.

20 Q. That is, about some of your employes there, who had accounts not properly margined? A. Well, one only.

Q. He pointed that out and said this should be attended to? A. He should have attended to it. It was up to him to attend to that.

Q. But that was brought out, and he pointed it out. You say he never pointed out you should take a greater personal supervision of some of these matters? A. No, he never told me that.

Q. Did he ever suggest something about coming up and taking over the North Bay office? Did he ever suggest that if he looked into the North Bay office that perhaps Mr. Bayne would not be there much longer? A.

30 Yes, towards the end he made that statement.

Q. About what date? A. I couldn't say.

Q. Before November 8th and 9th, 1932? A. I don't think so.

Q. You think it was after? A. After.

Q. You are not sure? A. Yes, I think it was after.

Q. You had some reason yourself at one stage to suspect Barkell?

A. I never believed him.

Q. Even from the first time you met him in your North Bay office?

A. No.

40 Q. That did not prevent you, however, from getting people into Pen Pete? A. It did. I never advised anybody to go into Pen Pete.

Q. You did not stop Bayne from going around as your manager and encouraging people to enter into the pool? A. I was not here part of the time.

Q. Your signature was on the pooling agreement. A. That might have been one day.

Q. When you found you had reason to distrust Barkell didn't that

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rather make you feel that this Pen Pete stock was perhaps something you should get out of? A. No. I just disliked Barkell instinctively.

Q. And he was the one really intimate source of information as to Pen Pete, you have told us I think, yet you still considered that you should retain your interest in Pen Pete, and do nothing to get your friends out of it, whom you knew had got into it? Isn't that right? A. Well, it was a penny stock.

Q. And they were in it, and you never took any steps to get them out? A. Not at that time, no.

Q. Did you know that Barkell went with Mr. Bayne to Sudbury 10 some time before November 8th? A. Yes, I heard he did.

Q. He went to see Woods? A. Yes.

Q. And it was as a result, I am told, of the interview that took place then between Barkell, Bayne and Woods that Mr. Woods advised you, or suggested, "Better be careful about Barkell," something to that effect? A. I don't remember it.

Q. Then on November 8th and 9th—were you in North Bay during those days? A. I was in North Bay on the 9th—the greater part of the day of the 9th. On the 8th I think I was away most of the day.

Q. On the 8th you were away most of the day; and on the 9th? A. 20 I was out in the morning for a while, but I was in probably half past twelve on to a quarter of three.

Q. Did you know some enquiries were made from the O'Hearn office as to whether you were in North Bay on that day, from Bayne? A. Mr. Marks told me so.

Q. Did you know certain enquiries were made of Bayne as to whether they could get in touch with you? A. Mr. Marks told me so.

Q. Have you ever found that out since from Bayne or anybody else? A. No.

Q. You never heard then, except from what Mr. Marks told you, 30 that O'Hearn & Company were told you were out of town that day? A. Oh, yes, I think I heard that.

Q. Where did you hear that? A. I think Bayne told me that.

Q. Told you that Bayne informed O'Hearn & Co. that you were out of town, and they could not get in touch with you.

Do you happen to know whether the purchases that were made of Pen Pete—the purchases that were put through on the first days of November—I think it was the 1st, the 4th and the 5th—whether those purchases were ever paid for up to the 8th of November? A. I don't know.

Q. I suppose Bayne would have that information. After hearing 40 from Marks by long distance telephone conversation on November 9th, you had an interview with Bayne. After November 9th there were several calls for margin from O'Hearn & Company, weren't there, to put this account in sufficient shape as a result of the purchases of Pen Pete? A. Oh, yes, undoubtedly.

Q. Those calls came through frequently? A. I wouldn't say frequently.

Q. I want to know whether you were at that time informed of calls made for margin by O'Hearn & Compay? A. For cash on this Pen Pete.

Q. Cash on the Pen Pete? A. Yes.

Q. Do you remember what sort of replies were sent either by yourself or Bayne, or upon your instructions, or with your knowledge? A. Yes.

10 Q. What were the replies? A. Well, this man Barkell was immediately got in touch with in New York, and said he would send up thirteen or fifteen thousand dollars.

MR. McRUER: Q. Did you say Barkell was got in touch with? A. In New York.

MR. PORTER: Q. And O'Hearn & Company were always informed that the money was expected in the immediate future. Wasn't that the effect of most of the communications? A. I think so.

Q. Do you know whose handwriting this is? (Handing document to witness). A. That is Bayne's I think. I am not quite sure.

20 Q. And that appears to be a telegram via private wires of L. S. Clarke, broker, North Bay, November 9, 1932. Do you know whether or not that telegram was sent? A. I couldn't say. I have not seen it before.

MR. McRUER: Bayne will be in the box.

HIS LORDSHIP: I do not think I would waste time with this man.

MR. McRUER: Bayne is the man who actually sent them.

HIS LORDSHIP: Ask him any general questions you want to, but do not waste time going over all these details. He does not know.

MR. PORTER: Q. Do you recognize the handwriting of this note? A. No, I couldn't say I do recognize the handwriting.

30 Q. It is not yours? A. Absolutely not.

Q. Anyone in your employ at that time whose handwriting you might know? A. Yes, but I couldn't recognize it. It might be Mr. Bayne's.

Q. After November 9, after these transactions came to your attention—transactions which you say you never authorized—Bayne still continued in North Bay as your General Manager, did he not? A. Absolutely.

Q. With the same authority he had before? A. Yes, possibly.

Q. Exhibit 5B has been produced as a list of the clients in your North Bay office. Did you prepare this list yourself, or supervise the preparation of it? A. No sir, I did not.

40 Q. Did not check it in any way yourself? A. No.

Q. This was all done by Bayne? A. Yes. I was in Toronto at the time.

Q. I notice by this statement that some of the clients on the books of the North Bay office are not necessarily people who live in North Bay?

A. No.

Q. Some time later, Mr. Clarke, there was a letter sent by Messrs.

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Kilmer, Irving & Davis to F. O'Hearn & Company. Kilmer, Irving & Davis were your solicitors at one time, were they not? A. Yes.

Q. This is a letter dated Feb. 4, 1933, from Kilmer, Irving & Davis to F. O'Hearn & Company,

"Re L. S. Clarke & Company, without prejudice." This is enclosing another list of clients. I do not know whether that "without prejudice" affects this case or not.

MR. McRUER: That is all right.

MR. PORTER: This letter then—your counsel admits this as being all right. This letter can go in? 10

MR. McRUER: Oh, yes, with the list attached, of course.

MR. PORTER: With the list attached, as Exhibit 23.

This letter reads,

"We send you a statement which we have received from Mr. Clarke and Mr. Wood, which we understand shows the customers' equity in the accounts at the North Bay and Sudbury offices respectively. The suggestion is that you will check these statements against the balances showing in the marginal accounts which you carry, in order to ascertain Mr. Clarke's equity in the stocks as a broker."

—EXHIBIT 23—Letter Feb. 4, 1933, Messrs. Kilmer, Irving and Davis to F. O'Hearn & Co. with list of clients attached. 20

Q. Did you check over these accounts at all? A. No.

Q. Apparently your solicitors say that they got them from you, however? A. From my office.

Q. You are satisfied these were correct statements at the time, or do you know? A. I would imagine they would be.

Q. There is one thing I wish to point out to you, and that is that in the statement of the North Bay clients there is shown here an account of Smith and Greenwood—I do not know what the other word is. A. And New York. 30

Q. Smith, Greenwood and New York, 729,500 Pen Pete and the debit here is shown as \$55,221.47. A. I see that.

Q. Do you remember whether there was such a thing as the Smith and Greenwood account on your books in the North Bay office? A. I didn't know it.

Q. Well, was there? A. I found out after there was.

Q. So at the time these transactions were going through, there was an account in your North Bay books in the name of Smith and Greenwood—and, as a matter of fact, you have found out since, have you not, that all the Pen Pete that was purchased through F. O'Hearn & Co. in these large quantities we have been talking about on the 8th and 9th, went through the Smith and Greenwood account? A. I don't know that. I don't think so. 40

Q. You do not know anything about how the 729,500 shares are made up? A. No.

Q. Nothing about it. Do you remember on one occasion between November 9th and the interview in Toronto on November 19th, asking Mr. Richardson not to sell out the Pen Pete so that you might protect the account, to hold it for a few days? A. Yes, I may have done that. I don't know. I wouldn't swear I did.

HIS LORDSHIP: Q. Of course, you may have done anything. You either remember it or you do not. If you do not remember, say so. A. I don't remember.

Q. Then on November 19th you were in Toronto. Did you at any time during the conversation you had with the partners of O'Hearn & Company repudiate your personal liability for the purchases of Pen Pete that took place on the 8th and 9th of November? A. Yes, I did on certain occasions.

Q. I am asking now about the interview on November 19th, and if you did at that time say anything to the effect of repudiating these transactions as far as you personally were concerned. I wish you would just say exactly what took place. A. It was a matter of a drafting arrangement between Bayne and Gardner of F. O'Hearn & Company.

Q. Did you tell them you were not responsible? A. I told them I knew nothing about it, and Gardner refuted the drafting arrangement.

Q. You did not shirk all responsibility, did you? A. No, not exactly, no. It was Gardner's word against Bayne's a telephone conversation.

Q. As far as you were concerned, did you say anything to this effect, "I am personally not liable for the price of this stock?" A. I couldn't swear that I did.

Q. Then this agreement, Exhibit 3, the Kaatz agreement—this was drawn, I understand you to say, by Mr. Jenner, a solicitor? A. So I understood.

Q. And Mr. Bayne brought Mr. Jenner in— A. Mr. Jenner brought it in himself.

Q. Did you read it over? A. Yes.

Q. You were satisfied with the terms of it as far as you were concerned? A. It seemed reasonable to me.

Q. The general object of course was to allow you to carry on I suppose? A. The general object was to try and get out of the hole that I apparently was in through this drafting arrangement.

Q. You were satisfied though with the wording of this agreement? A. Yes.

Q. And you looked it over? A. Oh, yes.

Q. I see by a recital in this agreement, it says, "WHEREAS Leslie S. Clarke of the City of North Bay, in the Province of Ontario, has an account with F. O'Hearn & Company, brokers, of the City of Toronto.

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"AND WHEREAS there have been transactions between Leslie S. Clarke and the parties of the second part hereto in connection with "a stock known as Peninsular Petroleum; on November 8 and 9, 1932, "for the purchase of three hundred thousand (300,000) shares of the "said stock."

You did not take any exception to that clause going in the agreement, did you? A. No.

Q. There is nothing about that that is untrue I suppose. Your attitude at that time was, as expressed to O'Hearn & Company, anything you said or did was quite consistent with what is set forth in this agreement, isn't it; namely, that the transactions involving the Peninsular Petroleum stock on November 8th and 9th were between Leslie S. Clarke and O'Hearn & Company? A. Yes. 10

Q. It goes on to say, "AND WHEREAS Leslie S. Clarke has not "taken up at the date hereof certain shares of the said Peninsular "Petroleum stock purchased through the said parties of the second "part."

So it put you in the position of being a debtor in respect of Peninsular Petroleum stock. Was that the understanding you had at the time? A. I felt I was responsible for what my agent Bayne did. 20

Q. You certainly never suggested you were not? A. I did object at certain periods.

Q. To whom? A. To the way the thing was being handled by F. O'Hearn & Company.

Q. But not at this date. It was some time later, wasn't it? A long time later? A. It was not so long later.

Q. At this time a formal agreement was brought in—an agreement which was apparently for your benefit as well as for the other parties? A. The benefit of my clients.

Q. And yourself, wasn't it? It was an agreement, at any rate, that you were interested in? A. Oh, yes. 30

Q. And the attitude you took quite openly at that time was that you were not repudiating this transaction which was wired through by your agent? A. Yes, at that time I was not.

Q. At that time that was your position, and it always had been up to that time? A. Yes.

Q. I also notice in this agreement that in paragraph five it states, "If the parties of the second part hereto at any time decide to and do "take proceedings against Leslie S. Clarke for any balance due them "in regard to the said transactions in Peninsular Petroleum shares, 40 "then the said 500,000 shares of Peninsular Petroleum stock deposited "by the party of the first part hereto, or any balance thereof then in "the hands of the parties of the second part shall be forthwith re- "turned to the said party of the first part."

That is, the agreement did contemplate some possible proceedings against you personally, if perhaps this collateral that was put up at any time went

down in value to such an extent that it would not be quite sufficient? A. I wouldn't say that.

Q. Was there any discussion about that particular clause in the agreement? A. I don't remember.

Q. Nevertheless you understood that that clause was in the agreement? A. Yes, I saw it.

Q. You took no exception to it? A. No.

Q. Then you produced this morning—at least your counsel put in this morning, certain auditors' statements which you say are correct (Exhibit 12). This is a later statement signed by Bayne acknowledging the correctness of an account between F. O'Hearn & Company and L. S. Clarke? A. I beg your pardon, Mr. Porter; I did not say they were correct. They were not prepared by me. I presume they are correct.

Q. Have you anything to say about it now? Do you say it is not correct? A. No, I have not, but I did not say it is correct.

Q. I am not asking you whether the exact figures are correct, but I see it is headed "Canadian Special Account," and it is an account between F. O'Hearn & Company and L. S. Clarke? A. Yes.

Q. Did you know these auditors' statements were coming through at the time? A. I understood so.

Q. You never suggested they should not be signed on your behalf as a debt from you to O'Hearn & Company, did you? A. No.

Q. And that is as late as December 31, 1932. Then I have a letter here November 14th, 1932, which appears to be signed by you. Is that your signature? A. Yes, it is.

Q. This is a letter dated November 14th, 1932, from L. S. Clarke to F. O'Hearn & Company.

"Re Peninsular Petroleum.

30 "I beg to advise that I have thoroughly discussed the matter of the "purchase of a quantity of the above stock on Tuesday and Wednesday, the 8th and 9th, of last week with my Manager here. A week ago Friday or Saturday, the 4th or 5th, Mr. Bayne, my manager here, tells me he called up your office and said that he was offered the purchase of a big block of this stock and asked whether it would be alright to send this out on individual drafts to New York. He stated that if you happened to be short of this stock in the clearing that he had in his possession over two hundred thousand shares which he would lend you to send down attached to the drafts that were to be sent out.

40 "After this stock was purchased on Wednesday your office telephoned Mr. Bayne and told him that they could not handle this on draft as it was too big a thing to handle. There was not sufficient money to be made out of this thing to warrant Mr. Bayne purchasing this stock in any other way except by arrangement with your office, as I had already told Mr. Bayne that no more stock of this type was to

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“be bought unless funds were wired here or an arrangement made
“with you for drafting this stock to customers.

“Mr. Bayne immediately on Thursday got in touch by telephone with
“the representative of this crowd in New York and told him that this
“arrangement had been voided and that he would have to get around
“and pay up the money covering this purchase and wire it to us.

“I was talking to New York three times today and this representa-
“tive told me how difficult his task was in getting around to see people
“who were to receive this stock on draft and explain the different ar- 10
“rangement. However, up to five o'clock this afternoon he had col-
“lected \$15,000. and expects to have the balance tomorrow and Wed-
“nesday.

“As I was out of town until late in the afternoon of Wednesday, the
“9th, I was not aware of the purchase of this stock.

“I am using every means in my power to have funds wired at the
“earliest hour possible.

“I shall leave it to your discretion as to whether you will sell this
“stock tomorrow or not.”

—EXHIBIT 24—Letter L. S. Clarke to defendants dated November 20
14, 1932.

Q. There is nothing in that letter that says that you are repudiating
this transaction after you found out what you say you found from Mr.
Bayne. You said you were endeavouring to get the money, and you are
leaving it to the discretion of O'Hearn & Company as to whether they
want to sell the stock or not. That is your position, then, isn't it? A.
Yes.

Q. Then during this period, after these transactions, you made con-
siderable personal effort to get this Peninsular Petroleum deal straight-
ened out? A. I'll say I did.

Q. You went to New York and got in touch with the directors of 30
the company. At one time I believe you became Secretary-Treasurer of
the company, didn't you? A. Yes.

Q. And tried to get the directors to raise the money personally?
A. Yes.

Q. You kept informing O'Hearn & Company that you were making
these personal efforts? A. Absolutely.

Q. And that went on for some considerable time, over a period of
weeks? A. Months, probably.

Q. And you were spending most of your time away from North Bay
in Toronto and New York during this particular period on this particular 40
deal? A. Just two days in New York.

Q. And as a matter of fact at one time you actually pledged some
of your life insurance policies to O'Hearn & Company? A. I absolutely
did.

Q. So they would be protected to that extent on the Peninsular Petroleum transaction? A. Not that they would, that my clients would. I was not protecting O'Hearn. I was protecting my clients.

Q. It was given to O'Hearn? A. Absolutely.

Q. You said that this Peninsular Petroleum transaction was what caused you to go into bankruptcy. Were you in pretty bad shape financially early in November, 1932? A. Well, things were not just as good as they might have been. There was no cause for—

10 Q. As a matter of fact, about a year before that you had put some property in your daughter's name? A. Yes, but not for the purpose of evading anything.

Q. You had a second mortgage on your house? A. No, that was in 1933.

Q. You had to raise a second mortgage on your house? A. Yes.

Q. And you had bad accounts in Sudbury up to about \$9,000? A. So I understand.

Q. Perhaps more? A. Around \$9,000.

Q. And you lost about \$25,000 in the stock market? A. Over a period of two years, yes.

20 Q. This Kirkland Lake contract that we discussed a few minutes ago, that contract involved you in considerable loss eventually, did it not? A. Yes, it did.

Q. To what extent—\$30,000 or \$40,000? A. Nothing like that.

Q. How much? A. Probably twelve or fifteen thousand.

Q. So you were not in what you would call a liquid condition? A. Not just at the time.

Q. I understand that the deficit which appears in the statement that was filed when you went bankrupt amounted to about \$99,000? A. Well, I am not sure.

30 Q. Was it somewhere in that neighbourhood? A. That was the gross—and there were some assets to offset that.

Q. The deficit which appeared in the statement filed at the time you made your assignment—

HIS LORDSHIP: Are you speaking of the total liabilities?

MR. PORTER: The difference between the assets and liabilities.

Witness: No, it was not.

MR. McRUER: Mr. Allen will be in the box, if you want to get the accurate information.

40 MR. PORTER: Of course, you have never produced any documents about it.

MR. McRUER: I could not produce all the documents in connection with the winding up, I would not think, in this action.

MR. PORTER: Q. I have here, Mr. Clarke, a glass plate which perhaps would show exactly the way this company advertised their business. I may say that this was found in the cellar of your old office in North Bay.

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Do you remember whether that was the sign that used to hang up in your window? A. I think so, yes.

Q. You had this sign in perhaps the south window, and perhaps a similar one in the north window of the North Bay office? A. I think so.

HIS LORDSHIP: Instead of putting that broken glass in as an Exhibit, what appears on it could be copied on a memorandum and put in as an Exhibit.

MR. PORTER: I think so, yes, my Lord.

MR. McRUER: What is on it could be copied just as it is.

—EXHIBIT 25—Sign from window of North Bay office.

10

MR. PORTER: Q. I suppose the signs you used in the Sudbury office were similar? A. I think so.

Q. There was mentioned some time ago a certain pooling agreement which bore the names of several citizens of North Bay and people in this vicinity. I think probably there are about forty names on it? A. I have not seen it.

Q. You do not know? A. No.

Q. Do not know how many people were in the pool? A. No, I have no idea.

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RE-EXAMINED BY MR. McRUER:

20

Q. Mr. Clarke, just a few questions. You told my friend that you made some considerable efforts to get this Pen Pete account liquidated and to get O'Hearn & Company paid? A. Yes.

Q. And I think you said you assigned your life insurance for the Pen Pete account too at one time? A. Yes.

Q. When did you first learn that Gardner admitted that there had been a drafting out agreement between him and Bayne in regard to the Peninsular Petroleum stock? A. About two weeks ago, something like that. Just recently.

Q. After his examination for discovery had been read to you? A. 30 Yes.

Q. And until that time had Gardiner admitted to you at any time that there was any such agreement? A. He absolutely refuted the fact that there was any agreement.

Q. And did all the other members of O'Hearn & Co. take the same position? A. Absolutely.

Q. Something was said about the commissions that were charged on the transactions on the Standard Stock Exchange, and on other exchanges. O'Hearn & Company allowed you half the commission on the Standard Stock Exchange transactions I understand? A. Yes. 40

Q. And then you would collect, of course, the full commission from the customer? A. (No response.)

Q. You would be billed by O'Hearn & Company for half the commissions? A. I think so.

Q. Bayne can probably tell us about the details of how that was worked out better than you can. I just want to have the record clear in reference to what Bayne told you about O'Hearn & Company enquiring whether you were in town or not on November 9th. You told my friend that Bayne had informed you that he had told O'Hearn & Company that

10 you were out of town? A. Yes.

Q. When did he tell you that? A. On November 9th I think.

Q. After he got in touch— A. After I had got him over to my office.

Q. It was after you had summonsed him to come to your office? A. Yes.

Q. Now, my friend put a question to you that after November 9th there were several calls for margin, and I think you said yes, and then you said calls for cash in this Pen Pete transaction? A. Yes, quite.

Q. Which was it? A. Calls for cash.

20 Q. In the Pen Pete transaction? A. Yes.

Q. Not general calls for margin? A. I don't think so.

Q. They were not calling Sudbury for margin? A. Not so far as I know.

HIS LORDSHIP: Q. All these Pen Pete purchases were made through the North Bay office, were they? A. Practically.

Q. Any made through Sudbury office? A. Very few, my Lord.

MR. McRUER: Q. There were a few, I understand through Sudbury office for some individual clients over there? A. Yes.

Q. But very few. None on these dates, the 8th and 9th? A. No.

30 Q. And the Sudbury transactions were all cash transactions? A. I think so.

Q. Mr. Woods can tell us about that. When you went in, or were in the office, when the Kaatz agreement was discussed, Kaatz was represented by a lawyer? A. Yes.

Q. Were O'Hearn & Company represented by a lawyer? A. Yes.

Q. And you had no lawyer? A. No.

Q. No lawyer acting for you? A. No.

Q. So far as any of the fine legal points might go in the agreement, they were not explained to you by any of the lawyers that were present?

40 A. Oh, no, I don't think so.

HIS LORDSHIP: He signed this agreement.

MR. McRUER: He did not sign it.

HIS LORDSHIP: Oh, no, that was signed by Kaatz.

MR. McRUER: And signed by Richardson.

HIS LORDSHIP: Q. Are you disapproving now of this Kaatz

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agreement? Do you say there is anything wrong in it? A. No, your Lordship.

MR. McRUER: Of course, I do not think his approval or disapproval would affect the trustee.

Q. But in the light of the fact that you know now that Gardner has admitted a drafting arrangement in regard to Peninsular Petroleum stock, made on November 4th what do you say as to the recital in the agreement? A. I would have refuted—

MR. PORTER: My Lord, there is no admission before the court accept a few questions my friend has read. I have not read the other questions in the examination for discovery. Surely, my friend cannot ask this man what he might have done. He has told us he knew all about this drafting agreement at the time, that it had been refuted at the time. 10

MR. McRUER: Now we have a different story.

HIS LORDSHIP: I do not think it makes any difference. What he would do now is a different thing altogether. We have to view the thing as he viewed it at the time.

MR. McRUER: Q. In your letter, Exhibit 24, which my friend read to you, you state,

"A week ago Friday or Saturday, the 4th or 5th, Mr. Bayne, my Man- 20
"ager here, tells me he called up your office and said that he was
"offered the purchase of a big block of this stock and asked whether
"it would be alright to send this out on individual drafts to New York.
"He stated that if you happened to be short of this stock in the clear-
"ing that he had in his possession over two hundred thousand shares
"which he would lend you to send down attached to the drafts that
"were to be sent out."

Is that correct? A. Yes.

Q. And Bayne stated that to you? A. Bayne told me that.

Q. And then again, 30

"After this stock was purchased on Wednesday your office telephoned
"Mr. Bayne and told him that they could not handle this on draft as
"it was too big a thing to handle."

Is that a correct statement of what Bayne told you? A. Absolutely.

Q. "There was not sufficient money to be made out of this thing to
"warrant Mr. Bayne purchasing this stock in any other way except by
"arrangement with your office, as I had already told Mr. Bayne that
"no more stock of this type was to be bought unless funds were wired
"here——"

Is that correct? A. Absolutely. 40

Q. Did you have any resources for handling \$49,000 worth of penny stock that had to be paid for in cash in Toronto? A. No sir.

—Court adjourned at 12:40 p.m. until 2:00 p.m.

—On resuming at 2:00 p.m.

LEWIS JOHN BAYNE, Sworn.

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Q. Mr. Bayne, you were employed by L. S. Clarke as Manager I believe? A. Yes.

Q. And prior to becoming employed with Mr. Clarke you had been employed with Stewart McNair? A. Yes.

Q. Who ran brokerage offices at Sudbury and North Bay? A. Yes.

10 Q. And prior to that you had been in the bank I believe? A. With Gamble Robinson.

Q. In what capacity? A. Bookkeeper.

Q. They are wholesale fruit people? A. Yes.

Q. Prior to your employment with Gamble Robinson you had been where? A. With the Imperial Bank.

Q. Where? A. North Bay.

Q. You had something to do, did you not, with conducting the negotiations to open the brokerage office here? A. Yes.

Q. Whom did you see first about it? A. I think I saw the partners of F. O'Hearn & Company first.

20 Q. Was that before you had spoken to Mr. Clarke? A. I had asked him before if he would be interested in it if negotiations could be arranged.

Q. And then final negotiations were carried on, and the brokerage office ultimately opened? A. Yes.

Q. During your negotiations with the members of the firm of O'Hearn & Company did you have any discussion with them about prospective clients up here? A. I don't remember just what the conversation was.

30 Q. At any rate, after or about the time the business was being opened here, you had some correspondence with them, did you not? A. Yes.

Q. And you wished stationery, did you not? A. We had to get our own stationery.

Q. That is, stationery for the purpose of carrying on a brokerage business here and in Sudbury? A. Yes.

Q. You had to get it printed? A. Yes.

Q. There is no mistake about this, is there, Mr. Bayne, that what you were opening up was a brokerage office to do business with customers? A. Yes, that is right.

40 Q. And O'Hearn's knew that? A. Oh, yes.

Q. Then, did you receive this letter from O'Hearn & Company? (handing letter to witness) A. Yes.

Q. A letter dated January 21, 1931? A. Yes.

Q. Addressed to yourself? A. Yes.

Q. "We beg to acknowledge receipt of your letter of January 20th

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“enclosing certificate covering 1000 Bunker Hill Extension and as requested have entered open order to sell at 6 or better for the account of Joe Alemany.

“As requested, we beg to enclose herewith copies of the various forms which we use. In regard to the contract forms you will notice that we have one covering several exchanges that the stock is being bought on and you could have same printed or you could have the name of the exchange typewritten in.

“This is under the Security Frauds Act which we quote for your information—

“15. Every broker who has acted as an agent for a customer shall promptly send or deliver to each customer for whom any security has been bought or sold by the broker, a written confirmation of the transaction, setting forth—

- (a) the quantity and description of the security.
- (b) the name of the person or company from or to or through whom the security was bought or sold
- (c) the day, and the name of the stock exchange, upon which the transaction took place,

“and failure, without reasonable excuse, to comply herewith shall constitute an offence.”

“On one of our confirmation forms we have given you our idea of the heading which you could use on all your forms, and your letterheads could carry the same heading.

“We are also attaching copy of practically all our forms that we use and you could have any of them printed that you think advisable.

“Yours very truly,

“F. O’Hearn & Company.”

Then these forms were the enclosures, were they, Mr. Bayne? A. There were forms attached to it. I don’t know whether those are all the forms attached.

Q. You do not know whether they are all of the forms or not, but they are forms attached to the letter? A. Yes.

MR. PORTER: If this is the property of the trustee, it has not been produced. This is the first time I have seen or heard of this letter.

MR. McRUER: I am very sorry. I told you I think that we had additional productions, and it was on the file of the additional productions.

MR. PORTER: That may have been so. Then perhaps I did see it.

—EXHIBIT 26—Letter defendants to L. J. Bayne, Jan. 21, 1931, with number of brokerage forms attached.

MR. McRUER: Q. Then the letter states that on one of the forms they have indicated the heading that might be used, changes that might be made. There is a blue form here with the heading “F. O’Hearn & Company” struck out, and L. S. Clarke put in; and “Correspondent, F.

O'Hearn & Company, stock broker, North Bay, private wire," written in pencil—is that the one that came in with the changes—the one that indicated the changes they suggested? A. No, I don't think so.

Q. You do not think that is the one. Did you copy that off it? A. That is my own writing.

Q. That is as you prepared it from the form they sent up? A. Yes.

Q. Is this the form you had your stationery printed from? A. Yes, that is the one I had it printed from. (part of forms attached to Exhibit 26.)

10 Q. You call that blue one a bought note? A. A buy contract form.

Q. The pink one is a sold contract form, is it? A. Yes.

Q. I notice you have drawn your pencil through "F. O'Hearn & Company," "Toronto," and put on here, "1000 North Bay—1000 Sudbury." What were those? A. We were having stationery printed for those offices.

Q. Those were your instructions to the printer? A. Yes.

Q. As a matter of fact, these actual ones we have here with the pencil memoranda are the ones you got back from the printer? A. Yes.

20 Q. And then as a sample I show you a bought note confirmation form. Is that the form in which it was printed ultimately and used by L. S. Clarke & Co.? A. Yes sir.

Q. And the pink one is the sold one? A. Yes.

Q. Those are the forms that were used in the business here and at Sudbury after you opened the offices? A. Yes sir.

Q. And then I have a third one, just to make it complete. It is a second bought note which indicates the form for North Bay? A. Yes.

Q. You had separate ones for North Bay and Sudbury? A. Yes.

—EXHIBIT 27—Forms of bought and sold notes of Sudbury and North Bay offices of L. S. Clarke.

30 Q. What arrangement was made about the commissions Mr. Bayne? A. We were to get 50% commissions on Standard Exchange, orders executed on the Standard Mining and Stock Exchange.

Q. That I believe was stated in a letter of January 22nd? A. Yes.

Q. This is the Sudbury letter. Apparently there was one sent to Sudbury and one to North Bay. It is dated January 22nd, 1931; (reads letter) attached to it is the memorandum of rates of commission mentioned.

—EXHIBIT 28—Letter January 22nd, 1931, defendants to L. S. Clarke, with schedule of commission rates attached.

40 Q. Well then, Mr. Bayne, how did you carry on the trading when the office got going? Did you do a marginal business? A. Both margin and cash.

Q. And was it understood between you and the O'Hearn Company

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that you were going to do a marginal business with them? A. Yes sir.

Q. When the arrangements were made? A. Yes sir.

Q. As far as Sudbury and North Bay were concerned did you have separate accounts and separate offices? A. Separate accounts and separate offices.

Q. And when margins were required at Sudbury, did they call the Sudbury office? A. Yes sir.

Q. And when margins were required at North Bay they called what office? A. The North Bay office.

Q. For the margins? A. Yes. 10

Q. And in response to the margin calls, if margin was sent down it was, I take it, specifically stated as to what account it would be credited to? A. Yes.

Q. Well then when you received an order from a customer in North Bay what was the process? How did you execute the order Mr. Bayne? A. The order would be signed if the customer were in the office, and placed with the operator, and relayed to Toronto by telegraph.

Q. You had a direct wire connection with the office of O'Hearn & Company? A. Yes sir.

Q. A customer comes into your office in North Bay and wants to buy 20 a thousand shares of Wright Hargreaves, we will say he wants to buy it on margin—now, how was that effected? A. The order would be placed in the usual way with the exception that the word "margin" would be used in the order instead of the word "cash."

Q. And then if he puts up cash or collateral for the margin, how is that handled? A. The cash would be deposited with our office, and periodically we settled with F. O'Hearn & Company.

Q. Remitted cheques to F. O'Hearn & Co.? A. Yes sir. If it was collateral, it was sent down the same day, or the day it came in.

Q. And did you treat each customer's order separately? A. Yes 30 sir.

Q. It would be entered in the books of L. S. Clarke under the name of the customer I take it? A. Yes.

Q. But the order as transmitted to F. O'Hearn & Company, the customer's name does not go with it? A. No sir.

Q. Well then, Mr. Bayne, there were certain stocks that were purchased that could be dealt with, or were dealt with on margin, and certain that were not? A. Yes sir.

Q. And as to the stocks that were dealt with, what you call cash stocks, how was a transaction such as that carried on? A man buys for cash in North Bay? A. It would be entered on the wire as a cash order 40 and the stock would come up as soon as it was free for delivery.

Q. And then what kind of stocks were they that were handled as cash stocks? A. Well, penny stocks were all cash stocks.

HIS LORDSHIP: Q. A penny stock is a stock less than a dollar in value, is it? What constitutes a penny stock? A. The rules of the Ex-

change at that time was stocks selling under a dollar.

MR. McRUER: Q. Then you got into a deal in Peninsular Petroleum, Mr. Bayne? A. Yes sir.

Q. By the way, you had power of attorney to sign cheques? A. With Miss Mulligan.

Q. Miss Mulligan countersigned them? A. Yes.

Q. Leading up to the transactions on the 8th and 9th of November, had you been buying Peninsular Petroleum? A. Yes, we bought considerable.

10 Q. For whom? A. For a number of our North Bay clients.

Q. And for others? A. Yes.

Q. For whom? A. For Mr. Barkell in two accounts called Smith and Greenwood.

Q. What were the Smith and Greenwood accounts? A. They were an overflow of stock. It was started through an overflow of stock.

Q. What do you mean by an overflow of stock? A. Over-purchase.

Q. By whom? A. By Barkell.

Q. Did Mr. Clarke know about that? A. No, he did not.

20 Q. Did you tell him about it? A. No.

Q. Why didn't you tell him? A. I don't know.

HIS LORDSHIP: I did not understand about the Smith and Greenwood account. You say it was started from what?

MR. McRUER: An over-purchase.

Q. What is it now, Bayne? Tell us about it. A. An over-purchase of stock. Sometime in September I think it started. He requested me to buy a block of stock on one particular day, I can't tell you the exact date, and advised me he would take up what could not be placed.

30 Q. Would that be the day of that big purchase in September, 45,000 or something like that? A. That would possibly be the day. I haven't any idea what the exact date is.

Q. You did not tell Mr. Clarke about this over-purchase of Barkell's? A. No, I did not.

Q. He had not taken it up? A. No, he didn't take it up.

Q. How did you meet Barkell first? A. He came into the office. I had known him previous in the north.

Q. Where had you known him? A. Cobalt a number of years before.

Q. And how did he locate you down here in North Bay? A. He came into the office, presumably on a trip through to Noranda.

40 Q. What was the object of his visit to your office? A. To see how the market was acting.

Q. Did he have anything to discuss with you then? A. He opened up the discussion on the possibilities of Peninsular Petroleum stock.

Q. Well, my friend Mr. Porter brought out this morning that there was some pool organized in Peninsular Petroleum? A. Yes, there was.

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Q. Who organized that? A. I think that Mr. Barkell and Mr Lyons were partially responsible.

Q. Where did Mr. Lyons come from? A. From Toronto.

Q. Who were to become members of this pool? A. There was a man by the name of Wildger in Chatham.

HIS LORDSHIP: Do we have to go into these?

MR. McRUER: I do not think so, my Lord.

Q. Anyway, some trading was done for the pool? A. Yes sir.

Q. And for that trading that was done had you got paid by purchasers of the stock? A. Yes. 10

Q. Then we get down to the 1st of November.

HIS LORDSHIP: Q. This would be a penny stock and a cash transaction would it? A. Yes sir.

Q. This particular stock, Pen Pete? A. Pen Pete.

MR. McRUER: Q. And getting down to the 1st of November or thereabouts, there were as we have seen a large number of orders going through for the purchase of Pen Pete stock? A. Yes sir.

Q. Up to that time had you had any discussion with Mr. Clarke about Barkell, doing business with him? A. He had told me previously not to open up any account for him. 20

Q. Had that anything to do with the fact that you traded for Barkell in the name of Smith and Greenwood? A. No, that was done before.

Q. But you did not tell him then that you had been doing some business under the name of Smith and Greenwood. For whom was this trading being done in the early days of November, the first, second, third and fourth? A. For the clients.

Q. For whom? A. For the pool.

Q. Who was placing the orders? A. I was placing the orders for our clients here.

Q. Who was placing them with you? A. The clients. 30

Q. What clients? Was Barkell in it? A. I don't think he had bought anything up until possibly the tenth or around there. I am not just sure of the date. I don't know whether that is the date or not.

Q. To get your mind on a particular date, do you remember the day that a cheque was returned by the Bank? A. Yes.

Q. That had been a cheque that was drawn by whom? A. Drawn by our office here in favour of—

Q. But by whom at your office here? A. I drew the cheque out.

Q. You had drawn the cheque payable to O'Hearn and Company? A. Yes sir. 40

Q. And was the cheque met at the bank? A. Not the day it was presented.

Q. For how much? A. \$7500.00.

Q. And when the cheque was not met did you have any conversation with any member of O'Hearn & Company? A. Yes, Mr. Gardner called me on the telephone.

Q. About what time of day did he call you? A. I am not sure, but I think it was between three and four o'clock in the afternoon.

Q. Had you ever had any trouble with cheques of L. S. Clarke up until that time? A. No.

Q. And Mr. Clarke tells us he never had a cheque returned in his life. As far as you know, that is true? A. That is true.

Q. And then did you have any conversation with Mr. Gardner in reference to Peninsular Petroleum stock on that afternoon? A. I did.

10 Q. What did you say to him about it? A. I told him, Mr. Gardner, in the conversation, that I expected to get an order to buy a large block of Peninsular Petroleum stock, and asked him if he would draft them out to New York for me.

Q. And what did Mr. Gardner say to that? A. He said he would. I asked him to send up draft forms and we would put the names and the amount of stock on the draft as a memorandum, and he would issue the drafts from Toronto to their destination.

20 Q. And what did he say about that? A. He said he would, although he wanted me first to send the names down by wire. I told him that the addresses would be rather large, and take a long time to put on the wire; possibly there would be errors in them.

Q. Where were you expecting to get this large order for the purchase of Pen Pete? A. From Barkell in New York.

Q. Why was it necessary for you to make these arrangements about drafting it out? A. Because we could not finance a purchase of that size.

Q. In North Bay? A. In North Bay.

Q. You were at that time having trouble about a \$7500. cheque? A. Yes.

30 Q. Then did Gardner send the drafts? A. He sent up about 25 that day. They were received the following day. And another supply a couple of days later.

Q. Had you later requested more drafts? A. Saturday we wired to send a further supply.

Q. Are you sure it was Saturday, because we have the wires? A. No, not positive it was Saturday.

Q. I think it was the beginning of the week. A. The day of the—I don't know just exactly what day it was.

Q. At any rate, in response to a further request for drafts more drafts were sent up? A. Yes.

40 Q. And altogether how many drafts were sent? A. Around fifty.

Q. Well, we probably might make sure of it. I am told this is the bundle of drafts I have here that came up. A. That looks like them.

Q. And there is one in as an exhibit—it is Exhibit 2. They were all similar to Exhibit 2 I understand. That is correct, is it? A. Yes sir.

Q. I am told by those who have counted them that there were 53. Would that be about it? A. Around that figure, sir.

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Q. Mr. Bayne, did Mr. Gardner at any time make any change in these arrangements that you had made with him about drafting out the Pen Pete stock? A. He didn't say anything until the 9th.

Q. Until the 9th? A. No sir.

Q. What time did you have any communication with him on the 9th? HIS LORDSHIP: Will you explain a little more fully about the drafting out? I am not quite clear in my own mind just exactly what was involved. Just give me a typical case. The drafts are made on whom?

WITNESS: On the parties in New York.

HIS LORDSHIP: Q. Did you have the names of these parties? A. 10
No, I didn't have them yet.

Q. Was this a fictitious purchase of this stock? A. No.

Q. I do not understand it yet. You clarify it if you can for me. Is it a trade term, the drafting out; or does it apply to this particular transaction? Do you understand what I mean? A. I understand what you mean.

MR. McRUER: Probably if I took a draft I could go right through it with him.

HIS LORDSHIP: Supposing you do.

MR. McRUER: Q. I want to understand how this transaction was 20
to be carried through. You have told us that Mr. Gardner sent up 50 some odd draft forms, which we have in the form of Exhibit 2, which are in the form of envelopes? A. Yes.

HIS LORDSHIP: Q. Who was it suggested this proceeding first? Was it you or O'Hearn & Company? A. It was me.

Q. You originated this idea? A. Yes.

Q. At whose suggestion did it originate with you? A. It was suggested by Mr. Barkell that I make arrangements with O'Hearn and Company.

MR. McRUER: Q. How was it going to be done? You told us you 30
were expecting a large order from New York. Through whom were you to get this order? A. Through Barkell.

HIS LORDSHIP: Q. Was it an order to buy or to sell? A. To buy.

Q. To buy this particular stock.

MR. McRUER: Q. How were you going to get the names of the purchasers? A. He was going to mail up the list of names.

Q. To whom? A. To me.

Q. Was this discussion with Barkell before you had the discussion with Gardner about drafting it out? A. Yes, several times. 40

Q. Then the envelopes were sent up. Your order was placed.

HIS LORDSHIP: Q. Just before you leave that; were the people whose names were to appear on these drafts real people who were going to buy this stock, or were they just fictitious names? A. No they were real people.

Q. He was going to supply the names of real purchasers of this stock? A. Yes sir.

Q. And they numbered about 50? A. I would imagine there would be about that number.

Q. Had you got these names before you got in communication with him? A. No.

Q. He just told you he was going to give you the names? A. Yes.

Q. You made your arrangement with O'Hearns, and then Barkell was to furnish you the names? A. Yes.

10 MR. McRUER: Q. Let us see what you were going to do with them then. The name would be filled in here in North Bay with the address? A. The name and the address.

Q. You would have to have the amount of the purchase? A. We would know that by the number of shares.

Q. The number of shares and the price would give you the amount that the draft was to be drawn for? A. Yes.

Q. That was to be filled in in North Bay too, was it? A. Yes.

Q. Then the drafts so completed were to be sent away? A. To O'Hearn and Company.

20 Q. And they would have to sign them, of course. These blank forms were not signed? A. No, they were not signed.

Q. They would have to sign them and send them away—where? A. Out for collection to New York.

Q. With the certificate in the envelope? A. Yes.

HIS LORDSHIP: Q. What you got was simply the draft forms, to go back again to O'Hearn and Company for their signature, and to be sent out to New York? A. Yes.

Q. That never happened I understand? A. No, it was repudiated.

30 MR. McRUER: Q. And in doing that—in completing the transaction in that way you would not be required to put up any money? A. No.

Q. That would be all financed from O'Hearn and Company? A. Yes sir.

Q. Then you went ahead to place these orders, did you? A. Yes.

Q. And I believe you placed 78,000 on the 8th? A. Yes.

Q. And 246,000 on the 9th? A. Around that figure, yes sir.

Q. And had the orders been all placed before you heard from Gardner? A. I think just as the last order went in Mr. Gardner called.

Q. Pardon? A. I think just as the last order was placed Mr. Gardner called.

40 Q. And what was the amount of the last order? A. Around 50,000 shares.

HIS LORDSHIP: Q. Were these bona fide orders? The 50,000 shares, was that a bona fide purchaser? A. That was the order I had from New York.

Q. You don't know how bona fide it was I suppose? A. Well, I would say it was O. K. if the deal had gone through.

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MR. McRUER: Q. What do you mean, you would say it was O. K. if the deal had gone through? A. I have no reason to "disbelieve" that it was a fictitious purchase.

Q. What do you mean, that you had no reason to disbelieve that it was a fictitious purchase? A. I had no reason to think it was anything but a legitimate buying order.

Q. What do you mean by saying if the deal had gone through, you think it would have been taken up? A. Well, if as I had agreed with Mr. Gardner to put it through—if it had gone through as I had expected, I think that there is no reason to believe otherwise than that the drafts 10 would have been taken up when presented.

Q. And what makes you think that? Why wasn't the stock paid for then? How did the fact that Gardner did not draft it out interfere with that, is what I want to get from you? A. Well, there was stock sold in the market a day or two after, and broke the market down much below the buying price.

Q. Then when Gardner called you on the phone that afternoon, what did he say to you? A. He asked me where I was going to get the money to finance the purchase.

Q. This was after the \$49,000 had been purchased? A. Yes. 20

Q. And what did you say to that? A. I told him that I had made arrangements with him to draft it out.

Q. And what did he say? A. He said he couldn't draft out as large an amount of stock as that.

Q. And then what did you say to that? A. I told him I would have to see—or call Barkell in New York and find out what could be done about it.

Q. And did you do that? A. I did.

Q. And did you get Barkell? A. Yes.

Q. And what happened after that? I cannot ask you what conver- 30 sation you had with Barkell. A. He said that he would go out and try and get as much money as he could from the purchasers.

Q. Was any sum stated that he thought he could get from the purchasers? A. Well, whether it was at that particular time or the next day, I am not sure, he intimated that he could send up ten or fifteen thousand dollars.

Q. When you entered into this arrangement to draft out Peninsular Petroleum stock, did you say anything to Mr. Clarke about it? That is before Gardner spoke to you, when the damage was all done—did you say anything to Mr. Clarke about the fact that you were drafting out Pen- 40 insular Petroleum stock? A. I was under the impression that I had told him, but he advised me that I had not told him.

HIS LORDSHIP: Q. You say you were under the impression that you had told Clarke about the transaction; is that what you say? A. Yes.

MR. McRUER: Q. What do you say now—have you any recollec-

tion of telling Clarke that you had made arrangements—that is, before Clarke called you over that afternoon? A. Not definitely.

Q. Or indefinitely? A. No.

Q. Clarke says you made no arrangements—

MR. PORTER: Are you cross-examining?

HIS LORDSHIP: This is your witness. The impression it leaves on me is, he thought he had told Clarke, but Clarke says he did not, and he will not say he did.

MR. McRUER: We are acting for a trustee, and we have to use the
10 people—

HIS LORDSHIP: You cannot cross-examine this witness when you put him in the box.

MR. McRUER: Q. Well, at any rate, have you any idea what you told Clarke? A. No sir.

Q. When you discussed it with him, if you did, about this drafting out arrangement? A. If I did tell, it would be three or four days before.

Q. If you did, because you hadn't had any discussion until three or four days before? A. That is just what runs in my mind. I can't say definitely.

20 Q. At any rate, you went on then and tried to get something out of Barkell? A. Yes.

Q. Did you get any money out of Barkell? A. No, just a promise that he was going to send it.

Q. You got the promise that he was going to get some. My friend produces a telegram from his files which purports to be signed "L.J.B. N.A." Was that your usual way of sending messages over the wire? A. Yes.

Q. L. J. B. standing for L. J. Bayne, and N. A. for— A. North Bay.

Q. And did you send that wire? A. Yes.

30 Q. It is dated the 10th of November, 1932, addressed to Gardner, "Have been talking to my party in New York. He is getting cash for "this deal instead of drafts and will wire funds to me, expect some "in Saturday and will shoot it along to you as fast as I get it every- "thing O.K. L. J. B. N. A."

—EXHIBIT 29—Telegram, Nov. 10, 1932—Bayne to Gardner.

Q. Now you said that you had sent a request for further drafts. I show you a copy of a wire dated November 8th. Is that the wire that you refer to? A. Yes sir.

40 Q. "Will you please send out today all P. S. you have on hand, also "some more draft forms? Nora."

Nora was whom? A. Miss Mulligan.

HIS LORDSHIP: Addressed to whom?

MR. McRUER: Nick, is it? Who is that?

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WITNESS: I believe that is the cashier in F. O'Hearn & Company's office.

MR. McRUER: Q. That is one of your regular copies of wires sent over the wire to F. O'Hearn & Co? A. Yes.

Q. Of course, these do not go over the regular telegraph? A. Private wires.

—EXHIBIT 30—Copy of telegram, Nov. 8, 1932—Request for draft forms.

MR. McRUER: Mr. Porter, you have your copies of all these wires. They could be handled much better than ours because you put the time 10 of the day on.

MR. PORTER: Are you prepared to have them all go in?

MR. McRUER: I think so. We might as well have the complete story.

HIS LORDSHIP: Are you going to put all these telegrams in separately? How many are there?

MR. PORTER: There are quite a few, my Lord.

HIS LORDSHIP: Can you not put them all in together?

MR. PORTER: Put them all in together as far as I am concerned.

MR. McRUER: Unless my friend wants them all in—sometimes it 20 is bad policy to put in a whole sheaf of stuff that may be partly irrelevant, because they may have to be copied some time.

HIS LORDSHIP: Are you going over them now for the first time?

MR. McRUER: No, there are just some of them I wanted to refer to.

MR. PORTER: Well, here they are if you want them. (producing)

MR. McRUER: Q. I can probably save a lot of detail, Mr. Bayne. You did not get money from Barkell? A. No.

Q. And O'Hearns were pressing for the purchase price of the Pen Pete stock? A. Yes.

Q. And you were not able to deliver the money? A. No. 30

Q. I believe you sent down a cheque for \$10,000, didn't you? A. On the strength of that money coming up, yes.

Q. On the strength of the money coming up? A. I think that is what it was. I am not just sure.

Q. And was the cheque returned? A. It was at a later date.

Q. It was not cashed? A. No, it was not cashed.

Q. There were not funds for it? A. No.

Q. And at a later date it was returned to you? A. Yes.

Q. Then did you go to Toronto at the time the Kaatz agreement was signed? A. Yes sir. 40

Q. You were down in Toronto with Mr. Clarke, or had you been down before? A. I was down before he was.

Q. He told us you had been to O'Hearn and Company before he went there? A. I think I was, yes.

Q. And did you have anything to do with securing the 500,000 shares that were put up as collateral with O'Hearn and Company under the Kaatz agreement? A. I called Mr. Stronach on the telephone and told him what had happened, and he and Mr. Lyons came up from Toronto to North Bay. And that was the morning that the 126,000 shares of Peninsular Petroleum were sold out by F. O'Hearn & Co., and Mr. Lyons and Mr. Stronach were in Mr. Clarke's and Lounsbury's office.

10 Q. Was Mr. Clarke there? A. Yes, and myself. And Mr. Stronach said he would arrange to deliver to F. O'Hearn & Co. a half a million shares of Peninsular Petroleum stock as collateral to cover the purchase. We called Mr. Gardner on the telephone at that particular time and told him—asked him if he would discontinue selling the stock out under those conditions, and he said he would. We immediately went to Toronto and arranged for the deposit of the stock with O'Hearn & Co.

Q. And at that time what if anything was said about the segregation of this account? A. I believe Mr. Clarke, also the representative of Kaatz, Mr. Jenner, suggested that it be segregated.

Q. And was anything said further about that? Were you there all the time? A. Most of the time, yes.

20 Q. I asked you if you were there all the time? A. I rather think I was.

Q. And did they agree to that? A. Yes. Mr. Gardner asked me to send him the figures stipulating the particular amounts purchased under the Kaatz agreement, and deducting the amount sold, which was to be transferred into a special account.

Q. Then I see a wire here dated November 25th. Did you send that down? A. I did.

30 Q. To Gardner, "Balance for special account \$41,897.60 after sale of 131,500 shares." Had that to do with Peninsular Petroleum? A. Yes. They had sold a portion of the 300,000 shares purchased.

Q. They had sold out a portion of the 300,000 shares purchased.

—EXHIBIT 31—Telegram, Nov. 25, 1932—Clarke to Gardner.

Q. Then did you ultimately send down the details of the figures? A. Yes. I was late sending it out.

Q. Is this letter dated December 5, 1932, the letter you sent down with the details of the figures? A. Yes.

Q. From Bayne to F. O'Hearn & Co. "Gentlemen, the figures on "the PS deal are as follows:"

40 PS deal—that is an abbreviation for Peninsular Petroleum? A. P. S. is the abbreviation used in the wire.

Q. "Purchases Nov. 8th 64,500 shares ours \$49821.87
9th 246,000 " "
"Sales Nov. 16th 126,000 " "
21st 5,500 " " 9019.67"

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And it left a net balance apparently, according to this, \$39,846.70. after the sales were deducted.

Q. You had made this up, had you, from your records? A. Yes.

Q. And long 179,000 shares.

—EXHIBIT 32—Letter December 5, 1932, Bayne to Defendants.

Q. Now did you get monthly statements from O'Hearn & Co? A. Yes sir.

Q. Then I show you Exhibit No. 13. Is that bundle the monthly statements for December 31, 1932? A. Yes sir.

Q. And this shows a statement for L. S. Clarke, North Bay, "N. A." 10
"Canadian Special Account." December 6th, 310,500 shares. That would be the day after you wrote the letter setting out the exact figures? A. Yes sir.

Q. And the amounts charged in the statement are \$49,045.62—that was the purchase price shown in your letter, was it not? A. I think it was, yes.

Q. And "Long Pen Pete, 679,000 shares." That would be inclusive of the 500,000 that was put up as collateral for this account? A. Yes. There is no entry shown where it was credited.

Q. The collateral. Then there is a charge of interest, \$191.06, on this 20
account.

On January 31st did you get monthly statements of the North Bay and Sudbury accounts? A. Yes.

Q. Are these statements that I show you statements for January 31, 1933? A. Yes sir.

Q. And that shows the special account with a balance of \$40,274.58? A. Yes.

Q. And long the same amount, 679,000 Pen Pete. They evidently had not sold any in the meantime? A. Yes sir.

—EXHIBIT 33—Monthly statements defendants to L. S. Clark, Janu- 30
ary 31, 1933.

Q. And then you got from them statements for February 28th? A. Yes.

Q. These are the monthly statements for February 28th? A. Yes sir.

Q. And I do not find in any of these statements (the Feb. 28th statements) a statement of a special account, but an entry under February 28th of 679,000 Pen Pete, "Spa"? A. "S/A."

Q. Is this an abbreviation for special account? A. I would imagine so. 40

Q. \$40,490.84—that is debited to the general account, the Canadian account, North Bay? A. Yes sir.

—EXHIBIT 34—Monthly Accounts of defendants to L. S. Clarke for Feb. 28, 1933.

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Q. These monthly statements as sent out show the transactions from day to day that have taken place during the month? A. Every day's business of the month.

Q. And the debits and credits that are made in the ledger account? A. For that particular account.

Q. And these shares in no way at any time charged to the Sudbury account? A. No sir.

10 Q. It was kept separate? A. Yes.

Q. Mr. Clarke told us about having discovered that you had been drafting out stock from the North Bay office, and that he had forbidden you to draft out stock further here. What do you say about that? A. That is right. He told me not to draft any more out.

HIS LORDSHIP: When was this? A. Some time the latter part of October.

MR. McRUER: Q. When you were in Toronto, and this arrangement was made in reference to the segregating of the Peninsular Petroleum purchases that you have told us about, do you recollect Mr. Clarke's getting anything that day from O'Hearn & Co? A. Yes, he got a cheque from them that day.

Q. Do you know how much it was? A. \$3,000.

Q. Now in reference to your arrangements with Mr. Gardner about drafting this stock out, and the hitch that occurred when he did not draft it out in the ordinary course—this was a stock that should be paid for in cash? A. Yes sir.

Q. And a broker would have to pay for it in cash? A. Yes.

Q. And the purchaser would have to pay for it in cash? A. Yes.

Q. And when he pays the cash he will get his stock? A. Yes.

30 Q. When these arrangements were made to draft the stock, as you have told us—to draft the stock from Toronto to New York—did you have any money here to pay for it? A. No.

Q. What time would ordinarily elapse between the placing of the order and the getting of the stock from clearing and drafting it—how long would that take? A. It should not take over 48 hours.

Q. You mean to get the draft away? A. Yes.

Q. Then it would have to go to its destination.

HIS LORDSHIP: Q. The draft would have to go back to Toronto to be signed, and be sent off to New York, and I suppose the customer would accept the draft and pay the money. You do not know how long that would take? A. It should not take over ten days at the outside.

MR. McRUER: Q. But the customer would have that length of time I suppose to finance it in the meantime? A. Yes.

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BY HIS LORDSHIP:

Q. Isn't the stock certificate attached to the draft? A. Yes sir, it would be.

Q. The stock certificate is attached to the draft. The man could not get the stock certificate till he had paid for the draft, could he? A. No.

Q. So he could not use that in advance.

MR. McRUER: No, not in advance, but when the certificate would go down to New York through the bank—

WITNESS: He would get it when he paid for it.

MR. McRUER: Q. He would get it when he paid for it? A. Yes. 10

Q. Had you ever in your time that you carried on business here made any arrangements with O'Hearn and Company to draft out stock other than this one? A. Once previously, I think.

Q. How much? A. A small amount, two or three hundred dollars.

Q. In reference to the agreement to pay half commission to Clarke, was there a change made in that when there were some stocks taken off the Standard Exchange and put on the Toronto Exchange? A. I think there was.

Q. What was the change that was made? A. Well, I think—

Q. Give us your recollection of it. You were looking after it. A. The 20 arrangements were not made with me, sir.

Q. With whom were they made? A. Mr. Clarke.

HIS LORDSHIP: Q. Were these some of the mining stocks that were taken off the Standard Exchange and put on the Toronto Stock Exchange? A. Yes.

Q. And then immediately the rules of the Toronto Stock Exchange would be applicable? A. They would prohibit the splitting of commissions. I think there was some arrangement made whereby O'Hearn and Company were to relieve us of some of the wire charges. Just what they are, I am not positive. 30

MR. McRUER: Q. Do you know to what amount? A. I don't know exactly because I don't think there was any correspondence in connection with it.

CROSS-EXAMINED BY MR. PORTER:

Q. Mr. Bayne, you have mentioned something about an arrangement between L. S. Clarke and F. O'Hearn & Co. as to paying for the wire service. Is it your understanding of that arrangement that there was some fixed charge every month, something of that kind? A. Well, there was a charge from F. O'Hearn & Co. to us every month.

Q. It was something like \$125. or some definite monthly sum? A. I 40 have forgotten the amount. It was charged through monthly.

Q. It was a monthly sum that was charged for the wire service? A. Yes.

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Q. And as you have stated, when International Nickel was moved from the Standard Stock and Mining Exchange to the Toronto Stock Exchange, or somewhere near that time, your understanding is that they relieved Clarke of that charge for the wire service? A. Yes.

Q. You also have identified certain contract forms which you used with your customers? A. Yes.

Q. And certain forms that O'Hearn & Co. sent to you? A. Yes.

Q. And also you have stated that on some of these forms sent to you by O'Hearn & Co. there was some pencil writing which was in your own handwriting? A. Yes sir.

Q. So that the form that was eventually settled upon to be used by L. S. Clarke in his general business was something that you prepared based on the general scheme of the forms that were sent by O'Hearn & Co? A. Yes.

Q. But the final form that you settled upon for use in L. S. Clarke's business, was that ever settled with the concurrence of O'Hearn & Co., or were there any later discussions with them as to what form those contract notes should take? A. Not as I know of.

Q. You were experienced in the brokerage business at that time? A. Yes.

Q. And you settled the form yourself? A. As far as I know, yes. I don't know whether there was any correspondence in connection with it or not.

Q. In September, 1932, you became interested in some way in this Peninsular Petroleum through information that was supplied to you by Barkell? A. Yes.

Q. And during the months of September and October Barkell, I am informed, was in your office a great deal of the time? A. Quite a bit.

Q. How often would Clarke come into the office—just roughly? A. I haven't any idea.

Q. Did he come into the office every day? A. Well, he was away quite a bit of the time, but whenever he was in town he would be quite likely in the office.

Q. In and out? A. Not very often; possibly once a day.

Q. Did he exercise any close supervision over the affairs? A. Not particularly.

Q. He left everything to you? A. Mostly.

Q. Trusted you? A. Yes sir.

Q. Did you make any reports to him from time to time as to how the business was going? A. Yes, ever so often I did.

Q. During the months of September and October did you make any reports as to the progress of the business during those months? A. I don't recall whether I did or not.

Q. Clarke knew that Barkell was a frequenter of your office in North Bay, didn't he? A. Yes, he had met him there at different times.

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Q. And he knew he was talking to your clients quite freely about Pen Pete, and so on? A. Yes.

Q. And you were doing the same? A. Yes.

Q. Clarke knew it? A. I presume he did.

Q. You were doing it in the course of your business, weren't you?
A. Yes.

Q. Business for the firm? A. Ordinary day's business.

Q. All your information about Pen Pete came from Barkell, didn't it?
A. Barkell, yes.

Q. Did you know Stronach at that time? A. Just met him. 10

Q. And Lyons? A. Just met him.

Q. They were directors of Pen Pete? A. Mr. Stronach I believe was Secretary-Treasurer. I don't think Lyons had anything to do in an official capacity.

Q. Then you got in a great many people in North Bay and surrounding vicinity, and you have mentioned a pool. That was really sponsored by yourself largely, was it not? A. Well, it was as far as the North Bay people were concerned.

Q. By yourself? A. Yes.

Q. Some of those people were friends of Clarke's, weren't they, rather than your own, at the time you solicited them in connection with this pool? A. Well, they were just the general run of people around town that we were dealing with. 20

Q. Did you know them very well yourself? A. Yes.

Q. And you used your own influence as well as your influence as manager of Clarke's business, I suppose? A. Yes.

Q. Did you ever indicate to them that Mr. Clarke was favourably disposed towards the pool? A. Well, it was a known fact that he held some of the shares.

Q. You did not hesitate to tell these prospective customers that was the case, did you? A. No. 30

Q. As a matter of fact, you did tell them Clarke was one of the participants in this pool? A. Yes.

Q. You were the Manager of this pool, and was Clarke ever pointed to as being a sort of backer of the whole proposition? A. No.

Q. Not quite that far? A. No.

Q. But Clarke's name was among some of the first subscribers to this pool? A. No, I don't think he was.

Q. What was he—the fourth or fifth? A. Possibly he was, and possibly he was not. I have not seen the list of the pool shareholders for some time and I don't remember. 40

Q. You, of course, had a great many conversations with Clarke yourself about Peninsular Petroleum, didn't you? A. Yes, he asked me from time to time about it.

Q. You were generally what they call bullish? A. Enthusiastic, yes.

Q. As a matter of fact, as a result Clarke became bullish too, didn't he? A. Mr. Clarke never said very much about it to my knowledge.

Q. Did you ever discuss with Mr. Clarke the possibility of boosting this stock in the office of F. O'Hearn & Co., anything of that kind? A. I think Mr. Clarke was down there one time and inquired about it, and when he came back he didn't say very much about it, except that someone down there told him that there was some short interest in it, and that is all he told me about it.

10 Q. You do not know whether he was there inquiring about it, or whether he was there to praise it? A. I presume he was inquiring.

Q. That is just a presumption? A. Yes. I don't know.

HIS LORDSHIP: Q. Did you know anything about this man Barkell? A. No.

Q. Did you make any inquiries about him at all, who he was or what he was? A. I had known him several years before, my Lord.

Q. What was he? A. He was manufacturer's agent at the time.

20 Q. Do you know anything about his financial responsibility, whether he was a man of any substance or just some fly-by-night fellow trying to create a market? A. Well, I didn't make sufficient investigation at the time. I thought he was all right at the time.

Q. Did you not become suspicious of this whole transaction pretty early in the day? You are not so simple-minded as all that, are you. A. At times I did, but I had the assurance that it was all right.

MR. PORTER: Q. At one time there were some 150,000 odd shares of Peninsular Petroleum in this pool, were there not? A. Yes, there were.

Q. Is it true that at one time Barkell took the stock certificates representing that 150,000 odd shares—took them away with him with the intention of depositing them with a trust company in Toronto? A. Yes.

30 Q. Now just when was that? A. Around the latter part of September I think, and 1st of October.

Q. Around the latter part of September did Barkell suggest that he should take this stock away from your office? A. He suggested that he take it and deposit it with a trust company.

Q. With what trust company? A. Chartered Trust and Executor.

HIS LORDSHIP: Q. For what purpose? A. To be deposited with the pool.

MR. PORTER: Q. Did he give you a receipt? A. He did.

40 Q. Do you know whether that stock was ever deposited with the trust company? A. We found out at a later date that it had never been deposited.

Q. After he took the stock away from you, did you ever ask the trust company to give you any evidence of having that stock with them? A. No, I did not.

Q. Did you ever ask Barkell whether he deposited the stock with them? A. Yes, I did.

Q. How long after the date when he took the stock away from you

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did you ask him whether he had deposited it with the trust company?

A. I don't remember.

Q. A few days or a few weeks? A. It would be a week or so I suppose.

Q. And what did he say? A. He said he had.

Q. You did not check that up in any way? A. No.

Q. You knew of course that the people interested in this pool in North Bay were very responsible men, and substantial men in the community here—didn't you? A. Yes.

Q. Some of them were doctors, and some of them were business men in quite a large way. You knew this stock belonged to them, didn't you? 10

A. Yes.

Q. And you did not ask for anything except a receipt from Barkell to satisfy you that it had been properly deposited in the trust company in Toronto. Is that correct? A. Yes.

Q. Did you have any interest in this pool yourself? A. I was supposed to get some stock out of it.

Q. What were you supposed to get? A. A percentage of the amount placed in the pool.

Q. That was part of the pool agreement, was it? A. Yes. 20

Q. Did you ever get anything from Barkell in addition to what you were supposed to get under the pool agreement—anything in the way of money? A. Some of the stock was supposedly sold and the cash was sent up to me.

Q. That was not yours? A. That was some of the stock that was allotted to me was sold.

Q. Some of your stock was sold and you got the cash. And how much did it amount to? A. I think it was around six or seven hundred dollars.

Q. And you put that into your own pocket? A. Yes. 30

HIS LORDSHIP: That was some easy money.

MR. PORTER: Q. How much of your time in September and October did you spend with Barkell? About how many hours a day was he sitting around your office up here? Can you give us some rough estimate? A. Quite a bit. I don't know just how much.

Q. This was not his home. North Bay was not his home, was it? A. No.

Q. So about the only place he had to sit would be your office? A. Yes.

Q. He was here solely on the business of boosting Pen Pete? A. 40
Yes.

Q. Didn't it occur to you it was rather extraordinary that this man who was so much on the inside of this oil proposition, with such a bright future, should concentrate all his time on your particular office? Why did he hit on North Bay? A. I don't know.

Q. You did not know him very well before this, did you? I think you have told me you didn't know him very intimately. A. Not for a number of years.

Q. And you had years of experience with Stewart-McNair and Co. as a broker? A. Yes—not years; a couple of years.

Q. And you were in a bank for a long time? A. Yes.

Q. Then you kept an account in the North Bay office under the name of Smith—B. Smith, I think it is here. Do you recognize these ledger sheets? A. Yes.

10 Q. And also another account, Greenwood? A. Yes.

Q. And you did not actually make these entries in your own handwriting, did you? A. No.

Q. Nevertheless you know that these are the ledger sheets from the company? A. Yes.

Q. And I see that Greenwood has an address here, Apartment 24, 101 Vaughan Road, Toronto. Is there such a man as Greenwood? A. I believe there is.

Q. Did you ever see him? A. No.

Q. Ever have any letters from him? A. No.

20 HIS LORDSHIP: Q. Where did you get the name Greenwood from? Who gave it to you? A. Barkell.

MR. PORTER: Q. He gave you the address of Greenwood? A. Yes.

Q. Did you ever get any written orders from Greenwood to buy anything? A. No.

Q. Did you know that the Greenwood account was a fictitious account? A. Barkell used that in place of his own name.

30 Q. You knew all the time that this Greenwood account was running in the North Bay office that it was not for a man by the name of Greenwood, 101 Vaughan Road, Toronto, but it was for a man named Barkell—is that right? A. Yes.

Q. Does the same apply to the Smith account? A. Yes.

Q. I will put in these two accounts as Exhibit 35.

—EXHIBIT 35—Ledger accounts from L. S. Clarke's books—Smith and Greenwood.

Q. Just look at these accounts for a moment. You see that the Greenwood account starts on September 10th. Is that "brought forward?" Is that what those words are? A. "Bought and sold."

40 Q. There was no account prior to this under the name of Greenwood? A. No.

Q. The first entry is September 10th, 1932, the purchase of 20,000 Pen Pete, price \$2900. And then on September 12th a cheque received for \$1500., leaving a debit balance of \$1400. You told us, and Mr. Clarke has

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told us, and it has been very much rubbed in today, that Pen Pete is what is known as a penny stock. That is right? A. Yes.

Q. And you are supposed to get 100% cash for it? A. Yes.

Q. But you did not in this case, did you? A. No. He was supposed to pay that up in full and he didn't.

HIS LORDSHIP: Q. Who was supposed to? A. Barkell.

MR. PORTER: Q. Barkell alias Greenwood. Then I see that on following days, September 13th, 14th and 16th there are a considerable number of purchases. So that at the end of the 16th of September, after all the purchases are accounted for, there is a debit of \$6653.75 in the Greenwood account. And then on the 19th of September there is a cheque received for \$1500. reducing the debit to \$5153.75. Did you get after Barkell to make up this debit? A. Yes. 10

Q. You allowed this to run for several days. There was a debit of quite a large amount of money at that time, wasn't there? A. Yes.

Q. And you did not know what Barkell's financial worth was, did you? A. No.

Q. And then you go on, even though that debit is accumulated as the result of several days' trading, and all you get is another cheque for \$1500. On the 19th there is some more trading—more Pen Pete purchased on the 19th, increasing the debit to \$5921.25. Then we go on, and there are more purchases on the 21st, and finally on the 22nd there is a cheque received for \$2500, this time reducing the debit to \$3586.25. That is right, isn't it? A. Yes. 20

HIS LORDSHIP: Are you dealing with the Greenwood account now?

MR. PORTER: The Greenwood account, my Lord.

Q. Without going into any further dealing in connection with this account, but looking down the balance column we see that every entry there is a debit entry in the three, four and five thousand dollar quantities, and still there is Pen Pete being purchased daily almost—perhaps not daily, but there are fairly heavy purchases from time to time. Sometimes you do receive cheques. There is a cheque here for \$1750. on one occasion, and so on. So that we come down to November, and we start out the month with a debit of \$4200. There are heavy purchases—increasingly heavy purchases in the early days of November coming on to the fourth and 5th, and there is a cheque for \$2500. on the third of November, and so on. 30

Now at no time during the length of this account was the debit ever wiped off? A. No.

Q. So you never got paid up for the Pen Pete, although you kept on buying for Barkell, didn't you? A. Yes. 40

Q. And as a matter of fact, the debit was generally up around four and five thousand dollars. On November 5th it was as high as \$12,970.31, and finally when the account was closed out—or rather, when the account was transferred to a New York account, on January 31, 1933, there was a debit of over \$5,000 at that time.

So much then for the Greenwood account. Then we look at the Smith account. The Smith account opens in the same way. By the way, I see that Smith is supposed to live at 334 Lauder Avenue, Toronto. Do you know whether he did? A. I don't know whether that is the proper address or not.

Q. Who is Smith? Just another name for Barkell again? A. No, it is an individual.

HIS LORDSHIP: Q. Did you ever see him? A. It happens to be a woman, Miss Smith.

10 Q. Did you know the woman? A. I have met her, yes.

MR. PORTER: Q. Had she ever been in your office in North Bay? A. No.

Q. Where did you meet her? A. Toronto.

Q. Who introduced you? A. Barkell.

Q. What was her occupation? A. She was in an office I believe.

Q. Stenographer or something of that kind? A. I imagine so.

Q. Was she financially substantial in any way?

HIS LORDSHIP: Q. She never gave any orders to buy this stock herself, did she? A. No sir.

20 Q. They were all given by Barkell.

MR. PORTER: Q. Did Barkell always say that these orders as they came through were for Miss Simth? A. Smith or Greenwood.

Q. And you could put them down in either account as you saw fit? A. Yes.

Q. Did you ever send any statements—any contract notes out to Miss Smith? A. I don't think so.

Q. Nor to Greenwood? A. No.

30 Q. Any that went out were sent to Barkell. I see the Smith account starts out in the same way, September 10th, 20,000 Pen Pete purchased, \$2900. Then there is a credit of a cheque for \$1500. So you start off with a debit of \$1400. And then without going into too much detail, the document pretty well speaks for itself, we see here that there was always a debit, but in this account at one time it got down into the hundreds of dollars, but for the most part, over the months of September and the latter part of October went up into the thousands of dollars, and finally when it was closed out in January, or transferred to the New York account on January 1st, 1932, the debit balance was \$7,139.63. Is that right? A. Yes.

40 Q. Now, Mr. Bayne, you always knew that you had no right to carry on an account of this kind without being paid for this stock from time to time, didn't you? A. Yes.

Q. Did you ever tell Mr. Clarke about this account? A. No.

Q. When did he first find out about the account? He says I think that he did not find out until a long time afterwards. Is that right? A. That would be around the 9th or 10th of November possibly.

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Q. Of course, all these orders for Pen Pete were put through O'Hearn and Company? A. The buying orders, yes.

Q. And the only reason that you were able to get the stock was because O'Hearn's general account was so well margined, with the funds of other customers of the North Bay account, that they could carry this Pen Pete stock—rather, they could deliver this Pen Pete stock and their account would still be in proper shape. That was about the situation, wasn't it? A. Yes.

Q. And you knew that, didn't you, at that time? A. Yes.

Q. When you received this stock from O'Hearn & Co. from day to day as the purchases were made, what did you do with it? A. If it was bought for the clients, it was held in the office. If it was bought for Smith and Greenwood account it was held until sufficient was sold to enable us to cash it. 10

Q. Sufficient sold, what do you mean? A. There was some being sold. The stock for payment was sold through a fellow by the name of Maguire, who Barkell had arranged for.

Q. Does this account show any of those sales? A. No, they were sold in Toronto—I don't know where they were sold.

Q. Is this what you mean; that Barkell in Toronto or some other place would go about and try to dispose of this stock which he was buying from you? A. He had a man down there who was acting. 20

HIS LORDSHIP: Q. Barkell was selling in Toronto? A. Yes, he had a man down there.

Q. Barkell was selling in Toronto and you were buying it here? A. Yes.

MR. PORTER: Q. Does this account show where any of this stock was actually handed out from time to time? A. It should show where deliveries were made.

Q. December 13, 1932 there is a delivery? A. That wouldn't be it. 30

Q. That would not be in a period we are particularly interested in. In the Smith account perhaps you can point out the first record of any delivery. That is on the 23rd of September, 15,000 Pen Pete delivered. It does not say to whom. Whom would it be delivered to? A. Possibly to Barkell.

Q. Would it be delivered conceivably to anybody else? A. Or to Mr. Maguire who was selling.

Q. Who is Mr. Maguire? A. He is a fellow who was working as a broker's agent in Toronto. 40

Q. Did he ever come up to North Bay to get it? A. No.

Q. You would send it through the mail to him? A. Yes.

Q. He was in league with Barkell? A. Yes.

Q. So that sending it to him was much the same as sending it to Barkell? A. Same thing.

Q. Apparently on the 23rd of September there were 15,000 shares

delivered. First, there is a draft for \$1850. It does not say where that came from; then a draft "Lyon," \$1025. Who is Lyons? Is that the same man you mentioned before? A. Yes.

Q. He is a director of the Pen Pete Company? A. No, he was not.

Q. He was connected with this whole proposition? A. Yes.

Q. And in league with Barkell? A. Yes.

Q. That would indicate, would it, that he was the man who paid the \$1025 in that particular instance? A. I think there was a draft sent
10 out on him.

Q. And he signed it, accepted it? A. I don't know whether he did or not.

Q. Isn't that what that entry would indicate? A. Yes.

Q. There is nobody else you know of who would? A. No.

Q. Here is the next draft, Maguire, \$750. That would indicate that Maguire was the man who accepted the next draft? A. Yes.

Q. So he was the man who paid that money in. That is what it means too, isn't it? A. Yes.

Q. Here is 6,000 Pen Pete delivered "cheque issued." What does
20 that mean? That is a cheque issued by whom? A. I don't know.

Q. It looks to me as if you issued the cheque? A. Yes.

Q. What does that say—"H.M."—what is that? A. I don't know what it is.

Q. You issued a cheque on this account on September 23rd, 1932, when there was still a considerable debit balance—a cheque for \$2275. A. I don't know what that was for.

Q. It looks to me as if that word was "H. M." something. Does that indicate anything to you? A. No.

Q. Then we go on a bit further. There are some other entries as to
30 Pen Pete being delivered without mentioning to whom, but on October 25th there are 10,000 shares of Pen Pete delivered to Barkell. That indicates it was delivered direct to him, doesn't it? A. Yes.

Q. On the 28th of October—that is the next entry as to delivery—12,500 Pen Pete delivered Barkell—is that right? A. Yes.

Q. That means it was delivered to him.

HIS LORDSHIP: Q. Where did the money come from to buy this stock and deliver it to Barkell? A. Maguire would wire it up from Toronto.

Q. That means that Barkell was selling to himself, does it? A. It
40 is the same thing, your Lordship.

MR. PORTER: Q. And we have here on November 4th 35,000 shares delivered, but no mention as to whom that was delivered to. And on November 7th there were 35,000 shares delivered, but does not mention any names. So that, to make a long story short, the whole situation was, was it not, that all deliveries of stock in the Smith and Greenwood

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accounts were deliveries made to some party who was in Barkell's scheme? Is that right? A. Yes.

Q. Have you any idea as to what Barkell and his associates did with that stock when they received it in that way? A. They would have to deliver it to the brokers through whom they sold it I suppose.

Q. You think then that they sold it through some brokers; is that right? A. Yes.

Q. Do you happen to know through what brokers they sold it? A. I haven't any idea.

Q. Was it sold in Toronto, or New York, or where? A. Toronto 10
I think.

Q. Do you know who was buying it? A. We bought some of it back.

Q. As a matter of fact, didn't you buy most of it back? A. Quite likely.

Q. All these orders you were sending out to O'Hearn & Co. were merely orders you gave to buy back some of this stock which had left the Smith and Greenwood account. Isn't that the situation. A. Yes.

Q. So you were having a sort of merry-go-round here. And as a matter of fact, you knew it, didn't you? A. Yes. 20

Q. You knew the whole scheme?

HIS LORDSHIP: Nothing more than fraud—first class fraud!

MR. PORTER: Q. I suppose the purpose of this scheme was in some way to get the price of this stock to go up, wasn't it? There must have been something in it for you somewhere. A. No.

Q. Do you mean to say you were doing this just for your health? A. No, the account was on the books there, and to keep it financed we had to sell it.

Q. You knew the thing from the inside out, didn't you? A. I knew it was growing each time it was turned over. 30

Q. You knew who were in it, what they were doing, and what their purpose was? A. I thought I did.

Q. Well, did you? A. I didn't know it all.

Q. You knew perfectly well that there was to be something in it for you and Barkell and some of his associates, didn't you? A. Well, there was supposed to have been.

Q. Wasn't it just a little means of boosting the price of this stock, and possibly when things went high enough you could unload the whole thing on to the public? A. Well, it was supposed to be a pool operation. I presume they intended to get the price of the stock high enough so they could possibly make some money out of it, and put money in the treasury. 40

HIS LORDSHIP: Q. Money in the treasury of what? A. Of Peninsular Petroleum.

MR. PORTER: Q. A high-minded motive. Of course, this little philanthropy you were engaged in was all done on the strength of the ac-

count of the other North Bay customers. They were well enough margined so you could act through O'Hearn & Co. without any difficulty there? A. Well, we did not have enough to do it that way, or we would not have had to re-sell it to keep it—

Q. You did not have quite enough. The Clarke account with O'Hearn & Co. was not quite well enough margined for them to carry on with this Pen Pete, and I suppose they were continually asking you to put up a few thousand dollars here and there. So you had to get some money in now and then, just enough from Barkell or his associates to pass it on to O'Hearn & Co? A. Yes.

Q. Of course, you never breathed a word of this to anybody connected with O'Hearn & Co., did you? A. No.

Q. And on September 14, 1932, did O'Hearn and Co. send you a wire over the private wire, "Would certainly watch your step on Pen Pete." A. Yes.

Q. And was your reply, "Thanks—everything O.K.?"

HIS LORDSHIP: Is that telegram in?

MR. PORTER: The telegram is not in yet, my Lord. It was mentioned but not put in as an exhibit.

20 Q. You remember getting that? A. Yes.

Q. And you remember the reply, "Thanks, everything O. K." A. I don't recall the reply to it.

HIS LORDSHIP: That telegram was a private wire sent to this man himself?

MR. PORTER: Yes, my Lord, that is the way it appears.

Q. Did you just receive this wire and not reply to it in any way at all? A. I don't think I did. Anyway, I don't remember replying to it.

Q. But you never followed that advice, did you? A. No.

—EXHIBIT 36—Telegram, Sept. 14, 1932—Defendants to Bayne.

30 Q. So that in September there were purchases through O'Hearn & Co. of Pen Pete of a total of about 447,000 shares. Is that right? A. I haven't any idea how many.

Q. Well those statements that were put in perhaps would show that. I don't think we need press you on it. Nevertheless, during September any calls for money either by way of margin or by way of cash, as my friend seems to like to distinguish the two, were always promptly met by your office, were they not? A. Yes.

Q. And they always had been ever since you started business? A. Yes.

40 Q. And the first time that any cheque had ever been sent in your experience in Clarke's office that was not honoured, was the one of November 3rd for \$7500? A. Yes.

Q. And that was honoured the next day.

HIS LORDSHIP: Q. How much did Clarke know of this merry-

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go-round we have just heard about? A. He didn't know anything about it.

Q. When did he find out about it? A. The 9th or 10th of November.

Q. And then did he know all about it at that time? A. I don't know whether I told him all the details or not.

Q. He understood what had been going on, did he? A. Part of it.

Q. What part did he not understand? A. I can't tell, your Lordship.

Q. Did you only tell half the story, or did you tell the whole story? 10
A. I don't know just what I did tell him, your Lordship.

Q. You can say more than that, can you not?

MR. PORTER: Q. You seem to have quite a clear recollection as to what you told Gardner on one occasion. Then the large portion of the purchases of Pen Pete from November 1st to November 5th was for the Smith and Greenwood accounts, was it not? A. Yes, I think it was.

Q. You may recall receiving a telegram on November 1st, something to this effect: "Please mail cheque, \$7500. your account," from the O'Hearn Company. There was such a telegram, was there not? A. I think so. 20

Q. And the cheque that you sent was in reply? A. Quite likely.

Q. I do not think it is necessary to put that in unless my friend wants it. On November 2nd there appears to be a telegram from North Bay office, "Sending cheque today." Would that be right? It would probably be in reply to the request for the \$7500. wouldn't it? A. Possibly.

HIS LORDSHIP: Are you putting these all in together?

MR. PORTER: I will put them all in together, my Lord.

HIS LORDSHIP: They are all telegrams, are they?

MR. PORTER: Yes, my Lord, between the North Bay office of 30
L. S. Clarke—

MR. McRUER: I think they are from Bayne really. I think they all have Bayne's initials on them.

MR. PORTER: Q. Perhaps I had better just clarify that. The telegram of November 2nd has the initials L. J. B. N. A. That means that you are the man who sent it. Is that right? A. Yes.

Q. Acting of course as manager of Clarke's office? A. Yes.

Q. This private wire was a Clarke affair; it was not your personal affair? A. No.

HIS LORDSHIP: Up to what date are these telegrams? They 40
commence on the 2nd of November, and when was the last telegram?

MR. PORTER: November 18th is the last in this batch.

—EXHIBIT 37—Number of telegrams passing between plaintiff per Bayne and Defendants.

MR. PORTER: Q. Then there is one here of November 3rd, "Would like to get delivery—" is that what that word is? A. I suppose so.

Q. "by Monday if possible." Do you know anything about that?

A. No, I don't know what that is at all.

Q. There is one here November 5th, 1932. This is from O'Hearn & Co., "Please mail cheque tonight, \$10,000." Do you remember that?

A. I presume it came in.

10 Q. Then November 7th, "Did not receive your cheque, \$10,000. this a.m. Now require \$12,000. Advise." Do you remember that? A. I presume it came in over the wire. I don't just recall it now.

Q. Then November 8th, "Will you please send out today all Pen Pete you have on hand also some more draft forms." That has gone in as an exhibit already. Do you remember that? A. Yes.

Q. Then here is a telegram of November 9th, and this appears to be sent at 9:55 a.m. "Please mail cheque tonight, \$15,000. Advising." Do you remember that? That was on the day of the heavy purchases, on November 9th, first thing in the morning before the market opened. Do you remember that? A. No, I don't remember it.

20 Q. You don't remember that as well as you do some of the telegrams about the drafts? A. If I saw the North Bay office—

MR. PORTER: (to Mr. McRuer) Have you got a copy of that November 9th telegram?

MR. McRUER: I have two here of the 9th.

MR. PORTER: Is it "Please mail cheque \$15,000?"

MR. McRUER: No.

MR. PORTER: We will just hold that then.

MR. McRUER: It is your wire coming in?

MR. PORTER: Yes. We can get the man who sent it you know.

30 MR. McRUER: It is all right, put it in.

MR. PORTER: Q. Then November 9th, 3:50 p.m. This is from Gardner of O'Hearn & Co. Is that right? A. Yes.

Q. "Have 54,000 P.S. in today. Shall we ship you tonight? Please say what you mailing us." P. S. refers to Peninsular Petroleum? A. Yes.

Q. Do you remember receiving that? A. I think such a wire came in.

Q. Here is a wire November 9th, 4:11 p.m. from you, "Hold Pen Pete. Mailing \$10,000." Is that right? A. I think so.

40 Q. Another wire from Gardner November 9th, 4:22 p.m. "Re \$10,000 you mailing, that leaves all of today's purchases to be paid for and part of yesterday. What can we expect tomorrow? Would like to get in touch with L. S. C. Can you say where we can reach him?" L. S. C. being Clarke. Do you remember that? A. Yes.

Q. Before we go any further with these telegrams, is it true that dur-

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ing the day Gardner sent a message to you asking whether he could get in touch with Clarke? A. I don't know whether he did or not.

Q. You don't remember. I think you said something to that effect in one of the examinations, when you were examined in the bankruptcy proceedings. A. He may have wired.

Q. And do you remember telling him that Clarke was out of town? A. I think I did, yes.

Q. I suppose you have a pretty clear recollection of saying that? A. Yes.

Q. Do you know whether or not Clarke was out of town? A. He 10 was.

Q. On the 9th? A. Yes, until some time in the afternoon.

Q. Then November 9th, another telegram from you at 4:32 p.m., "Will send as much as can tomorrow, you can get L. S. C. in morning." Do you remember that? A. Yes.

Q. November 10th, a telegram from O'Hearn at 2:49 p.m. "Please advise what you are mailing us today. Require \$40,000 after crediting \$10,000 received this a.m." Do you remember that? A. I don't recall whether that came in or not.

MR. PORTER: (To Mr. McRuer). Have you got that? 20

HIS LORDSHIP: I do not see why you and Mr. McRuer cannot go over these telegrams and agree on what should be put in.

MR. PORTER: I asked my friend whether he would admit these telegrams.

MR. McRUER: They look to be stamped regularly in their office. I am not raising any objection to that, my Lord.

HIS LORDSHIP: Why not put them all in?

WITNESS: If there is a date stamp from their office they would be O.K. quite likely.

MR. McRUER: I find them quite as helpful to me as they are to my 30 learned friend.

MR. PORTER: I will be glad to put them all in.

HIS LORDSHIP: If there is any particular telegram that requires elucidation from this witness, ask him about it.

I do not think it is necessary to ask as to each telegram, whether he recalls he got it.

MR. McRUER: There are certain things in regard to them that I intend to argue, but there is no need of commenting as we go along.

HIS LORDSHIP: Quite so.

MR. PORTER: Q. There is a telegram in particular amongst this 40 bundle that I want to draw your attention to; November 16th, 11:05 a.m., and it reads—

"Wire to F. L. Werhan at 40 Wall Street amount of purchase on "November 8 and 9 of Pen Pete for our account. Working with "New York gang on this. Hold up until we wire you advise."

The initials L. S. C. are at the foot. Have you any recollection of that telegram? A. No, that would be Mr. Clarke's telegram.

MR. McRUER: Clarke said he did not send that I think on the examination. He was not asked about it when he was in the box.

MR. PORTER: I asked him whether he knew.

Q. Did you say you remembered his sending that? A. No, I am not sure.

Q. Do you remember that going out? A. There was some conversation with him. I don't know whether—

10 HIS LORDSHIP: Q. There was some what?

A. There was some conversation between Mr. Clarke and Werhan and myself.

MR. PORTER: Q. And as a result a telegram was sent? A. I don't know.

MR. McRUER: Here is our copy of it. I do not know whose writing it is. Probably Bayne can tell you.

MR. PORTER: Q. Do you know whose handwriting that is? A. That is Miss Mulligan's.

20 Q. You don't know whether you dictated that or not? A. No, I don't.

MR. McRUER: Will you just attach that to your copy? Apparently the initials arrive at your end in that way. Our copy does not seem to bear them.

MR. PORTER: I think there is one I omitted to make it complete. Better put this one of November 1st in there.

HIS LORDSHIP: It commenced on November 1st then.

MR. PORTER: November 1st instead of the second.

30 Q. Now, Mr. Bayne, you say some time on November 4th, was it not, you had a telephone conversation with Mr. Gardner with reference to the drafting out of the Pen Pete stock? A. Yes.

Q. As a matter of fact, at the time when that telephone conversation took place there had been several orders for Pen Pete stock in the few previous days—orders which had not quite been completed; that is, the stock had not come through the clearing, and had not perhaps got into O'Hearn's hands at that time—certainly, had not come to you? A. There may have been some.

Q. Well, the records show the Smith and Greenwood account was quite active between November 1st and 4th? A. Yes.

40 Q. And those stocks on November 4th would not actually have been delivered to you, would they? A. Not necessarily.

Q. You know enough about brokerage practice to know that they have to go through, and it takes perhaps two or three days. Stocks purchased on the 3rd of November certainly would not have been received by you on the 4th, would they? A. No.

Q. Or even stocks purchased on the 2nd of November? A. Not necessarily.

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Q. When you spoke to Mr. Gardner about drafting out at that time, there were certain stocks which had been ordered, and which had not yet come through. Isn't that correct? A. I believe there were some wires stating there were some stocks to deliver.

Q. This agreement that you allege was made, was an agreement of very great importance, was it not? A. Yes, it was.

Q. You say you told Gardner you were expecting a large order for stock in the next few days? A. Yes.

Q. Did you tell him how much? A. No.

Q. Did you tell him who was going to order it? A. No. 10

Q. Did you tell him anything about it at all? A. No, I don't think I did.

Q. Is your recollection absolutely clear now that you were referring in that telephone conversation to some order that you were going to receive, that you expected to receive, and not referring to the stock which was at that time in the course of coming through the clearing? A. No, I was not referring to what had been bought. I was referring to something to be bought.

HIS LORDSHIP: Q. You say you were referring to what? A. Some stock to be bought. 20

MR. PORTER: Q. And not to the stock that had already been ordered at that time. On November 4th did you know how much stock was going to be ordered in the next few days from this party whose name you did not disclose? A. I knew it would be in the neighborhood of close to 300,000.

Q. Who told you that? Barkell? A. Yes.

Q. You did not tell Gardner that? A. No, I don't think I did.

Q. Do you think if you did tell him you expected to receive an order for 300,000 shares of Pen Pete stock within the next few days, "Kindly draft this out to customers whose names I do not choose to disclose to you at the moment," that he would have entertained such a suggestion? A. I don't know. 30

Q. Well, you are a broker. You have said it was a very unusual thing to do. Your account of the telephone conversation with Gardner showed that it was a very short and fragmentary sort of conversation. It did not occur to you at that time that you should give him some particulars, that you should disclose to him exactly what you had in mind? A. No, I didn't mention any specific amount. I just said a large amount.

Q. "Expecting a large amount. Will you send up some drafts?" Is that what you said? A. Yes. 40

Q. Did you say these drafts were to be applied to this particular order that was coming through? A. I don't know whether I did or not.

Q. You don't know whether you did? A. No.

Q. Did you give any indication at all as to what stock those drafts were to be applied on? A. For the order that I expected to get, that I expected to put through.

Q. I suppose it would have made some difference to Mr. Gardner, to know whether that order was for 5,000 shares or for 300,000 shares, wouldn't it? A. Yes.

Q. And the very fact that he, apparently from what you say entered into this agreement with such alacrity without any question—didn't that rather suggest to you that perhaps he did not understand what you were driving at when you suggested this arrangement? A. No, I didn't think so.

10 Q. You did not think about it that way. Well, did you put on record, even on the private wire any confirmation of this agreement?
A. No.

Q. Or by letter? A. No.

MR. McRUER: He got the drafts.

MR. PORTER: Q. And we have seen by the wires that after these purchases of November 9th there were continuous calls from O'Hearn and Company for more money, and there are no wires that I saw that suggested in any way there had been a breach of any agreement.

MR. McRUER: Oh, yes, there is a wire there, two wires, after the 9th referring to the drafts.

20 MR. PORTER: No suggestion in any of these wires that there had been a breach of any arrangement between you and Gardner, is there? If there is, perhaps Mr. McRuer will be good enough to point it out.

HIS LORDSHIP: There was no letter or wire confirming this conversation anyway.

MR. McRUER: No, but the two wires I refer to are the wires stating that this party is going to pay cash instead of draft. It was the 10th I think.

30 MR. PORTER: Q. Of course, on the 9th of November you have told us about a telephone conversation with Gardner, in which he refuted any arrangement whereby he had agreed to send drafts for the purpose of taking up 300,000 shares, or any such large quantity in the future of Peninsular Petroleum? A. Yes, he did that.

Q. After that, on the 10th, apparently you wired to say: "Well, since we can't get the drafts we are getting the cash—trying to get it anyway." A. Yes.

Q. And that was your position. You knew I suppose of Clarke's general reputation, that he was well regarded in the way of being substantial financially—wasn't he? A. Yes.

40 Q. And there was nothing you knew of, even up to November 8th and 9th, to the contrary, was there? A. Not particularly.

Q. And you knew perfectly well that if you put in an order for a large quantity of this Pen Pete stock with O'Hearn and Company, that the likelihood was they would execute it without any question, didn't you? A. Well, I figured they would when I had supposedly made arrangements with them.

Q. Do you suggest for a moment that that arrangement you say

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you made with Gardner would imply that Gardner, instead of putting these through the Clarke account in the usual way, would draft the stock out to a large number of people whose names at that time he did not know, and rely upon them to pay O'Hearn and Company for the stock, and Clarke not be in the picture at all? Is that what you understood? A. Yes. We were charged with it.

Q. I want to know. You are saying there was something about this arrangement for drafting out that made this Pen Pete transaction of November 9th different from the transactions in the general account. Is that right? Because of the drafts? A. It was different to the extent that I had made arrangements to draft it out. 10

Q. While it may not have been said in so many words, was your understanding of the agreement that O'Hearn & Company would merely hold the purchasers of this stock responsible for the price of that stock, and not look to Clarke at all? A. We naturally figured that they would be paid.

Q. Paid by the purchaser? Do you understand the question? A. If they were not paid, we would be naturally looked to to pay for it.

Q. If they were not paid by the customer, you and Clarke company— A. Would be responsible. 20

Q. Would be looked to for the payment of that stock? A. Yes.

HIS LORDSHIP: Q. Is that what you understood? A. Yes, your Honour.

MR. PORTER: Q. And as a matter of fact, the drafts were just a means for your convenience, weren't they? A. Yes.

Q. You asked for them so you thought you would be able to get the money in more quickly from your customers by the use of these drafts. Wasn't that it? A. Yes.

Q. Were there real customers for these 300,000 shares of stock? A. Yes. 30

Q. Not Smith and Greenwood this time? A. No.

Q. Do you know? A. Yes.

HIS LORDSHIP: Q. Who were they? A. I haven't got a list of them, but I have seen the list.

Q. How do you know they were real people? A. They are names of people.

Q. In New York, aren't they? A. Yes.

Q. Do you know if they are real people or fictitious names? A. I have every reason to believe they are real names.

Q. Why? A. Well, I can't answer that, your Lordship. 40

MR. PORTER: Q. Coming down to the 19th of November, the conference in the office of O'Hearn and Company when the Kaatz agreement was entered into; you have said in your examination in-chief that there was some arrangement for segregating the Peninsular Petroleum account insofar as it referred to this 300,000 share purchase, from the general margin account of L. S. Clarke? A. Yes.

Q. Once again I would like to remind you of the fact that you have had considerable experience and are quite familiar with the ways of doing business in a broker's office, aren't you? A. Yes.

Q. You were thoroughly familiar, were you not, on that day with the terms of this agreement? A. I heard it read over.

Q. You were the man who got these people together, weren't you? A. Yes.

Q. You understood the purpose of it and the terms of it? A. Yes.

10 Q. The people who put up the 500,000 shares—apparently according to this agreement it was a Mr. Kaatz—put them up on certain conditions, and I think perhaps I will just go into this. Turning to page two of the agreement,—

“Now, therefore, this indenture witnesseth that in consideration of the premises and the sum of one dollar now paid by each of the parties hereto to the other of them, it is agreed that the party of the first part hereto will deposit the said 500,000 shares of Peninsular Petroleum stock as collateral to the account of Leslie S. Clarke, in so far as 300,000 shares of Peninsular Petroleum purchases are concerned on the following terms and conditions:—”

20 The object of this agreement was, that in view of the extraordinary circumstances surrounding the 300,000 shares, the purchase of which you have described, and in view of the difficulty that Clarke had in meeting the payments for it; and also in view of the fact that the directors of the Peninsular Petroleum Company did not want to see their stock go to pieces on the market; you got some of the Peninsular Petroleum people to assist in working this thing out. Wasn't that the situation? A. Yes.

Q. So the 500,000 shares was put up by somebody who had some interest in the company? A. Yes.

30 Q. And it was put up on the terms, however, that it would be applied as collateral only to a certain portion of Clark's account? A. Yes.

Q. That is, the portion of his account that referred to the 300,000 shares? A. Yes.

Q. They did not want to pledge the 500,000 shares so it would be used as collateral to the whole general account? A. No.

Q. So then paragraph 1 says: “That none of the shares of Peninsular Petroleum stock so deposited or now held in the account of Leslie S. Clarke will be sold during the currency of this agreement for a less sum than seven cents per share.”

40 That was one of the terms that were agreed upon, on which these outsiders put in 500,000 shares collateral. Their object was to protect the market, wasn't it? A. That is the idea.

Q. “2. And further that no more than 12,000 shares of the said stock in the Leslie S. Clarke account and of the half million shares herein set out will be offered by the parties of the second part or sold on any one day.”

That also was for the purpose of protecting the market, wasn't it? A. Yes.

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Q. Because they were afraid that if O'Hearn and Company sold out all this Pen Pete stock, or any substantial quantity of it, it would completely wreck the standing of the stock on the exchange.

MR. McRUER: The merry-go-round would stop going.

MR. PORTER: Yes.

"3. And further that after the account of the said Leslie S. Clarke, "in so far as the aforesaid Peninsular Petroleum share transactions "are concerned, has been settled in full, any shares of Peninsular "Petroleum stock remaining out of the said 500,000 shares so de- "posited shall be returned forthwith to the party of the first part 10 "hereto."

Q. So the arrangement was that as they gradually let out this stock at prices, if they could get them, over seven cents, they hoped that in that way they would be able to meet the amount owing on the 300,000 share purchase. Is that right? A. Yes.

Q. And perhaps settle the matter in that way, so that Clarke could go on and everyone would work out of it to everybody's benefit? A. Yes.

Q. Paragraph 4: "It is further agreed that in realization of Penin- "sular Petroleum shares, any shares of the said 300,000 now on hand 20 "of Leslie S. Clarke's are to be first resorted to."

That is, if there are any sales to be made to help liquidate this account, they would have to sell first the 300,000 shares, so that possibly they would not have to sell any of the collateral at all. Wasn't it put in that way? A. Yes.

Q. "5. If the parties of the second part hereto at any time decide "to and do take proceedings against Leslie S. Clarke for any balance "due them in regard to the said transactions in Peninsular Petro- "leum shares, then the said 500,000 shares of Peninsular Petroleum "stock deposited by the party of the first part hereto, or any balance 30 "thereof then in the hands of the parties of the second part shall be "forthwith returned to the said party of the first part."

That is, if they wanted perhaps to sue Clarke, or to make use of his general margin account, or take any proceedings against him—

HIS LORDSHIP: It is quite plain what it means, isn't it? Why ask this witness what it means?

MR. PORTER: Q. Isn't it perfectly clear to you, Mr. Bayne, that in order for O'Hearn & Co. to know on any given day exactly how this Peninsular Petroleum matter stood, how much had been paid for and so on, that they would have to keep it in a separate account? A. I think they were requested to by Mr. Jenner and Mr. Clarke. The terms of the 40 agreement also required it.

Q. There is nothing in this agreement about any separate account. I am asking you as a broker, isn't it good, prudent practice for a broker who enters into an agreement of this kind, and takes collateral that applies only to a portion of the account, to keep that in a separate account, so he knows exactly how it stands from day to day—so he will know

whether that Pen Pete has been paid for, whether he should release the collateral, and so on? Isn't that a proper thing, arrangement or no arrangement? A. That is entirely up to the bookkeeper.

Q. Don't you think that is good brokers' bookkeeping practice?
A. Yes, it would be.

HIS LORDSHIP: Are you going to be much longer?

MR. PORTER: I do not think so.

HIS LORDSHIP: If you are going to be much longer, I am going to adjourn.

10 MR. McRUER: I may say my re-examination of this witness must necessarily take some time. My friend has gone into considerable material.

—Adjourned sine die.

—On resuming at North Bay, May 30, 1934, at 9:30 a.m.

LEWIS JOHN BAYNE, Recalled.

CROSS-EXAMINATION BY MR. PORTER: (Cont'd.)

Q. Mr. Bayne, during the cross-examination that was carried on the last day we went in some detail into the Smith and Greenwood accounts. You will recall that, of course. And at one stage you said that 125,000
20 shares of Peninsular Petroleum stock, which was being held in the Clarke office, in a pool for some of the Clarke clients, was handed out by you to Mr. Barkell. You will recall that? A. I don't remember whether I did or not. It is a fact anyway.

Q. You will remember handing out—I think it was 125,000 shares, wasn't it? A. Something like that.

Q. Those were shares that belonged to clients of L. S. Clarke? A. Yes.

Q. And you got a receipt, I think you said, from Barkell for it? A. Yes.

30 Q. Your understanding was that he was to deposit it with the Chartered Trust and Executor Company? A. Yes.

Q. And you never had any word from the Chartered Trust and Executor Company as to whether or not they had received the stock?
A. No.

Q. Do you remember about when that was that you handed out the 125,000 shares? A. Some time in September I think.

Q. It was before the Smith and Greenwood accounts were opened?
A. I don't recall.

Q. Is there any way of fixing approximately the date? Would you

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6th April, 1934.
—concluded.

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know from the books of the L. S. Clarke Company? Would there be anything there to indicate when the stock was handed out? A. Yes, there should be a record showing.

Q. Could you state what book it was? Perhaps the Trustee could produce it, if you know how we can find out. I would like to get the date when that stock was handed out. A. The books would show. I don't know just which one it would be now.

Q. What books? How can we look that up? A. (No response.)

MR. PORTER: (To Mr. McRuer) I suppose you have not that information on hand, unless he can suggest what book it would be in? 10

Q. May I see the Smith and Greenwood accounts, Exhibit 35? According to the Greenwood account, that account was opened on the 10th of September, 1932. Can you recall whether or not the shares, the pool stock that you handed out to Barkell was handed to him prior to September 10th? A. I think there was some before and some after.

Q. It was not all handed out in one certificate? A. No.

Q. How many times did you hand out stock to Barkell—that is, hand out some of this pool stock to Barkell? On how many occasions did you do that? A. Possibly seven or eight times. I don't just remember.

Q. So it was handed out to him in driblets, small quantities? A. 20
Yes.

Q. Did you get a receipt from him every time? A. Yes.

Q. What happened to those receipts? A. I have them.

Q. In your own possession? A. Yes.

Q. With you here today? A. No.

Q. They were not kept with the records of L. S. Clarke and Company at all? A. No, they were turned over to the Security Frauds, and they were mailed back to me.

Q. You have them at your house? A. Yes.

Q. I do not know that I want too much detail about them. Nevertheless, apparently this stock which belonged to clients of L. S. Clarke was handed out by you to Barkell in small quantities until finally 125,000 shares were handed out. That is about the situation? A. Yes. 30

Q. Do you remember when the first of these quantities was handed to Barkell? Was it before September 10, 1932? A. I can't tell you definitely.

Q. Do you remember whether it was before the Smith and Greenwood accounts were opened? A. I think it was, but I can't say for sure.

Q. Now, wasn't it? A. I don't know.

Q. Why do you say you think it was? You apparently have some recollection of it? A. It just runs in my mind that it possibly was, although I would not say for sure. 40

Q. As a matter of fact, wasn't it the stock that you handed to Barkell that he sold on the market in Toronto, and that finally came again into the Smith and Greenwood accounts? A. It might have been.

Q. Didn't you know that? A. Not at the time.

Q. Not at the time? A. I certainly did not.

Q. Do you remember how much of this pool stock you handed out in the first instance, how large a block it was? A. No, I don't remember how much it was in the first block.

Q. Would it be 20,000 shares? A. Possibly that; possibly more.

Q. It would not be less? A. Not likely.

Q. Might it have been 40,000 shares? A. I don't know. There is a sheet in the ledger showing exactly.

10 Q. Do you know how that sheet could be identified so that we could find it here today? A. I think the sheet was headed, "Chartered Trust and Executor Company."

Q. Have you any way of finding that?

MR. McRUER: We will find out if Allen knows.

MR. PORTER: Q. As a matter of fact, Mr. Bayne, you know now, do you not, that the stock that eventually came into the Smith and Greenwood accounts was stock that you handed out to Barkell, wasn't it? A. I believe some of it was.

20 Q. So that the only capital upon which Barkell had to work when he commenced to operate this scheme of his that has been described was the stock that you handed him? A. Apparently. I don't know.

Q. That is what you know now? A. I found out after.

Q. You say you did not know it at the time, but you know it now. No question about that now, is there? A. No.

30 Q. Just to get this arrangement completed, so there will be no misunderstanding about what took place exactly; from what you have discovered subsequently, you handed out stock to Barkell; Barkell sold that stock, and it was finally purchased through O'Hearn & Co. upon your instructions, and the stock eventually got back in the Smith and Greenwood accounts, and from time to time the stock that got into the Smith and Greenwood accounts was stock that went to Barkell? That was about the situation, wasn't it? A. Some of the stock was loaned to the company on their receipt, of course. I don't know what they did with that stock.

Q. Loaned to what company? A. To the Peninsular Petroleum Company.

Q. How much? A. Around 80,000 shares.

Q. When did that happen? A. I don't remember whether it was September or October.

40 Q. I said a moment ago there were 125,000 shares, but I think more accurately it was about 154,000, wasn't it? A. I think it was more than 125 (thousand).

Q. That was handed to Barkell, and you say that of that, 80,000 shares were loaned, or in some way handed, to the Peninsular Petroleum Company. The balance was left with Barkell, and he dealt with it in the way that has been described? A. Yes.

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Q. And from time to time when O'Hearn & Company would need some money to pay for the stock that they were purchasing on the market, Barkell would supply you with just enough money from time to time as calls were made? A. Yes.

Q. And then you would hand that money to O'Hearn & Company?
A. Yes.

Q. And the general position of the margin account of L. S. Clarke with O'Hearn & Company was such that it was not necessary to put up the whole purchase price of the Peninsular Petroleum stock when it was purchased? A. Yes.

10

Q. So that taking advantage of that excess of margin in the margin account between L. S. Clarke and O'Hearn & Company, you were able to deal in the Peninsular Petroleum stock in this way without having to put up the full purchase price for it—without having to send the full purchase price to O'Hearn & Company? A. Yes.

MR. PORTER: My Lord, I served notice to produce on my friend, to produce the evidence taken on the examination of L. J. Bayne in the bankruptcy proceedings, a copy of which is in the possession of the plaintiff in this action. I also asked for the production of a copy of the evidence which is in the Plaintiff's possession taken before the Trustee in Bankruptcy, Mr. Allen, who is the plaintiff in this action, and I wanted to use those in this cross-examination. My friend says he refuses to produce them.

HIS LORDSHIP: Are they properly producible in this action, do you think?

MR. PORTER: They are copies of evidence of this witness, statements he has previously made in connection with the very issues in this action.

HIS LORDSHIP: Is there any obligation on the other side to produce them?

30

MR. PORTER: Except that notice to produce was served, and they have them. They are documents that are in their possession and relate to the issue.

HIS LORDSHIP: Should you not have obtained a copy of these documents? An examination in connection with bankruptcy proceedings?

MR. PORTER: One was.

HIS LORDSHIP: That is available to you as it was to them.

MR. PORTER: It is probably filed in the proper court, one copy of it, but they have a copy of it.

HIS LORDSHIP: What do you say, Mr. McRuer?

40

MR. McRUER: I submit it is not a production. A Trustee in Bankruptcy in discharge of his duty causes examinations to be taken for the purpose of the general benefit of creditors, and ascertaining the position of the estate, and so on; and then he brings an action in regard to the same matter that arises in the estate. I think it is perfectly absurd to say

he has to produce to the defendant's solicitors an examination that he has bought and paid for at the expense of the creditors.

HIS LORDSHIP: I do not think there is any reason for compelling the plaintiffs to produce these examinations. They are court records. You can get access to them in a proper way.

MR. PORTER: One of them is a court record; the other is a statement made before Allen, the Trustee, the plaintiff in this action, prior to the sworn statement made in the bankruptcy proceedings.

10 HIS LORDSHIP: The mere fact that he made a statement at some other proceeding does not enable you by serving notice to produce to compel the plaintiff to produce it.

MR. PORTER: Nevertheless, they are documents in their possession.

HIS LORDSHIP: They may have paid for a copy. The mere fact they have got it in their possession, if it is a court record, does not compel them to produce it.

MR. PORTER: It relates to the matter in issue, the very point that comes up in this action.

HIS LORDSHIP: But some different proceeding altogether.

20 MR. PORTER: Yes, it is a different proceeding.

HIS LORDSHIP: It is a matter of friendly relations between you and the solicitor, whether he wishes to produce it. I do not think I can compel him.

MR. PORTER: I might have ordered a copy of it from the court I suppose.

HIS LORDSHIP: I cannot order him to produce it.

MR. PORTER: Q. When you telephoned Gardner on the fourth of November, I think it was, in connection with the drafting arrangement that you have referred to—it was a telephone conversation between you and Gardner? A. (No response.)

Q. I think Gardner telephoned you by long distance in connection with the \$7500 cheque, and there was some mention in that conversation of drafts to be sent up. You remember that conversation? A. Yes.

Q. Now, in that conversation you say you told Gardner that you were expecting a large order of stock to come through? A. Yes.

Q. A large order of Peninsular Petroleum stock. I think we went over in some detail the fact that you did not tell him how much stock, and did not tell him from whom. That is right, isn't it? A. Yes.

Q. At that time considerable stock of Peninsular Petroleum had 40 been ordered by you and had not yet been delivered? A. Yes.

Q. Amounting to, I think the records show, over one hundred thousand shares—a large quantity of stock. There was the usual delay in the stock's coming through the clearing house? There is nothing unusual about stock being delayed two or three days before it is delivered after the order? A. No.

Q. That is perfectly clear, is it not? A. Yes.

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Q. So that at the time of this telephone conversation there was a considerable quantity of stock which had been ordered, and the order had been executed by O'Hearn & Company, and the stock was yet to be delivered to you. That is right, isn't it? A. Yes.

Q. You say that in that telephone conversation you referred to a further order of a large quantity of stock? A. Yes.

Q. That you were expecting? A. Yes.

Q. As a matter of fact, at that time did you know how many shares that prospective order was to cover? A. Just a rough estimate, yes.

Q. And you knew then that the order expected was to be for about 10 three hundred thousand shares? A. Yes.

Q. You knew that from Barkell. You did not tell Gardner that, however? A. I don't think so.

Q. When did you get the definite instruction from Barkell to execute that order? A. The morning of the day of the eighth, I guess it was.

Q. Are you sure he did not give you discretion to execute it when you saw fit? A. No.

Q. Are you sure of that? A. Positive.

Q. Did he telephone you by long distance to tell you on the 8th or 20 9th—did he say, "Now the time has come for this order to be executed?" A. Yes.

Q. It was a telephone message, and not a telegraph? A. Telephone.

Q. From New York? A. Yes.

Q. Mr. Gardner says this in the evidence that my friend has put in from his examination for discovery,—

"112. Q. And what was your conversation with him in refer-
"ence to the drafting out? A. He wanted to know if I would send
"him some of our draft forms, that he wanted to send some drafts 30
"out and if I would send the draft forms up to him at North Bay he
"would fill in the names and return them to me and by this time we
"would have stock in from our clearing and be able to send the drafts
"out for him, get some money for him."

Do you disagree with that statement insofar as it goes—Mr. Gardner's statement of what that telephone conversation was? A. My understanding of the conversation was—

Q. You have heard what Gardner says.

MR. McRUER: I think my friend should permit him to answer the question. He asked him if he agreed with it. He is telling what his 40 understanding was. I submit the witness should be entitled to answer the question. He started to answer and my friend cut him off.

HIS LORDSHIP: Oh, well, he is cross-examining, go on, Mr. Porter, please.

MR. PORTER: Q. Do you agree with Mr. Gardner's statement of what was said in that telephone conversation? A. It does not agree

with my view of what I understood when I was talking to him.

Q. You have got some view in the matter? A. My understanding was that I had told him that I was going to have a large purchase of stock from New York, and asked him if he would draft it out for me, he saying he would, and I asked him to send up the drafts, which he did.

Q. You say that is your understanding. Why do you say it is your understanding? A. Because he has said that he understood different.

Q. What he says is, all you wanted him to do was to send some drafts up, and if Gardner would send the draft forms up to North Bay, 10 you would fill in the names and return them to Gardner, and by this time Gardner would have the stock in from the clearing, and be able to send the drafts out for you. In that way you would be able to get the money more quickly. You say you got some different understanding of the conversation? A. Yes.

Q. Do you remember the exact words you used in the conversation to Gardner? A. No, I do not.

Q. So isn't it quite possible that Gardner would get rather a different understanding of the situation than you would? A. Possibly.

Q. Your recollection is not so clear that you can say now positively 20 that you expressed yourself so clearly that these drafts were to refer to stock that was yet to be purchased— A. I told him I expected a large purchase.

Q. You expected a large purchase, you told him that; and you also told him you wanted some drafts. Did you make it absolutely clear to Gardner that the drafts were to be used for the purpose of that large purchase? A. I thought I had.

Q. From what you recollect of that conversation wouldn't it be quite reasonable for Gardner to get some other understanding of what was said? A. Yes, possibly.

Q. So that the way Gardner puts it in his own evidence might be 30 quite an honest statement of his understanding of the matter, as far as your recollection goes of what was said in that conversation? A. Well, he had his opinion of it, the same as I had mine, possibly.

Q. I mean it was quite possible—you know the way these things go through. It was not a very long telephone conversation was it? A. No.

Q. You did not express yourself very elaborately, did you? A. I don't think so.

Q. Just said something about expecting a large purchase, and you 40 wanted some drafts. That is about as far as you remember, isn't it? A. I don't remember the details of all the conversation.

Q. Do you really remember clearly enough to be able to swear here in this court—do you remember clearly enough exactly what was said to be able to swear positively that you told Gardner that the drafts to be sent were drafts to be used for the purchase that was expected, as opposed to the purchase that had already been made? A. Well, when I

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told him I expected a large order of stock to buy, I would not be asking for the drafts for something else.

Q. I want to know from your recollection of that conversation whether you really clearly recollect enough to be able to swear here that you made it absolutely clear to him that these drafts were for the expected purchase, and not for the stock that had already been purchased, but was at that time undelivered? A. Yes. That was what I had in mind when I asked him.

Q. I am asking you now, did you say? Did you express yourself?
A. I don't know. 10

Q. You are not sure whether you expressed yourself really clearly on that point? A. No.

Q. You knew at that time of course that there was stock to come through that had already been purchased? A. Yes.

Q. As a broker, wouldn't you say that if Gardner were to put the construction on this request of yours which you now say was intended —wouldn't you say, that Gardner as a broker would certainly want to know how many shares these drafts were to apply to, and have some particulars about this prospective purchase before committing himself to such a rather unusual arrangement? A. I don't know. 20

Q. If you had been in Gardner's position, surely, you would have wanted to know something about it before you committed yourself to sending out drafts to cover something that you knew nothing of the details of, wouldn't you? A. Yes.

Q. And, as a matter of fact, this prospective purchase which you were to make for Barkell was the largest single purchase that you had ever had in your experience with L. S. Clarke, that is as far as Peninsular Petroleum stock was concerned? A. Yes.

Q. It was a great many more shares than had ever been traded in, in any one day? A. Yes. 30

Q. Even though large quantities of this stock had been traded in on single days in the immediate past? A. Yes.

Q. In all your dealings with Mr. Gardner while you were in Clarke's office in North Bay, did you ever have any misunderstanding arising as the result of any arrangement you had ever made with him before? A. No.

Q. Then in the evening of the 9th of November you had a telephone conversation with Gardner again, didn't you? A. I think so.

Q. And in that telephone conversation he told you that he had made no arrangement to send out drafts for the three hundred thousand shares which were purchased on that day, didn't he? A. Yes. 40

Q. What did you say when he told you that? A. I think I said that if he repudiated it, we would have to try and collect the money from the purchasers in New York.

Q. There you go again, thinking. Do you remember what you said? A. No, not definitely.

Q. Do you remember whether you used the word "repudiated"? A. No.

Q. Are you sure you did not say, "If you are not going to send out the drafts we will have to get the money in some other way?" A. May have said that.

Q. You did not suggest to Gardner, did you, that Gardner made this arrangement, and you were going to hold him to it? A. I don't think so.

10 Q. You did not put it up to Gardner at that time, that the arrangement was something that you regarded as being so important that you would have to press him to carry it through at all? A. I don't think so.

Q. And you said you were going to get the money, didn't you? A. I said we were going to try to get it.

Q. And you did try to get it? A. Yes.

Q. And you kept promising that you were going to send the money? A. Yes.

20 Q. You remember a series of telegrams that came through immediately after that date, requests for money, and the general attitude which you took was, "Everything is O.K.; we are doing our best to get the money, and we will get the money?" That is about the gist of it, isn't it? A. Something to that effect.

Q. That was the stand you took. And then I believe it was on the morning of November 9th, just before the market opened, there was a wire from O'Hearn & Company asking for quite a large sum of money in payment of stocks that had already been purchased? A. Yes.

30 Q. So it was indicated to you at that time that O'Hearn & Company were not waiting for the drafts to be completed before they expected to be paid for these purchases; but it was clearly shown then by their demand for money on the morning of the 9th of November, that they were looking to L. S. Clarke to see that they were paid? A. I think that was for the previous purchases.

Q. Previous purchases of Peninsular Petroleum? A. Yes.

Q. The purchases that had been made prior to November 9th? A. 8th and 9th.

Q. You went through the day of November 9th, put in the orders for this block of stock, knowing that they were asking for payment for the previous purchase? A. Yes.

40 Q. You knew that that money could only come from Barkell I suppose, didn't you? A. For the previous purchase, yes.

Q. You knew that the money for the three hundred thousand shares would have to come from Barkell too I suppose? A. Through him.

Q. He was the man you were looking to? A. Yes.

Q. And you did not tell Gardner that situation either, did you? A. No, I did not.

Q. The purchases that were made on the 8th and 9th of November,

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how were they entered in the books of L. S. Clarke? A. Headed up as the New York account.

Q. In whose name? A. There wasn't any name.

Q. Wasn't that purchased on behalf of some client on the books?

A. No. The names come through later.

Q. So there was a New York account opened for clients whose names were later to be submitted? A. Yes.

Q. But really it was all the same,—it was really the same thing as the Smith and Greenwood account carried a little further, wasn't it? It was all Barkell? A. Yes, it was Barkell. 10

Q. Then you prepared I think a statement of the names of customers for Messrs. Kilmer & Company, who acted as solicitors for L. S. Clarke at one stage? You prepared a list of customers of the North Bay office, did you not? A. Prepared a list for Mr. Clarke.

Q. That is put in as Exhibit 23. Did you prepare this list of clients of the North Bay office? A. Yes.

Q. That is your handwriting, is it? A. Yes.

Q. Did you prepare it for Mr. Clarke? A. Yes.

Q. Did you show it to him? A. I think he was in Toronto at the time. I mailed it to him. 20

Q. You mailed it to him personally in Toronto? A. If he was in Toronto. I don't know whether he was at that time.

Q. Anyway, you submitted it to Clarke? A. I think so. I am not positive.

Q. I see by this statement you have Smith, Greenwood and New York as one of the clients of the North Bay office. That is so, isn't it? A. Yes.

Q. And the state of their account is set forth—the balance is set forth, showing the equity. And when you say Smith, Greenwood and New York, you are referring to the Smith and Greenwood accounts that have been produced here, and the New York account which was opened for the customers who were at that time unascertained? A. Yes. 30

Q. Put in as one of the North Bay customers? A. It was listed on there.

Q. And after November 9th when Mr. Clarke found out about these heavy purchases of Peninsular Petroleum which he says he did not authorize, you continued as General Manager of his business, did you not, in North Bay? A. Yes.

Q. With full power to sign cheques as previously? A. Yes.

Q. The same powers as you had previously? A. Yes. 40

Q. You continued to give orders to O'Hearn & Co., and to anybody else with whom L. S. Clarke was dealing in his capacity as a broker? A. Yes.

Q. And later you signed certain auditors' statements which I believe are in as Exhibit 12. You signed these auditors' statements, did you not? A. Yes.

Q. As manager of L. S. Clarke? A. Yes.

Q. Did you ever tell Gardner or any partner of O'Hearn & Company that this transaction in Peninsular Petroleum stock that took place on the 9th of November was a transaction of your own, and not a transaction of L. S. Clarke? A. No.

Q. You always took the position that it was in the ordinary course of business insofar as L. S. Clarke was concerned, didn't you? A. Yes.

10 Q. Did you approach a man named Geo. Wright in North Bay with a view to getting him to join the pool in Peninsular Petroleum that you were operating? A. He had a number of shares in the pool.

Q. Did you approach him with a view to getting him into it? A. Sure.

Q. You showed him the list of subscribers to the pool at that time? A. Yes.

Q. And Clarke's name was on it? A. I imagine it was.

Q. Clarke was one of the earlier subscribers, was he not? A. I don't know just what time Mr. Clarke put his shares in on the list.

Q. Was Wright a friend of Clarke's? A. Not particularly.

20 Q. Was he a particular friend of yours? A. No.

Q. But he knew who Clarke was? A. Yes.

Q. And Clarke's name would perhaps be of some value in determining whether this thing was good or not to him, wouldn't it? A. Well, I don't know.

Q. Didn't you use Clarke's name as being one of the people interested in this pool? Didn't you use his name when approaching various responsible parties in North Bay? A. I might have.

Q. Did you now? A. No more than any of the others that were on.

30 Q. You did use Clarke's name, however? A. Yes, it was on there, and quite likely brought to the attention of other people.

Q. And you brought it to the attention of other people? A. Quite likely.

Q. Now, did you?

HIS LORDSHIP: Anything is likely.

WITNESS: Yes, I think I did.

MR. PORTER: Q. You think you did. Can you not say you did?

A. Yes, I did.

Q. And they knew you were Clarke's manager? A. Yes.

40 Q. And that Clarke was running a brokerage business here? A. Yes.

Q. As a matter of fact, when you went to Geo. Wright you used Clarke's name as an inducement to him to join the pool, didn't you? A. I don't remember.

Q. You cannot recollect a little more? A. No, I don't remember whether I did or not.

Q. You may have? A. May have, yes.

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Q. It is quite likely that you did? A. Possibly.

Q. It is quite likely that you did? A. Possibly I did.

Q. And Wright bought about 25000 shares, didn't he? A. Or more, yes.

Q. He was one of the larger holders in the pool? A. The largest.

Q. Then there was a man named Moody in North Bay. At one time you took him with you to New York to investigate this Pen Pete transaction, didn't you? A. I didn't take him. He went down with some of the others.

Q. With whom—Barkell? A. I think so. 10

Q. Did you at any time while you were still carrying on as manager of the Clarke business, tell O'Hearn & Company that Barkell was the man for whom the 300,000 shares of Peninsular Petroleum had been purchased? A. I don't know whether I ever did or not.

Q. It is not likely that you did, is it? A. If I did it would be after—long after it was purchased.

MR. PORTER: (To Mr. McRuer) Have you got that New York account that was mentioned a moment ago?

MR. McRUER: I do not know. Probably Mr. Allen has it.

MR. PORTER: There was a New York account in which this ac- 20
count was recorded.

MR. McRUER: I will ask Mr. Allen about it. He may not have it here.

MR. PORTER: I do not know that I want to ask this witness about it, but it would be just as well to have it in.

MR. McRUER: He no doubt will have it.

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RE-EXAMINED BY MR. McRUER:

Q. You told my friend in your cross-examination something about a merry-go-round; that the stock that was being bought through O'Hearn & Company was going back to Toronto, and coming back through O'Hearn again. You told us that on the last day. A. There was some of it came back. 30

Q. I think a man by the name of Maguire was selling in Toronto, and it was being bought through North Bay? A. Yes.

Q. And all your transactions in this merry-go-round were going through O'Hearn & Company? A. Yes.

Q. Of course, Peninsular Petroleum was not a margin stock? A. No.

Q. It was a cash stock? A. Yes.

Q. For each deal with O'Hearn & Company you would get a confirmation? A. Yes.

Q. My friend put in a list.

MR. PORTER: It was only the buy orders that went through O'Hearn.

MR. McRUER: Q. Your buying orders went through O'Hearn & Company? A. Yes.

MR. PORTER: Not the selling.

MR. McRUER: Q. All your buying orders. My friend put in
10 a list of customers that had been prepared, and it is in as Exhibit 23, attached to a letter of Kilmer, Irving & Davis. These were customers of the North Bay office? A. Yes.

Q. And this was apparently prepared on the 4th of February, 1933? A. Yes.

Q. They would be customers at the time of this Peninsular Petroleum transaction. That was the purpose for which this was prepared?

A. That would be at that date. It would show everything up until that time.

Q. And for each of these customers there would be on each trans-
20 action that Clarke had with them a confirmation sent in the form of Exhibit 27 which was put in? A. Yes.

Q. And for each transaction as it was carried on with O'Hearn & Company there would be a confirmation from O'Hearn & Company in their form? A. In their regulation form.

Q. There is one of O'Hearn & Company's regulation forms attached to Exhibit 26, which was a form sent up which you used in drafting the Clarke form? A. Yes.

Q. That would be the form, the blue form, for instance, for the
30 bought notes. The blue form of O'Hearn & Company for bought transactions. Isn't that right? A. Yes.

Q. And in the Peninsular Petroleum transactions, is this a sample of the form that was used in confirmation? (handing form to witness). A. Yes.

HIS LORDSHIP: That is the O'Hearn form, the purchase?

MR. McRUER: For purchase of Peninsular Petroleum.

WITNESS: Yes.

—EXHIBIT 38—Bought note form of O'Hearn & Company used in purchase of Pen Pete stock.

MR. McRUER: Q. When these pool transactions were going on,
40 you told my friend I think that you had some discussion about Peninsular Petroleum with members of the O'Hearn firm at different times? A. From time to time, occasionally.

Q. And did you have any conversation with them about a pool oper-

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ating in it? A. I don't know whether they were advised that there was a pool operating or not.

HIS LORDSHIP: Q. Speak out. A. I don't know whether they were advised there was a pool operating in it or not.

MR. McRUER: Q. I suppose this was a stock that was very narrowly traded in. Outside of North Bay there would not be many transactions in Peninsular Petroleum? A. Sometimes there were.

Q. Some times there were. My friend was asking you in connection with a conversation you had with Gardner in reference to sending out stock on drafts—drafting it out, you called it—and whether or not you were referring in that conversation to stock that had already been purchased, or stock that was to be purchased. Directing your mind to that conversation, did you cause to be sent, or send this telegram that my friend put in, contained in Exhibit 37, dated Nov. 8th, 1932, at 11:52 a.m. (handing telegram to witness)? A. Yes. 10

Q. "Nick, H." Who is "Nick, H."? A. Nick is Mr. Nicholson in F. O'Hearn & Company's office.

Q. "Will you please send out today all Pen Pete you have on hand also some more draft forms?" That was to send out Pen Pete to where? A. To New York. 20

MR. PORTER: I think my friend went into this in his examination in-chief.

HIS LORDSHIP: Well, I will hear it anyway.

MR. McRUER: My friend put this in in his cross-examination as Exhibit 37. It is a telegram in a bundle.

HIS LORDSHIP: It is part of Exhibit 37, not by itself. Are you taking it out of Exhibit 37?

MR. McRUER: No, my Lord, just referring to it as the telegram of November 8th at 11:52 a.m.

Q. Did you get the draft forms as requested? A. Yes. 30

Q. And, Mr. Bayne, did you have any discussion or telegrams in reference to loaning them stock from up here if they needed it, to send it out? A. I told them to hold the stock that they had down there so they could use it on the drafts when they went down.

Q. You told my friend in your examination the last day when you were in the witness box that if the drafts were not paid by the purchasers when the stock went out with draft attached, that you regarded it as Clarke's responsibility. Did you at any time get any consent from any of Clarke's customers who had stock lodged with you, and through you with O'Hearn, to charge their account with this drafting transaction if the drafts were not paid? A. No. 40

Q. Any communication with them at any time in reference to that? A. No.

Q. And all of the Pen Pete deal that is in question in this action was conducted through the North Bay office? A. Yes.

Q. Sudbury office had nothing to do with it whatever? A. No.

Q. And when you had the conversation that you told us about later on, when you went to Toronto, after the whole thing was over, and the drafts had not been paid, I think it was on the 19th of November, the matter was quite apparent to everyone that it was Clarke's own private responsibility then? A. Yes.

Q. O'Hearn & Co. were seeking to hold him personally responsible, were they not? A. Yes.

10 Q. Now, in regard to the drafting out arrangement that you were telling about this morning when Mr. Porter was examining you—and he was examining you as to exactly what was said at the time—will you please tell me how the conversation arose? Did you call up Gardner, or Gardner call up you? A. Gardner called up me.

Q. About the Seventy-five hundred dollar cheque? A. Yes.

Q. And how did this conversation first start about drafts? What was the beginning of it? A. I told him that I expected—

HIS LORDSHIP: I think you (Mr. Porter) should have the right to cross-examine on this.

MR. PORTER: I should think so, my Lord. I thought this was gone into as fully as possible.

20 MR. McRUER: My friend was going into the exact words. I wanted to get the origin of it.

HIS LORDSHIP: I will give Mr. Porter the right to re-cross-examine if he wants to.

MR. McRUER: Q. What was the beginning of it? A. I don't remember just what the beginning of it was.

Q. Who suggested the question of drafts? A. I did.

Q. In what connection did you suggest it? A. In the purchase of a larger block of stock.

30 Q. That had been got was coming? A. It was to come.

Q. You said to my friend in regard to this block of stock—I think he put it to you that it was all Barkell, and you said yes. What do you mean by that, "It was all Barkell?" A. It was through him that the orders were received.

HIS LORDSHIP: Q. I suppose Barkell originated the whole fraudulent scheme, didn't he? A. Yes, my Lord.

Q. Was it not Barkell's idea from beginning to end—and you were the tool of Barkell? A. Yes, my Lord.

Q. You did not know anything about Pen Pete stock at all, only what you heard from Barkell? A. Only what I heard from Barkell.

40 Q. Did he suggest to you this idea of buying in North Bay and selling in Toronto so that these people might make some money, this pool? A. Yes.

Q. He originated this idea of making money at somebody else's expense? A. Yes.

Q. Why did you not go to Clarke when Barkell suggested this, and tell him all about it? A. I have wondered that a good many times since.

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Q. I am asking why you did not go to Clarke and discuss this whole proposition that Barkell put up to you. You were only a salary man, weren't you? A. Yes.

Q. You were not a partner in any sense with Clarke. You were paid to handle the transactions that went over the counter. Was this not outside of your regular general authority that you had from Clarke, this kind of transaction? Was it not outside of the scope of the authority you had from Clarke altogether? I am speaking from your own point of view, from your own knowledge of it? A. Yes, I think it was

Q. Yet you did not feel called upon to discuss it with Mr. Clarke? 10
A. (No response.)

Q. What do you say, witness? A. I beg your pardon?

Q. What do you say? A. I should have.

Q. It is a long time since we had the first part of this trial. This may have come out earlier. When did you first tell Clarke what you were doing? When did he first have this knowledge through you? A. After the 300,000 shares were purchased.

Q. He did not know anything about it as far as you were concerned; he did not know the shares had been purchased? A. Not for Barkell.

Q. What is it? A. He knew there were other shares purchased. 20

Q. He did not know anything about this 300,000 share purchase? A. I was under the impression I told him it was going to be purchased before.

Q. Before you did purchase it? A. Yes.

Q. Can you say whether you did tell him or not? A. Well, I think I did.

MR. McRUER: Q. You told my friend when he was referring to this merry-go-round, that you would deliver out some stock in North Bay, and you would get some cash for O'Hearn. There was sufficient balance in the margin in the O'Hearn account to carry along the transaction, or 30 in the Clarke account with O'Hearn. That is what you told my friend?
A. Yes.

Q. So that with this penny stock you were carrying on this merry-go-round by reason of the margin account? A. Yes.

Q. And O'Hearn & Co. must have known that. They knew it was a penny stock—

MR. PORTER: My friend, surely, cannot cross-examine.

HIS LORDSHIP: No, this is your own witness.

MR. McRUER: I am probably arguing more than anything else.

HIS LORDSHIP: This is your own witness. 40

MR. McRUER: Yes, my Lord.

Q. At any rate, did they at any time dissent and say that this was a penny stock and must be paid for in cash? A. Not that I recall.

HIS LORDSHIP: Do you object to this line of questioning, Mr. Porter?

MR. PORTER: Yes, my Lord.

HIS LORDSHIP: You must not suggest the answer.

MR. McRUER: Quite right; I do not want to do that.

Q. Did you have any conversation with them about that at all? A. No.

Q. The merry-go-round went on its way? A. Yes.

Q. My friend said something about supplying stock. I show you a telegram, dated the 10th of November, 1932. That is apparently to L. J. B., and is signed J. C. L. Who is J. C. L? A. I think that is the bond trader in Toronto.

10 Q. Is he with O'Hearn & Company? A. Yes.

Q. I suggest to you the name of Labatt. Do you know him? A. Yes, I knew the name.

Q. There was a man of the name of Labatt with O'Hearn & Company? A. Yes.

Q. Is that O'Hearn & Company's wire? (Showing wire to witness). A. Yes.

Q. It says, "So far unable to make arrangements borrow stock. Can you get any money out of him as guarantee?" Do you know what that is about? A. No, I do not. I don't remember.

20 Q. Can't remember what it is about at all? A. No.

MR. PORTER: Was that produced. I do not remember it.

HIS LORDSHIP: This witness says he cannot identify it.

MR. McRUER: He says he does not know anything about it. I think that is all, my Lord.

HIS LORDSHIP: Any more questions?

MR. PORTER: No further questions.

JOHN A. ALLEN, Sworn

EXAMINED BY MR. McRUER:

30 Q. Mr. Allen, you are the Trustee in bankruptcy of L. S. Clarke?
A. Yes.

Q. Can you tell us the date of the assignment? A. 28th of February, 1933.

Q. I wonder if you could tell us about what time of day the assignment was made? A. Well, it was the morning of the 1st of March that I was acquainted with the fact that I had been appointed custodian of the estate.

Q. After the assignment was made did you receive this letter from F. O'Hearn & Company? (handing letter to witness) A. Yes, I did.

40 Q. A letter dated March 6th, 1933 from F. O'Hearn & Company to J. A. Allen,—

"As we did not receive any reply to our telegram of Saturday re-

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“questing an additional \$7500., owing to the decline in the collateral held by us for the account of L. S. Clarke Estate, we have to advise that we were obliged to further reduce the account and beg to en-“close herewith confirmation notices covering the sales made today.”

—EXHIBIT 39—Letter defendants to J. A. Allen dated March 6, 1933.

MR. McRUER: Have you copies of those confirmation notices, Mr. Porter?

HIS LORDSHIP: Are you putting them in with the letter?

MR. McRUER: I will if I have them here, my Lord. I think they probably were put in with the record of the other sales that were made. 10

Q. At any rate, while that is being looked for, Mr. Allen, you can tell us, were sales of collateral made pursuant to that? A. Yes.

Q. And they were confirmed. We can have the list put in. And was that collateral, collateral that was held for the margin accounts of customers? A. Yes.

Q. Then did you have an interview with members of the O'Hearn firm a few days after that? A. Yes, we did.

Q. And that was where? A. In O'Hearn's office.

Q. In Toronto? A. Yes.

Q. And subsequent to that interview, or at the interview, did you 20 write them a letter? A. Yes

Q. Is this a copy of a letter that was delivered to the members of the firm at that time (handing letter to witness)? A. Yes, it is.

Q. This is a copy of a letter dated March 11, 1933, directed to F. O'Hearn & Company.

“Re L. S. Clarke Estate.

“As arranged with you this morning, you are in order to avoid carrying this account and the speculation involved to liquidate the account as soon as reasonably possible, and the proceeds from sale of stocks and the equity in the Grain Account, to be paid into a Trust 30 Account in the Canadian Bank of Commerce, Head Office, to remain pending investigation by the trustee and inspectors of the estate, and to be dispersed upon cheques drawn by you and counter signed by the trustee.

“All this to be without prejudice to all legal rights of the estate and to your legal rights whether in accounting or otherwise. Pursuant to our arrangement Pen Pete stock is not to be sold pending further arrangements and the New York stocks will be dealt with when the New York market opens.”

—EXHIBIT 40—Letter J. A. Allen to defendants, March 11, 1933. 40

Q. And at the same interview was a letter addressed to you by the O'Hearn Company? A. Yes.

Q. And is this the letter? (handing letter to witness) A. That is the letter.

Q. This letter is from F. O'Hearn & Co. to J. A. Allen, Trustee, L. S. Clarke Estate,—

“We beg to acknowledge receipt of your letter of March 11th instructing us to liquidate the account of L. S. Clarke estate as reasonably as possible and that the proceeds from sale of stock and the equity in the grain account to be put into a trust account in the Canadian Bank of Commerce, Head Office and to be dispersed upon cheques drawn by us and counter signed by the trustee.

10

“We note that the Pen Pete stock is not to be sold pending further arrangements and the disposal of New York stocks held by the estate is to be made when the New York Market opens. This to be without prejudice to your rights to an accounting.”

—EXHIBIT 41—Letter defendants to J. A. Allen, dated March 11th, 1933.

Q. At this interview who were present? A. There was Mr. Marks, Mr. Gardner, Mr. Richardson, yourself (Mr. McRuer) and Mr. Cooper, and Mr. McDonald.

20 Q. The members of the firm at any rate?

HIS LORDSHIP: Is there any dispute as to what took place at this meeting?

MR. McRUER: No, I think not.

MR. PORTER: I think the only dispute that has arisen is the question of what was meant by the term “proceeds” in that letter. I do not know that it really makes any difference now. If there have been any wrongful acts on the part of my clients, there is the same liability as there ever has been.

MR. McRUER: I am not going into it in detail, my Lord.

30 Q. As a result of this interview and this correspondence, with exception of the Peninsular Petroleum stock, the stocks that were carried in the account were liquidated? A. Yes.

Q. Did they pay the amount realized for the stocks into the trust account with the Canadian Bank of Commerce? A. No.

Q. What did they pay? A. They paid the equity into the account; the equity of the grain account and the equity of the other accounts.

Q. The equity of the grain account, and only the equity realized on the other accounts? A. Yes.

40 Q. I want to get what you mean by equity? A. They deducted all that Clarke owed them from the sale of the stocks, and paid into the Bank of Commerce the amount that was owing to Clarke for his customers.

Q. Including the amount that was owed by Clarke for the purchase

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of these 300,000 shares of Peninsular Petroleum? A. That was deducted.

Q. And when you learned this I think you got in touch with your solicitors again? A. Yes.

MR. McRUER: And have you a letter, Mr. Porter, from my firm to O'Hearn & Company dated April 1st, 1933?

MR. PORTER: Yes. (Produces letter.)

MR. McRUER: This is a letter, my Lord, from McRuer, Evan Gray, Mason & Cameron to F. O'Hearn & Co., dated April 1st, 1933,—

"We have been advised by the solicitors for the Estate that the 10
"full sum realized from the sale of the stocks which you were holding
"for Mr. Clarke, has not been deposited in the Canadian Bank of
"Commerce, but only the equity.

"Our correspondence was quite clear on this matter, and we would
"ask you to complete this deposit at once. There are complications
"in winding up an estate of this sort, and this is the only practical way
"of protecting the Trustee. We will be glad to hear from you on Mon-
"day that the deposit has been completed."

—EXHIBIT 42—Letter Plaintiffs' solicitors to defendants, dated April 1st, 1933. 20

The reply to that, I have a copy of it.

HIS LORDSHIP: Put in the copy.

MR. McRUER: It is dated April 3rd, 1933. It is stated to be without prejudice, Mr. Porter, I notice.

MR. PORTER: I do not think there is any need to withhold it.

MR. McRUER: It is entirely for my friend.

HIS LORDSHIP: Are you content it should go in?

MR. PORTER: I am content, my Lord.

MR. McRUER: "We beg to acknowledge receipt of your letter of 30
"April 1st, in regard to the amount deposited in the Canadian Bank
"of Commerce by us for the above estate.

"Our understanding, as well as that of Mr. Fennell, of Messrs.
"Fennell, Porter & Davis, is that the amounts we were to deposit in
"the Canadian Bank of Commerce were to be the proceeds of the sale
"of the stocks held by us, after deducting the amount of our lien on
"the stocks."

—EXHIBIT 43—Letter defendants to solicitors for plaintiffs dated April 3, 1933.

MR. McRUER: Q. In regard to the understanding, it was set out in the letters after some long conference, wasn't it? A. Yes. 40

Q. And I believe the letter was read over on the 'phone to the solicitor, was it not? A. The solicitors for the defendants—I understand

that is who it was. They were called on the 'phone twice.

HIS LORDSHIP: Q. What letter are you speaking of? A. The letter addressed to me regarding the sale of the stocks, my Lord.

MR. McRUER: That is the letter of March 11th.

HIS LORDSHIP: Exhibit 40?

MR. McRUER: Yes.

HIS LORDSHIP: Q. What letter are you referring to? A. This is a copy of my letter to O'Hearn's, and this is O'Hearn's letter to me.

10 Q. Is this the letter? You say it was all set out in the letter, on which you rely? A. Yes, my Lord, this letter was all read over to their solicitors before it was handed to me, and the conversation carried on with their solicitors, and after it was written it was again read over to their solicitors.

Q. That is Exhibit 41 you are talking about now.

MR. McRUER: Q. Do you know off hand what the sale price was of the stocks that were held for customers, and how much was actually paid in? A. I wouldn't want to say.

20 Q. That can be ascertained. A. There was approximately \$30,000 paid into the account. It may have been within a thousand more or less.

HIS LORDSHIP: I thought you were asking the different prices. You mean the net result?

MR. McRUER: The net result.

WITNESS: Approximately \$32,000 or \$33,000. That was the equity deposited in the account in Toronto, not the amount realized from the sale of the stock.

MR. McRUER: Q. The amount that was realized— A. Would be considerably higher.

30 Q. And, of course, our particular quarrel is in reference to the Peninsular Petroleum stock? A. Yes.

Q. Just one question—I do not think there is any occasion for going into a lot of detail, as we said when we opened, if there was any question of accounting arose, that would be taken care of on the reference—but a general question in regard to the accounts that were outstanding; a list has been filed here of the customers' accounts that were outstanding from close to the time of the bankruptcy, at any rate. A large number of those accounts were outstanding at the bankruptcy, and were open accounts with money owing by customers? A. I have not seen that list.

40 Q. I mean there was a large number of accounts? A. If the list was dated the twenty-something of February, there could not be very much variation.

Q. It is just to cover the question that there were a great many open accounts with O'Hearn & Company? A. Yes.

Q. Balances owing by customers on those accounts? A. On margin accounts and open—

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Q. Open margin accounts; that is what I mean. A. Yes.

Q. What do you say in reference to demands having been made by a great number of these customers for delivery of their stock? A. I don't follow your question.

Q. Have customers been wanting to pay up their balances and wanting delivery of the stock? A. You mean since I was appointed trustee?

Q. Yes. A. Oh, Yes.

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CROSS-EXAMINED BY MR. PORTER:

Q. In connection with the letter, Exhibit 41, you say that there was some lengthy interview between the various people that you mentioned in O'Hearn's office? A. Yes. 10

Q. Was there not a discussion at that interview as to approximately the amount of money that would be netted and paid into this account if the stocks were sold on or about that day? A. I can't recall that.

Q. I am advised and informed it was mentioned then and fully discussed that there would be approximately \$26,000, which was to go into this joint account. A. There would be hardly any occasion for having O'Hearn and company's joint signatures to a cheque if the moneys that were paid to the bank were entitled to the estate alone. If that was the case there was no occasion for having O'Hearn signing the signature card. The money that would be coming in would be entitled to the estate. 20

HIS LORDSHIP: Q. The estate was entitled to the equity in any event? A. Yes. We made arrangements with the bank to put O'Hearn & Company in a joint account with ourselves.

MR. PORTER: Q. That is not exactly what I asked you. I asked you whether there was some discussion about the amount that would likely be realized as a result of carrying out this arrangement, and paid into the account? A. There might have been a discussion as to the actual equity that would result from the sale of the stocks, but that was not considered. 30

Q. There was a discussion about that? A. I wouldn't say there was or was not.

Q. There was an approximate amount, somewhere around \$26,000, that was in contemplation of all the parties when that agreement was entered into. A. There could not have been because the New York market was closed.

HIS LORDSHIP: Q. Was there or was there not? A. I have said I could not recall the discussion as to the equity. There was a conversation of an hour and a half, or an hour at least, in the office.

MR. PORTER: Q. And then the word "proceeds" was used in the letter. Of course, the proceeds of the sale of the stock would not be, I suppose, the whole purchase price of the stock. Out of those proceeds naturally they would have to pay off any loans to the bank in connec- 40

tion with the stock, wouldn't they? A. I don't know. The letter read "proceeds."

HIS LORDSHIP: What do you mean by loans to the bank?

MR. PORTER: On the margined stock I suppose they would have to pay.

HIS LORDSHIP: I have not heard anything about any arrangements made by O'Hearn & Company for borrowing money. I suppose like all brokers they borrowed from the bank and put up their customers' stocks as security. You are suggesting now what they would have in
10 mind would be that the bank's lien would have to be paid off?

MR. PORTER: I was wondering whether that was in mind.

WITNESS: It was not any concern of ours.

MR. PORTER: Q. Did you expect as a result of this agreement that they would pay into the bank the full purchase price of all the stocks they had in their account for L. S. Clarke? A. If they did not agree to that, there was no occasion for us to make joint signatures at the bank.

Q. You understand what I mean; the full purchase price including the price of stocks carried on margin and everything else. In other words, they would have to raise their own money to carry in the mean-
20 time the margins of Clarke's clients; that is what it would amount to, wouldn't it? A. It would, yes. They agreed to it.

Q. Your understanding was they would sell out the stocks they had on their account with Clarke on a margin basis, that they would clear out those stocks, and the total proceeds were to go into the bank without deducting any balances that might be owing on those margin stocks? A. Yes.

HIS LORDSHIP: Q. The accounts were bearing interest on the unpaid amount? A. Yes.

Q. Was there any discussion about that? How did O'Hearn take
30 care of that? A. That matter was never discussed that I remember.

Q. What were they charging, six or seven? A. Seven—I am not prepared to say that definitely.

Q. They would have a lien on this money in the bank for whatever their account was? A. The money was to be deposited with joint signatures; that is, O'Hearn & Company were to sign, and myself. The arrangements were made at the Bank of Commerce in Toronto, Main office, to open the account and receive the signatures of O'Hearn & Company and myself.

Q. Was it to be deposited to the credit of yourself and O'Hearn &
40 Company? A. Yes, my Lord, in the main branch of the Bank of Commerce in Toronto. The account was opened with Mr. Findlay, the Assistant Manager.

MR. PORTER: Q. At that time the only dispute between you and O'Hearn & Co. was in reference to the Peninsular Petroleum stock, and as to whether they could sell out the general account of Clarke for the purpose of liquidating the indebtedness that they claimed in respect

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to Peninsular Petroleum stock? That was the only dispute, wasn't it?
A. I had only been appointed Trustee the day before.

Q. So you did not know very much about it? A. No, I did not.

Q. How long had Mr. McRuer been acting at that time, do you know? A. I think it was a day or two days.

Q. You had this interview with the members of O'Hearn & Company in their office. You had Mr. McRuer and Mr. McDonald, two lawyers, present? A. Mr. McDonald I don't believe was there.

Q. I thought you said he was. A. I did say that, but I don't believe he was. 10

Q. Mr. McRuer had only been engaged a couple of days before, and I suppose got his instructions from you? A. Yes.

Q. This arrangement was made, and the word "proceeds" was used, and you thought that meant the total sale price of all the stocks that were held on Clarke's account? A. Otherwise it would not have been incorporated in the letter.

Q. You expected that O'Hearn & Company would have to put up then out of their own pocket enough money to take up all this stock, and pay off any bank loans they had on the margined stock, and put all that money in the bank? A. Well, O'Hearn agreed to it. 20

Q. That was your understanding? A. Yes.

Q. Now, as a matter of fact, it really does not make any difference, now, does it, whether that was done or not? A. Well, we would have had control of the money. Now we have not.

Q. If you get a judgment against them and they are bankrupt, I suppose it might make a difference. That is the only difference. A. We would have had control of the proceeds of the stock, the moneys. As it was all we had were the equities.

MR. McRUER: To which we were entitled anyway.

MR. PORTER: He wanted something he was not even claiming he was entitled to. He wanted more than even was in dispute. 30

Q. Did all the customers of L. S. Clarke, the North Bay customers, file claims with you in the bankruptcy? A. Practically speaking, every-one. I stand to be corrected I have not a list here to say that authoritatively. There are very few that have not filed claims.

Q. Do you remember whether Mr. St. Pierre filed a claim? A. I couldn't recall.

Plaintiff's
Evidence.
No. 9.
John A. Allen.
Re-
Examination.
by
Mr. McRuer.
30th May, 1934.

BY MR. McRUER:

Q. Just one question. You said the money was deposited in the Canadian Bank of Commerce, Head Office. I believe that was O'Hearn's own bank? A. Yes, the main office. 40

GEORGE M. MILLER, Sworn,

EXAMINED BY MR. McRUER:

Q. Mr. Miller, you live in Sudbury? A. Yes sir.

Q. And I see on Exhibit No. 23 filed that you are listed as one of the customers of the Sudbury office of L. S. Clarke, who had a margin account with them? A. Yes sir.

Q. And it is stated on this list that you had with them an account for 300 Nickel? A. Yes.

Q. That was not delivered to you? A. No.

10 Q. And 200 United Light, and 100 Warner? A. I had 200 Warner and 200 United Light.

HIS LORDSHIP: Q. 200 Warner and what? A. 200 United Light & Power "A".

MR. McRUER: Q. Those were purchased through what office? A. Through the Sudbury office.

Q. Is this a statement of your account? (handing statement to witness) A. This is a statement dated November 30, 1932, of the Canadian account.

20 Q. And the other is a statement— A. A statement dated November 30, 1932, of the New York account.

—EXHIBIT 44—Two statements of account between L. S. Clarke and G. M. Miller.

Q. There was a balance owing by you on this account? A. Yes.

Q. It is shown on the statement? A. The balance on the two accounts is shown. In my calculation, figures I made myself, \$2,225.72, according to these statements.

30 Q. And you were long in those accounts, what stocks? A. 300 Nickel, 200 Warner Brothers, and 200 United Light and Power. I wish to state that subsequent to that statement of November 30th, that account was transferred to the name of Mrs. Miller.

Q. No other alteration? A. No other alteration except the transfer was made.

Q. It was in your name when it was attached to the Kilmer Irving letter of February 4th? A. Yes.

Q. Did you get confirmations of these purchases? A. I did.

Q. Let me have the form please.

MR. PORTER: My Lord, I do not know how this is evidence against us. Perhaps that will be later disclosed.

40 MR. McRUER: I will tell you why I am putting it in. Your Lordship realized that Clarke constituted himself for the purpose of this action, trustee for the customers. I am putting in one customer, that is all, to prove the transaction.

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Supreme
Court of
Ontario.
Plaintiffs'
Evidence.
No. 10.
George M.
Miller.
Examination
30th May, 1934.

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Plaintiffs'
Evidence.
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Miller.
Examination
30th May, 1934.
—concluded.

HIS LORDSHIP: He is a customer of the Sudbury office. Has this transaction anything to do with the Sudbury office, or had it anything to do with the Sudbury office?

MR. McRUER: That is a double reason why I am putting Mr. Miller in. They sold out all the Sudbury stock at the same time. The Sudbury stock was sold indiscriminately. I am putting Mr. Miller in to show he demanded his stock and could not get it.

Q. This is a confirmation of the 200 Warner Bros. You show me a confirmation dated the 25th of August, 1932? A. Yes.

—EXHIBIT 45—Confirmation of purchase for G. M. Miller of 200 10
Warner Bros, dated Aug. 25, 1932, on the form of
L. S. Clarke.

MR. McRUER: It just shows the type that was used, my Lord.

Q. Then, Mr. Miller, did you make demand for your stock? A. I did.

Q. When was that? A. On February seventh.

Q. And were you able to get it? A. I was not able to get it.

Q. Had your stock been sold? A. I don't know. I was told I couldn't get it.

Plaintiffs'
Evidence.
No. 10.
George M.
Miller.
Cross-
Examination
by Mr. Porter.
30th May, 1934.

CROSS-EXAMINED BY MR. PORTER:

20

Q. You say your account was transferred to your wife? A. Yes.

Q. When did that take place? A. I can't tell you exactly when it took place. I think it was after the confirmation of November 30th.

Q. That was before the demand was made, and you were told that you could not get the stock? A. Yes.

Q. A transfer was made to your wife, so she is the person now who would be entitled to anything, if anybody? A. Yes.

Q. What is your occupation, Mr. Miller? A. Solicitor and barrister.

MR. McRUER: That is the case for the plaintiff, my Lord.

30

HIS LORDSHIP: Defence.

DEFENCE

ELLY MARKS, Sworn.

Defendants'
Evidence.
No. 11.
Elly Marks.
Examination.
30th May, 1934.

EXAMINED BY MR. PORTER:

Q. Mr. Marks, you are one of the partners of O'Hearn & Com-

pany, the defendant in this action? A. Yes sir.

Q. You were a partner of O'Hearn & Company at the time arrangements were made with Mr. L. S. Clarke in January, 1931? A. Yes sir.

Q. When those arrangements were made with Mr. Clarke did you have anything to do with the negotiations with him? A. Very little.

Q. Did you know anything about Mr. Clarke at the time? A. No sir.

Q. Were any enquiries made as to his position at the time? A. Oh, yes, there had been some, I heard about them, as to his responsibility.

10 Q. What was the arrangement that was ultimately made with him?

A. That he was to open an office in North Bay and Sudbury, and have our wire connection, and he was to receive the usual half brokerage allowed on the Standard Mining Exchange transactions, no commission on the Toronto Exchange, or the Grain, and any business of that kind. I understand that was discussed with him, that he would charge an over-riding commission in both of his offices, in North Bay and Sudbury. Both offices were to be one account, L. S. Clarke.

20 Q. And there was an agreement signed by Mr. Clarke, was there not? I show you Exhibit 8. Do you recall this? A. Yes, I seen that card shortly after it was signed.

Q. And was there any other written agreement besides Exhibit 8 that was ever entered into with L. S. Clarke in reference to his account?

A. Not that I know of, sir.

Q. And during the dealings with L. S. Clarke that ensued, what did you know if anything about who his customers were? A. I didn't know any of his customers, or ever heard the name of them.

30 Q. That is, up until certain letters were written? A. The only one I ever heard for sure was Mr. Gordon who bought some nickel from him in North Bay. That was the only one I ever heard of; that is, for absolute name.

Q. Had you ever seen the form of contract note that Clarke used for the purpose of sending out to his customers after transactions had been closed? A. Only very late in our dealings with Clarke I had seen them.

Q. When you say very late—? A. Very late—it might have been even after he assigned.

Q. And in the dealings with your firm and L. S. Clarke, whom did you always deal with? A. L. S. Clarke.

40 Q. But any particular employé in the firm, or did you deal with L. S. Clarke personally, when orders came through and were executed, and so on? A. They would be dealt with through his managers in both places.

Q. And his manager in North Bay was, as we have heard, L. J. Bayne? A. Yes.

Q. And during the year 1931, and up to the month of September, 1932, the account was carried on with L. S. Clarke, transactions took place from day to day. Was there anything out of the usual that hap-

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—continued.

pened during that time? A. Just the regular brokerage business where you have a connection, and sometimes it was fairly extensive. There would be times during that when the market would have severe, great fluctuations. It would be necessary to call on Clarke for considerable margins, which were always paid very promptly during those times.

Q. As a matter of fact, during that time did you have any information in addition to the information you obtained when the arrangement was originally made which indicated in any way to you what Clarke's financial position was? A. I had friends living in North Bay, and I had occasion to visit North Bay several times during 1931 and 1932. And I discussed an odd time about Mr. Clarke's responsibility. They thought he was very responsible, and they always told me he was very well thought of in North Bay, extremely highly respected, and that he was a man of considerable means, and everyone looked to him as to be a man who was well fixed in every way. 10

Q. Did you have any conversation with Clarke himself during that period which touched the question of his financial means? A. Yes, I had met him an odd time in North Bay, and one time he took me out in his car, and we drove out to the suburbs of the city. He showed me a very nice estate he had out here. I don't know the financial value of this, but he also discussed matters that impressed me as he being a man of considerable means. 20

Q. Was there any such conversation in 1932, or some time later, in the relationship that existed? A. Well, I met him on the train about the end of 1931, I think it was, coming to Toronto. He was discussing with me about entering into some substantial contracts in Kirkland Lake, that he could get very large contracts there for public work, and he even suggested—wanted to know if I wanted to go in partnership with him. I told him I was not interested; I had several businesses to look after. But they were considerable amounts that he mentioned, all of which led me to the same conclusion as to Clarke's responsibility. I discussed some of those with my partners on coming back to Toronto, who also seemed very favourably and highly impressed with the financial responsibility of L. S. Clarke. Never had occasion to think otherwise because I remember in the severe break when England went off the gold standard, we were carrying for both offices, all under the name of L. S. Clarke, a substantial amount of stocks. I believe we had to call him one night for \$30,000 at one time. It was promptly paid. During the week or ten days around which that market was very sensitive there were calls made between the two places, might have amounted to \$100,000, all of which was promptly paid; in fact, I would say as a broker they were paid so promptly that he would have to use his own means, that they were paid before he would possibly have time to obtain any such amounts like that from his clients. 30 40

Q. Did you know some time around September, 1932, anything about Clarke's interest—perhaps interest is not the word—did you have any conversation with Clarke about Peninsular Petroleum stock? A. He

mentioned it I believe when I was in the North Bay office, thinking it looked like a good speculation. He further mentioned it in Toronto a little later, and one time when he discussed it with me I asked him, was he sure of what he was doing, when he was talking; that the Canadian end of it had been a re-organization, or something of that nature, in connection with the Wainwright oil fields in Western Canada. I told him I did not think they amounted to very much, because I was President of a private company who were drilling and had spent considerable money, about 125 or 150 miles south of there with practically no results; in fact, they

10 were so poor that we abandoned it, having spent practically about \$200,000.

Q. Was anything further said about Peninsular Petroleum? A. Once in Toronto, I believe it was over the telephone, he rang me up, probably asking me about the market—I know there was some reason he rang me up. The conversation again went to Peninsular Petroleum. I asked him, “Have you learned anything further about it?” He said, “Oh, yes, I have had investigated the A. and P. directors in New York, and I find them to be very reliable,” taking from that, I thought he meant the Atlantic and Pacific directors, but the A. and P. I later found out to be the

20 Andean Petroleum, which had an interest in this Peninsular Petroleum—Pen Pete it is called. I found out that the success of Pen Pete hinged considerably on this Andean Petroleum, a stock listed on the New York produce Exchange I believe.

Q. You are referring to a conversation with Mr. Clarke? A. Yes, and the later events of the Andean Petroleum. It looked to be about in the same category as Pen Pete itself. It has all passed out of the picture. I don't think there is any value at all on it. It was never quoted. The last quotes I have seen have been extremely low.

Q. In any of your conversations with him did he ever discuss the

30 price of Peninsular Petroleum in any way? A. He thought it would double or more, in fact, he felt quite confident. And another time about a short interest he discussed—

Q. What did he say about a short interest? A. He came into our office one afternoon—I believe it was after the market had closed. I asked him about Pen Pete. He said another reason he thought there would be a market play in Pen Pete, that there was a considerable short interest in it. I asked him how was he sure of it. He said from what he learned he thought there was. I said, “Perhaps we can get some further views as to a short interest prevailing,” because he had been a big

40 buyer of it.

Q. When was this conversation? A. It would be in the Fall of 1932. What month, I would not like to say.

Q. You say there had been some buying at that time? A. Yes. Just guessing, but fairly sure, that it would be in around October, probably the middle of October. And I went with him to the back of our office, which is quite a long office, in a part called the cage, those who

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handle the securities and keep records of the incoming stocks. I asked them how much Pen Pete was owing to us from other brokers in the way it comes in. They told me that the Pen Pete deliveries were being made very promptly, and there was practically none that they were behind in, in deliveries to us—meaning that sometimes it takes in an ordinary actual quick delivery two or three days to obtain it from the day it is purchased to the day it is delivered. At that time, over those three days they practically owed us no Peninsular Petroleum. I told Mr. Clarke in this way, he must be mistaken as to any large short interest. That is all I could dope out of it.

10

Q. Then we have seen—it is already of record that there were heavy purchases in Peninsular Petroleum from Clarke's office in September and October, 1932. And during that period how did Clarke meet the various payments that were demanded of him? A. It was not my department to look after that, but if anything seriously went wrong I would know about it, but I had never heard during all that time any references made from the rear portion of our office that looks after any correspondents or our branches as to the slowness of Clarke's payments excepting in November.

Q. Then on November 9th did you know about the purchases that were made on that day? A. Yes sir.

20

Q. When did you find out about them? A. I was out to lunch that day. I don't go out as a rule, but I had an appointment with a particular friend of mine, and I came in late, in the neighbourhood of two o'clock. Mr. Gardner had told me—

Q. Never mind what Mr. Gardner told you. I just want to fix the time when you first found out about the purchases that were being made. A. After that I went and looked at the sheet. I could see the amount of Pen Pete on it.

Q. As a result of some conversation with somebody in the office? A. Yes. I went into the wire room and seen the sheets. It looked like I guess about 200,000 had been purchased up to that time.

30

Q. Then did you do anything with respect to that? A. Well, I asked Mr. Gardner had he spoken to Mr. Clarke, or was Clarke in North Bay; and he said he had tried to get in touch with him.

MR. McRUER: I do not think this is—

WITNESS: They told me that Clarke—

MR. PORTER: I wanted to know whether you personally did anything. We can get from Gardner whatever he has to say. All we can get from you is what you did, as the result of learning about these heavy purchases? A. Well, there had been a call put in for North Bay asking for to speak to Mr. — the branch office up there.

40

Q. Was that put in by you? A. Not the branch office—Mr. Clarke's office; it was no branch.

Q. Was that put in by you? A. It was put in by somebody in our office.

Q. And did you have any conversation with anybody as the result

of it, not in your own office, but with Clarke, or somebody in Clarke's office? A. Later in the afternoon I had a conversation with Mr. Clarke himself.

Q. About what time was that? A. About five o'clock or half past five.

Q. That was by long distance telephone? A. That was by long distance telephone.

Q. And what did you say? A. I asked Mr. Clarke about this heavy buying of Pen Pete. He said, "I have been out all day. I just came
10 in." I said there had been considerable buying, and that there had also been some discussion I believe about some drafts in connection with these purchases, which, from what I learned in the office, there had been a dispute or misunderstanding—I believe a dispute that it was not made, any connection to purchase that large a quantity of Pen Pete on draft. It is not a custom of our office to do anything of that nature, regardless of how good a customer he might be. It has never been before that or since, or is not today, or would it be allowed in the future. And I told Mr. Clarke about this idea, that they thought drafting out to the United
20 States a large portion of Pen Pete, which would take at least a week before they would know whether the drafts had been paid—I said we would not stand for a thing of that nature. Mr. Clarke's reply was, "I have just come in. I don't know anything about what is going on, but that idea of drafts would be silly." I am positive of that word "silly" he used. Very little conversation after that. Mr. Clarke didn't seem at least put out over it. That is probably about all that took place in the conversation.

Q. Was anything said in the conversation about money that would be required to pay for the stock? A. I feel confident that I referred to the question that this would have to be paid for in cash promptly.

HIS LORDSHIP: I do not know what he means by that. Does he
30 remember, or does he not?

MR. PORTER: Q. Have you any recollection, definite recollection? A. I can't swear to that.

Q. After November 9th did you have any further conversation with Mr. Clarke in respect to this matter? A. He visited our Toronto office.

Q. Before visiting the Toronto office were there any more telephone conversations? A. With me myself?

Q. Yes. A. No sir, not that I remember.

Q. He then visited the Toronto office you say, and that was when? Do you remember the date? A. About ten days after.

40 Q. Do you remember an agreement known as the Kaatz agreement which is Exhibit 3 in this action? A. I seen it. I didn't take any part in the drawing of it.

Q. I am asking you that because I wanted to know whether the time Clarke came to see you in the office was before or after or at the time that agreement was drawn. A. He had been in the office before that agreement had been drawn, I feel sure of that.

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Q. Do you remember speaking to him before that? A. Yes.

Q. Do you remember what the conversation was? A. He always felt that he was making progress in his solution of the Pen Pete difficulty, and that he would be able to pay the amount owing, as he expected to receive it from different parties; and furthermore, that there was going to be a very active market in the stock; and further, that the company, or the rest of the directors, had given him authority to do anything he wanted, that they would work with him, that they would contribute towards a fund in order to get the company on its feet again, and that there would be considerable buying in the stock.

10

Q. Then you say you were not present when the Kaatz agreement was signed? A. I was not in the room, or took any part in the conversation connected with it.

Q. And after the Kaatz agreement was signed did you have any interviews with Clarke, after that date? A. Yes.

Q. With reference to Peninsular Petroleum stock? A. Yes sir.

Q. Do you remember whether those conversations were many, or could you give an estimate of how many there were? A. There must have been at least three; other members of the firm were present too.

Q. What did you learn in those conversations from Clarke? A. Well, I still had confidence that Clarke was making some headway for himself in this Peninsular Petroleum, and as we all had a great deal of respect for Clarke, and very happy to see if he would have come out of this mess.

20

Q. Then a certain conference has been mentioned, held in your office on March 11, 1933. This was after Clarke made an assignment in bankruptcy. At this conference, Mr. Allen, Mr. McRuer, and the three partners of your firm were said to have been present. Do you recall that occasion? A. I remember it very well.

Q. And a letter has been produced, Exhibit 41, which refers to the proceeds from the sale of stock. Do you recall that letter? A. Yes.

30

Q. And in the course of the discussion between these parties—was it a long discussion? A. No, it was not a very long discussion. It is now some time ago, but I can remember fairly well what took place there.

Q. Will you just state what did take place in the discussion? A. Mr. Allen I believe asked Mr. Gardner—or, there had been some cross-word discussions as to how much money would be left in the estate. The amount was mentioned, in the neighbourhood of \$26,000.

Q. Who mentioned the amount? A. I believe Mr. Gardner, and Mr. Allen thought it would be a little more, and then they decided that it would be a little more because there were a few other odds and ends that had to be cleaned up in an odd stock or two that probably was not good delivery the way it was, and when fixed up would help the sale, the amount a little. One of them discussed—I believe it was Mr. Allen—that he would like to get it fixed up that morning. We said, "It is Saturday morning, it is only a short time." And then Mr. McRuer, I believe, did

40

some talking and said, "Well, it is not hard, we will write a letter and fix it up." And one of them said—I believe Mr. Allen—that he wanted to get north that night. And the letter was entered into with the word "proceeds" used. I rang up our solicitor, all done very quickly. The word "proceeds" is often used in the selling out of a stock and the proceeds sent to a customer. Consequently, as I am not a lawyer, I understood very carefully that they were dealing with the proceeds that belonged to the Clarke estate after we had been paid off for the balance due on the stocks we had outside of the Pen Pete. Consequently, that
10 letter was signed. Otherwise, it never would have been signed with the word "proceeds" in it.

Q. Then Mr. Allen has stated his understanding to be that you were to deposit in the bank the whole of the sale price of this stock, that is, without deducting even the amount that would be owing by Clarke as margin.

A. I think we would have been dealing like children—

Q. Was that proposition ever discussed in any way? A. No sir.

Q. As to the Peninsular Petroleum pool which Bayne has described as being carried on in the North Bay office, did you know anything about a pool when you were dealing with L. S. Clarke? A. No sir.

20 Q. Did you know anything about it at the time that the heavy transactions on November 8th and 9th were put through? A. No sir.

Q. Had your firm any interest in Peninsular Petroleum of any kind, either in the way of the market price of it, or of holders of stock, or in any other way? A. Individually or collectively, as far as I know, and I think I do know, neither one of them individually or collectively ever had a transaction for the firm in Peninsular Petroleum. They never bought or sold on their own behalf one share.

CROSS-EXAMINED BY MR. McRUER:

30 Q. You have told us something about arrangements when Mr. Clarke opened up in North Bay and Sudbury. Did you have any discussion with him at all in regard to that matter? A. I may have been introduced to him in our office at that time.

Q. Do you remember when you were examined for discovery,—

"32. Q. Then did you have any general negotiations with Mr. Clarke at all personally in regard to his arrangement with the firm "when he opened the offices in North Bay and Sudbury? A. No."

That would be correct? A. Yes. I may have been introduced to him.

40 Q. He may have been introduced to you, but you undertook to tell my friend some of the details of the arrangements, and I was wondering how you reconciled what you were telling my friend with the answer you had made on your examination for discovery? A. At the time, just as mentioned and answered, I had practically no discussion on my part with

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him. Later on, probably within a day or two days I was shown the particulars of what happened.

Q. I am asking you if you had any discussion with Clarke? A. No.

Q. Then anything you told my friend was something somebody else told you in regard to what arrangements had been made, if any? A. And they showed me the card that was signed.

Q. And outside of that you know nothing; is that correct? A. That is correct.

Q. Pardon? A. That is correct.

Q. Stewart McNair and Company had been operating offices in North Bay and Sudbury prior to Clarke opening up here. You knew that? A. I can't recall that I knew it. 10

Q. Did you know whether or not any other offices had been operated by brokers in North Bay and Sudbury prior to Clarke opening up here. You knew that? A. I can't recall that I knew it.

Q. Did you know whether or not any other offices had been operated by brokers in North Bay and Sudbury prior to your making these arrangements with Clarke? A. North Bay? You want to take them separately or collectively?

Q. Either one. A. Yes sir, I knew there had been other brokers. 20

Q. You knew there had been other brokers operating in North Bay and in Sudbury? A. Yes sir.

Q. And that these other brokers had ceased to operate there—you knew that? A. I was informed of that.

Q. Then the opportunity came along for you to make arrangements with Clarke who was anxious to start up a brokerage business in these two cities? A. I don't think that is the way it happened. I think Clarke came to us through some other party.

Q. We have the correspondence in at any rate. I think a man by the name of Richardson started the negotiations? A. I think he bought over the furniture and equipment or something, and somebody went to Clarke and interested Clarke to go into the business, and Clarke I believe then came to O'Hearn & Company. 30

Q. I suggest your first negotiations were with Bayne? A. I can't give you the details.

Q. You do not know about that, who carried on the initial negotiations in regard to opening up offices in Sudbury and North Bay? A. I believe Mr. Bayne visited Toronto.

Q. Who carried them on, on behalf of your firm? A. I don't know. I did not. 40

Q. Would it be Mr. Gardner or Mr. Richardson? A. I don't know. I didn't carry them on.

Q. It was not you, at any rate. And you then later knew that Mr. Clarke had opened up offices to carry on business as a broker, and was stated to be a correspondent of O'Hearn & Company? A. Yes.

Q. And you had occasion to visit his offices at different times? A. No sir. I have visited North Bay.

Q. The North Bay office? A. At different times I have visited the city of North Bay and called into Mr. Clarke's office. I never came to North Bay especially to see Mr. Clarke.

Q. I do not care whether you came here especially to see Mr. Clarke or not. You visited the offices and saw him carrying on business there as a broker, correspondent of F. O'Hearn & Company? A. Yes, and was very friendly with Mr. Clarke.

10 Q. And he had a board room? A. Yes.

Q. To which customers could come and see the quotations and stocks? A. Yes.

Q. Those quotations were supplied by F. O'Hearn & Company? A. Yes.

Q. You had a private wire for that purpose, and for the purpose of taking orders and so forth? A. We had a private wire that touched North Bay. He was on that wire. It was not a private wire just for L. S. Clarke.

20 Q. It was F. O'Hearn & Company that supplied the quotations for the boards in Sudbury and North Bay on the wire? A. Yes sir.

Q. And one of your arrangements with Clarke was that O'Hearn & Company should make the purchases on the Standard Stock Exchange? A. Or any other exchange that they gave us orders on.

Q. But you were a member of the Standard Stock Exchange? A. Oh, yes, we had two or three seats.

Q. Clarke did not have any? A. No, not that I know of.

30 HIS LORDSHIP: He has already told us what the arrangement was. Do you want to go all over that again? He said he was to open an office in North Bay and Sudbury, and have their wire connection. He was to have half commission on stocks sold on the Standard Mining Exchange, but no commission on sales on the Toronto stock exchange or the grain exchange. He was to charge an over-riding commission on those.

WITNESS: And it may be on one or two stocks there was no division of commission, such as Nickel.

HIS LORDSHIP: Q. I suppose Nickel is on both Exchanges? A. At that time was on both.

MR. McRUER: Q. You were arranging with him that he was to do business for customers on margin? A. Or any other way he wished.

40 Q. That is one of the things that would be necessary, an arrangement in regard to margin transactions? A. Not necessarily the most important.

Q. Anyone could do business for cash. You would be glad to get the cash and receive it, but a margin business was a little different. A. You may be surprised that a very large portion of the mining business for considerable time has been all cash.

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Q. But it was arranged that he should do business with customers on margin? A. Yes.

Q. The general account was to be carried at your office? A. What do you mean by that, sir?

Q. I mean the account was carried at your office? A. The stocks were carried there?

Q. The stocks were carried there? A. Yes.

Q. You did not keep the books. I understand that the bookkeeping was specially under Mr. Gardner's department? A. Yes.

Q. I do not want to bother you, Mr. Marks. I presume Mr. Gardner is going to be put in the witness box? A. You won't get very far if you try that, because I don't know. 10

Q. We will not go into the details of how the accounts were carried. And you did not appear to be very keen, if I may say so, on Pen Pete? A. No.

Q. You regarded it as rather a highly speculative venture? A. A great many stocks around the same price we feel the same towards.

Q. You regard them as rather highly speculative ventures? A. They are all highly speculative in that class.

Q. And you regarded it as one of that class? A. Yes. 20

Q. And then Mr. Bayne had quite evidently made some arrangement, at any rate, with Mr. Gardner, according to your conversation with Mr. Gardner, to draft out Pen Pete stock? A. Only a certain amount, to help him out of a temporary condition that I thought, and Mr. Gardner I believe, from what he told me, thought he was in.

Q. You say it was only a certain amount? A. Yes.

Q. Would it surprise you if I told you Mr. Gardner has sworn, and it is in evidence now in his examination for discovery, read into the record, that he put no limit on the amount? A. I don't believe Mr. Gardner would do that. 30

Q. Whether you believe he would do that or not—

HIS LORDSHIP: What does he know about what Mr. Gardner would do?

MR. McRUER: Q. Did Gardner tell you he put any limit on the amount? A. From his conversation with me?

Q. Did he tell you at the time you questioned him about this that he had put any limit on the amount? A. Yes.

Q. He said he had put a limit on the amount? A. Yes, approximate limit.

Q. What did he say the approximate limit was? A. To help him out of that difficulty, that there was about \$7500, that he was for a day temporarily tied up. 40

Q. Do you say Gardner told you that? A. Yes.

Q. Did he say that? A. Practically.

Q. Not practically—I have got what Gardner said, you know. A. That is the gist of the conversation with him, yes.

Q. Do you remember when you were examined in the bankruptcy proceedings? A. I was examined one afternoon by you.

Q. This is an examination by Mr. McDonald I think. Do you remember that? A. By you.

Q. Do you remember an examination by Mr. McDonald? A. No sir, but I remember—

Q. You don't remember being examined by Mr. McDonald. I want to get how clear your recollection is? A. By you.

10 Q. Do you not remember being examined by Mr. McDonald? A. Yes, for about five minutes.

Q. Whether it was five minutes or ten minutes. A. By you for an hour and a half.

Q. That is all right; I am longer winded than Mr. McDonald,—

20 Q. Not Bayne and Clarke? A. Bayne and Gardner—at least, “I heard what Gardner’s answers were. Gardner had told me “a few minutes previously that he had agreed to send up a few days “before some stock on draft of Pen Pete to help him out, and Gardner’s answer to Bayne was, ‘I didn’t make any arrangements with “you for any heavy purchases of Pen Pete to be sent out by draft. I “‘simply did this previously to help you out.’ He said, ‘No, I cannot “send out such a quantity as that, and besides we have made no arrangement of that nature.’”

Do you remember answering that question in that way? A. Yes.

Q. So, whatever the quantity was, there quite evidently had been some arrangements made by Gardner in regard to drafting out Pen Pete stock? A. I believe there was, just of a temporary nature.

Q. Whether it was temporary or otherwise. You told us this morning that that was a very unusual sort of thing? A. I have worked with Gardner for several years and know his methods pretty well.

30 Q. You told us it was a very unusual sort of thing? A. It is an unusual thing.

Q. And, as a matter of fact, I think you put your foot down on it good and flat when you heard about it? A. No. I didn’t interfere with Gardner’s department. He is quite capable of looking after that himself.

Q. Drafting out a highly speculative stock of this kind was a very unusual transaction in the brokerage business? A. Not for the amount with the equity in Clarke’s account at the time.

40 Q. Oh, yes. I say the drafting out of a highly speculative stock of this sort to purchasers that you did not even know the names of, was a very unusual sort of transaction? A. For a modest amount—it was unusual for a modest amount, but he had I believe agreed to it.

Q. We have Gardner’s story. We will come back to that. At any rate, when you spoke to Clarke about it, Clarke said it was silly? A. When I told him of the quantity he did not agree to it, thought it was a silly idea.

Q. Clarke said it was a silly idea? A. Yes sir.

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Q. Now when we come to the interview of March 11—both these letters that are put in dated March 11th were read over the phone to your solicitor? A. Yes sir.

Q. And you say the idea was that you were going to pay the equity into the trust account? A. Yes, because we had discussed about how much equity there was.

Q. Allen had been making some inquiry about what you considered the equity was? A. Not what I considered. Mr. Gardner answered that.

Q. And that was the equity after you deducted what you claimed 10 was owing for the Pen Pete stock? A. Or anything else.

Q. Everything? A. Yes.

Q. But it was perfectly clear that Mr. Allen was taking the position that he did not know the whole position of this account? A. I don't believe it.

Q. You don't believe it? A. No. He knew what the equity was.

Q. Why didn't he tell you to sell it out and let him take the equity, and have the cheques made directly payable to him? A. I don't know what is in his mind.

Q. What conceivable reason was there for going to all the trouble 20 and opening up a trust account in the head office of the Canadian Bank of Commerce in Toronto, having the proceeds paid in there to be checked out on a joint checking account to be signed by you and by Mr. Allen, if he was only getting the net equity to which he was entitled after you deducted the purchase price of the Pen Pete? A. He should get that regardless how small the equity amounted to, because he was then dealing with trust funds. Whether it was one dollar, or ten thousand or twenty thousand it was entitled to be taken out of our hands. That was the reason—and good business.

Q. Why was it being stipulated in the letters that you were to have 30 the right to sign cheques on the trust account, if it was not that you were keeping a lien on the funds over a disputed amount? A. I am no solicitor.

Q. But you are a business man. A. I can't answer that.

Q. You are a business man, and the trust account was opened? A. I had heard some remarks afterwards made by one of your party, that they thought we would never agree to sign such a letter, that Mr. Allen or one of you had made a wager you would not get a letter like that put through. I heard Mr. Allen make that remark.

Q. I am asking you a question. The trust account was opened? A. 40 I believe it was.

Q. You know it was? A. I didn't deposit the money. I knew something was going to be opened.

Q. It was in your own bank? A. Doesn't make any difference. There are only a few banks.

Q. Wasn't there a discussion that took place there that day as to

what your bank was, and you said it was the head office of the Canadian Bank of Commerce? That is right? A. Yes.

Q. And you were dealing with the Canadian Bank of Commerce and pledging shares with them? A. We deal with several banks. We do deal with the Canadian Bank of Commerce.

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Q. The idea was that if the trust account on which you had the right to sign cheques was opened with the Bank of Commerce, you would be protected in regard to your general account with them when they understood the circumstances, and that is why it was taken into your own
10 branch of the bank. What do you say to that? A. There isn't any answer to make to that.

Q. You have no answer to make? A. There isn't any.

Q. And the Pen Pete transaction they expressly reserved in the letters, that there was to be no dealing with the Pen Pete stock. Do you remember that? A. I can't remember that. I can't remember all the points. It is quite a while ago.

—Court adjourned at 12:45 p.m. until two p.m.

—On Resuming at Two P.M.

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20 CROSS-EXAMINATION BY MR. McRUER: (Cont'd)

Q. Mr. Marks, you came in about two o'clock on the day of November 9th? A. Yes sir.

Q. Came in from lunch? A. About two o'clock.

Q. And you were then told about the heavy buying in Pen Pete?
A. About the quantity that had been bought.

Q. And you regarded it as heavy buying? A. Well, to satisfy myself as to the condition of Clarke's account I went to the back, in the margin department, and found out about how much Clarke's equity was.

Q. Had you known that a cheque for \$7500 had been returned "N.
30 S.F." two or three days before? A. No.

Q. Gardner did not tell you that? A. No.

Q. Did you learn that from Gardner later in the day? A. Yes. And he told me also it had been paid the day after.

Q. Returned "N.S.F." and paid on Saturday? A. It was not returned, I don't think.

Q. But payment was refused? A. For the one day.

Q. The question of the quantity of buying of Pen Pete stock was a matter of discussion between you and Gardner, and you asked him if he had been in touch with Mr. Clarke? A. Yes sir.

Q. And he told you that he was out of town? A. That is what
40 North Bay told him.

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Q. And up until that time about 200,000 shares had been bought?
A. I believe that was roughly the quantity.

Q. Then you went back and checked up the margins on the Clarke account? A. Just made enquiries.

Q. You made enquiries from the margin clerk? A. Yes.

Q. And then they went on and continued the purchasing? A. Very little more after.

Q. How much more afterwards? A. Until Gardner had got in communication with Bayne, and then Bayne told him—there was a reason for that. 10

Q. I am asking you a question at the moment. I am not asking for any reasons. I am asking you how much was bought after you went back to the cage or the margin clerk and checked up the margins? A. The only further amount I knew was bought was 50,000 shares.

Q. You do not know what account I suppose the margin clerk checked up? A. He would check up his whole account.

Q. That would include the Sudbury account? A. Yes sir. It was all one account.

Q. It was not all kept in one account? A. One name.

Q. I am saying it was not all kept in one account. Mr. Gardner can tell us about that. You did not look after the bookkeeping? A. No, except I knew it was one account, L. S. Clarke. 20

Q. You say you knew it was one account. As a matter of fact, it was not one account. The Sudbury and North Bay branches were kept separately, and statements were rendered separately. You knew that, didn't you? A. Naturally they would be.

Q. You knew they were doing a margin business for customers through that account? A. Yes sir, I imagined they were.

Q. You did not imagine, you knew it? A. I didn't positively know.

Q. You never imagined anything else. That was the very purpose of opening the Sudbury office, wasn't it, to do business with customers? A. Yes sir, and his own. 30

Q. He was not opening an office in Sudbury to put through his own transactions? A. He might. He did plenty of business.

Q. You do not mean to suggest you thought he was opening an office in Sudbury to put through his own transactions? A. No sir.

Q. Or that he was appointing a manager in Sudbury to do his own business over there? A. No sir.

Q. You never thought any such thing? A. No sir.

Q. Or that he was appointing a manager in North Bay to conduct his own personal transactions. You never thought of any such nonsense as that, did you? A. No sir. 40

Q. I asked you this morning about whether it was not a very unusual thing to draft out penny stock, and I took it that you were rather saying it was not unusual to draft out \$7500 worth of penny stock on draft. I want to read you what you swore to in Examination in-chief. I have

had the reporter read it over to me, and this was the conversation that took place between you and Mr. Clarke,

“I asked Mr. Clarke about this heavy buying of Pen Pete.”
That was correct, was it? A. This was over the telephone?

Q. Yes. A. Yes sir.

Q. “He said, ‘I have been out all day. I just came in.’ ”
That is correct, is it? A. Yes sir.

Q. “I said there had been considerable buying and there had also
10 “been some discussion I believe about some drafts in connection with
“these purchases.”

That is as you gave it this morning; that is correct, is it? A. It is all correct.

Q. “Which, from what I learned in the office there had been a
“dispute or misunderstanding, I believe a dispute that it was not made
“any connection to purchase that large a quantity of Pen Pete on
“draft. It is not a custom of our office to do anything of that nature,
“regardless of how good a customer he might be.”

Is that correct? A. With the draft idea in view?

Q. I am reading exactly what you swore to this morning. “It is not
20 “a custom of our office to do anything of that nature, regardless of
“how good a customer he might be.”

You swore to that this morning? A. Meaning—

Q. You recollect making that statement this morning? A. The statements are all true as I can remember. I have no reason otherwise.

Q. “It has never been before that, or since, or it is not today, or
“it would not be allowed in the future.”

Do you remember putting it that way? A. Yes sir.

Q. “And I told Mr. Clarke about this idea that they thought,
30 “drafting out to the United States a large portion of Pen Pete, it
“would take at least a week before we would know whether the drafts
“had been paid or not.”

Do you remember telling him that? A. Yes sir.

Q. “And I said we would not stand for a thing of that nature”

Do you remember saying that? A. (No response.)

Q. Do you remember saying that? A. You have it down, so it must have been said.

Q. “Mr. Clarke’s reply was, ‘I have just come in. I don’t know
“‘anything about what is going on, but that idea of drafts would be
“‘silly.’ ”

40 A. Any such quantity, yes.

Q. No, no, here is just what you swore to this morning. A. The meaning—

Q. And 53 drafts would sound like quite a lot, wouldn’t it? A. I don’t know.

Q. Did Mr. Gardner tell you how many drafts had been sent up to North Bay? A. No, I don’t think he did.

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Q. And if Mr. Gardner was sending 53 drafts up to North Bay for the purpose of drafting out a penny stock like Pen Pete, getting the names filled in up there, and sending them back to O'Hearn & Company, that would sound to you like a very unusual transaction? A. It depends on the amount involved.

Q. Well, it is an unusual transaction anyway to draft out penny stock? A. In a large amount it would be.

Q. In any amount? A. No sir.

Q. You have one bundle of 53 drafts of penny stock? A. That is not the first question you asked me. 10

Q. I know, but you would regard 53 as a lot? A. It would be an unusual amount if the amounts were heavy in each draft, but if they were modest it would not be.

Q. Did you ever draft out \$7500 worth of penny stock for Mr. Clarke before? A. I can't answer that.

Q. Did you ever draft it out for anybody? A. I can't answer that.

Q. You don't know of a case where \$7500 worth of penny stock—
A. There is no reason why it comes under my knowledge.

Q. You are the principal man with O'Hearn & Co.? A. No sir, I am not. 20

Q. When it comes to financial interest, are you not? A. No sir.

Q. I thought you told me you were? A. No, I did not.

Q. Is Mr. Richardson? A. No, Mr Gardner.

Q. The man with the principal financial interest in O'Hearn & Company? A. The business don't work that way. It works according to routine. It is a very large organization.

Q. The man with the principal financial interest in O'Hearn & Company is Mr. Marks? A. No sir, I didn't tell you that.

Q. Is that not correct? A. It is not correct.

Q. You have a very substantial interest? A. You didn't ask that. 30
I don't know what you call substantial.

Q. All I want to know is, you are pretty active in the business down there? A. And we are a pretty large firm.

Q. You are one of the partners. As far as you know, you cannot tell me of a single instance of drafting out Pen Pete stock to anybody, or penny stock, of taking orders from anybody to draft out a penny stock? A. We have drafted out cheaper-priced stocks.

Q. A highly speculative stock like Pen Pete, you cannot tell me of an instance where you ever drafted that out? A. Mr. Gardner will tell you of that. 40

Q. You cannot tell me? A. No, I can't tell you. It is not my department.

Q. If you heard of it going on you would put your foot on it pretty quickly? A. It is not necessary for me to know. They are running their department.

Q. What is your department? A. General, nothing special.

Q. Are you general manager of the business? A. No sir.

Q. I think there must be something that comes under Mr. Marks supervision down there. A. Nothing particular.

Q. I rather imagine if anything goes on that is wrong Mr. Marks has his finger on it pretty quickly? A. If it goes wrong, they come to me.

Q. Do you remember this question being put to you in your examination, and do you remember making this answer,

“184. Q. There was nothing said about it. All I am trying to do is to find out what you say about these things. Gardner did not tell you that there had been any promise made by Bayne that if these people did not take up the drafts, that Clarke would pay for it? A. Should I answer that question?”

10

“Q. Did he or did he not? A. No.”

Q. Do you remember answering those questions in that way? A. No sir.

Q. Is it a fact that Gardner did not tell you that he had any promise from Bayne that if these drafts were not taken up Clarke would stand good for them? A. I don't remember.

ALBERT GARDNER, Sworn.

20 EXAMINED BY MR. PORTER:

Q. Mr. Gardner, you are one of the partners of F. O'Hearn & Company, the defendants? A. Yes.

Q. As has already been said, you have general charge of the book-keeping department of the firm? A. It comes under my supervision, yes.

Q. As to the arrangements between F. O'Hearn & Company and L. S. Clarke, are you familiar with the arrangements, that were made when Clarke first started up business in January, 1931, in North Bay and Sudbury? A. I think Mr. Richardson introduced me to Mr. Clarke at the time he was in our office.

30 Q. I want to know briefly if you can recall what arrangements were made as between you and Clarke? A. I think I talked to Mr. Clarke and went into the matter of commissions, in regard to being able to allow him a non-member broker half commission on the Standard Stock Exchange, and that the other commission would have to be charged in full, and he would have to add any over-riding to any customer of his.

Q. Are you familiar with the agreement which was signed by Mr. Clarke, and which was put in here as Exhibit 8? A. I can't say I am very familiar with it, the details.

40 Q. You know the agreement I refer to, and you know it was signed by Clarke? A. Yes.

Q. Do you know of any other written agreement that was entered

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into with Clarke concerning his relationship with your firm? A. Not at that time, no.

Q. Was there any written agreement with Clarke governing the relations between you and him? A. No.

Q. In addition to Exhibit 8? A. No.

Q. And did you come to any agreement at all in your negotiations with Clarke, one way or the other, as to any sharing of profits or losses in Clarke's business? A. No.

Q. I think that Clarke himself has told us that as to the stock that was dealt with on the Standard Stock and Mining Exchange, there was a sharing of commissions? A. Yes. 10

Q. But upon all other stocks you would receive the full commission? A. Yes.

Q. Was there any rebate at all to Clarke in the case of other stocks at all? A. No sir.

Q. As you carried on doing business with Clarke, was there any difference in the general course of business dealings between you and Clarke? Was it different in any way to the usual relationship that exists between you and any other client? A. A little different to what you would call a client. We regarded Mr. Clarke as a broker, a non-member broker, which puts him in a little different light than a client. 20

Q. In what different light? A. An ordinary customer does not do the volume of business, and would not have the large account that Mr. Clarke would have.

Q. So the size of his account would be larger than that of the average client? A. Oh, very much larger.

Q. There was a private wire, I think, that has been mentioned, which you financed? A. Yes.

Q. Did Clarke contribute in any way to the expense of that private wire? A. For some time, for possibly about a year, I think he did. 30

Q. And about how much, do you recall? A. My recollection, I think \$125. a month.

Q. And that was later discontinued? A. Yes.

Q. So that during the last few months of the relationship, of the dealings with Clarke, you received nothing from Clarke as a contribution to the cost of the private wire? A. No.

Q. And that private wire not only ran through North Bay and Sudbury and was connected with Clarke's offices there, but it was also connected with other brokerage houses? A. Our own branches.

Q. You had some branches of your own in other towns? A. Cobalt, Kirkland Lake. 40

Q. As to the capital in Clarke's business, I think there is some correspondence here to show he had twenty-thousand dollars capital. He said that himself. Did your firm contribute in any way towards the capital of his business? A. None whatever, no.

Q. And did you know how much of the capital of the business was

to be allotted to the North Bay office, and how much was to be allotted to the Sudbury office? A. No.

Q. Did you know the names of the clients who dealt with Clarke either at Sudbury or North Bay? A. No sir.

Q. Something has been said about the way the accounts were kept in your office. I would just like you to state how many different ledger sheets there were kept in relation to the Clarke business. Would you just outline that briefly? A. There was one account, L. S. Clarke, North Bay, for the Canadian stock account; one for the New York account—

10 Q. There is one Canadian account, North Bay? A. Canadian stock account.

Q. Another American stock account, North Bay? A. Yes, and there would be a grain account,—Canadian Grain account, and U. S. Grain account.

Q. Canadian Grain account, North Bay; and United States Grain account, North Bay? A. Yes, and there would be the same for Sudbury.

Q. The same number of ledger sheets, and ledger sheets with the same names attached to them in the case of Sudbury? A. Yes.

20 Q. The manager of the North Bay office, as we have heard, was L. J. Bayne? A. Yes.

Q. You had a good deal of direct dealings yourself, did you not, with the North Bay office? A. Not an awful lot.

Q. How was it generally done? A. The order came over the private wire. Mr. Bayne was down in the office a few times. I think in view of the volume of business I did not have a great lot to do with him.

Q. There were employes who dealt with the wires as they came in? A. Yes, instructions and requests for margin and cheques.

Q. I suppose everything was bought and sold in the usual course? A. Yes.

30 Q. You, of course, being in charge of the books, would from time to time keep in touch with the standing of that account? A. The account would be brought to my attention if it needed any margin, or if there was any difficulty, or any trouble.

Q. During the course of business with L. S. Clarke there were a good many stocks bought on margin we have been told? A. Yes.

Q. And there were a good many stocks bought that were not margin stocks? A. Yes.

40 Q. In the case of stocks being bought that were not margin stocks, how would they be dealt with? A. They would be charged up to the general account. If it were what they call a cash stock the amount would be charged up to the general account. If it required any money—any ordinary amount being charged up, if it were in need of margin, we would call him for margin on the general account.

Q. The only difference was—I do not want to put words in the witness's mouth, but it may save time—

MR. McRUER: Well, do not. I think that is rather important.

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MR. PORTER: You would rather I would not?

MR. McRUER: I would.

MR. PORTER: Q. Perhaps you could just look at it this way; say an order would come in for the purchase, we will say, of Peninsular Petroleum stock. It was a penny stock, a stock that could not be dealt with on margin. Suppose on looking at the general account you were to find that there was more equity, I think you call it, in the general account than was absolutely necessary to carry the stocks when all the different margins were properly allowed; what would you do in determining how much additional money would be required from Clarke to make up the price and pay for the penny stock that was being purchased? A. The amount of the penny stock purchased would be charged to the account, and then in figuring the equity it would be omitted. In figuring that, they would not figure the penny stock, and if the account required money, the margin clerk would call him. If it did not require money the stock laid in Clarke's account awaiting instructions. Generally it was ordered out by them. 10

Q. Was there any difference or any distinction made in the calls for cash that were sent to Clarke from time to time as to whether he cash was required to apply to a penny stock or a margin stock? A. It was called on the general account. 20

Q. And the general account was balanced in the way you have stated? A. Yes.

Q. And Mr. Marks told us that ever since the account was opened in January, 1931, any calls for cash were always promptly met? A. I think that is right.

Q. Would you say that was correct? A. Yes.

Q. Were there sometimes particularly heavy transactions? A. Yes.

Q. Perhaps you can give us some idea of any particularly heavy transactions when the calls for cash were promptly made? A. I think it was around the time Great Britain went off the Gold Standard, if I remember rightly, around September, 1931—I think the market broke pretty badly after that. I think there were heavy calls. Our ledger will show it. 30

Q. I do not think you need to point out the exact figures. What was the size of the calls? A. \$50,000 within a few days, I would say.

Q. And there was never any hesitation on the part of Clarke to pay that? A. No.

Q. Well then, in September, 1932, we see that Clarke began to buy heavily in Peninsular Petroleum stock? A. Yes. 40

Q. Statements I think have been put in showing the amounts that were purchased from day to day. The total in the month of September I see according to these statements comes to about 447,000 shares. Is that approximately correct as you know it? A. Yes.

Q. Did you ever have any conversation with Clarke himself about

Peninsular Petroleum stock? A. Yes. He was in the office around September or October, about that time, and came down to my part of the desk in the back part of the office there, and talked about the stock. He told me he thought the stock was worth 25 cents and would go much higher.

Q. What was it selling at then approximately? A. 12 or 14 cents I think. He also told me that there was a large short interest. I think he said 600,000 shares, and that on one of the properties that they had—I think it was down in Venezuela—some company had offered them \$30,000 for a right-of-way through the property.

10 Q. Was there anything else in particular that he said? A. I don't remember, Mr. Porter.

Q. Then in September and October, as we have seen, there were heavy purchases; September, 447,000 odd shares, and October, about 75,000 odd shares. And how were these purchases entered up in your books? A. Charged up to the North Bay account, sir, in the regular way.

Q. As you have described? A. Yes.

Q. During this period when money was required you sent out requests for money? A. Yes, if we required it.

20 Q. What response did you get to those requests? A. As far as I know it was paid.

Q. Always paid. Then there was a cheque that has been mentioned for \$7500, some time around the third or fourth of November, which was not honoured? A. Yes.

Q. Was that the first time that anything of that kind had happened? A. Yes.

Q. And how soon was that matter put right? A. It was paid the next day.

Q. The very next day? A. Yes.

30 Q. Did you have some telephone conversation with Mr. Bayne in respect of it? A. I called Bayne I think on Friday afternoon.

Q. Friday the fourth? A. Yes, and told him that the bank had reported that the cheque was not paid, and were asking for instructions. Bayne told me it would be taken care of tomorrow, and to hold it up in North Bay. We notified our bank to do that.

40 Q. Was there any further conversation? A. Yes. Then he asked me if I would send out some drafts on Pen Pete for him. I asked him about how many. I think he said about ten or fifteen. I took that from the previous purchases that he had made, inasmuch as the cheque for \$7500 had not been paid, that he had not got all of his money in.

Q. At any rate, the amount mentioned you say was about ten or fifteen. And what further was said about it? A. As far as I remember, that was all.

Q. He has told us that he told you he was expecting a heavy purchase. A. Absolutely not.

Q. Of stock in a few days, and that it was in connection with that

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purchase that was expected, that he wanted the drafts sent out. A. No.

Q. Did he say that? A. No.

Q. Or anything to that effect? A. No sir.

Q. Was there anything said that indicated to you he was expecting a heavy purchase? A. No.

Q. And you did send him out some drafts? A. Yes.

Q. For what purpose were those drafts sent out? What stock were they intended to cover? A. I took it to be Pen Pete.

Q. Which Pen Pete? A. That had been bought two or three days 10
beforehand.

Q. I also see by the statements that have been put in that up to the seventh of November, in the month of November from the first to the seventh, there was over 170,000 shares of Pen Pete that had been purchased. A. Yes.

Q. And some of that Bayne has told us would not be actually delivered at the date when the telephone conversation took place? A. That is right, some part of it. I think there was 94,000 bought that day I was talking to him.

Q. 94,000 shares? A. I think that is correct. 20

Q. So those, of course, would not be actually delivered for one or two days? A. No.

Q. Perhaps a little more, and you sent the drafts out, contemplating that that stock would come through? A. Yes. He was to fill the names in on the drafts and send them back to me.

Q. By the way, do you remember how many draft forms you did send out? A. No. I instructed somebody in the cage, the cashier, to send some out.

Q. You say you do not know how many did go out? A. No, I actually do not. 30

Q. Then during this time, on November 5th there is a telegram here which shows you were asking for \$10,000 to apply on account of the Peninsular Petroleum transaction. Which transaction would that be applicable to, on November 5th? A. It would be the account up to the fourth or fifth, I am not sure. It would be the general account up to that date.

HIS LORDSHIP: Q. To apply on the general account? A. Yes.

MR. PORTER: Q. Would that request for \$10,000 be to cover Peninsular Petroleum purchases as well as— A. The general account required. 40

Q. Including everything? A. Yes.

Q. That would be for all the stock that had been purchased up to that date, would it? A. I think it would, Mr. Porter.

Q. Then there are further telegrams that are put in as exhibits which show that on the 7th you asked for another \$12,000. I am not asking you to remember these. A. The margin clerk would know that.

Q. That was done as a matter of course? A. Routine, yes.

Q. On November 8th, my friend has produced a telegram asking you to send out all Peninsular Petroleum and more draft forms. Did you see that telegram? A. I did, to the cashier.

Q. What did you do? A. I instructed Mr. Nickles to send some more out.

Q. Do you how many more were sent? A. No, I do not.

Q. Then the heavy orders came in on November 9th. Did you have any communication with Bayne during that day? A. Yes. About two
10 o'clock, I figure it was probably a little before, my attention was called to the heavy lot of buying that had taken place, and inasmuch as I had had the \$7500 cheque, I thought I would call him up to find out how about the money. Before I did that, to confirm that Mr. Clarke was aware of these transactions, I asked the telegraph operator if Mr. Clarke was in North Bay. He told me he was not in. I also asked the Sudbury operator if he was in Sudbury, and they told me he was not there. So I got in touch with Bayne by telephone. I told him I noticed they had been buying a heavy lot of Pen Pete, and how about the payment on it. He said,
20 "Well, that is the stock I want you to draft out." I said, "I am not drafting any big large amount of stock out like that." I think at that time there had been about 200,000 bought. I told him I would not have the stock in from the clearing for three or four days; it would take three or four days before the drafts were paid; that it was ridiculous to send drafts out like that on that cheap stock. He said, "Well, I will get in touch with my party and I will have him wire the money up." He also said, "I am mailing you a cheque for \$10,000 tonight."

Q. Was there a further communication with him that afternoon?

A. Yes. I think after that time Mr. Marks came in, and I told Mr. Marks about it. He said, "I think you better call him up and tell him you
30 are not going to take any more orders from him." At this time when I told him in view of the mix-up I didn't want to take any more orders from him on that stock—just at that time there was an order came in for 50,000 shares. In view of the fact that he told me he was mailing the cheque for \$10,000, I let that one go through.

Q. On November 9th there are several telegrams in here in which you asked for money, and continued to ask for money for several days after? A. Yes.

Q. What happened to the price of this Peninsular Petroleum stock on the market after November 9th? A. It gradually went down.

40 Q. And did you eventually sell some of this stock that you had purchased for him? A. I sold about 126,000 shares.

Q. That was approximately when? A. The 15th or 16th of November.

Q. Then there was the conference in your office on November 19th when the Kaatz agreement was signed. Were you present at that conference? A. Yes sir.

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Q. Do you remember a special account, a special ledger sheet that was opened in your books some time after that agreement was signed, called the Clarke special account, or something like that? A. Yes.

Q. And was there any discussion at that conference on the 19th with reference to opening up that special account? A. I think it was at the suggestion of Mr. Jenner, a lawyer.

Q. Whom was Mr. Jenner acting for? A. I really don't know. Mr. Bayne brought him in. I think he was acting for this party Kaatz.

Q. And he was the one who suggested it? A. He suggested that in order to carry out the terms of that agreement, to have this three hundred and odd thousand shares that had been bought transferred into a special account. 10

Q. In view of the terms of that Kaatz agreement, was there any way of keeping the status of that collateral in such a way that you would be able to tell where you stood from day to day, other than by opening a special ledger sheet for doing so? A. It would be hard to do it, sir.

Q. Was there any discussion on that occasion about segregating this Peninsular Petroleum stock into a separate account for the purpose of relinquishing any claim you had against L. S. Clarke, or against the general account? A. No, never mentioned. 20

Q. During the month of November, 1932, you say you sold about 126,000 shares of Peninsular Petroleum stock and applied it on the general account I suppose? A. Applied it on the special account eventually, sir.

Q. And did you have any conversations, or communications with Clarke as to selling stock of Peninsular Petroleum for the purpose of liquidating the account? A. That would be prior to the agreement?

Q. First, I will ask you prior to the agreement? A. No, I had no conversation.

Q. You sold 126,000 shares. Do you remember whether there was any— A. I think Mr. Richardson talked to him. 30

Q. So that after this agreement was made, this Kaatz agreement, what happened to the price of the stock on the market? A. It went down. We were unable to liquidate any stock under the agreement. There was a price limit on the agreement.

Q. You were unable to liquidate further stock under the terms of the Kaatz agreement because the price went too low? A. Yes sir.

Q. And eventually what happened to the stock that was deposited under the Kaatz agreement? A. It was delivered to the liquidator eventually. You mean the delivery of the stock? 40

Q. Perhaps I had better put it this way. Perhaps it is not clear what happened. What was the final outcome of this Kaatz agreement and the working out of it? You could not sell the stock under it because the price went too low. What did you eventually do? A. It was eventually returned to Kaatz, the stock he put up as collateral was.

Q. Eventually returned to him? A. Yes.

Q. And after the 19th of November when the Kaatz agreement was drawn and executed, did you have any interviews with Mr. Clarke at all in Toronto? A. Yes. Mr. Clarke was in our office several times after that for two or three months.

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Q. And do you remember any of the conversation you had with him with reference to Peninsular Petroleum, or did you have any conversation with reference to it? A. Yes. It always seemed to be that he was working with officials of the company and directors, and was to have a heavy buying in the market that would put the price up to enable us to
10 sell under that agreement.

Q. And after the purchases of November 9th, did you continue the relationship with L. S. Clarke—continue the correspondent's relationship? A. Yes.

Q. And was Bayne still the general manager? A. Yes.

Q. And you still dealt with him? A. Yes.

Q. Was there anything that was said by anybody, either by Clarke or anybody on his behalf to suggest that you were not to deal with Bayne, or anything of that kind? A. No.

Q. Do you know whether or not Clarke was aware that you continued to deal with Bayne as his general manager? A. He must have
20 been aware because we were still doing business with the North Bay office and Bayne was the only man in charge at that time.

Q. Then were you present at the conference on March 11th, 1933, when Mr. McRuer and Mr. Allen were present? A. Yes.

Q. And you remember Exhibit 41, the letter that was written on that occasion? A. Yes.

Q. And the reference in that letter to proceeds of stock? A. Yes.

Q. Proceeds, I think it was, of the sale of stock? A. Yes.

Q. Do you remember what the discussion was which led up to using
30 that word "proceeds" in the letter? A. I think they asked me what we figured the equity was. There were four of these gentlemen came in there. I think there were Mr. Allen, Mr. McRuer, Mr. Bayne, and I think a Mr. Cooper.

Q. Who is Mr. Cooper? A. I don't know, sir.

Q. What is his occupation? A. I think it was Sudbury.

MR. McRUER: One of the inspectors of the estate.

WITNESS: And after introducing themselves, the enquiry was made mostly of how much equity did we have at that time. I left the room to find out what the equity was. I came back, and as far as I remem-
40 ber, it was around \$25,000 or \$26,000.

MR. PORTER: Q. Did you tell them that? A. Yes.

Q. Mr. Allen says that his understanding of that letter was you were to deposit in the Canadian Bank of Commerce the total purchase price of the stocks that were to be sold without even deducting any moneys that

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might be owing on the stocks by L. S. Clarke. A. That was never talked about, sir.

Q. It was never talked about? A. No.

Q. In view of the state of Clarke's account at that time—I think you have told us, and we have heard from other witnesses, there were a good many stocks that were being carried on margin—that was correct, was it not, at that time? A. Yes.

Q. If you were to carry out the arrangement as Mr. Allen understood it, would you have to put up a considerable amount of money in addition to what would be derived from the net proceeds of the sales? A. 10
It would be the amount of the debit balance. We would be out that amount.

Q. And, as a matter of fact, at that time was there any dispute between you and L. S. Clarke, or the trustee of L. S. Clarke, as to your rights with respect to the account, except insofar as the Peninsular Petroleum stock was concerned? A. I have no recollection of any dispute.

Q. The Peninsular Petroleum transaction was the only dispute? A. I think at that time that we showed them a copy of the Kaatz agreement, and I think that is what that special arrangement was put in the letter for. Special mention was put in the letter about the 500,000 shares. 20

Q. This is Exhibit 41, the letter you signed yourself. A. Mr. Marks signed it.

Q. And you are referring to the last paragraph,

"We note that the Pen Pete stock is not to be sold pending further arrangements and the disposal of New York stocks held by the estate is to be made when the New York market opens. This is to be without prejudice to your rights to an accounting."

That Pen Pete that was referred to, you were just telling what that was? A. I think we mentioned at that time about having 500,000 shares under the Kaatz agreement. 30

Q. That was the stock that was referred to in this letter? A. Yes.

MR. McRUER: It was all the Pen Pete stock.

MR. PORTER: Q. And, as a matter of fact, you did sell out the account, and you did put the equity into the bank? A. Yes.

Q. And did you have any knowledge at any time while Clarke was dealing with you up to the time of his bankruptcy of the pool that was carried on in his office, the pool of Peninsular Petroleum stock? A. I think we heard about the pool after the big heavy purchases.

Q. After the big heavy purchases you did hear something about it; 40
that is, that there was a pool. And what sort of information did you get at that time? A. I think it was in connection with the big purchase that caused the failure or trouble, that we heard they had been operating a pool up there.

Q. What did you hear about the pool? You will recall the evidence of Mr. Bayne that there was a fraudulent scheme initiated by a man

named Barkell, which caused a sort of merry-go-round in this Peninsular Petroleum stock. Did you ever hear about that at all while you were still dealing with L. S. Clarke? A. No.

Q. What are you referring to when you speak of the pool? A. I say a pool of some three or four, or half a dozen, people probably, banded together to buy stock.

Q. That is what you heard about? A. Yes.

Q. And the first you even heard of that was after the big purchase?

A. Yes.

10 Q. Do you know whether or not any members of F. O'Hearn & Company, any of the partners of F. O'Hearn & Company, had any interest in Peninsular Petroleum stock during the period in question in this action?

A. They had no interest at all.

Q. You had none yourself? A. No sir.

Q. And you know that none of the others had? A. Absolutely.

CROSS-EXAMINED BY MR. McRUER:

Q. Mr. Gardner, you had been in the brokerage business how long at this time? A. Probably fifteen, eighteen years.

20 Q. And I suppose when Mr. Clarke opened up at Sudbury and at North Bay it was quite understood that he was going to do business with customers on margin? A. Yes sir.

Q. And the margins were to be sent down to the firm of F. O'Hearn & Company, and they would be held there in the general account? A. Some margins.

Q. That margins for customers and collateral security for customers would be sent down and held in the general account there? A. Can I qualify that by saying it is possible that L. S. Clarke would call his customer for a higher rate of margin than we would call him?

30 Q. There might be occasion when he would call a customer for more margin than he sent down to you? A. Yes.

Q. But generally the account that was run in your office for Clarke was the customers' margin account? A. Yes.

Q. And in preparation for opening up the business and carrying on in this way, you wrote Mr. Bayne on January 21, 1931, this letter which is now in as Exhibit 26, or part of Exhibit 26—did you not? A. That is my signature, yes sir.

40 Q. And you say, "As requested, we beg to enclose herewith copies of the various form which we use. In regard to the contract forms you will notice that we have one covering several exchanges that the stock is being bought on and you could have same printed or you could have the name of the exchange typewritten in."

That was written to Bayne about the time you were having the nego-

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tiations with him to open Clarke's offices at North Bay and Sudbury?

A. Yes.

Q. And then you give a quotation from the Security Frauds Act, "Every broker who has acted as an agent for a customer shall promptly send or deliver to each customer for whom any security has been bought or sold by the broker, a written confirmation of the transaction, setting forth," and giving the things that must be set forth?

A. Yes.

Q. You were drawing that to Mr. Bayne's attention in contemplation of the opening up of these two Clarke offices in North Bay and in Sudbury? A. Yes. The object of calling attention to that was, I told Mr. Clarke he had to get his license out, a broker's license to operate, and I thought that was more important—

Q. That is not what you are discussing in this letter. What you were discussing in this letter was the necessity for confirmations, and you were sending up forms of confirmations? A. Yes, that is right.

Q. So Mr. Bayne could have copies made for their general use. That is right? A. Yes sir.

Q. Then you carried on in this way pursuant to these arrangements throughout the balance of the year 1931, and the year 1932 up until the time of this Pen Pete transaction in any case? A. That is correct, yes.

Q. You understood, of course, that when they started trading in Pen Pete it was a penny stock? A. So-called penny stock.

Q. It was a penny stock according to the rules of the Toronto Stock Exchange? A. A cheap stock.

Q. It was a stock that could not be traded in on margin according to the rules of the Toronto Stock Exchange; that is correct? A. Standard Stock Exchange at that time.

Q. Of the Standard Stock Exchange? A. Yes sir.

Q. And it was a stock that was traded in on the Standard Stock Exchange? A. Yes.

Q. And the way you did, you told me, was to buy the stock and charge it up to this general account that was carried for North Bay in your books? A. Yes.

Q. And that was the account in which you carried the customers' margin transactions? A. Yes.

Q. And then when you got into these heavy purchases on the 8th and 9th of November you charged that to the same account? A. In the regular way, yes.

Q. In the way that you had been doing? A. Yes

Q. But the stock itself was not carried in the account if it was not taken out. You told my friend I think that the cash stocks were charged up but, "We would not figure the penny stocks in figuring the equity."

A. In figuring it, yes.

Q. So the equity in the account was calculated by your having re-

gard to the other stocks that were in the account, but not the penny stocks? A. Yes.

Q. This card that was put in, Exhibit 8, signed by Clarke, is a card that you have printed for signature by customers who deal with you? A. Yes.

Q. And Mr. Clarke, of course, as you said, was not an ordinary customer. He was a correspondent? A. Yes.

Q. But you used the same printed form of card for Mr. Clarke that you used for the ordinary customer who might deal with you at your head office in Toronto? A. Yes.

Q. And you, of course, did not get any card signed for Sudbury? A. No.

Q. You kept the accounts of the dealings that were had for the Clarke office in Sudbury separate from the dealings that were had for the Clarke office in North Bay, in your accounts? A. Yes.

Q. They were all kept separate? A. Yes.

Q. And when Sudbury became under-margined, you made a demand on Sudbury? A. That is correct.

Q. And when North Bay became under-margined you made a demand on North Bay? A. Yes.

Q. And when we get down to the situation that was created by the heavy purchasing of Pen Pete in November, 1932, your demands for payment of money were all made on North Bay? A. Yes sir.

Q. Did not call Sudbury for anything in respect of that? A. No.

Q. You, of course, sent confirmations to Clarke at North Bay, or to the North Bay office, for purchases that were effected through that office? A. Yes.

Q. And you sent confirmations for purchases that were effected through the Sudbury office to the Sudbury office? A. Yes.

Q. I show you a confirmation dated October 5, 1932, L. S. Clarke, North Bay, margin account, and bought from Osler & Co. five shares, C. P.R. That is a typical confirmation for a purchase on margin through the North Bay office, is it not? A. Yes.

—EXHIBIT 46—Confirmation F. O'Hearn & Company to L. S. Clarke showing purchase on margin.

Q. At the end of the month you rendered monthly statements showing the transactions that had taken place in regard to each account? A. Yes.

Q. And you rendered monthly statements to Sudbury showing the transactions that had taken place through the Sudbury office; that is, the general Canadian account, and the grain account, and the New York account; you kept them separate? A. Yes.

Q. Those were all rendered to Sudbury? A. Yes.

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Q. And for North Bay you rendered similar statements for transactions that took place through North Bay? A. Yes.

Q. And you would show in the statements the stocks that were carried long for these various accounts? A. Stocks that were held.

Q. I think we have samples of them. Here is a statement for November 30th which is not in yet. Is that one of your monthly statements to the North Bay account? A. Yes sir.

—continued.

—EXHIBIT 47—Monthly statement, November 30, 1932, F. O'Hearn & Co. to L. S. Clarke, North Bay

Q. Commencing on November 1st the transactions at that time seem to be almost exclusively Pen Pete. A. On that one day bought, yes. 10

Q. Just three other purchases on that day except Pen Pete? A. Yes.

Q. And a whole column of Pen Pete? A. Yes.

Q. Then on November 2nd, not so much of anything. There are a few Teck Hughes, C.P.R., 250 Pen Pete and 100 Ventures. That was a very light day. November 3rd, very little, just two transactions. November 4th, there were a large number of transactions in Pen Pete? A. Yes.

Q. And November 5th quite a number again? A. Small on the 5th.

Q. The 5th was a small one was it? A. Six. 20

Q. Six or seven transactions, running up to 5000 shares each. Then on November 4th a cheque of Clarke's had not been met at the bank? A. \$7500.

Q. Of Clarke's North Bay office? A. Yes.

Q. And you got in touch with Bayne about that cheque? A. Yes.

Q. And it was at that time you had the conversation with him about drafting out Pen Pete stock? A. Yes.

Q. You will agree with me, will you not, Mr. Gardner, that it was a very unusual course for you to take to draft out a penny stock? A. Yes, it was. 30

Q. In your examination for discovery, Question 206, you were asked,—

“Q. And that was all that was said? A. As far as I remember, Mr.

“McRuer. I told him too that I didn't make any arrangements with

“him to send any big amounts of purchases out on drafts.”

This was in reference to the conversation you had with him on the afternoon after the big purchases had taken place, if you will recall that.

“207. Q. But you hadn't limited the amount? A. Pardon?

“208. Q. But you hadn't limited the amount that you were agreeing

“to send out on drafts? A. No sir.” 40

You will remember answering those questions in that way? A. I don't remember answering the questions.

Q. You don't want to go back on it now? A. No.

Q. Then in regard to your conversation with Mr. Bayne, you were

doing something out of the ordinary to try and help him because you felt he was financially embarrassed up there? A. Not exactly financially embarrassed.

Q. If he was not financially embarrassed, what was it, when his cheque had been returned? A. There is a time probably in every broker's transactions—well, I will agree, probably financially embarrassed—where he just does not get everybody's money in.

Q. I am not putting it out of the way when I say you were doing something out of the ordinary to help him because he was financially em-
10 barrased? A. Yes sir.

Q. In agreeing to draft out Pen Pete stock? A. Yes, and I was governed by that by the large equity that we had in that account at that time.

Q. I am just coming to that. And in agreeing to follow this extraordinary course you say that you were governed by the large equity that was in the general account? A. Yes.

Q. And in estimating the large equity that was in the general account you were taking into account and considering the account for Sud-
20 bury customers as well as North Bay customers? A. The equity that L. S. Clarke had with us.

Q. In both offices? A. L. S. Clarke.

Q. In both offices? A. In both offices.

Q. And you knew that that equity was created by the pledging of securities of customers with whom you expected Clarke to deal? A. Yes, and the fact of him having capital in his own business.

Q. You never imagined it was the capital of his own business that was creating that equity? A. No.

Q. Then let us see what the effect of it was. You had no conversation with Bayne after the 4th of November until the afternoon of the 9th
30 of November? A. No, I don't think I had.

Q. And on the 4th of November the agreement, whatever it was, in regard to drafting out Pen Pete stock was made, and you went on with the transactions that are shown in the last exhibit that I put in; on the 5th, 6th, 7th, 8th and 9th until the afternoon, without ever communicating with Bayne? A. Well, I think there are margin calls to him.

Q. Asking for money? A. Yes.

Q. But I say without ever calling him on the 'phone or saying, "Our drafting agreement is off," or varied, or anything of that sort, you went on taking orders for Pen Pete stock? A. I didn't figure I made any big
40 arrangements with him.

Q. He was financially embarrassed on the 4th; we have agreed on that? A. Yes sir.

Q. And then you went on.

HIS LORDSHIP: That cheque was paid as I understand it.

MR. McRUER: The cheque was paid the next day.

Q. You went on, and on the 5th without any additional arrange-

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ments except the drafting out arrangement, you went on purchasing? A. I don't think the 5th's purchases amounted to very much.

Q. The purchases of the two days, the 8th and 9th, amounted to \$49,000 in a penny stock, and you had nothing but the margin account to rely on? A. That is correct.

HIS LORDSHIP: Q. At that time had you had any talk with Clarke? Clarke owned this business, Bayne was only a paid employe of Clarke's? A. No sir. We had bought in September 450,000 shares of this stock and just charged it up in the regular account.

Q. As I understand what you have told Mr. McRuer, you were charging the purchase of this penny stock up against the equity in the marginal stocks held for these other customers? A. Yes. Then we would call him on that, give him a margin call. And then on a good number of occasions he was taking delivery of these stocks. We would hand the certificates out to him.

Q. You would hand the certificates out in what manner? Would you make a draft on him? A. No, he sent his own cheque, and we would send the stock up.

MR. McRUER: Q. But these were very large transactions for one day—so large that when Mr. Marks learned about them he began to get alarmed? A. Yes, they started to get large, there is no question about it, on those two days.

Q. You say you were making margin calls. This was a cash stock that ought to have been paid for over the counter; you knew that? A. You mean by Clarke?

Q. By anybody. A. In our method I take it that we did get paid for it by charging up to that account and calling him in the general account.

Q. You called him for the amount of the penny stock. You have to call him for the whole amount? A. That is if he was all right even the day before. He may have bought something and sold something in the account.

Q. A customer who deals on margin, if there is a marginal stock bought for that account, the account is charged with the purchase price and the stock comes into the account? A. Yes.

Q. That is a real marginal transaction? A. Yes.

Q. But with a penny stock, if you charge a penny stock to the margin account, there is no stock comes into the margin account to remain there as security for the general margin account and protection of the customers in general? A. That is right, sir.

Q. That is true, isn't it? A. Yes.

Q. What you were doing in the case of Clarke I think was disclosed pretty well in your telegrams. On November 1st, looking at these telegrams in Exhibit 37, I see you sent a telegram to North Bay asking for a cheque for \$7500? A. Yes.

Q. And that would be the cheque that was returned? A. I presume it would be.

Q. And then on November 3rd there is a wire from North Bay, "Would like to get delivery by Monday if possible." Would that be of Pen Pete stock? A. I would take it it was.

Q. They were asking for delivery on November 3rd? A. Yes.

Q. And then on November 2nd there is a wire, "Sending cheque today." A. I think that is in reply to that call.

10 Q. That would no doubt be the \$7500 cheque. Then the next one appears to be on November 5, "Please mail cheque tonight ten thousand dollars, "advising." A. Yes.

Q. So that was after the \$7500 cheque had been adjusted? A. Yes.

Q. On November 5th you were demanding ten thousand dollars? A. Yes.

Q. And then on the 7th there is a wire, "Did not receive your cheque "ten thousand dollars this a.m. Now require twelve thousand dollars. "Advise." A. Yes.

Q. That is the situation? A. Yes sir.

20 Q. The day before the big purchasing started you had failed to get a response to your call for ten thousand dollars, it had then got up to twelve thousand dollars, and you had sent a second wire? A. Yes sir. In the meantime we still had the Peninsular Petroleum which was worth some thousands of dollars.

Q. And in the meantime you had sent out the drafts to North Bay? A. I think so.

Q. And then on November 8th at 11:52 in the morning a wire came in from North Bay, "Will you please send out today all Pen Pete you have on hand "also some more draft forms?" Did you see that wire? A. Yes.

30 Q. And you yourself instructed the cashier on November 8th to send up some more draft forms to North Bay? A. I did, yes.

Q. And your idea at that time was that the draft forms should be filled out at North Bay with the name of the purchaser, and that they should be returned to Toronto, you would sign them in Toronto, put the Pen Pete certificates in the envelopes, and draw through the Bank of Commerce on the intended purchasers? A. Yes.

Q. That was how it was to be executed? A. Yes.

40 Q. And then when the draft was honoured by the intending purchaser and the stock taken up, your account in Toronto would be credited with the proceeds of the draft? Eventually it would be credited? A. Through our bank, yes.

Q. And the account would eventually be credited with the proceeds of the draft? A. Yes.

Q. That was how you expected it to be carried out? A. Are you referring to the—

Q. To the stock that was to be drafted out, whatever it was. I

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want to get the technical process. A. There was no arrangement made to buy any large 300,000. There was no arrangement made with Bayne to buy any large amount of stock.

Q. I am not talking about any large amount. I just read your examination, and you admitted in it it was not limited as to the stock that was to be bought. I want you to tell me how it was to be carried out. You have told me that the name was to be filled in in North Bay; it was to come back to your office; you were to sign it; you were to put the security in the envelope; the scrip in the envelope; and send it through your bank, the Canadian Bank of Commerce, to the intending purchaser, and when the intending purchaser honoured the draft, the stock would be delivered, and I suggest to you that your account would eventually be credited with the amount on the draft? A. And we in turn would credit Clarke's account. 10

Q. That is your understanding of how it was to be carried out? A. How it would be worked, yes.

Q. You did not send a wire or anything of that sort changing your understanding throughout the whole of this large purchasing? A. It was not called to my attention. The orders were executed as a matter of routine. 20

Q. It was called to your attention when there was a call came for more drafts? A. On the 8th, yes.

Q. And you sent them up? A. Yes, but on the 9th the heavy purchasing was not called to my attention.

HIS LORDSHIP: Q. In making this arrangement, would you have done that had you not had considerable equity in the general margin account with Clarke? A. No, I would not have done it.

Q. You would not have done it if Clarke had not had— A. A substantial equity in the account, and had had a large amount of trading in that stock. 30

Q. Supposing in the initial arrangement between yourself and Clarke that this plan had been suggested by Clarke or Bayne; would you have carried out this arrangement as your telegrams show you did, without any equity at all in the marginal account? A. No.

Q. You were relying on that to protect yourself? A. Yes.

MR. McRUER: Q. And the net result was when the deal went wrong the customers who traded on margin bore the brunt of it. You sold out their stocks to recoup yourself? A. Eventually, yes.

HIS LORDSHIP: Q. You always had that in mind, that you could fall back on that? That was your idea of what your powers were? A. It was Clarke's responsibility, yes. 40

Q. I am not so sure about that. However, that was what you were doing.

MR. McRUER: Q. To go on now, Mr. Gardner, to what happened afterwards; you actually did transfer the transactions that took

place on the 8th and 9th of November to a special account? A. Yes, we did.

Q. That is, those two days' transactions, for whatever reason it was, were segregated and transferred to the special account? A. The reason for that was that the Kaatz agreement specified that as a matter of accounting.

Q. It was not all the Pen Pete transactions that were carried into this special account, but the transactions for the two days, the 8th and 9th of November? A. Some part of those transactions.

10 Q. Just a minute, till I show you your own handwriting. I show you Exhibit 7, in this action. Is that your handwriting? A. Yes.

Q. It reads, "300,000 Pen Pete Nov. 8 and 9, "Tfd Spcl. Also 126—sold 16th." A. Yes.

Q. And opposite November 8 are the figures "78" and opposite the 9th, "247"? A. Yes.

Q. Those are in your figures too? A. Yes.

Q. So that of the purchases of the 8th and 9th 300,000 were transferred to this special account? A. I don't think it was actually 300,000. The ledger will show.

20 Q. Probably we had better have the ledger and let us see. Have you got it? A. Yes. (Producing ledger.) 310,500 was transferred.

Q. 310,500. At any rate, that was the purpose of this memorandum, a notation of the transfer that was to be made. A. I think that was a memo I took at the time Mr Jenner was in on November 19th.

Q. The transactions of those two days were being singled out for this special account? A. Part of them, yes.

Q. That could not be when Mr. Jenner was in, because the transfer was not made for some time afterwards, and the sale of the 126,000 was made some time afterwards. A. But they talked in the agreement 30 about 300,000 shares. Mr. Bayne was down at that time.

Q. That may be true, but I am pointing out to you that that memorandum deals with the sale of 126,000 shares, which were to be transferred to the special account as well, and that sale was made some time after Mr. Jenner was in? A. Prior, sir.

Q. It was made prior? A. I think so.

Q. It does not make any difference anyway.

Then I think this transfer was made on the 5th of December, was it not?

HIS LORDSHIP: That is to the special account?

40 MR. McRUER: Yes, my Lord.

WITNESS: 6th of December, sir.

MR. McRUER: Q. On December 5th you had received a letter from Mr. Bayne setting out the transactions that had taken place, and the amounts, the cost price of the Peninsular Petroleum of the 8th and 9th of November? A. Yes, I think we did, sir.

Q. It is in now as an exhibit, I think a letter of the 5th of December.

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Exhibit 32—that is the letter that you refer to (handing letter to witness)?
A. Yes sir.

Q. And on that letter are your own figures I think of 310,500? A.
That is not my figures.

Q. That is the amount anyway that was transferred to the special
account? A. Yes.

Q. So it was evidently following this letter that had come from
Bayne in regard to the purchases on the 8th of 64,500 shares, and on the
9th of 246,500 shares, that you set up the special account? A. That was
in line with a talk—

Q. It was following this letter you did it, immediately on receipt of
it? A. Yes.

Q. And the total amount shown in Bayne's letter for the 8th and
9th was 310,500? A. Yes.

Q. And that was where you got the figure from? A. Yes.

Q. And when you rendered a statement on the 31st of December,
you sent up a statement showing the special account, and showing the
Pen Pete loaned to that account? A. Yes.

HIS LORDSHIP: What date is that?

MR. McRUER: December 31st, my Lord, Exhibit 13.

WITNESS: It is our regular monthly statement.

MR. McRUER: Q. Your regular monthly statement went out, and
it shows the Canadian special account, December 6th, 310,500 Pen Pete,
and \$49,045.62. That was the amount that the Clarke general account
had been debited in regard to the purchases for those two days? A. Not
the total; part of it, I think.

Q. I beg your pardon. Let me have that last Exhibit, No. 32.
310,500 shares. A. My point is that it was part of the purchases of that
date, not the whole purchases of that date.

Q. I beg your pardon; look at the letter, Exhibit 32, and there we
have purchases November 8th, 64,500; November 9th, 246,000, making a
total of 310,500 of Pen Pete stock. I am only dealing with Pen Pete. A.
Yes, but I think we actually did buy more stock than that on those two
days.

Q. This is Bayne's letter, and Bayne told us you asked him to send
down what the purchases were for that date, and you said that was what
you took it from? A. Yes, but I think we actually did purchase more
than that on that date. Our records will show it.

Q. The amount of this 310,500 shares, the purchase price of that was
\$49,045.62—that had been debited to Clarke's general account? A. Yes.

Q. And as against that there had been Pen Pete sold amounting to
126,000 shares for \$8,781.54? A. Yes.

Q. And your monthly statement at the end of December, 1932, show-
ed long in the special account, 679,000 shares of Pen Pete? A. Yes.

Q. That would be the 500,000 pledged as collateral, and the balance
that had been purchased on those two days? A. Yes. Our understand-

ing was that was done for a matter of accounting under the Kaatz agreement.

Q. You say that. I am getting what you did. Then on January 31 there was another monthly statement sent to L. S. Clarke? A. Yes sir.

Q. And I point out to you that there is no indication in any of the Sudbury statements that there was any charge against the Sudbury account for this transaction at all? A. In the ledger, no.

Q. In the ledger or any other place? A. no.

10 Q. And then on January 31st, the special account was shown in the monthly statement sent up to North Bay, and it shows a balance of \$40,036.56? A. Yes.

Q. And an interest charge of \$238.02. That is correct? A. Yes.

Q. You were charging interest on the balance that was owing on this Pen Pete stock up to this special account? A. Yes sir.

Q. Making a total charge to the special account at the end of January of \$40,274.58? A. Yes sir.

Q. And you show long the same 679,000 Pen Pete? A. Yes.

Q. This was a statement that was made out on the 31st of January? A. Yes.

20 Q. On the 25th of January you had received a letter from Mr. Clarke that I think he stated had been prepared by his solicitors Kilmer, Irving & Company—do you remember that letter? A. I don't actually remember the letter.

Q. We will just get it. It is Exhibit 4. Before I go into this; at the time the arrangements were made in regard to the transfer of this matter to the special account you actually paid Clarke \$3,000? A. Yes. The reason for that was that Clarke was assuring us all the time he would be able to sell this stock and liquidate this special account.

30 Q. The letter I referred to of January 25, 1933, is Exhibit No. 4, and I show it to you. You received that letter? A. Yes sir

Q. Now, in this letter Mr. Clarke was pointing out to you that he was in the brokerage business, not for the purpose of buying and selling stocks for himself, but for the purpose of buying and selling stocks for local customers, and he says, "Your monthly statements in which you have charged half commissions on various transactions, clearly indicates your understanding of the capacity in which I have dealt with you." There was no doubt about the capacity in which he was dealing with you? A. I don't think there was, no.

40 Q. "You state in your letter that you decline to make any further deliveries of stocks held by you representing transactions of the North Bay and Sudbury offices unless you receive the market price for same. At the same time you require me, within two weeks, to furnish certain cash to you in part satisfaction of the moneys for which you claim I am indebted to you. In your letter you make no mention of two facts, which I would like to recall to you; first, that the marginal accounts which are held by you apparently in my name,

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“but to your knowledge held for the customers, are all properly mar-
gined.”

Now, that was a fact if you left out this \$49,000 of the Pen Pete trans-
actions? A. Yes sir.

Q. “Secondly, that the amount which you claim to be owing by
me represents an alleged debit balance in respect of transactions ag-
gregating about 300,000 shares of one stock—Peninsular Petroleum,
which is not a stock traded on margin, and which transactions oc-
curred during the first two weeks of November, 1932.

“In connection with the Peninsular Petroleum transactions, you 10
will recall that at the time certain negotiations occurred, looking to
the adjustment of the moneys you claim to be owing on these trans-
actions, you agreed with me that the Peninsular Petroleum account
would be kept and dealt with by you as an account separate from the
marginal accounts and all other accounts.”

You remember receiving that? A. Would you repeat the two last para-
graphs, sir?

Q. (Repeats matter just read.) This letter came to you on, I sug-
gest, January 26th? A. I don't know what date it came, sir. We re-
ceived it all right. 20

Q. You received it all right, and on January 31st you sent the usual
monthly statement showing the Peninsular Petroleum transactions in the
separate special account? A. Yes sir.

Q. “I am enclosing herewith a list of the accounts of customers of the
Sudbury and North Bay offices, showing in each case the stocks
which you hold and to delivery of which those customers are entitled
upon payment of the comparatively small debit balance which may
be owing in the respective accounts. On behalf of these custom-
ers, I notify you that they respectively are the persons entitled to 30
the stocks listed opposite their names, and that delivery must not
be declined in any case where the debit balance is paid and delivery
requested either by the customer or by me on the customer's behalf.
In event of failure on your part to observe this notice and to give
effect to the request here made, you will be held responsible for any
loss or damage which may result.

“You will also be held responsible for any loss or damage which may
result to the customer's named in the enclosed lists or any of them, or
to me, by reason of any steps which you might take to sell any of the
stocks set out in the lists as a means of liquidating in whole or in part
the amount which you claim to be owing in respect to the Peninsular 40
transactions.”

And you did get the list that was mentioned in this? A. Yes sir.

Q. “And I demand that, if you have not already done so, you segre-
gate the account in respect of the Peninsular Petroleum transac-
tions, not only to carry out your agreement with me, but also be-
cause I take the position that our relationship in the Peninsular Pe-

“troleum transactions was a different one to that created in the other transactions in the ordinary course of business, and I am not at all satisfied that you are only agent for me in the Peninsular Petroleum transactions.”

After that was put to you in that way, you then sent on the 31st of January your statement of the special account? A. Yes sir.

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10 Q. “Anything here stated is quite without prejudice to any and all rights which I may have to decline responsibility either in whole or in part for the transactions in Peninsular Petroleum stock or to any question which I may desire to raise with regard to the relationship of the business carried on at North Bay and Sudbury to your own firm.”

Well then, on what date did you transfer the balance shown in the special account back to the general account? A. Under date of February 28.

Q. February 28th, 1932? A. 1933.

Q. And you got no authority from Clarke to make that transfer?

A. No.

Q. You did not communicate with Clarke and tell him you were doing it? A. I think we transferred it on legal advice, sir.

20 Q. I don't care whether it was legal advice or what; you did not communicate with Clarke that you were doing so? A. No, I don't think we did.

Q. And before this was transferred to that account at all, you had made the first sale of securities that were held in the general margin account?

HIS LORDSHIP: What is that?

MR. McRUER: Q. Before this transfer was even made, on February 7th, you had made the first sale for the general margin account of North Bay and Sudbury as well? A. I don't know about the date, sir;

30 around that time. Yes, February 7th I see by the ledger.

Q. And what was the total value of the stocks that were sold from the margin account for the customers of Sudbury on February 7th? A. I think I supplied that to Mr. Porter, sir, and you have a copy too.

Q. If you have it will be in good keeping and we will probably get it. The total value of the stocks sold for Sudbury on February 7th, and North Bay as well? A. Mr. McRuer asked for it some time after, Mr. Porter, and you kept a copy.

40 Q. Does not your ledger show? A. It shows whatever sales were made on that day. There may be something outside of what we actually sold out.

Q. There may have been a sale made in the actual course of business, that would show on that date? A. Yes. Have you not got those figures?

Q. I am like Mr. Porter. I may have them, but I am not able to tell where they are.

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Exhibit 9 is your wire of the 7th of February that shows the details of the stocks that were sold for these two offices? A. Yes.

Q. And this states, "Owing to your account not being sufficiently margined, we have today sold the following stocks for your account," and there is N. A., meaning North Bay; and S. B; meaning Sudbury? A. Yes.

Q. I suggest to you that that is the first time you ever sold out stocks in Sudbury for North Bay account? A. First time I had the occasion to do it, yes sir.

Q. And this says, "Owing to your account not being sufficiently margined, we have today sold the following stocks for your account." As a matter of fact, if it was not for this transaction in this penny stock the account was sufficiently margined? A. It would have been, yes.

Q. And the penny stock was a stock you could not carry on margin? A. That is right, sir. Furthermore, it had little or not value at that time.

Q. And following that on the 28th of February you say on legal advice you transferred the special account to the general account? A. Yes sir.

Q. So that both the Sudbury and North Bay accounts as they stood by themselves in your books would show sufficient margin on February 7th, 1933? A. That is omitting the special account?

Q. Yes. A. Yes, I think so.

Q. Then the special account was transferred to the North Bay Canadian margin account? A. The end of February, yes.

Q. Turn it up in your ledger please. I want the general accounts of North Bay. A. (Turns up book.)

Q. And the charge that was made to the general account on February 28 was \$40,490.84.

HIS LORDSHIP: Are you putting in the ledger?

MR. McRUER: It is not in, my Lord.

HIS LORDSHIP: I think you had better have extracts made from these entries. This way of reading it and not putting the book in is not satisfactory.

MR. McRUER: I think we should have the Clarke accounts taken from the ledger and put in.

WITNESS: These are all Clarke accounts.

MR. McRUER: Q. We can put the ledger in, You do not need it any more? A. Not unless Mr. Porter needs it. We need it for a record, if we can get it back.

HIS LORDSHIP: Q. What do you call it? A. Stock ledger.

—EXHIBIT 48—Stock ledger of F. O'Hearn & Company containing the L. S. Clarke accounts.

MR. McRUER: Q. I notice on the first page of this account, the

L. S. Clarke North Bay account, to which we have just referred, to which the forty thousand some odd dollars was charged, that at the heading of it it says, "L. S. Clarke, 19 Main Street, North Bay, Canadian margin."

A. Yes.

Q. And that was the one that was run for the general customers' account of North Bay? A. Yes.

Q. The Sudbury accounts are also in this book? A. Yes.

Q. When did you make the next sale? A. Have you those papers there, Mr. Porter? The 28th I think it was.

10 Q. Oh, yes. Exhibit 10 is a wire of Feb. 28th? A. Yes.

Q. At 4:04—that means four minutes past four in the afternoon? A. Yes.

Q. It says, "Owing to the decline in stocks held for your account and not receiving any response to our margin call, we have today sold the following for your account." And you have N.A. — that stands for North Bay; and S.B. — for Sudbury? A. Yes.

Q. I notice the Sudbury part of it is 4:05. That wire would be sent to Sudbury separately? A. It means he can only send one at one time.

20 Q. Immediately following the itemized list for North Bay would go the wire of the itemized list for Sudbury? A. Yes.

Q. I see a memorandum attached to this wire. Is that in your handwriting? A. No, it is the margin clerk.

Q. I notice on this memorandum there are several amounts mentioned, with apparently the balances owing on each account? A. Yes.

Q. And in that list is the special account of \$40,300. A. Yes.

Q. That was apparently figured up for the purpose of making this sale? A. Possibly, yes.

Q. It is attached to the wire? A. Yes.

Q. I take it that is what they were figuring out? A. Yes.

30 Q. And at that time there was not any need of making any sale if it was not for the balance in this special account? A. No.

HIS LORDSHIP: That is abundantly clear, that it was sold for that purpose.

MR. McRUER: Q. I suggest to you that there was at no time any demand made on the Sudbury office. You just sold their stocks out up there and never made any demand on them that they were short of margin? A. We called L. S. Clarke.

Q. You called North Bay for payments? A. Called L. S. Clarke.

Q. At North Bay? A. At North Bay.

40 Q. And made no demand on the Sudbury office? A. No.

Q. But before you got into this snarl on Pen Pete, if the Sudbury office required margin you made a demand on them? A. Yes.

Q. If the North Bay office required margin you made a demand on them? A. Yes.

Q. Then, Mr. Gardner, the assignment took place on February 28th, or you learned of it on March 1st? A. I did, yes.

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Q. Had you learned that an assignment was imminent on February 28th? It was apparently made late in the afternoon. I was wondering whether you knew it was after they got your wire that you had sold them out again? A. I don't know anything about that.

Q. Mr. Allen tells me he was told about it on the first anyway. There was another sale of stock made after the assignment, March 6th? A. March 4th—no, March 6th.

Q. You can give us the amount realized on stocks sold of North Bay and of Sudbury on both of these occasions. I do not want to trouble you with it now. You gave it to Mr. Porter at one time, and I am sure Mr. Porter gave it to me, so we can get that and have it filed. 10

MR. PORTER: I think this is it here.

WITNESS: I think they want the detail of the money.

MR. McRUER: It is the amount received by O'Hearn & Company for the sale of these stocks for the different offices on three different occasions. I think we have it some place.

Q. Then on March 11th you were visited by Mr. Allen, the trustee? A. Yes.

Q. And there was a discussion there about the condition of this account? A. Yes. 20

Q. And Mr. Allen made it clear to you that he had not up to that time been able to ascertain the particulars in regard to the Peninsular Petroleum transaction? A. There was some discussion about it, sir.

Q. There was some discussion about the Peninsular Petroleum transaction, and Mr. Allen did not know then what the whole story was? A. I can understand that.

Q. And you understood that at the time? A. I don't remember Mr. Allen pointing it out.

Q. Do you remember some discussion along that line? A. Yes. We told him about the Kaatz agreement I think at that time. 30

Q. You did tell him about the Kaatz agreement? A. Yes.

Q. And there was a difference between you in regard to the balance that might be chargeable against the general account at Sudbury and North Bay in regard to this Peninsular Petroleum transaction? A. I don't understand that.

Q. You told my friend Mr. Porter that outside of the difference in regard to the Peninsular Petroleum transaction, there was no dispute about the rest of the account? A. My recollection was that Mr. Allen agreed with the equity within a thousand or two that we had given him, within a thousand dollars. 40

Q. Taking into consideration the Peninsular Petroleum transaction? A. Yes.

Q. But that was a matter that he did not understand, and did not know what the story was? A. Well, that is possible.

Q. You had shown him the Kaatz agreement in the office, and it was a matter of discussion, and then an agreement was arrived at. By

the way, that day was a day, or one of the days, on which the stock market was in a very nervous condition. The New York market was closed that day? A. Yes sir.

Q. And a trustee in bankruptcy naturally was in a difficult position to know what to do about stocks that were held on margin, and you were in a difficulty to know what to do with stocks over which there was a dispute, as to whether you would take the responsibility of carrying them or selling them out? A. I think at that time, sir, we were fairly well protected.

10 Q. You think you had sold out enough that time to fix you up? A. I think we were protected.

Q. At any rate, the New York market was closed, and Mr. Allen did not want to speculate in stocks on margin for the benefit of creditors. He said that, as a matter of fact, in your office, did he not? A. He did, yes.

Q. And in order to avoid that you entered into an agreement which was put down in writing, and letters exchanged, and all three of you partners perused the letters before they were signed? A. Yes sir.

20 Q. And not only that, but they were read over on the telephone by one of the partners to your solicitor, Mr. Fennell? A. Yes.

Q. And then they were signed and exchanged? A. Yes.

Q. Now then, Mr. Gardner, you were in charge of the financial transactions in the office, the financial end of it? A. Yes.

30 Q. If you suggest that this was an agreement merely to pay the equity into a trust account, I want to know how you explain these letters. The letter to you was, "As arranged with you this morning you are in order to
"avoid carrying this account and the speculation involved, to liqui-
"date the account as soon as reasonably possible, and the proceeds
"from sale of stocks and the equity in the Grain account, to be paid
"into a Trust Account in the Canadian Bank of Commerce, Head Of-
"fice, to remain pending investigation by the trustee and inspectors of
"the estate, and to be dispersed upon cheques drawn by you and coun-
"ter-signed by the trustee.

"All this to be without prejudice to all legal rights of the estate and
"to your legal rights whether in accounting or otherwise.

"Pursuant to our arrangement Pen Pete stock is not to be sold pend-
"ing further arrangements and the New York stocks will be dealt with
"when the New York market opens."

40 You wanted the last clause in because the New York market was closed that day? A. Yes.

Q. In reply to that you say, "We beg to acknowledge receipt of your
"letter of March 11th instructing us to liquidate the account of L. S.
"Clarke estate as reasonably as possible and that the proceeds from
"sale of stock and the equity in the grain account to be put into a trust
"account in the Canadian Bank of Commerce Head Office and to be

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“dispersed upon cheques drawn by us and countersigned by the trustee.”

“We note that the Pen Pete stock is not to be sold pending further arrangements and the disposal of New York stocks held by the estate is to be made when the New York Market opens. This is to be without prejudice to your rights to an accounting.”

If all that was to be paid into the Canadian Bank of Commerce was the equity, as you say, that would be a sum that the trustee would be entitled to receive in a cheque from your office immediately the sales were made? A. I don't know about that, sir. 10

Q. Well, if any other customer had an equity in his stocks with you, and he instructed you to sell them out, you would deduct what was owing on the general account and hand him a cheque for the balance. A. Yes.

Q. The trustee would be entitled to that without opening any joint trust account in the Canadian Bank of Commerce, wouldn't he? A. Mr. Allen requested us to do it, and we did it.

Q. Can you conceive of why? You, surely, did not think Mr. Allen was completely foolish that morning? A. Well—

Q. Can you conceive of why it was put in this letter that was so carefully drafted and read over to your solicitor, “And the proceeds from sale of stocks and the equity in the grain account, to be paid into a trust account in the Canadian Bank of Commerce, Head Office, to remain pending investigation by the trustee and inspectors of the estate.”? 20

Wouldn't that indicate to you that Mr. Allen wanted the whole price of these shares held in statu quo while he was investigating what the situation was in regard to this account? A. It didn't indicate that to me, no.

HIS LORDSHIP: Does it make much difference from one point of view? Supposing you are successful in this action, does it make any difference? 30

MR. McRUER: I think probably not. It is only one of the agreements we say were broken in this matter, and if we cannot realize, it is a very serious thing to us. I do not know that there is any way of locking the door after the horse has gone.

HIS LORDSHIP: The stock has been sold and they have taken the money.

MR. McRUER: Yes.

Q. What were the proceeds of the sale of those stocks? A. I supplied that information to Mr. Porter and to you, sir. I cannot tell by the ledger. 40

Q. You can give it to us. We will have that, will we, Mr. Porter?

MR. PORTER: I suppose I could get it. Haven't you got it?

MR. McRUER: He says he supplied it to you.

HIS LORDSHIP: I suppose it went into their private account.

They claimed they had a right to this money. They helped themselves to it, and put in what was left after.

MR. McRUER: After they reimbursed themselves for the Pen Pete transaction.

HIS LORDSHIP: Does it make any difference what they did with it after they got it?

MR. McRUER: No, not at all. All I wanted was the amount. You can give us that, Mr. Gardner. There is no trouble in getting it?

WITNESS: It would just mean a question of adding up.

10 HIS LORDSHIP: There were three sales; the first one, on the 7th of February; the next one on the 28th; and the last one —?

WITNESS: On the 6th of March.

MR. McRUER: Then a fourth sale, after this letter was received on the 11th.

HIS LORDSHIP: You have not got that date yet?

MR. McRUER: Q. Those stocks were liquidated immediately after this letter was received? A. The Canadian stocks on the 13th.

Q. The 11th was a Saturday, wasn't it? A. Yes. The New York stocks on the 15th of March.

20 Q. Then in order to clear up the matter of the sale on the 6th of March, this is a wire. A. It is not a wire.

Q. It is a memorandum of the stocks that were sold on the 6th of March? A. Yes.

Q. Was there a wire sent out advising they were sold, to anybody? A. There was the wire to Mr. Allen.

Q. There was a wire sent to Mr. Allen on March 4th which is attached? A. Yes.

—EXHIBIT 49—Memorandum of stocks sold March 6th, with telegram March 4, O'Hearn to Allen and copy of letter confirming telegram, attached.

30

MR. McRUER: Q. And, Mr. Gardner, at the time or before the sale on the 7th of February, did you have a discussion with Mr. Clarke in regard to some securities of one Mrs. Chaput? A. I don't think I had.

Q. Did you hear about it? A. I think Mr. Richardson remarked about it.

Q. That she was wanting delivery of her securities? A. No. I think he had some conversation with Mr. Clarke.

Q. That he was asking delivery of Mrs. Chaput's securities? A. No. I am not clear what the conversation was.

40 Q. At any rate, it is safe to say this, that you were refusing delivery of securities to customers who were willing to pay up the balances that were owing, on account of the Pen Pete deal? A. We could only recognize Clarke in the matter.

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Q. You were refusing to deliver securities to customers? A. To Clarke.

Q. To Clarke's customers. Clarke's customers were making demand through him during January and February for securities. You knew that? A. Yes.

Q. You were refusing to make delivery to them on account of the balance that was owing on account of this Pen Pete deal? A. Yes.

Q. Was there not an agreement made on the 7th in regard to Mrs. Chaput's securities, that you agreed to sell them and forward the money through the Royal Bank on the following day? A. An arrangement made with me? 10

Q. With your firm, that you know of? A. No sir. I don't know of it.

Q. Did you hear Mr. Richardson say anything about that? A. I remember Mr. Richardson saying something about Chaput. He had some conversation with Mr. Clarke. I can't say I remember what it is now.

Q. Will you say you did not talk yourself to Mr. Clarke in regard to Mrs. Chaput? A. Yes, I will.

Q. You say it was Mr. Richardson? A. No. The way it came up was in regard to the examination for discovery, which I think I answered before, Mr. McRuer. Mr. Richardson said something, "What about that Mrs. Chaput?" I said I didn't talk to him. He said, "I think I heard something about it," but Mr. Clarke certainly did not talk to me, sir. 20

Q. I want to show you a letter dated August 10, 1932. Just look at that. It is apparently sent out over a typewritten signature of Mr. Marks, per M. Salmon. Was she an employé of yours? A. Yes.

Q. That would be the type of letter you sent out to these offices with information in regard to securities for use in the offices, in order to give information to customers? A. I never saw that letter before, sir.

Q. Do you recognize the signature? A. Yes sir. 30

Q. And I asked you, was that part of your way of carrying on, that you would send out letters of a similar sort to these offices at North Bay and Sudbury, containing information about stocks to be communicated to prospective customers? A. Mr. Marks would send out an odd one or two possibly, but we have another department sending out information on various stocks.

Q. You can tell me this, that it was part of your business to send out information in regard to securities, stocks? A. Yes.

Q. To be communicated to customers at the offices in North Bay and in Sudbury? A. Yes, or put up on the notice board. 40

Q. In order to stimulate trade with customers at those offices? A. Yes sir.

Q. And the same wire that went to Sudbury and North Bay went to offices that you operated yourselves in Kirkland Lake and Cobalt? A. And Timmins, and latterly Noranda.

Q. You had then four offices in those cities that you operated yourselves? A. Yes.

Q. Getting orders from customers in those various offices? A. Yes.

Q. And for the purpose of your bookkeeping your own offices in Timmins, for instance, would be carrying the general account for Timmins. You would not carry the individual customers' names who were dealing with your branch office at Timmins in your head office books in Toronto? A. We did do so.

10 Q. Your individual customers' names? A. Yes, we did. all our accounting in Toronto for our branches.

Q. Were your calls for margin made on Timmins generally? A. We notified our Timmins office that a certain account would require so much margin, and they would make the margin call from there.

—EXHIBIT 50—Letter F. O'Hearn & Company to Mr. Frank Wood, c/o L. S. Clarke, Sudbury, dated August 10, 1932.

—Court adjourned at 5:00 p.m. until 9:30 a.m.

—May 31, 1934.

—On resuming at 9:30 a.m.

20

ALBERT GARDNER, Recalled

MR. McRUER: There were one or two things Mr. Gardner was to get for me, some figures. May I just ask him about that, my Lord?

HIS LORDSHIP: Yes.

BY MR. McRUER:

Q. Have you got those figures, Mr. Gardner? A. Yes.

Q. The total value of the stocks sold on February 7th, 1933, was \$40,712.96? A. Yes.

30 Q. And the total value of the stock sold on the 28th of February, 1933, was \$24,780.90. And on March 6th, \$16,130.14. Then we have not got in the record, Mr. Gardner, March 13 and March 15, the final closing out? A. I did not understand you wanted that.

MR. PORTER: I thought you had that.

MR. McRUER: You gave it to me, but I wanted to get it in the record from Mr. Gardner.

WITNESS: Can I confirm them with Mr. Porter?

MR. McRUER: If you will confirm the figures that were furnished to me?

MR. PORTER: Oh, yes, I recall these. I recall furnishing these.

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MR. McRUER: Q. Then these figures I show you are the figures you furnished in reference to the sales on March 13th and 15th, the final closing out. North Bay, New York account, \$1769.41. Canadian account—that is North Bay still—\$12,364.02. Sudbury, New York account, \$14,365.00. Sudbury, Canadian account, \$24,131.23. Or a total from the stocks of \$52,629.66.

And from the Grain account, North Bay, United States, \$83.15. Canadian, \$2,780.74. Sudbury Grain, \$2,380.66. Or a total of Grain sales of \$5,244.55. Those are correct, Mr. Gardner? A. Yes.

Q. How were the margins regulated, the amount you would require 10 for margin on margin stock? A. How were they regulated.

Q. Yes. A. You mean our requirements?

Q. Yes. A. Generally a third of the market value.

Q. Was that a regulation or custom of the Standard Stock Exchange? A. No, that is just the broker's own requirements.

Q. That was your custom, at any rate? A. Yes.

Q. That was on margined stock? A. Yes.

Q. Then have you got the purchasing orders for Pen Pete for those two days, the 8th and 9th of November, the orders as they came in? You had them in a little bundle in your productions. A. (Produced) 20

Q. We can put them all in. These are the purchasing orders starting at the 7th and continuing through to the 9th for the Pen Pete stock, taken from your records? A. Yes.

—EXHIBIT 51—Bundle of Buy Slips covering Pen Pete purchases November 7th, 8th and 9th, 1932.

Q. You said you put through the last order of 50,000 shares after you had had the discussion with Mr. Marks about the Pen Pete transactions? A. I think I said it was while I was talking to Mr. Bayne.

Q. Or after you had talked to Mr. Bayne? A. Yes.

Q. I notice it was at 2:15 in the afternoon that that order came in? 30 A. Yes.

Q. And that was an order to buy 50,000, and the price that you bought that at ranged from 14½c to 17½c. Is that correct? A. 16 I think.

Q. You tell me what it was? A. 14½ to 16.

Q. These figures on the slip indicate the prices paid, so we do not need to detain you on that.

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Q. Mr. McRuer in his cross-examination referred to Exhibit 4, a letter of January 25, 1933, and pointed out that after receiving this letter, at 40 the end of the month you sent out a statement showing the balance in a

separate special account for Peninsular Petroleum. This is a letter sent from L. S. Clarke—

MR. McRUER: Prepared by Kilmer and Company, the evidence was.

MR. PORTER: Q. You recall those questions. I just want to point out to you Exhibit No. 6. You recall that letter, dated January 30th? A. Yes.

Q. I think we have it on the record already that that letter was received, and that it was in reply to the letter of the 25th.

10 MR. PORTER: I might point out to your Lordship at this point, my purpose in showing this to the witness is to recall to your Lordship that we said in reply to the letter of the 25th, "In reply to your letter of "25th instant we beg to state that we do not agree with your conten-

"tion with reference to your account with us." Then we go on to say, "You have signed the usual client's agreement," and so on. Because I thought it looked as if they never replied.

MR. McRUER: They do not say what he said in it was not true.

MR. PORTER: Q. In your cross-examination my learned friend asked you some questions about margin accounts, and cash stocks, and so
20 on. I think perhaps there may have been some confusion with reference to the exact meaning of those terms, and the way these accounts are kept. I would like you to elaborate more fully exactly what is meant by the various terms you used. It may sound very elementary, but I want to ask you this, Mr. Gardner: What is the difference—as a broker, in your dealings in the brokerage business, in view of your experience and so on—between a transaction that is known as a margin transaction—that is, the purchase of stock on margin—and a transaction in which the stock is to be purchased for cash? What is the real distinction between those two types of transaction? A. On a margin account, sir, it is con-
30 templated that the customer will put up a proportion of the value of the stock, either by cash or satisfactory collateral. The broker will carry that stock on margin against this collateral or cash that is put up practically indefinitely, depending on the change in the market price, when the broker will call for additional margin.

Q. So that a margin transaction is one in which the total price of the stock that is purchased does not have to be paid perhaps for some indefinite period? A. The full total?

Q. Yes. A. No sir.

40 Q. Now, in stock that is purchased for cash, that is regularly not dealt in on margin, what is the transaction? What is contemplated by the parties in that sort of case? A. It is understood that the purchase or the stock will be paid for within a reasonable length of time, maybe three, four, five days.

HIS LORDSHIP: Q. Then the customer gets delivery of the stock certificate? A. Yes.

MR. PORTER: Q. Does he necessarily always get delivery of

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the stock certificate? A. No. The customer may wish us to hold the stock for his account.

HIS LORDSHIP: Q. For what purpose would you hold it, to enable him to trade with it? A. Possibly that, or we may hold it for safe-keeping. He may enter an open order to sell the stock at a higher price, and we may hold it for that.

Q. It is his stock and he can do what he likes with it? A. Yes.

Q. Supposing he buys on margin, subject to any marginal requirements, he could still transfer that stock to somebody else? A. The margin stock? 10

Q. Yes. A. Yes. Take it up in any manner, shape or form.

Q. He could sell the stock subject to the margin requirements? A. The stock belongs to him. We just have a lien on the stock.

Q. You understand my question? A. No sir.

Q. Suppose a man buys a stock on margin, and you are holding the stock, and have a lien, and have collateral; it is open to him if he wants to, to transfer that stock to somebody else? A. Yes sir. It is done right along.

Q. And the purchaser of that stock from the customer would take it I suppose under the same conditions?—that is, subject to the marginal requirements? A. Do I understand you mean this man would sell the stock to a second party? 20

Q. Yes. A. He would just instruct us to transfer the account on our books to the other party.

Q. In a marginal sale the stock certificate remains in the broker's name? A. Yes sir. The bank does not wish to take stocks in what they call street names.

MR. PORTER: Q. Why is that? A. You can understand if the bank had three or four hundred thousand dollars worth of stock in 100 names, and somebody died, it is not very— 30

Q. That is a practice carried on by the banks? A. And the brokers.

Q. Suppose a client was carrying certain stocks on margin with you. Let us put a definite example. Suppose he came to you and said, "I have ten thousand dollars. I want to buy some stocks on margin," of International Nickel, which I understand is a stock that is traded in on margin—suppose he said, "I want to buy as much International Nickel as I can for the ten thousand dollars." What would you actually do when he gave you those instructions and deposited the ten thousand dollars?

HIS LORDSHIP: What do you mean by that question? Do you mean to buy as much as he can on margin? 40

MR. PORTER: Yes, on margin.

WITNESS: On a stock like International Nickel our marginal requirements are one third of the market value.

Q. You have said those marginal requirements are the requirements of your own firm? A. Yes.

HIS LORDSHIP: Q. Have the stock exchange any requirements as to margin? A. They have no requirements, sir.

Q. A broker could ask one third or one half? A. Or twenty per cent.

MR. PORTER: Q. He could deposit his ten thousand dollars, or it would be understood he would deposit it in a reasonable time? A. And we would purchase approximately thirty thousand dollars worth of stock.

Q. Of course, he would owe the twenty thousand dollars, and it would be just a question as to the market conditions as to how you would carry it, and so on? A. Yes.

Q. Suppose that client came to you and said, "I have got \$15,000 dollars, and I want you to buy me \$30,000 worth of International Nickel," that is 50% of the price of the stock he was buying. You have told us your margin requirements would be \$10,000. So there would be \$5,000 in his account which would be more than you would require to carry the International Nickel stock? A. We call that surplus margin.

Q. Suppose he came into you a few days later and said, "I have this surplus margin of \$5,000 and I want to buy \$3,000 worth of Barry Hollinger stock," which is a stock which has to be paid for outright; it is not carried on margin? A. Yes.

Q. Then, how would you deal with that situation? A. We would take the order; the order would be executed, and when bought the amount of the purchase would be charged up to his account, and if we did not deliver the Barry Hollinger to him—we might hold it, whichever he required—but in figuring we would only figure the market value of the International Nickel against his then debit balance.

Q. You would have that \$5,000 of excess margin out of which to pay the total price of the Barry Hollinger stock? A. Yes.

Q. And that is the way transactions are regularly carried out? A. Every day, sir.

Q. So a client would most likely in a mining brokerage business such as yours is, where you deal very heavily in mining stocks—most of your clients I suppose would quite likely have a mixed—

MR. McRUER: I do not know, my Lord—this seems to be extraordinary re-examination.

MR. PORTER: I can get it by taking a little more time.

HIS LORDSHIP: He is just outlining the thing.

MR. PORTER: I think it would be an advantage to have it.

Q. In a good many of your clients' accounts there would be some margin stocks carried, and there would be purchases from time to time of ordinary cash stock? A. A very large percentage.

Q. I produce this ledger (Exhibit 48) open it at random and pick out a page that might illustrate the situation. A. I don't understand exactly what it is.

Q. I wanted some ledger sheet in the Clarke account with your firm

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which would show a variety of stocks; that is, cash stocks and margin stocks dealt in, which would be shown even on the same page perhaps?

A. There is one; 100 Vipond and 100 Vipond.

Q. Referring to the L. S. Clarke account, the first date on this page is December 8, 1931. That is the only way the page can be indicated?

A. Yes sir, by date.

Q. We have the debit balance carried forward, and various purchases and sales and record of stocks received, and a record in some places of stocks delivered? Is that right? A. Yes.

Q. And on this page you have stocks that are bought, stocks 10
classed as margin stocks. For instance, name one of them that would be a margin stock? A. 30 International Nickel.

Q. We have on December 9, the purchase of 30 International Nickel, indicated here by the figures I.K. There is a debit for that amount, \$294.37. A. Then there is Granada.

Q. Is that a margin stock? A. Yes.

Q. Pick out a stock that is a cash stock. On December 9 there is the purchase of 100 Vipond at 34½c and there is a debit shown on the statement of \$45? A. Yes.

Q. And that is the general way of carrying on the account with L. 20
S. Clarke. Is that right? A. Yes.

Q. So there was no separation at all of the stocks that were bought for cash on your books and the stocks that were bought on margin? A. No.

Q. From time to time you worked out here the debit balance, and in the debit balance from time to time it shows the full amount of money that is required to take up all the stock? A. Yes.

Q. Cash stock, margin stock, everything—the total amount of money that is owing from L. S. Clarke to O'Hearn & Company. A. 30
Debit balance of the account.

Q. Then in order to determine how much money is required by you to carry on this account, I think you told us previously that you would work out the equity of the margin stocks in the first place? A. Yes. We would work out the market value of the margin stocks.

Q. In order to determine how much money you would require to carry the margin stocks which were not required to be paid in full at any particular time? A. Yes.

Q. You would work out the market value on any given day and the amount of money that had been paid in—or how would you work that?

A. Take the market value of the marginal stock and take the amount 40
that we required, and then see what the debit balance is against that market value.

HIS LORDSHIP: Q. You would disregard the cash sales? A. Yes.

Q. The equity may have been partly used in purchasing for cash certain stocks. That reduced the equity in the margin stocks? A. Yes.

Q. I think that is very clear. That is their practice.

MR. PORTER: Perhaps I had better elaborate on that.

Q. How many years have you been in the brokerage business? A. In Canada, sir, fifteen years.

Q. And previous to that? A. I was in England, sir, for nine years in the brokerage business.

HIS LORDSHIP: Q. Are you mining brokers as distinguished from general stock brokers? Do you specialize in mining stocks? A. My Lord, we were members of the Standard Stock Exchange, which was a mining exchange before, but there has been an amalgamation with the Toronto Stock Exchange now. We did specialize in mining stocks, but we take any class of business, my Lord.

MR. PORTER: Q. Did any member of your firm have a seat on the Toronto Stock Exchange before the amalgamation? A. Yes.

Q. Which was used for the use of the business? A. Oh, yes, we did extensive Toronto Stock Exchange business, but we were not members of the Toronto Stock Exchange prior to the purchase of the seat.

Q. For some time before the amalgamation of the Exchanges you have carried on business in general stocks on the Toronto Exchange? A. Yes.

Q. Grain? A. Grain.

MR. McRUER: I think this is getting beyond re-examination.

HIS LORDSHIP: If there is anything you would like to bring out, I will let you cross-examine.

MR. McRUER: I do not want to prolong it.

HIS LORDSHIP: There is no hurry, you know.

MR. PORTER: Q. In your experience in the brokerage business were you always in the accounting department? Is that your special line? A. Yes.

Q. You know the way your own business has been carried on? A. Yes.

Q. Have you any general knowledge at all of regular brokerage practice in the respects that we have been discussing? A. From the knowledge I have had I cannot see how they would do it any other way. I would think that would be the businesslike way to do it.

Q. At the time the Pen Pete purchases were being made in the months of September, October and November, did you know at all as to whether these purchases were being made for ordinary clients of the North Bay office in the sense of being made for people who had already accounts, or for somebody else? A. No, we didn't know. We just bought the stock for L. S. Clarke. We had no knowledge of any of the customers.

Q. You had no knowledge of these particular Pen Pete stocks being purchased for anybody who had not up to that time been a regular client of the North Bay office? A. No.

HIS LORDSHIP: Q. I am not quite clear about that last point.

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When you buy through Clarke and Company certain stocks, or at the request of Clarke and Company, aren't you given the name of the purchaser of the stock? Does that appear in your books at all? A. Not at all, sir.

Q. You do not know anything about who the purchaser is? A. No sir, we just charge the item up to L. S. Clarke account.

Q. Clarke does not say, "I want you to buy a thousand shares of Nickel," giving the name of the customer? A. No sir, just for his own account, sir.

MR. PORTER: Q. And that, of course, as you say, is what happened with all the Pen Pete purchases? A. Yes.

Q. And the account, Exhibit 48, shows that? A. That is the L. S. Clarke account.

Q. That is the only account you kept for L. S. Clarke during the period that this book covers? A. Yes.

Q. It is all L. S. Clarke, North Bay. Does this book show those Pen Pete purchases? Does it go that far? A. Yes sir, that is the whole account.

Q. You had perhaps better identify the way they were put through your books. Let us start in September and just indicate what the account shows. At the page commencing September 1st, 1932, we have the general account which shows amongst other stocks the purchases of the Peninsular Petroleum? A. Yes.

Q. And that carries on September, October, and up to November 9, does it not? A. Yes.

Q. And then there is a page commencing November 8th, and going on to November 9th; and another page commencing November 9th; and those pages show all the Peninsular Petroleum purchases made by L. S. Clarke of which there has been evidence given in this trial? A. Yes sir.

Q. There is just one thing—perhaps his Lordship may be clear on it, but I am not quite clear yet—when you say you are making up the amount required on any given day, the amount of money required from a client to put his account in proper condition in view of the margin stocks you are carrying, and in view of the purchases of cash stock that you have made for him, you determine the equity of the margin stocks without any reference—you do not take into consideration the market value at that time of any cash stocks that you have on hand that are not paid? A. No.

Q. But of course those cash stocks are in your possession? A. Yes, and they have a market value.

Q. But as a matter of practice you do not take them into consideration? A. No.

HIS LORDSHIP: Q. Does that apply to penny stocks? A. Yes, my Lord.

Q. Supposing a man buys any stock outright like International Nickel—that is traded in, and has a value, and has a marginal value—he

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buys it outright; in figuring out the amount of marginal requirements you surely have regard to the fact that you are holding paid-up stock of International Nickel? A. If it was in the general account it would just lay in the general account unless the man wanted the International Nickel transferred into his own name, or delivery of the certificates.

Q. I am speaking now of the marginal requirements. Suppose an order came through to buy a thousand shares of International Nickel for cash and the cash was forwarded, and you were to hold the stock and not deliver it to the customer; in figuring out the marginal requirements you

10 would surely take into account the fact that you had the stock on hand?

A. We would allow him the value of that stock on the marginal account.

Q. But in the penny stocks you do not do that? A. No.

Q. A distinction is followed between the penny stocks and the stocks that are not? A. Yes.

MR. PORTER: Q. Is that distinction a practice in your office?

A. Yes. May I just say in regard to the illustration his Lordship has used—a broker paying cash for a large amount like a thousand Nickel invariably would take delivery of the stock, another broker.

20 HIS LORDSHIP: Q. Suppose he did not. Wealthy people do funny things. He might say, "I will buy this stock outright," A. Unless he definitely told us to transfer the stock into his own name it would lay in the general account.

Q. The stock would not be put in his name? A. No. We would just hold it, and put it into general collateral.

MR. PORTER: Q. Often clients take delivery of stock in the form of what they call street certificates? A. Yes. Then there is actual delivery.

Q. There is no necessity to have the stock made out in the client's name? A. No.

30 Q. When you decide at any given moment how much money a client owes you, or you require a client to pay for his general account to be carried, you work out the values of the margin stocks and the total debit balance? A. That gives his marginal equity.

Q. And the total debit balance as you have said includes the total price of any cash stock that you have on hand for him as yet undelivered to him? A. Just the amount that the party is indebted to us, including any cash purchase.

HIS LORDSHIP: Q. Disregarding the penny stocks? A. Not in the ledger.

40 MR. PORTER: Q. As I understand it, the only reason for disregarding the penny stocks in working out the equity—

MR. McRUER: I do not think my friend should—

HIS LORDSHIP: I want to get this clear.

MR. PORTER: The only reason for disregarding the value of the

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penny stocks in determining the equity in the account is that they as a matter of business practice—

HIS LORDSHIP: —have no value.

WITNESS: Not marginal value.

MR. PORTER: Q. In deciding how much the client has to pay, they take the total value of the margin stocks as they are on that day on the market, and take the total debit balance—that includes the full purchase price owing, less any deposits that have been made of margin stocks and cash stocks—it is the total debit balance the client owes. It is on those figures that they decide whether there is enough to carry the account, whether they need any more, and so on. Is that right? A. Yes. 10

Q. The word “penny stocks” has been used quite frequently. That is an expression which is commonly used, is it, in the brokerage business? A. Yes.

Q. What do penny stocks mean generally? A. Cheaper class of stocks, below ten cents.

HIS LORDSHIP: Q. It means a stock on which you will not advance any margin? A. That is the general term.

Q. That is what it means? A. I think it is more the penny value of it. 20

Q. Are there any penny stocks on which margin is allowed? A. Stocks selling at 60, 70 or 80 cents, under the rules we cannot carry a mining stock on margin under a dollar, but there may be a stock that we may advance our own money, that sells at 80 cents, that we are satisfied has got some marginal value.

MR. PORTER: Q. My point is really this, that you rather loosely use the expression “penny stocks” referring to stocks of very low value? A. Yes.

Q. But there may be stocks of somewhat higher value less than a dollar that you may not generally talk about as penny stocks? A. No. 30

Q. And yet you would not carry them on margin? A. No.

Q. The term “cash stocks” is perhaps more correct as to distinction between margin and cash stocks? A. Yes.

Q. To follow up this hypothetical case of the client who comes in—suppose you have an account with him, and you have been carrying some stocks on margin, and he is sufficiently margined for your purposes, and he puts in an order to buy some cash stock—is it necessary for you to ask him to put up a deposit then and there, or to pay for the stock in advance; or when is the payment for the stock generally required? A. Within a reasonable time, a week, a few days. 40

Q. Of course, it take a few days I understand for the stock to come through from the clearing to you? A. Yes.

Q. So you cannot make delivery till perhaps a few days after the order is executed? A. Yes.

Q. And perhaps for some reason or other there may be a little delay? A. The party may be out of town.

Q. The chief distinction is there is reasonably prompt payment in full contemplated by the party? A. Yes.

Q. That is the only distinction, isn't it? A. Yes.

Q. In dealing with any particular client, would it depend on how well you knew him? A. Our knowledge of the man's standing, from transactions we had had with him previously.

Q. That is, as to whether you would accept an order from him? A. Yes.

10 Q. And what you would require by way of deposit if you were buying a cash stock? A. Yes.

Q. Or whether you would want the whole thing paid in advance? A. Yes.

20 Q. We have heard that you had dealings with Clarke over a considerable period, that all calls for money had been promptly met, and that you had some knowledge and information as to Clarke's being a responsible man, and so on. When orders would come through for stock, for the Pen Pete stock, in September, October and November, was there any reason that you had, or do you know of any reason why you should not execute those orders without any question? A. They were all executed as a matter of routine right away, sir; immediately the order was placed.

Q. And I think the ledger shows that Clarke's account was a big and profitable account? A. This is the ledger account. That is Clarke's account. (Exhibit 48).

Q. Doing a continuous stream of business of one kind and another? A. Every day, sir.

MR. McRUER: With your Lordship's permission, just a question or two.

RE-CROSS-EXAMINATION BY MR. McRUER:

30 Q. But with Clarke you fully understood that he was carrying on business both in North Bay and Sudbury as correspondent of F. O'Hearn & Company? A. I understand that, yes.

Q. It was on all his stationery and so on? A. Yes.

Q. It was on the window.

MR. PORTER: The stationery, my Lord, does not say anything of the kind; and the sign in the window does not say anything of the kind. It says, "L. S. Clarke—Broker—Correspondent—F. O'Hearn & Co." The "of" is not in there.

40 MR. McRUER: Q. You understood he was taking orders from customers although you did not know their names. You knew they were customers at both Sudbury and North Bay who were trading through him on margin with you? You understood that? A. Trading on margin with him.

Q. But the trades were put through you, and executed by you on the

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Exchange, and the margin account carried with you? A. For Clarke, sir.

Q. You knew there were trades for the customers? A. For some customers.

Q. For some customers whose names you did not know? A. Yes sir.

Q. You say that the orders for Pen Pete were executed in the ordinary routine. Did you ever have a transaction like the 8th and 9th of November in a penny stock with any one man in your life—\$50,000 in a stock in which you had no confidence yourselves? A. I have no recol- 10
lection of having that amount of stock from anybody.

Q. Contemporaneously while these large orders were going through, wires were going out to Clarke to send \$10,000, and it was not coming; next day, sent twelve, and it was not coming; next day, sent fifteen, and it was not coming. A. In view of the large equity in the account, I don't think that that was possibly as large as you want to make out.

Q. It does not make any difference whether it was larger than I want to make out. I am saying the demands for payment in cash were going out and not being met, and you were carrying on, you say in view of the large equity in the account? A. Yes sir. 20

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EXAMINED BY MR. PORTER:

Q. Mr. Richardson, you are a partner in the firm of F. O'Hearn & Company? A. Yes sir.

Q. The defendants in this action? A. Yes sir.

Q. Do you know L. S. Clarke? A. Yes sir.

Q. You had some dealings with L. S. Clarke during the time that he carried an account with your office? A. Yes sir.

Q. And did you ever know at any time while the account was carried of the names of any of Mr. Clarke's customers? A. Never had any 30
knowledge of any name, any one name.

Q. I produce Exhibit 8 at this trial, which is a card signed by L. S. Clarke, January 29, 1931. I would like to know whether you recognize that document? A. Yes, I recognize that.

Q. Was there any other written agreement with L. S. Clarke to govern his dealings with your firm than this Exhibit 8 that you know of; or is this the only one? A. I don't know. There may have been some correspondence, I don't remember, but that generally covered the agreement and the basis on which we were dealing.

Q. And during the course of your dealings with L. S. Clarke from 40
time to time, from January, 1931, during the year 1932, did you have deal-

ings with Clarke personally at all with respect to his account, general conversations, anything of that kind? A. I used to see Mr. Clarke when he was in town occasionally, possibly once a month, or once in two months.

Q. I do not want to go into the detail of what was said, but generally you did discuss matters of the business of his account with him in a general way? A. Yes.

Q. He had, I understand, a branch office in the City of Sudbury? A. Yes.

10 Q. In discussing business matters with Mr. Clarke was the Sudbury branch discussed, or the North Bay branch, or did they come up in any way? A. Well, he talked general business, his general business there. He might have mentioned Sudbury, what he was doing there, or how things looked, or what he was doing in North Bay.

20 Q. Did you have some conversations with Mr. Clarke during the months of September and October, 1932, with reference to Peninsular Petroleum stock? A. I had discussions with him from time to time as he was in the office regarding Peninsular Petroleum around that time. He spoke very favourably of it, was very much impressed apparently with the merits of Pen Pete. We did not agree with him, and we advised him that we did not like his stock, but he seemed apparently quite bullish on it for some reason, and he spoke of the President of the A & P Company being a shareholder, which we interpreted as the President of the Atlantic & Pacific, which is a rather large concern over in the States; but later on we discovered that the President of the A & P Company was the Andean Petroleum, or some similar name, which as soon as we found out and looked it up, it was quite evident on the face of it, that it was a very inferior sort of company.

30 Q. And what other information did he give you about this Peninsular Petroleum? Do you recall anything in particular? A. Well, I remember him saying that, when they were doing some of that heavy buying, there was a very large short interest in it, and during the two or three days of that heavy buying I happened to be out of town.

Q. Before you come to that two or three days of the heavy buying, you say he mentioned a short interest in it. That was some time before November 8th and 9th. A. Yes sir.

Q. And at that time when he mentioned the short interest, was he buying from his office considerable or not? A. They had been trading in it fairly actively, but not nearly as heavily as they did on the last couple of days.

40 Q. I think we have got exactly what trading was done. A. As I recall it, on getting home, they had bought those shares very rapidly.

Q. Do not let us go into that. I am drawing your attention to what happened before November 8th and 9th. You had a conversation with him in which he talked about Peninsular Petroleum and so on, as you have described. How did these discussions about Peninsular Petroleum arise in the first instance; that is, who opened the discussion on this stock? A.

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Mr. Clarke would bring the subject up, and as I recall it, he tried to tell Mr. Marks, Mr. Brooks, our statistician, and myself—tried to impress on us what a valuable stock this was. Very emphatically he did that, and we were distinctly of the opinion it was not a good stock, as near as we could tell.

Q. This was during September and October when there were heavy purchases coming through? A. They were very active at that time in that stock.

Q. Did he ever mention the price of the stock in any way? A. Just in a general way, he thought it would sell up to very much higher price than it was at at that time. 10

Q. We have also heard from some of the other witnesses that there was mention of some short interest in the stock. Do you recall any conversations about that? A. Yes. Mr. Clarke told me himself that he thought there was a short interest of approximately 600,000 shares. And when I returned after these three days of heavy buying, I got in the next morning—I think it was a Thursday morning.

Q. Would you mind just waiting? I am coming to that. I want to deal with the prior incidents first. Then the large transactions of November 8th and 9th took place, and you were not in the city during those 20 days? A. No.

Q. You came back when—the next day? A. It was the next morning. I think it was Thursday morning that I returned.

Q. And then did you get in touch with Clarke at all after those heavy purchases of the 9th of November? A. Yes. I remember distinctly getting a well-worded wire off to him. I think Mr. Marks—and I have forgotten whether Mr. Gardner went over it with us or not—but we sent a very emphatic wire pointing out his position as we saw it—trying to protect ourselves and himself by showing him the exact condition, and after that I spoke to him myself on the phone. 30

Q. Do you remember about when you telephoned him first? A. It was right around after I got the picture of what had happened. I tried to warn him on the telephone that I thought his position was bad unless he could collect these funds.

Q. What did you telephone him for? What was the purpose of it? What did you say to him? A. The account looked to us as if it was getting in a dangerous position unless he was able to get his cash. Every time we asked him he said he was quite positive of the men he had sold this stock to being able to collect, and that they were expecting money to be collected in New York which would be forwarded to them by wire and immediately forwarded to us. Every time I spoke to him they seemed absolutely confident that they were going to be able to collect this money. 40

Q. And do you remember what your firm did with the stock that they had purchased? Did they take any action with respect to the Peninsular Petroleum stock themselves? A. I don't just get your question right there.

Q. Was anything done by your firm to protect the account? A. The Clarke account?

Q. The Clarke account? A. Well, there was. When we saw what we thought was the precarious position—Mr. Clarke phoned me one day stating that a man in New York who was apparently interested with him, a man named Werhan, that he expected some support from him, and had disclosed to Mr. Werhan his position in the Peninsular Petroleum stock, showing himself long a very substantial amount of stock, and he told me that Mr. Werhan would call me. About twenty minutes later Werhan came on the phone. I didn't know him at all. He talked for a while and he said, "What is going on up there?" He said, "I am not going to hold the bag. There is something wrong up there." He said, "I am going to sell my stock." There was apparently a pool down there which we knew nothing of at all. He said, "Do you want a selling order?"

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MR. McRUER: This is something with Werhan that I know nothing about.

MR. PORTER: Q. Do not give us the conversation with Werhan. A. Yes, he called me up.

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Q. You cannot give evidence of the conversation between yourself and Werhan. That is not evidence against the plaintiffs in this case. All I want to know now is what you did, not what you said to Werhan or anyone else. What did you finally do? What was the next thing you did to protect yourselves in this Clarke account? A. We immediately started to sell Peninsular Petroleum because I knew there was going to be other selling.

Q. We have it on record that about 126,000 shares or thereabouts were sold on that day? A. Yes. It was a fortunate thing for the Clarke Estate that we did sell them.

30

Q. Do you remember what the prices were? A. The stock sold down on the strength of the selling, if I remember rightly—it started to sell at 12 cents and sold down to eight cents.

Q. After the sale of this stock, or just about this time, did you have any telephone conversation with Mr. Clarke? A. Well, he called me and wanted us to hold up selling any further Peninsular Petroleum stock, that he was getting some other arrangements made, and asked us to withhold from selling any further stock.

Q. As a result of that telephone conversation did you sell any further stock or not? A. I don't think we sold any—a very small amount—I don't think probably any.

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Q. We have also heard in the evidence about a conference in your office when the Kaatz agreement was drawn up. I do not know that I need to ask you anything about that. That is pretty well in the evidence as it is. Then after this Kaatz agreement on November 19th, did you have any conversations from time to time with Mr. Clarke about Peninsular Petroleum? A. Yes, we had a number of conversations, and Mr. Clarke at that time was working with these different groups—we did not

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know who they were—and he kept advising us definitely all the time that he was making progress, and that he hoped to get assistance in some way that would rectify his position, and he was very hopeful from time to time, and I think worked very hard on it himself.

Q. And that carried on for about how long—do you recollect? A. Possibly a month or six weeks, or some similar time.

Q. About how frequently would Mr. Clarke come into the office? A. He was down to Toronto quite frequently at that time. I possibly saw him every week, or possibly twice a week, or probably would be two or three days at a time. 10

Q. When you saw him at that time, in the conversations with him, was the Peninsular Petroleum situation generally referred to? A. Yes sir.

Q. And as you have said, he indicated what he was doing, and so on? A. Yes.

HIS LORDSHIP: Q. What did he say? A. He advised us he was making progress.

Q. Making progress doing what? A. In getting people to support his issue by buying shares, or getting these additional shares, or generally, as I understood it, from the groups with whom he had been dealing —they were in some way supporting him—he hoped to get their support. 20

MR. PORTER: Q. And your interest, of course, was to get your account cleared up? A. Absolutely.

Q. And were all these conversations with that in mind? A. We were definitely trying to assist him in any way we could.

Q. And do you remember any particular conversation with Mr. Clarke in the month of December, 1932, with reference to this situation? A. In what way?

Q. You say you had various conversations in your office. Do you remember any particular conversation that took place anywhere else? 30
A. Apart from the office?

Q. Yes. A. We visited—Mr. Marks and myself visited Mr. Clarke at the King Edward Hotel on a Saturday. I just don't remember when it was—along about that time. And he was still hopeful of being able to arrange something.

Q. And was that a lengthy conversation? A. Yes, we were there for some little time—probably a couple of hours.

Q. And what was the subject of conversation during most of that couple of hours? I do not want you to give everything that was said. A. Mr. Clarke was telling us of how he was working, trying to get the thing straightened out, with the people with whom he had been interested, the Peninsular Petroleum— 40

Q. So that the conversation related chiefly to the Peninsular Petroleum situation? A. Yes sir.

Q. And was anything said in that conversation which would indicate whether Clarke had any relationship with the Peninsular Petroleum

Company himself? A. As I gathered—I don't know whether it was definitely at that time or not—he was considering going on the board of directors.

Q. That is what he told you? A. Yes, and I had his solicitor advise him against it, on account of the mess the thing was in at that time.

Q. And is there anything further you remember about that? A. I think he talked about having someone else go on the board, representing him—representing Mr. Clarke.

10 Q. Mr. Clarke I think himself told us that he became an officer of the Peninsular Petroleum Company, Secretary-Treasurer or something of that kind? A. I think it only lasted for a day or two and he was advised to get off the board.

Q. I am asking you now what he told you at the time, or do you recall anything about his position with the company at that time? A. Nothing further than he was going to join them as a director or secretary, so he would have a position there.

20 Q. Mr. Richardson, did any members of your firm—you yourself or any other members, have at any time any interest in Peninsular Petroleum stock? A. I had none whatever myself, and to the best of my knowledge neither the firm nor any of its partners dealt or traded in one share of Peninsular Petroleum.

Q. That is, on their behalf or on behalf of the firm? A. Directly or indirectly, or in any way.

Q. Did you know until after the transactions of November 9th anything about a pool which was being operated by Mr. Bayne in Clarke's office in Peninsular Petroleum? A. I had heard that there was some sort of a pool. I didn't know any particulars of it.

Q. Where did you get any information you had about the pool? A. I don't remember where I got that information.

30 Q. Have you any impression as to what sort of a pool it was, anything of that kind? A. No, I had no idea.

Q. Did you know at any time anything about the position of Barkell? A. No, I knew nothing about him.

Q. You were not here when the evidence was given, but did you know anything about the source of the stock that was coming through your office from time to time and being shipped up to L. S. Clarke? Had you any information about where that stock came from, who was selling it? A. You mean the stock we purchased for Clarke on the exchange?

40 Q. The stock you purchased for Clarke on the exchange, did you have any information outside of the information you would have about the brokers who were selling it? A. I had no information about where the stock was coming from at all.

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Q. Mr. Richardson, you had a board room, did you not, in Toronto?

A. Yes sir.

Q. On which the purchases and sales of stocks that were going through your office would be marked up? A. Yes.

Q. Just tell me where your board room was situated? A. In the front part of our office.

Q. It was quite a large board room? A. A little larger than this room.

Q. With a board across one side? A. Yes. 10

Q. And Pen Pete was one of the stocks that would be on the board? A. Yes.

Q. I suppose members of the firm circled around the board room, to see what was going on, in the ordinary course of business? A. Yes.

Q. That is part of your business? A. Yes.

Q. You keep in fairly close touch with the quotations that are being registered on the board? A. Sometimes, sometimes not.

Q. If you see a big long line going down the board in one stock, you know there is some pretty active buying in that stock? A. Yes. Sometimes I wouldn't see it at all. 20

Q. One of the three members of the firm would be walking around that board-room? A. Not necessarily.

Q. Not necessarily—I would think in keeping in touch with the business as brokers that is exactly what they would be doing? A. That is no way to keep track of your business, looking at a board. You would not get very much information by looking at a long line of Peninsular Petroleum, to stay there and watch that.

Q. You would know the activity in it? A. You would in that particular stock, but your interest is not all confined to one stock.

Q. You had heard there was a pool in this? A. Yes. 30

Q. You always found the deliveries came very quickly? A. When we purchased. I looked that up, yes sir.

Q. You would buy 50,000 shares and it seemed to be passed over right away? A. They sort of gave it the "rush" act, and slipped a few in in a hurry. When we saw what they were doing, and our wire man detected it—he pointed it out to Mr. Gardner, there were very heavy sales, Gardner came up immediately and said "No more purchases."

Q. Would you be surprised to know, Mr. Gardner said he looked at the margin account, and then said, "Let the 50,000 go through." A. But it was after that he stopped. There was no more. 40

Q. I show you a wire contained in Exhibit 37, dated November 12, 1932. Would that be the well-worded wire you have reference to? A. May I look through these and see a couple of others?

Q. Yes, certainly. A. I think that is probably the wire.

Q. Your wires are produced, and that is the only one we have that

appears to be from you. You say to L. S. Clarke, "You should give this "Pete proposition your personal attention, make sure of your ground, "imperative have money wired here first thing Monday."

A. Yes.

Q. It was money to pay for the Pen Pete you were after, wasn't it?

A. No, for his general account.

Q. But it is the Pen Pete transaction you are talking about when you are wiring for money. A. Not definitely talking about the Pen Pete transaction. We are talking about his account and his position with us.

10 Q. The purchases of Pen Pete were the only thing that required you to ask him for money? A. It was undoubtedly the heavy buying of Pen Pete that put the account in the position it was in.

Q. And compelled you to ask him for money? A. It was his account that required us to ask for the payment of the money.

Q. It was the purchases of Pen Pete that required you to ask him for money? A. No, look at the account.

Q. I don't care what you do. I am asking what the fact was. A. As I recall it, naturally you would call for putting your account in shape. It does not make any difference whether it is Pen Pete or something else.

20 If it had been Noranda it would be the same thing.

Q. All I am asking is, it was the purchases of Pen Pete that was requiring you to ask Clarke for money? A. I don't know.

Q. What else was it? A. There may have been—

Q. Never mind what there may have been; what else was it? A. There probably are other purchases there.

Q. Mr. Gardner says that is what it was. A. We will have to look up the ledger. It would be the general account.

30 Q. Don't forget that you sent a wire, and it was a carefully worded wire after consulting with your partners, "You should give this Pete "proposition your personal attention, make sure of your ground, im- "perative have money wired here first thing Monday."

You were not talking about anything else in that wire that was so carefully worded except Pen Pete, were you? A. Undoubtedly the heavy buying in Pen Pete had put the account in the position it was in.

Q. And required you to wire for money? A. Undoubtedly.

Q. All right, thanks. You said you had no knowledge while dealing with Clarke of the names of any of the customers. Do you recollect having a conversation with Clarke in February—I think it was February 7th? A. What year?

40 Q. 1933—in which he discussed the name of Mrs. Chapput? A. He may have mentioned one. From day to day we had no records of any names whatever.

Q. Deal with Mrs. Chapput at the moment. He asked you to make delivery of Mrs. Chapput's shares? A. Yes.

Q. He first asked for delivery of Mrs. Chapput's shares, and then he said to go ahead and sell them, and you said you would wire the money

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through the Royal Bank the next day? A. Is this a conversation with me?

Q. Clarke had with you? A. I don't remember that at all. I remember the thing coming up, but my idea was he had spoken to Mr. Gardner about it.

Q. Mr. Gardner says he spoke to you. We would like to know the truth of this conversation about Mrs. Chapput. A. I don't remember it distinctly enough to recall it. I was under the impression it was Mr. Gardner he spoke to.

Q. What do you remember about it? A. I knew very little about 10 it. That was in Mr. Gardner's department, the book-keeping department; and all I knew was, I had a recollection that there was some conversation about this lady regarding some stock. I couldn't give you the detail of it.

Q. Did Gardner tell you about the conversation? A. Well, I heard it in the office there. I knew there had been something on.

Q. Mr. Gardner yesterday said you told him about it? A. It does not make any difference really. It was told to either one of us, and there was a conversation, we admit that—it came to our attention.

Q. And you were going to sell the shares and forward the money 20 through the Royal Bank? A. I couldn't give you the detail of that, because I don't know that part of it. All I recall is, there was some conversation. I recall it was some Wright Hargreaves shares.

Q. You don't remember anything about the conversation. If it was with you, you don't remember any of the details of it? A. No.

Q. Well, you cannot help us much on it.

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EXAMINED BY MR. PORTER:

Q. Mr. Brooks, what is your occupation? A. I am a statistician with F. O'Hearn & Co. 30

Q. Did you have that position in September, 1932? A. I have held that position since I have been with that firm.

Q. How long has that been? A. About eight years.

Q. And as a statistician roughly what are your duties? A. My duties are to keep the branch offices, certain customers, our correspondent offices and so on, supplied with as much up-to-date information as possible.

Q. Information about what? A. Securities, bonds, mining stocks, industrial stocks, all classes of securities that we deal in in the business.

Q. And as to L. S. Clarke, did you have any dealings with him in 40 your capacity as statistician? A. When L. S. Clarke first came on our

books as a client I quite realized then that they would need quite a bit of help from my department. They were more or less new at the game. They had no files. They were not able to contact with general conditions as well as I was; and consequently, I figured that I would have to do as much for them as I could in the way of information and helping them along with their business.

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Q. And over a period did you have much dealings with them? A. Oh, repeatedly, both Mr. Bayne and Mr. Clarke would call me up from North Bay or Sudbury, as the case might be, concerning my attitude on a certain security, or certain commodity. I usually supplied them with my opinion or whatever information they desired, providing of course I could find out what was necessary.

Q. Do you remember in the month of September, 1932, having any interviews with Mr. Clarke with reference to Peninsular Petroleum stock? A. That was prior to the very heavy buying?

Q. That was prior to the heavy buying of November 8th and 9th. During the month of September, prior to those two days did you have any conversations with Mr. Clarke about Peninsular Petroleum stock? A. I had noticed in the Clarke account, and being in and out of the wire room considerably, that there was buying on the Clarke wires of Peninsular Petroleum. Naturally I wanted to know why the buying was coming in, and I endeavoured at the time to find out what was going on in that particular issue.

Q. Did you have some interviews with Clarke about it? A. On two particular occasions that I remember prior to the very heavy buying. I spent an afternoon—two afternoons—with Mr. Clarke in the hotel. At that time I was still looking for information, and still very very sceptical about the stock.

Q. You say you were looking for information. What I want particularly is, what was the conversation with Clarke about this stock? A. I may be a little ahead. I can see what you are asking me now. Clarke would come into the office very often, and on account of my having contacted him considerably, he would usually speak to me. Very often he would speak to me when he would not speak to a partner. I was always asking him for this information about Peninsular Petroleum, and he did tell me that there was a short interest in the stock, and repeatedly would come in and ask me what was the undelivered balance of Peninsular Petroleum owing by our firm to the Clarke firm against delivery. I would go down and look in the books and tell him, such and such an amount of stock owing to you as at tonight's close.

Q. You started out in your evidence by saying you noticed his heavy buying during the months of September and October. Did you ever discuss that with him in any way? A. I discussed it with him on a great many occasions. The matter of directorate and so on was one thing that bothered me a little.

Q. I am not asking you now about what you discussed with him

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about the company itself. You did say you noticed some heavy buying in Peninsular Petroleum coming through the Clarke account? A. Yes.

Q. As the result of noticing that, did you have any conversation with Clarke about that? A. Yes, I did.

Q. After noticing that heavy buying what did you say to Clarke? A. I said that I thought he was making a mistake.

Q. With reference to what? A. With reference to the calibre of the stock, and the fact that there was in my opinion no short interest there.

Q. In those conversations you told him he was making a mistake, 10
in what way did you tell him he was making a mistake? That is, by doing what, was he making a mistake? A. By buying stock as heavily as he bought it. In other words, what was bothering me at that time was that I thought he was getting too much of one kind of security on his books, and I didn't like that particular security.

Q. You have said that on various occasions he asked you to check up and see what stock was coming to him on the books, and so on? A. Yes.

Q. Did you inform him? A. I informed him of how much would be owing each evening he would ask me. That might be twice a week 20
or once a week, depending on how often Mr. Clarke was in the office. Usually that point came up and we went back and looked at the books.

Q. You say once a week or twice a week; over what period would those visits of that frequency take place? A. I would say over two or three months possibly.

Q. Would they be occasions when Mr. Clarke came to your office? A. He came into our office.

Q. You then mentioned some conversations outside of the office at the King Edward Hotel. A. I was with him in the hotel on three occasions I can remember. 30

Q. That was before the heavy purchases? A. Before and after.

Q. Can you tell me now about any conversations you had before November 8th and 9th when the big purchases took place? A. The two conversations that stand out mainly in my mind are once when I had dinner with him, and again when he had just finished his lunch. Both occasions I spent practically the whole afternoon with him. I was trying to throw him off the stock. I didn't like it, and he liked it. He was trying to throw me on, and I was trying to throw him off, and we were stalemated, that is about what it amounted to at that time. I had an idea Mr. Clarke figured I was probably a little young for my position and possibly not in a capacity to tell him what to do about his own business. That was my reaction to it when I got back to the office. 40

Q. Then did he give you any particular information about this stock? A. Well, he liked it very much.

Q. Did he tell you anything about who was behind it? A. I asked him that. There was one particular name mentioned. There was a Mr.

Lyons of Sault Ste. Marie, who has been on several occasions identified with stocks of similar calibre—that is, what I mean by similar character, stocks of the oil group, a group which I never liked.

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Q. Did he tell you about any other groups of people who were interested in it? A. I was given to understand by Mr. Clarke that the A. & P. Stores, the executives, were behind this movement in the stock, and I was under that impression for quite a while, that it was a New York movement, that it was a movement that was to a great extent based on sponsorship in New York and locally, and that these A. & P. executives
10 were behind it. At that time I figured that the A. & P. was the Atlantic and Pacific Stores.

Q. When was that, that you found out from Clarke that certain people called the A. & P. directors were in it? A. That was in one of the two meetings I had with Mr. Clarke in the hotel.

Q. Can you tell us the date at all? Was it late in September? A. I couldn't place the date. It was prior to the heavy buying.

Q. Do you recall whether it was fairly close to the heavy buying, or was this early? A. It was pretty close to the heavy buying.

Q. You say later you found out it was not the A. & P. Stores people;
20 it was some other company. Did you find that out after the heavy buying? A. No, I found that out before the heavy buying.

Q. So this conversation in which Clarke first mentioned the A. & P. people must have been some time prior— A. Prior to the heavy buying.

Q. I think you told us you found out later it was not the A. & P. Stores people; it was somebody else? A. Yes.

Q. And you found that out some time after you had first heard about the A. & P. people? A. Yes.

Q. Have you any way of recollecting just about how long that was?
30 A. No, I wouldn't recollect that.

Q. He mentioned a Mr. Lyons. Do you know who Mr. Lyons is, what his position is? A. I don't know what his position is. He was known to me as a man who was interested in various cheaper-priced oil securities.

Q. Did you know at that time what he did, what his occupation was? A. As a matter of fact, I understood—my impression of Mr. Clarke's conversation was that it was a pool, that there was a pool operating, and that Mr. Lyons was one of them.

Q. I am asking you now what you knew about it, when he told you
40 about Mr. Lyons? A. He didn't tell me anything about Mr. Lyons.

Q. What were you told by Clarke about any pool that was operating? A. I understood there was a pool operating.

HIS LORDSHIP: Q. What you were told, not what you understood? A. Mr. Clarke told me there was a pool operating in the stock, composed of himself and friends, and so on.

MR. PORTER: Q. Did he tell you anything about how it was

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operating? A. He didn't tell me any of the methods of operation, no.

Q. Did he ever tell you about whether he himself personally was interested in this stock? A. No, he didn't tell me that personally, anything about his personal account.

Q. As to whether he was interested in the pool? A. I was—Mr. Clarke told me that he was working with these people. I don't know whether that would refer to the fact—he might or might not be in the pool. I would not know from his personal account standpoint.

Q. After the purchases of November 8th and 9th did you have any interview with Mr. Clarke then about Peninsular Petroleum? A. After that heavy buying occurred, and I had seen the market situation in the issue, and sized the general thing up from every angle that I had at my disposal, I went over to Mr. Clarke in the hotel one day and told him that he was on dangerous ground in my opinion, and that he should take steps to rectify any mistakes that he had made as soon as possible. 10

Q. What did he say to that? A. He said he knew what he was doing.

Q. Did he tell you anything at all about the situation besides saying he knew what he was doing? A. He told me he was making arrangements whereby the whole matter would be cleared up satisfactorily, which would infer the payment for the stock which had been bought and so on. 20

Q. In those discussions was there any mention of Mr. Gardner's position with reference to the transaction? A. No. Mr. Gardner did not enter into any of my discussions.

Q. In your discussions with Clarke did you ever mention that? A. No.

CROSS-EXAMINED BY MR. McRUER:

Q. Mr. Brooks, you said you were a statistician, and it was part of your duties to keep branch offices and correspondent offices supplied with information as much as possible? A. That is right. 30

Q. And when L. S. Clarke opened up the offices at North Bay and Sudbury you thought that he should have some special attention from you, on account of not having carried on business before? A. That is right.

Q. And then you would give him special attention in the way of giving his offices information from your department? A. I went out of my way to do that for him.

Q. And his offices were offices that you would term correspondent offices? A. That is right.

Q. And the purpose of supplying this information to Mr. Clarke would be for posting up in his offices? A. That is right. 40

Q. For the information of customers who might deal through those offices? A. That is right.

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Q. And to encourage trading through the Clarke offices at Sudbury and North Bay? A. That is right.

Q. And that is what you were there for? A. Yes sir.

Q. Part of your duties? A. Yes.

Q. And he was trading with customers, and expected to trade with customers on margin? A. Yes sir, as I understood it.

Q. And the information you were sending out would be to stimulate trading of that nature? A. Yes.

10 Q. I show you a letter, just as a sample of what you did along that line? A. That is right.

Q. That is one of your letters, isn't it, to the Sudbury office, dated November 16, 1931,—

"I am enclosing herewith a copy of a chart prepared by Crandall, Pierce & Company, of Chicago. This chart shows a comparison of market value with book value and current assets of leading corporations (U. S. A.). I feel that this is a very excellent chart for you to have either on fyle or posted on your Bulletin Board as it supplies a quick and ready record of vital information."

A. That is correct.

20 EXHIBIT 52—Letter, Nov. 16, 1931, E. W. Brooks to L. S. Clarke, Sudbury office.

Q. You were very sceptical about Peninsular Petroleum stock? A. I was, yes.

Q. And I suppose you discussed it with the members of your firm at different times, and expressed how sceptical you were about it to them? A. That would be natural.

Q. That would be to Mr. Gardner particularly. He was looking after your department, wasn't he? A. Mr. Gardner and I don't work very much together. I am on the sales end.

30 Q. Who was the man? A. Mr. Richardson or Mr. Marks.

Q. I have no doubt it was a matter of general discussion, the fact that the statistician was a bit sceptical about Peninsular Petroleum stock?

A. That is true.

Q. And you rather felt it was an unwise thing for Clarke to handle any large amount of this stock? A. That is right.

Q. And you made up your mind to that some long time before the big buying, as you term it, on November 8th and 9th? A. Yes, that is right.

40 Q. That it was an unwise thing for him to handle any large amount of that stock. And then you termed the buying on the 8th and 9th of November as big buying. You regarded that as very heavy purchasing of Peninsular Petroleum stock? A. Yes.

Q. Extraordinarily heavy purchasing of that stock, at any rate? A. Yes.

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Q. And I suppose there was no movement of that stock any other place but through the Clarke office, to speak of? A. When you get heavy buying coming from any one concentrated source, it is an almost invariable rule that it will draw other buying in with it.

Q. I am just talking about Pen Pete. Do you remember whether there was any dealing to speak of in it from any other place? A. Any heavy buying similar to Clarke's?

Q. Yes. A. No, not as heavy.

Q. Nothing of that— A. No.

Q. Nothing to approach it, compared with the buying that took 10 place on the 8th and 9th? A. Absolutely.

Q. And you had had some conversation with Mr. Clarke about it, and he had mentioned the name of Mr. Lyons? A. That is right.

Q. Did you learn that Mr. Lyons was a son of the Hon. Mr. Lyons from Sault Ste. Marie? A. I didn't know whether he was Mr. Lyons the member or Mr. Lyons the son.

Q. Either one? A. Yes.

Q. Mr. Clarke apparently had some confidence in what Mr. Lyons had said about it? A. That is so.

Q. And it was long before the heavy buying of the 8th and 9th that 20 you had realized that you had misunderstood, at any rate, your conversation with Mr. Clarke when he referred to A. & P., as being the A. & P. Stores? A. Yes, it would be.

Q. So that you had known that A. & P. stood for Andean Petroleum? A. I finally found that out.

Q. But that was before the heavy buying of the 8th and 9th? A. Yes.

Q. Had you learned that the A. & P. Co. were buying a right-of-way over the Peninsular Petroleum, or were said to have been buying one, at any rate? A. I couldn't remember any particular conversation about 30 right-of-way. The thing that struck me was that if A. & P. directors were with their money back of them, back of any kind of a move, that the buying that would come from such a source would be enough to lift the stock into higher levels.

Q. You said you understood that the A. & P. referred to was Atlantic & Pacific Stores, but you do not suggest that Clarke told you it was? A. No, he said the A. & P.

Q. He just referred to it as A. & P. A. That is right.

Q. From your conversations afterwards you gathered from Clarke that he was trying to work the whole thing out so you would be paid up? 40 A. That is right. That is my understanding.

Q. And you folks were trying to co-operate with him to that end? A. That is correct.

Q. The thing had got in a mess, and you were working together to try to work it out? A. Working together to try and work it out?

Q. You were both co-operating together to that end? A. I don't understand your question.

Q. Trying to get it paid up? A. We were endeavouring to get the money for the stock, and Clarke as I understood it was endeavouring to get it paid for.

Q. And it was to get the money for the Peninsular Petroleum stock—that is what you were working for? A. Yes.

Q. And Clarke was trying to get it for you? A. Yes.

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JOSEPH FREDERICK WOODS, Sworn.

10 EXAMINED BY MR. PORTER:

Q. Mr. Woods, what is your occupation? A. Manager for F. O'Hearn & Co.

Q. Whereabouts? A. Sudbury.

Q. That is, you are Manager of the office of F. O'Hearn & Co. which is now operating in Sudbury? A. Yes.

Q. How long have you held that position? A. Since April 1st, 1933.

Q. Prior to that time what was your occupation? A. I was 30 years with the Spanish Pulp Co.

20 HIS LORDSHIP: Q. You do not want this man's whole history?

MR. PORTER: No.

Q. Before April, 1933, as a matter of fact, you were in the employ of L. S. Clarke? A. Yes, I was two years with L. S. Clarke.

Q. As Manager of his office in Sudbury? A. Yes.

Q. It was a branch office, was it, of L. S. Clarke? A. L. S. Clarke had two offices; one in North Bay and one in Sudbury.

HIS LORDSHIP: Q. Did you say you were manager of the Sudbury branch? A. Yes, sir.

30 MR. PORTER: Q. As a matter of fact, in addition to your position as manager of that office you had other business interests, did you not? A. Yes.

HIS LORDSHIP: Q. You are speaking of the 1st of April, 1933? A. Prior to the 1st of April, 1933, I was two years with Clarke as manager of his office at Sudbury.

MR. PORTER: Q. It was not as if the income you were getting from Clarke was the only source of your income. I am not asking what your position was, but you were a man of some financial position? A. Yes.

40 Q. You had lived in Sudbury for a great many years? A. 31 years.

Q. You were well known there? A. Yes.

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Q. And did you ever have an interview with Mr. L. J. Bayne, manager of the North Bay office of L. S. Clarke, and a Mr. Barkell? A. Yes.

Q. When did that take place? A. I would not be sure of the date. It was in the fall of 1932, I think it was.

Q. You know, do you not, about the heavy purchases of Peninsular Petroleum stock that took place on Nov. 8 and 9 in the North Bay office of L. S. Clarke? A. Yes.

Q. Perhaps knowing what you do about that, you will be able to say whether your interview with Bayne and Barkell was prior to the dates of those heavy purchases of Peninsular Petroleum stock? A. Yes, it was. 10

Q. It was prior to that? A. Prior to it.

Q. And what was the conversation about? A. Mr. Bayne and Mr. Barkell came up from North Bay in a car, and asked me to meet them. Mr. Bayne and Mr. Barkell asked me to meet them at the office in the evening. I think it was about 10 o'clock when they came in the evening.

Q. And what was the conversation about? A. Regarding Peninsular Petroleum.

Q. How did the subject arise? A. After they were in the office a little while they approached me regarding Peninsular Petroleum, and advised me that there was a pool on. 20

Q. Was there anything further they asked for or wanted? A. Well, they explained just what was going on regarding it, showed me how the pool were working, and wanted to know if I would be interested.

Q. What did you do about it? A. I told them I would not be interested in it in any way.

Q. Did you go into the matter in some detail? A. Not very much.

Q. Had you ever met Barkell before? A. No.

Q. You knew Bayne of course? A. Yes. I had met Bayne.

Q. How long had you known Bayne? A. Well, I don't think I was ever acquainted with him when he was in Sudbury before, but I knew he was working at Gamble Robinson's, and I knew him to see him. I think the first I ever met Bayne was when he came up to the office in 1931. 30

Q. Then after this conversation with Bayne and Barkell did you have an interview with Clarke with respect to the business, or some communication by telephone or otherwise? A. Oh, I had several interviews with Mr. Clarke.

Q. Did you have an interview with Mr. Clarke about Barkell; or did you ever speak to Clarke about Barkell? A. I think I told him that I didn't care much for the appearance of Barkell.

Q. That was after Barkell had come to your office? A. Yes. 40

Q. Did you tell Clarke he had been to your office? A. I wouldn't say. I may have told him. I think may be I did, but I wouldn't be sure.

Q. You do remember saying you didn't think much of the appearance of Barkell? A. Yes.

Q. That was some time before the heavy purchases of November 8th and 9th? A. Yes.

Q. Could you tell me this, insofar as your business in Sudbury for L. S. Clarke was concerned, did Clarke take much of an active interest in the way matters went there from day to day in the office? A. Well, we sent our reports in to him regularly. Mr. Clarke was not in Sudbury very often.

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Q. He lived in North Bay? A. He lived in North Bay. And the reports were sent in from Sudbury office to him.

Q. Did you ever have any discussion with him about this question of supervising the business, anything of that kind? A. Yes.

10 Q. What did you say? A. We were in Toronto one evening and sitting in the King Edward Hotel.

Q. About when would this be? A. I imagine it was in the fall of 1932.

Q. Before the heavy purchases? A. Yes, I think it was.

Q. Before November 8th and 9th? A. Yes, I think it was before that date. We were talking regarding the general business at Sudbury, and I think both at North Bay and Sudbury. I think Mr. Clarke mentioned it to me, that he might like me to oversee both offices, Sudbury and North Bay.

20 Q. And then what did you say? A. I told him that I would not like to take on that job unless I was in charge of it, and have the say who was running it.

Q. Was there any mention at that time of Bayne's position at all? A. I don't know. I think it was brought up regarding Mr. Bayne. Of course, my idea at that time—I didn't like the looks of this man Barkell. That was one thing I didn't like.

30 Q. What did you say to Clarke about it? A. I told Mr. Clarke if I took charge of it there might be some changes in that office, not that I knew anything about Mr. Bayne in any way. I didn't know a thing about him because I had never been in the office. I just told him that, there might be some changes.

Q. How did the conversation end? A. Mr. Clarke said he might call me up after he got back to North Bay.

Q. Did he ever call you up? A. No.

CROSS-EXAMINED BY MR. McRUER:

Q. Mr. Woods, you are now in charge of a branch office operated by O'Hearn & Co. in Sudbury? A. Yes.

Q. They actually took over the office that was operated by L. S. Clarke there? A. The same office.

40 Q. The same office. You are just in the same place as you were when you were operating an office for L. S. Clarke? A. Yes.

Q. But you are doing it for O'Hearn & Co? A. Yes.

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Q. And you are dealing with customers in Sudbury in very much the same way as you dealt with customers when you operated for L. S. Clarke? A. Yes.

Q. And when customers dealt with you in Sudbury at the time you were with L. S. Clarke as local manager, they dealt with you on margin? A. Yes.

Q. And you would put through the purchases through F. O'Hearn & Co. directly under an account that was run for the Sudbury office? A. Yes.

Q. You had nothing to do with North Bay transactions at all? A. 10
Nothing whatever.

Q. There is no doubt about it that O'Hearn & Co. knew you were dealing with customers in Sudbury in marginal transactions? A. Yes.

Q. That was what you were there for? A. Yes.

Q. And a very large portion of your business in Sudbury was marginal business? A. Yes.

Q. You would receive the customers' margins and pass them along to F. O'Hearn & Co. with an order to buy the customers' stock? A. Yes.

Q. And when collateral was deposited by customers to secure the marginal transactions, that was passed along to F. O'Hearn & Co? A. 20
Not right direct, Mr. McRuer.

Q. It would be sent on. You probably would not remit every day? A. No.

Q. But you would send it along within a day or two? A. Yes.

Q. And there is no doubt that F. O'Hearn & Co. would know that the collateral that was coming in, was coming in to secure margins on customers' accounts?

MR. PORTER: This witness does not know what F. O'Hearn & Co. would know.

MR. McRUER: Q. From your conversation with them there was 30
no doubt about it that they knew that? A. That they knew it was from clients?

Q. Yes. A. Well, I suppose they would.

HIS LORDSHIP: Q. Are you speaking of since you became representative of O'Hearn & Co., or the time you were representing Clarke? A. I think it was the time I was representing Clarke.

MR. McRUER: Q. Yes, I am dealing with the time you were representing Clarke entirely; and that was what you were referring to when you were answering my questions? A. Yes.

Q. And there would be times when you would have stock transferred 40
to customers, and you would send the customer's name down to O'Hearn & Co? A. Yes.

Q. And they would put through the transfer to the customer? A. Yes.

Q. Did any members of the firm come to visit you at times up there? A. I don't think so.

Q. You went to visit them in Toronto at different times? A. Yes.

Q. And you had discussions with them about business in Sudbury from time to time? A. Yes.

Q. Different members of the firm? A. Yes.

Q. With Gardner and Richardson? A. And Marks and Brooks.

Q. And from your discussions with them could you say, Mr. Brooks, that there was any doubt they knew you were trading on margin with customers in Sudbury? A. I don't think there would be any doubt.

Q. They do not say that there was. A. No.

10 Q. And from time to time accounts would be actually transferred from the Sudbury office to O'Hearn & Co. if a customer was moving from Sudbury and going to Toronto? A. Yes.

Q. The account would be transferred? A. Yes.

Q. And that happened on different occasions? A. I don't think there were very many but there were some.

Q. There were some, at any rate. And did you not get instructions as to marginal requirements from O'Hearn? The amount of margin you were to get from customers? A. Yes.

20 Q. And the marginal requirements during the time you were managing the office there were what? A. Well, there is a difference on different stocks.

Q. But whatever they were, you got advice from O'Hearn & Co? A. Yes. I would say I did. I don't know whether we got it in all cases, but we got them, in a good many cases.

Q. And then when the Sudbury account with O'Hearn & Co. would get under-margined they called on Sudbury? A. Yes.

Q. You had nothing to do with North Bay in regard to that? A. No.

30 Q. And you would get the margin in from the various customers and remit it to O'Hearn & Co. in one lump sum. That is the way it was carried out? A. Yes. We always had some money in the bank there.

Q. You would have some capital there, carrying on? A. Yes.

Q. The process would be, if you advanced it for the moment you would get reimbursed by calling on the customers? A. Yes.

Q. There was some stock, of course, that was cash stock. That was not dealt with on margin? A. Yes.

Q. And if you were buying cash stock, of course, that was a cash proposition? A. It might not be cash just when they ordered the stock, but when the stock came in it would be paid for.

40 Q. In due course you would expect delivery of the stock, and the payment of cash in a very short time? A. Yes.

Q. Then, Mr. Woods, coming along to the time following these heavy purchases on the 8th and 9th of November, did you go to Toronto? A. I think I was down there but not for some little time after that.

Q. Had you tried to get delivery of stock from O'Hearn & Co. for Sudbury customers? A. Before I was down there?

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Q. Yes. A. I don't think so.

Q. Did there come a time when you tried? A. Not that I hadn't received it. I got everything I asked for.

Q. For a period you got everything you asked for? A. Yes.

Q. When you wanted delivery for customers you got it for a period after this heavy buying? A. Yes.

Q. Then a time came when you were refused delivery, I take it? A. There was only two stocks I was refused delivery of, but which they came through with.

Q. Afterwards they came through with them? A. Yes. Mr. 10
Clarke was down there. I might tell you in regard to the one stock, it was a stock that was coming to the bank for cash, and I was in Toronto at the time, and Mr. Clarke was there, and I think we went up to Mr. O'Hearn's office that morning, and they didn't want to give us the stock out at first, but they finally said they would send it through that day.

Q. Did you make inquiry about the Sudbury account, as to whether it was properly margined? A. Yes.

Q. And what was the information you got? A. It was well margined, quite a surplus there. I think Mr. Gardner told me around \$10,- 20
000 to \$11,000. in our Sudbury account, over-margined.

Q. Around what time would that be, Mr. Woods? A. I wouldn't be sure whether it was in December or January. It might have been near the latter part of December, or early part of January.

Q. And that was an account that was carried for customers in Sudbury? A. Yes.

Q. And then, Mr. Woods, part of your Sudbury account was sold out? A. Yes.

Q. I think the first sale was on the 7th of February. Is that right? A. Seventh of February.

Q. Did you know anything about it till you got a notice it had been 30
sold out? A. No.

Q. No communication with you at all? A. No.

Q. And the stocks that were sold out were stocks that were carried on margin for customers in Sudbury? A. Yes.

Q. And then after you got notice that part of your stocks were sold out, did you get in touch with O'Hearn & Co? A. I went down that same night to Toronto.

Q. And did you have any discussion with them? A. Yes. You see our wire closed off that day, and I asked them if they could not keep the wire open to let my customers anyway see the board as it was run- 40
ning, and they agreed to do it. Then I further discussed with them regarding the stocks that were sold. They had sent me a list of the stocks that were sold, but I had no way of telling who those stocks belonged to, and I asked them if there was any way that I could say whose stocks was sold, and they said that there was not; they didn't know whose stocks they were.

Q. And then did you make any inquiry at that time as to the condition of the marginal account in Sudbury? A. I don't know whether I made an inquiry at that time or not.

Q. It does not make much difference. Mr. Gardner has told us that with the exception of charging Pen Pete it was all right. A. The Sudbury account was in good shape all the time, that is, as far as margin in Mr. O'Hearn's office. I think Mr. Gardner agreed with that, that it was always in shape.

10 Q. Then, Mr. Woods, you had some discussion with them, did you not, about O'Hearn & Co. putting up \$10,000. to straighten the matter out, to assist in getting it straightened out? A. Yes, that was quite a bit later on.

Q. With whom was that discussion? A. With Mr. Marks, Mr. Richardson and Mr. Gardner.

Q. When did that take place? A. I don't remember the date.

Q. Not exactly the date, but would it be in January or February? A. It would be in February.

Q. It was before Mr. Clarke made the assignment? A. A little after the first sale.

20 Q. And what was said about that matter? A. Well, I think my first discussion was with Mr. Marks, and the reason I had the discussion—may be I better tell you that first. The reason we had started into this was we met Mr. Slaght and Dan Lang, and Mr. Armstrong from North Bay and myself—

Q. Who was Mr. Armstrong? A. A hardware man.

30 Q. A customer of North Bay office? A. No. He was a man that had lived here in North Bay, and had moved to Toronto. We were talking over what we thought might be best to do, and after discussion they asked me if I could do anything with the customers up here, both at Sudbury and North Bay in regard—

Q. Who asked you that? Mr. Marks? A. No, I think it was—it was not in Mr. Marks' office; it was in Slaght's office.

Q. I don't want the conversation that took place outside of Marks' office. I want the conversation that took place in Mr. Marks' office. A. Mr. Marks was there first, and I told him what the proposition was.

Q. What did you tell him? A. That we could probably arrange to get 10% from our customers up here. We were going to approach him on that. If we could get satisfactory arrangements through them—

40 HIS LORDSHIP: Q. 10% of what? A. 10% of the clients' accounts. And that they would take a reduction of 10% to try and get this settled up. And that would run to what we figured with the accounts in North Bay and Sudbury, to about \$20,000.

MR. McRUER: Q. What did Marks say about his taking a share? A. The amount was about \$40,000 at that time.

Q. That was the balance of this Pen Pete? A. Yes, the balance of the Pen Pete stock. And I told him that Mr. Armstrong had suggested

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up there that he thought ten thousand could be raised by Mr. Clarke here in North Bay. And that if they would agree to assist us to the amount of \$10,000, that we thought we might get this cleaned off without any bankruptcy.

Q. Did he agree to that? A. No. Mr. Marks did not agree to it at the time. Mr. Marks talked with me on it for a little while, and he said, "Well, if we go into this we figure Mr. Clarke should be responsible to us for it." I said, "I don't know anything about that." I said, "I don't know anything about that." I said, "It is only a matter—we are trying to get some place." Then I think Mr. Gardner came in, and at the end Mr. Gardner went out, and Mr. Marks and Mr. Richardson and I were still there, and I talked it over with Mr. Richardson whether we could go ahead on this or not. Pardon me, but prior to this Mr. Marks had said that if he did go ahead—he thought may be there was more than that deficit here in North Bay—he said if he did go ahead he would have to have auditors to audit the books before he would be agreeable to do any part. At the finish Mr. Richardson said providing we could go ahead and do this, Mr. Clarke could get the money up here, we could get the 20%, they would do their part. 10

Q. I understand you were not able to do it? A. No. 20

Q. The customers could not do it? A. The customers were not right, and we could not raise the other money here.

Q. You told my friend you had some conversation with Clarke, and told him you did not like the looks of Barkell. Could you tell us when that was? A. I don't know. I think it was the time we were in Toronto.

Q. When would that be? In September or October? A. Yes, along there somewhere.

Q. Mr. Clarke has told us that at certain stages before the heavy buying took place he had told Bayne he was not to do any more business with Barkell. I wondered if you knew that, or did you hear that later on, or can you place the time? I was wondering if you could help me at all as to correlating those two matters? A. I could not, because I don't know just the time I was in Toronto. I was down there a couple of times and I could not say. 30

Q. You said you made some reports to Mr. Clarke. What was the nature of the reports? A. You mean the reports from Sudbury office?

Q. Yes. A. It would be a report of our business.

Q. Do you mean each transaction or the general transactions? A. It would be the general amount of the commissions collected. 40

Q. And the expense of carrying the business on? A. Yes. We made that every month.

Q. It was not a monthly report of purchases and sales, for whom they were, or anything like that? A. Oh, no.

Q. Clarke had no personal account in the Sudbury office? A. Yes, he had.

Q. A personal account? A. Yes.

Q. Did it amount to anything very much? A. No, just one order he gave me. He paid cash for it.

Q. Then Clarke was no part of the marginal transactions from Sudbury? A. No, nothing at all.

RE-EXAMINED BY MR. PORTER:

Q. You were asked something about passing on money to F. O'Hearn & Co. with the orders to buy from time to time. I think you said that perhaps they would not all be passed on immediately the money
10 came in? A. No.

Q. As a matter of fact, when an order came in for the purchase of stock, whether it was cash or margin stock, you would put the order through to F. O'Hearn & Co? A. Yes.

Q. And you would get the money from the client in due course? A. Yes.

Q. And then eventually did you send the money down to F. O'Hearn & Co. earmarked that it was for some particular transaction? A. No. It was put into the bank, and probably every three or four days a cheque was sent down.

20 Q. You would accumulate money coming in from clients in your own bank account? A. Yes.

Q. And every three or four days you would send down something to apply on the general balance of your account? A. Yes.

Q. You also said that you sometimes sent customers' names down for the transfer of their stock? A. Yes.

Q. Did you ever send customers' names down, indicating to F. O'Hearn & Co. that any particular transaction was to be put through for any particular customer? A. Their name would just be sent down to have the stock registered in their name.

30 Q. When would that be sent down? After the order was put in?

HIS LORDSHIP: Q. When the stock was bought on margin would the name go down? A. No.

MR. PORTER: Q. The only names that would be sent down would be when a customer came in and wanted stock delivered to him in a certificate in his own name, and you would send down to O'Hearn & Co. and instruct them to do that. Is that right? A. Yes.

Q. Would that name you would send down to them be identified in any way with any particular order? A. No.

40 Q. So the orders would be going down for different blocks of stock from day to day to F. O'Hearn on L. S. Clark's account? A. Yes.

Q. And occasionally when you wanted stock delivered you would send the name of a customer to whom the share certificate was to be delivered? A. Yes. It might happen in the margin account too that he wanted his stock out, and it would be sent down just the same.

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Q. I suppose very often when several orders came in from clients for any one stock, you would perhaps on some occasions send down an order to O'Hearn & Co. for the total amount of stock that the several clients would order? Do you see what I mean? A. No, I don't get just what you mean.

Q. Suppose in any one morning you received orders from five or six clients for some stock that each of them wanted, the same stock. Perhaps the total of those orders would amount to 10,000 shares of a particular stock—five or six clients altogether order about 10,000 shares of the stock from you. Do you see what I mean? A. Yes. 10

Q. And when you would send the order down to F. O'Hearn & Co., would it sometimes be just an order for 10,000 shares of that stock? A. No, I think it goes through—I am not just sure of that—I think it goes through in separate amounts. If there is ten men order a thousand shares of Barry Hollinger say, it would go in, a thousand, a thousand and a thousand. I don't think it goes in quantity—I am not so sure about that.

Q. I do not say that it does every time. At some times when several orders came in pretty well at the same moment, did you ever send down a blanket order to cover perhaps several clients' instructions? A. 20 I don't think so.

Q. You don't think so? A. I don't think so.

HIS LORDSHIP: That is his opinion.

MR. McRUER: The books show how it was done, if my friend wants to go into them. They are all done separately.

MR. PORTER: Q. You also mentioned that you were advised by O'Hearn & Company at different times as to their margin requirements? A. For the Sudbury office.

Q. Was that advice as to what their account would require with you? A. With Sudbury office. 30

Q. That is, whether— A. It would be \$1800. may be, or \$2,000, whatever amount they asked.

Q. Did they ever give you any advice in any way, or interfere in any way with the amount of margin that you would collect from your own clients in Sudbury? A. No.

Q. That was left entirely to you, to do what you liked? A. They would tell us what stock the margin was on. It might be on Wright Hargreaves. It might be \$3. There is some of those stocks, they are on margin maybe at this time of the year, and a month from now you can't take them on margin. 40

Q. They would give you information from time to time as to what their margin requirements were, according to their practice? A. Yes.

MR. McRUER: I do not think my friend should put statements in the witness' mouth that way. He has told us what he did.

HIS LORDSHIP: He is only putting in his own words what the witness is trying to say. It is just a question of what took place. I do

not suppose there is any dispute about all this.

MR. PORTER: It is a question of getting clear what the practice was.

MR. McRUER: I don't want you to put something in the witness' mouth that he does not want to say, especially your own witness.

HIS LORDSHIP: I do not think Mr. Porter is doing that. The witness is trying to express it, and I think Mr. Porter is trying to help him.

MR. PORTER: Q. As far as your relationship with your customers was concerned, and the amount of margin that you required from them, or demanded that they pay, did F. O'Hearn & Co. ever make any inquiries or interfere in any way with the carrying on of your own business in that respect? A. No.

Q. Then you mentioned to my friend the discussions with members of O'Hearn & Co. about raising money from clients, and from Clarke, and from O'Hearn & Co. to straighten this matter out? A. Yes.

Q. In those negotiations were you acting for Clarke? A. No.

Q. Were you acting for anyone in particular? A. No. Mr. Clarke was in bed at the time, sick.

Q. What was your position? Were you just a free lance in the matter, or were you acting in anyone's interest in particular? A. No, just trying to figure a way to get straightened out.

Q. You have told us something about what Mr. Marks said, and Mr. Richardson said as to what they would do under certain circumstances. Mention was made of \$10,000, and you say that Mr. Richardson agreed that he would put up the \$10,000 if the other parties could contribute their share? A. I gave you I think just about the words Mr. Richardson said, that they would look after their end of it if we got the other through.

Q. Was there any discussion in this conversation as to whether F. O'Hearn & Co. would be repaid the \$10,000? A. Nothing only what Mr. Marks said, regarding Mr. Clarke should look after him. I said I couldn't say anything about that because I didn't know.

Q. Mr. Marks did say something about being repaid? A. Yes. He thought if they put this up, Mr. Clarke ought to be responsible to them. I think I even told him I thought Mr. Clarke wanted to pay all his debts if he could.

Q. Was any special means of repayment mentioned or discussed at the time? A. I don't think so.

Q. Did Clarke know that you were carrying on these negotiations? A. I couldn't say that he did. He was in bed and was not able to take up any business at that time.

HIS LORDSHIP: He said he did it on his own, trying to straighten things out.

MR. McRUER: May I ask one question in reference to the marginal requirements?

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HIS LORDSHIP: Yes.

BY MR. McRUER:

Q. O'Hearn & Co. told you what the marginal requirements were on particular stocks? A. Yes.

Q. And those were the marginal requirements you fixed for the customers in Sudbury? A. You don't always get the same margin. You might ask a man for three hundred margin, and he might put up three hundred and fifty.

Q. As a minimum requirement? A. That is the basis we went on.

Q. Sometimes people want to put up more? A. Yes.

10

MR. PORTER: There is just one other matter, my Lord, and that is, my friend in the opening of his case read some questions from the examination for discovery of Mr. Gardner. I said at that time I wanted certain other questions read with them in order to complete them.

MR. McRUER: I don't know. Mr. Gardner has been in the witness box. I could have cross-examined. I do not know of any right to read them now.

HIS LORDSHIP: Why did you not put them in at the time?

MR. PORTER: I suggested it, and my friend objected, said, "You can put them in when you come to your own case." I cannot ask Mr. Gardner as to what he said on his examination. All I want to show is that the questions my friend read—

HIS LORDSHIP: The practice I have followed, Mr. Porter, is that after a man has been in the witness box I do not allow questions on the examination for discovery to be put in. In this case I do not remember. You say you asked leave to put in certain questions to explain other questions put in by Mr. McRuer?

MR. PORTER: Yes, my Lord. The only reason for doing it is; we have had Gardner's story, and I submit there are certain questions on the examination which will show that he told the whole thing.

30

HIS LORDSHIP: I think I will take them, Mr. McRuer. Mr. Porter says he made that request at the time you were putting in the questions.

MR. McRUER: I have the evidence here that was taken down. I want him to show me where it is in the record that there was any such thing happened, because it puts me in a very difficult position when a man has been in the witness box and I might have cross-examined.

HIS LORDSHIP: Quite right! It should not be done unless the right was given at the time.

MR. PORTER: I do not know whether this appears in the evidence or not. I remember distinctly doing it.

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MR. McRUER: Starting at page 19 is the examination for discovery of Gardner.

MR. PORTER: I do not say it is here—I do not know—my recol-

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lection is I did say I wanted to put in some questions, and my friend said, "You will have your opportunity to do that when your own case comes along."

HIS LORDSHIP: That does not mean you would have the opportunity of putting in the questions and answers after Gardner had been in the box.

MR. PORTER: The only reason for doing it is this; that the questions my friend read did not give the complete account of Mr. Gardner's evidence.

10 HIS LORDSHIP: I cannot understand why you did not ask at the time, Mr. Porter, or insist on exercising your right at the time you asked for it.

MR. PORTER: It may be I was not persistent enough, and perhaps did not say it in loud enough voice.

MR. McRUER: I cannot see it in the record, my Lord.

HIS LORDSHIP: I think perhaps if Mr. Porter says he did that, I will accept his statement.

MR. PORTER: I can say this; I did not formally ask your Lordship. I merely said I wanted to add some questions.

20 HIS LORDSHIP: I think I will take them, Mr. McRuer. If you want to recall Mr. Gardner as a result of this, I will permit you to.

MR. PORTER: I will be willing to call him again if my friend wants me to.

HIS LORDSHIP: What are the questions?

MR. PORTER: "136. Q. Well did Bayne say anything to you "about expecting a quantity of orders in? A. No sir."

HIS LORDSHIP: Mr. Porter, I suggest you give me the numbers of the questions you propose to read, and read them afterwards.

MR. PORTER: 136, 137 and 187.

30 MR. McRUER: My Lord, this is not explaining anything I read. They are questions and answers on the examination for discovery when we are trying to find out his story. It does not give the defendant any right to read them in his own behalf. Gardner has given his evidence about all the conversation he had with Bayne, and to then put in questions that I asked on examination for discovery of that nature—we do not do that in examination for discovery here the way it is done in some other provinces where you are bound by your questions. I am trying to find out. Gardner says some things there, and there are some things he has testified to in the witness box. It is absurd to start and read them—

40 HIS LORDSHIP: What does 136 explain, Mr. Porter?

MR. PORTER: The way it was left my friend—

HIS LORDSHIP: What question does 136 explain?

MR. McRUER: Without putting it on the record, if your Lordship would take the examination and just see it, your Lordship would see what a difficult position it puts me in, to start reading questions of that sort.

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HIS LORDSHIP: You can just tell me.

MR. PORTER: In the preceding questions that were read—

HIS LORDSHIP: What question does 136 explain?

MR. McRUER: Your Lordship will see on page 26 of the evidence that is transcribed we got down to question 135.

MR. PORTER: There is a question here in which he gives his full account of this conversation, question 112, which is on page 25 of the evidence,—

“112. Q. And what was your conversation with him in reference to the drafting out? A. He wanted to know if I would send him some of our draft forms, that he wanted to send some drafts out and if I would send the draft forms up to him at North Bay he would fill in the names and return them to me and by this time we would have stock in from our clearing and be able to send the drafts out for him, get some money for him.”

136 goes on and asks him further questions about that conversation,—

“136. Q. Well did Bayne say anything to you about expecting a quantity of orders in?”

HIS LORDSHIP: The questions and answers were put in and then Gardner went in the box. You have a right to explain anything that you see fit, but after cross-examination I do not think—

MR. PORTER: Well, there is nothing really very much to explain. The thing I wanted to do was complete the record—

HIS LORDSHIP: I do not think this is the time to permit this. I am sorry you did not insist on your rights at that time. I think it might prejudice the plaintiff. I do not think it is fair at this stage after this man has been examined, cross-examined and re-examined. I do not think it would be helpful, because we have heard the whole story.

MR. PORTER: The only reason I wanted to do it was to show the whole of his evidence in reference to that one conversation was the same in both places; whereas, as it is, you have got part of it.

HIS LORDSHIP: I heard his story in the witness box.

MR. PORTER: That is about all it amounts to. That is all, my Lord, I have no further evidence.

HIS LORDSHIP: Reply?

MR. McRUER: No reply, my Lord.

HIS LORDSHIP: I would like to hear verbal argument, and I will give both of you the right to put in any additional memorandum after you have argued verbally, and give me any authorities in writing you want to do. This will not be the complete argument.

—Court adjourned at 12;35 p. m. until two p. m.

—On resuming at 2 p. m.

—Argument.

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—Judgment Reserved.

Certified,
H. O. TAYLOR,
Official Reporter, S. C. O.

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This is an action brought by J. A. Allen as trustee in bankruptcy of the estate of L. S. Clarke and L. S. Clarke as trustee against F. O'Hearn & Company claiming: (1) a declaration that the defendant and the said L. S. Clarke were partners, in connection with the operation of branch offices at North Bay, Sudbury and Toronto; (2) an accounting in connection with all transactions between the defendant, the said L. S. Clarke and the plaintiff J. A. Allen in connection with the brokerage business carried on by the defendant and the said L. S. Clarke in the said cities; (3) in the alternative a declaration that the defendant held the securities in question in trust for the clients and customers of L. S. Clarke and that it had no right to charge the trust account with the purchase price of three hundred thousand shares of Peninsular Petroleum stock, and for damages and for an accounting by the defendant of all securities and moneys received by the defendant company as trustee and for further appropriate relief.

The relevant facts may be stated as follows: L. S. Clarke, a resident of North Bay prior to 1931, carried on business there as a contractor. O'Hearn & Company as a partnership were doing a general brokerage business in Toronto and were members of the Standard Stock and Mining Exchange in Toronto. In 1931 they entered into negotiations with Clarke to open a brokerage office in North Bay and also one in Sudbury for the purpose of doing a general brokerage business in those places. Clarke, after some negotiations, agreed to and did carry on business as correspondent of F. O'Hearn & Company in these two cities and opened offices under these auspices with board rooms and the usual paraphernalia that is necessary in offices of this kind. He was not a member of any mining exchange, but placed his orders through O'Hearn & Company who would execute them on the appropriate exchange and paid him a share of the commission. The operations were chiefly mining but there were some orders given in connection with the purchase of grain. Members of the defendant firm visited the North Bay office from time to time and supplied both these branch offices with information and literature and sent wires and messages from time to time as to Mining and other Companies for the benefit of the customers and clients at North Bay and Sudbury.

Clarke put in charge of his North Bay brokerage office one L. S. Bayne who had had some previous connection with the brokerage firm of Stewart, McNair and Company, formerly operating as brokers in North Bay and Sudbury. The Sudbury office was managed by a man named Woods, and on the books of the O'Hearn Company the business coming from these two offices was kept separately.

Clarke did not give close attention to the operation of these brokerage offices in North Bay and Sudbury as he was interested in a lumbering business and the general work of a contractor, and relied to a large extent on his local managers Bayne and Wood to carry on the necessary operations. It is only necessary to add that from the correspondence filed and the conduct of the parties the members of the defendant firm were fully conversant with the situation, viz., that Clarke in both North Bay and Sudbury was dealing with O'Hearn & Company in the purchase and sale of shares for customers and clients as their agent and not for himself. 10

In September, October and November of 1932, Bayne became involved in the purchase of stock, which is the main cause for the difficulties which have arisen in this action, called Peninsular Petroleum, and described throughout the trial of this action for short as "Pen. Pete." 20 Bayne had been buying this stock as and for Clarke with a man by the name of Barkell in a manner at that time unknown to Clarke, and was carrying on what subsequently transpired to be a fraudulent, improper and highly irregular course of dealing through fictitious parties in New York City and elsewhere. These dealings in this stock made with this man Barkell were carried on Clarke's books in a secret account in the name of Smith and Greenwood.

Bayne had received from Clarke a power of attorney to sign cheques. Purchases of this stock had been made by Bayne in September and October, but on the 8th and 9th of November large orders for the purchase of 30 the stock were placed with O'Hearn & Company by Bayne. Approximately 78,000 shares were purchased by Bayne on the 8th November and 246,000 on the 9th. The stock might be described as a "penny" stock (i.e. the market price was less than \$1.00) and was selling at about eleven or twelve cents a share. When these large purchases were made of this penny stock the partners of the defendant company became alarmed and telephoned to Bayne as to how he was going to pay for these shares. Prior to his purchase of this stock what is called a "drafting-out" agreement was entered into with the defendant company. O'Hearn and Company would make out drafts in blank and send them in envelopes to Bayne, the latter 40 being supposed to fill out the names of the persons to whom the drafts were directed; the drafts then would be returned to the defendant company and it would attach the requisite amount of stock to the drafts and send them through the bank to the parties whose names appeared on the drafts, for acceptance and payment; most, if not all, of these names which appear on the drafts were merely fictitious and non-existent persons.

Then demands would be made by O'Hearn & Company on Bayne for the cash for the market value of the stock as the drafts went out and these demands were not met by Bayne or Clarke. These transactions were, of course, of a most extraordinary and unusual nature and one of the partners of the defendant company said he never had an experience similar to this before in their brokerage transactions.

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At this time, in 1932, Clarke had a number of clients for whom he was acting in North Bay, and some of these clients were interested in the purchase, and did purchase, this Pen. Pete. stock, being induced by Bayne and probably Clarke, I think, to buy it. At the same time there were a great many other clients of Clarke's who took no part in these transactions and were not in any way concerned in them and especially did this apply to the Sudbury clients.

At this time Clarke had on behalf of his clients in North Bay and Sudbury purchased in their names a number of shares of mining companies and some grain stocks through O'Hearn & Company. O'Hearn & Company was in possession of these shares as the stocks had been purchased on margin, and in September, October and November of 1932, there was a satisfactory equity and margin on these stocks held by O'Hearn & Company for Clarke's clients. In buying stocks through Clarke, the procedure was that these clients would come to Clarke and buy a certain stock on the mining exchange and in the case of stocks bought on margin make the required deposit or advance and Clarke would notify O'Hearn & Company of the purchase. The purchase would be made by O'Hearn & Company for Clarke, the name of the customer not being disclosed to them, and at the end of each month Clarke would settle with O'Hearn & Company whatever was necessary to adjust the purchase price according to the margin required by the defendant company.

There is no suggestion at all that during this period in question that any demand was being made or complaint made by the defendant company that the stocks other than the Pen. Pete. stock was not fully margined and protected. The clients of Clarke of course would receive as evidence of the purchase of their stock bought notes or the equivalent from Clarke, but as the market fluctuated and further moneys or securities were required from time to time by O'Hearn & Company, Clarke would notify the client to pay up necessary margin requirements. The situation, therefore, was at this time when these transactions on this particular stock of Pen. Pete were being put through there was, as already stated, a comfortable and safe equity in the stocks held by O'Hearn & Company for Clarke's clients, and it is this equity and interest in these stocks that the defendant company resorted to satisfy the unpaid amounts owing by Clarke incurred in the purchase of this penny stock. In February, 1933, the amount owing by Clarke to O'Hearn for unpaid Pen. Pete stock was approximately, as I understand it, some \$49,000.

On November 19th, 1932, after the purchase of some three hundred thousand shares of this Pen. Pete stock had been executed by O'Hearn &

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Company on behalf of Clarke in the way I have indicated, it was brought to Clarke's attention that something would have to be done to take care of the unpaid purchase money, and an agreement was entered into on the 19th November by one Charles K. Kaatz with the defendant company (it is filed as Ex. 5 in this action). Under the terms of this agreement Kaatz deposited with the defendants 500,000 shares of the Pen. Pete. stock as collateral to the account of Clarke, in so far as the 300,000 shares of Pen. Pete. purchased were concerned, on the following terms and conditions: (1) That none of the shares of Peninsular Petroleum so deposited and now held in the account of Clarke will be sold during the currency of this agreement for a less sum than seven cents per share. (2) Further that no more than twelve thousand shares of the said stock and of the half a million shares mentioned in the agreement will be offered for sale by the defendant company or sold in any one day. There were other clauses and conditions in the agreement and this agreement in my opinion was entered into at the instigation of Clarke for the protection of Clarke's customers who had stock with the defendant company safely and properly margined. Clarke apparently realized at this time that an attempt might be made by the defendants to resort to the equity in these stocks to pay themselves the balance due by Clarke on this Peninsular Petroleum stock. As a further protection, I believe, Clarke arranged with the partners of the defendant company that the Peninsular Petroleum account should be segregated from the other accounts which the defendant company had against Clarke for the purchase of the margined stock as above indicated. This whole Pen. Pete. transaction of the purchase of the three hundred thousand shares was entered into and carried out in a manner different entirely from the margin transactions. It was not done in the ordinary course of business.

The rules of the Stock Exchange provide that stocks purchased and sold under a dollar were not to be carried as marginal stocks.

O'Hearn & Company as stated transferred on their books the purchase of three hundred thousand shares to a special account and showed that amount and the five hundred thousand shares lodged under the Kaatz's agreement as collateral security "long." The defendants then proceeded to liquidate Pen. Pete. stock in retirement of this particular indebtedness. They disposed of 126,000 shares, when as a result the market for this particular stock became valueless and unsaleable. On the 28th February, however, O'Hearn & Company transferred the whole of this stock back into the customers' margin accounts and notified Clarke that they were proceeding to sell the shares standing in his name but belonging to his customers to pay off the indebtedness. At this time, excluding this Pen. Pete. stock I find that the Clarke account was sufficiently margined.

On the 28th January, Clarke, learning of the proposed action of O'Hearn & Company and having consulted a firm of solicitors had a letter written to the O'Hearn Company notifying them that they should not charge this indebtedness against the customers' margin account; that the

account they held was for individual customers, and he sent them a list of the individual customers for whom they were carrying shares with a special statement of what shares they were carrying for these customers. On the 4th of February the legal firm of Kilmer, Irving & Davis, on behalf of Clarke, wrote to the defendant giving it a statement of the customers equity on the accounts of North Bay and Sudbury offices respectively, and notwithstanding the formal protest and information contained in these letters the defendant company sold out many of these shares on the customers' accounts with a view to liquidating the amount due on the Pen. Pete. stock. As a result of this action of the defendant company, Clarke was forced into bankruptcy and Allen the plaintiff was appointed trustee on or about the 28th February, 1933.

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Further sales were made of the stock, on the 6th and 11th March and Allen, thinking that he could best protect the interest of the creditors, consented to a sale of the stocks standing on margin and the entry in grain account on condition that the proceeds would be deposited in the joint account of himself and Allen in the Canadian Bank of Commerce; the arrangement being that all moneys so realized on the sale of these stocks should only be checked out on cheques signed by O'Hearn & Company and countersigned by Allen. This arrangement was entered into for the purpose of having this money realized from the sale of these stocks put into a trust account until the contention of the defendant company that it was entitled to debit the marginal account with the balance owing on the Peninsular Petroleum deal, had been determined and settled. Instead of paying in the total amount of the proceeds from the sale of these stocks to this joint account the defendant company paid in only the moneys representing the equity or surplus indemnifying themselves for the full amount of all that was owing to them in respect of Peninsular Petroleum stock and other charges. Allen protested against this course being followed but with no result, and as a consequence this action has been brought.

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Something turns on the form of this action as to the right of Allen as trustee in bankruptcy to claim on behalf of the owners of these shares, and to protect and preserve the rights of all parties, Clarke has been added as trustee on their behalf.

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The first point that comes up for consideration is the contention of defendant counsel that the action is not properly constituted and that no right of action exists in Allen or Clarke to sue on behalf of the customers and clients. In this connection it is perhaps necessary to determine the legal relation of Clarke to the defendant firm and the customer of Clarke.

I think it is clear that Clarke dealt with the defendant firm throughout as agent for undisclosed principals (his clients). Is the position any different to the ordinary rule that applies between broker and client where, as in this case we have a second broker or jobber? There is no special magic attaching to the name of correspondent; but counsel in this

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case argues that no privity of contract exists between the principal (here the customer) and the second broker (the defendant) and quotes from Dos Passos on Stockbrokers, 2nd. Ed. (1905) page 393, which reads as follows:

“But it has been held that when a broker not being in London employs a second broker to make a bargain for him on the Stock Exchange, there is no privity between the principal and such second broker and therefore if the principal seek to make the latter a defendant in a suit for specific performance the bill will be demurrable.”

The case of *Book v. Fielding*, 1 Weekly Notes, 245 (1866) supports 10 this view.

The recent case of *Solloway v. Johnson* (1934) A.C. 193 is illuminating on this point.

A Company known as the Frontier Company carried on a business at Kamloops in British Columbia as a broker with no seat on an Exchange and they traded through Solloway Mills & Co. on the Vancouver Exchange. It went into bankruptcy. The Trustee in Bankruptcy brought an action to set aside a whole series of closed transactions because he alleged that Solloway Mills had not bought the stock that was ordered to be bought and that as Trustee representing the customers of the Bankrupt Company he was entitled to recover the money that had been paid 20 by the Frontier Company on behalf of customers to the firm of Solloway Mills & Co. The point that was decided in that case was that the trustee had no right to bring the action because the Frontier Company was merely an agent for undisclosed principals and the accounts having been closed—the transactions completed—the agent who put them through had no further interest in the matter. The principals—the customers in that case, were the only people who could bring the action if an action would lie. In his reasons for the decision arrived at by the Judicial Committee, Lord Blanesburgh is reported as follows:— 30

“This matter may equally well be approached from another angle. In what relation it may be asked did the Frontier Coy. stand to each one of these transactions entered into by it with Solloways on the instructions of a client. The answer made on indisputable authority must surely be that while the Frontier Company may have been personally liable to the Solloway Co. for the contract it was at the same time merely an agent for an undisclosed principal the client. . . . The Conclusion that in each transaction the client was the undisclosed principal is reached by reference to such facts as have here already been detailed . . . With its bankruptcy all authority of the Frontier Company as agent came to an end and in relation to any question arising out of any transaction, certainly any closed transaction the two contracting parties Frontier Coy’s client and the Solloway Coy. thereafter stood face to face. . . . These clients have no more claim against Frontier’s general assets in respect of these moneys than have Frontier’s general creditors any right to participate in them. In the same way these moneys when recovered can never proper- 40

ly become general assets in the bankruptcy. They would constitute a separate trust fund for the benefit of Frontier's different clients who in the first instance provided them. All of which is another way of saying that even if they might have been recoverable by the Frontier Coy. before its bankruptcy no title to sue for them ever vested in the plaintiff as trustee in that bankruptcy."

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This Solloway case is similar to the present case under review except in one important respect. Frontier Coy. at the time of the Bankruptcy proceedings had no stocks standing in its name as Clarke had on the 28th
10 February, 1933, when he was forced into Bankruptcy. The transaction of the Frontier Coy. with Solloway Mills had been closed and their commission paid but on the 28th February in this case stocks were standing in the books of O'Hearn & Co. in Clarke's name and many of the sales made by the defendant and complained of in this action were put through after the bankruptcy and the moneys applied by O'Hearn in liquidation of what was claimed by the defendant firm as owing on the Pen. Pete.

These observations of the learned Law Lord would therefore, it seems to me, apply here, and the trustee in bankruptcy would be in a position on behalf of these customers to maintain an action for an accounting
20 of those sales made subsequent to the date of the order in bankruptcy.

As to those transactions when sales had been made prior to the 28th February, Clarke would as trustee be in a position to claim on behalf of his customers. In Powell on Agency at page 111 the law on this point is set out by the learned text writer:

"It is a well established rule of law that when a contract is made with an agent in his own name and the agent is in fact acting for an undisclosed principal either the agent or the principal may sue on the contract."

Rule 74 of the Consolidated Rules enables a trustee to sue and be sued on behalf of or as representing the property or estate of which he is trustee or representative without joining any of the persons beneficially interested.
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As stated by Lord Blanesburgh in the Solloway case if the transactions are closed ones the trustee in bankruptcy has no right or title to them at all and the two contracting parties Frontier Coy's clients and the Solloway Co. thereafter stood face to face. This should clearly be construed as meaning that as to these transactions there was a privity of contract between the clients of Clarke and the O'Hearn brokerage firm and under Rule 74 Clarke as representative of that class is a proper party to sue on behalf of those customers whose stocks were sold before the bank-
40 ruptcy.

It is strongly argued by counsel for the defence that O'Hearn has a general broker's lien on all stocks pledged with him by Clarke and that under a contract signed by Clarke in January, 1931, (Exhibit 8) the defendant is well within its rights in liquidating these stocks in question for the purpose of paying itself the indebtedness owing by Clarke, The form used (Ex. 8) and signed by Clarke would seem to be the ordinary form

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in use between broker and client and not altogether appropriate and suitable as between a broker and some one acting for third parties as here. This form does authorize the defendant firm whenever it shall deem it necessary for its protection to sell any of the securities in their possession without even notice to Clarke.

The contract, however, does not in my opinion alter the legal relations and obligations of the defendant firm to the clients. In the Canadian Encyclopaedia Digest, Vol. 10, page 287, the following passage occurs:

“Brokerage law is quite in accordance with the ordinary course of business and with the principals which govern agents generally in the management of the property of others which is entrusted to their care. A broker is the agent of his customer. The relation of broker and client is that of principal and agent and the principal must indemnify the agent for anything done in the course of his employment—the relationship is fiduciary in character.” 10

How could any contract between Clarke and the defendant, however strongly worded, relieve the defendant company from their legal obligations to third parties who had no knowledge of this particular contract. It is true notices were sent to Clarke’s clients under the advice of O’Hearn & Co. containing somewhat similar language that he reserved the right to sell or pledge the stocks in his possession for any advance made by him or for any greater sum. But these notices and this contract and the broker’s lien possessed by O’Hearn & Co. does not permit a broker to sell or dispose of his client’s stocks as if they were his own. The broker is in the nature of a fiduciary agent and must take due care of the property entrusted to his care. 20

Mr. Meyer in his work on Stock brokers at page 314 discusses the lien of a broker on his customers’ securities in his possession.

“If the broker is carrying two or more marginal accounts for the same customer or a marginal or cash account the question of the generality of the lien cannot be answered with certainty. The question might be of importance when these are two marginal accounts one showing a profit and the other a loss. The broker desires to apply the profit on one to the loss on the other. On principle it would seem that whether or not under such circumstances the broker’s lien is a general one would depend upon the intention of the parties. What intention would be inferred in the absence of a definite expression must be regarded as an open question. But whatever the extent of the broker’s lien may be in the absence of an expression of intention it is clear that the lien is not a general one when from all the circumstances such a lien was not within the contemplation of the parties. Such is the case when the account showing the profit belongs not in fact to the customer but to some other party and when there has been disclosed to the broker either the fact of such ownership or facts sufficient to put him on inquiry with re- 30 40

spect thereto. In such a case the broker may not apply the equity on the one account to the deficit on the other."

By-law No. 38 of the Standard Stock Exchange prohibited any member, firm or company purchasing on a marginal basis for the account of a client any security selling for less than one dollar per share on the Exchange.

10 Here the customers and clients had a right to insist that their equity in the marginal stocks was not to be affected or prejudiced by the purchase by Clarke of a penny stock except for cash. O'Hearn & Company in Exhibit 8 (the contract) and in subsequent correspondence agreed that all transactions were subject to the rules, regulations and customs of the Exchange and were not at liberty in their dealings with Clarke as agent for undisclosed principals to ignore this salutary rule. I think the real position is that O'Hearn & Co. was an agent within well defined limits to purchase for these customers stocks on a marginal basis. Once having purchased them it became a fiduciary agent or trustee in a limited sense for the customer to hold these stocks subject to the rules of the stock exchange and with power to pledge and if there was default to sell for the purpose of protecting itself in a reasonable way for moneys advanced
20 or borrowed by it as a broker.

It cannot be that it was the intention of the parties at the time these offices were opened in North Bay and Sudbury that Clarke with the assistance of the O'Hearn firm could speculate and gamble with securities that were well known to both of them to be the property of innocent third parties. In the Sudbury office, as I recollect the evidence, none of the clients were approached or took any Pen. Pete. stock. Are these people in complete ignorance of the transactions that wrecked the Clarke business to have their property taken from them on the ground that a broker's lien is of so extensive a character that it must prevail, so
30 as to cover a transaction never in contemplation of the parties who deposited or left their securities with O'Hearn through Clarke?

Counsel for the defence urges that there was nothing to put the defendant on inquiry that the Pen. Pete. transactions were not being carried on by Clarke in the ordinary course of his business as broker and the defendant owed no duty to the Clarke customers to see that Clarke did not speculate or gamble with their securities. Undoubtedly it was Clarke's primary duty to protect his clients but these securities of the clients were not in Clarke's possession but in the possession of the defendants.

40 The members of the defendant's firm were well aware of the extremely hazardous nature of the stock in question and were warning Clarke against dealing in it. The defendant knew that the North Bay office was financially embarrassed and that a cheque of Clarke signed by Bayne on the 4th November, 1932, for \$7500 was not accepted by the Bank. On November 5th a demand was made for \$10,000 and three days later this amount not having been paid the sum of \$12,000 was asked for.

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Notwithstanding this situation the defendant firm proceeds on the 8th and 9th of November to make on behalf of Clarke large purchases of this highly speculative stock. The exceptional and unusual "drafting out" arrangement already referred to was entered into prior to these large purchases of this stock. It is obvious that the members of the O'Hearn firm throughout these transactions were relying and depending on the equity in the customers' securities on a marginal basis. The members of the firm admit that they would not have carried out the orders for purchase of this stock without this security. The whole Pen. Pete. transaction not inaptly described as a "Merry-Go-round" initiated as already stated 10 by Bayne at the instigation of Barwell and permitted by, if not assisted by, members of the defendant firm, was of such an unusual nature and in many respects fraudulent in character as one would have thought would have aroused and excited the suspicion of even less experienced brokers than were the defendant firm. The subsequent conduct of the parties, the depositing of the Kaatz shares, the segregating of the accounts and the rendering of these marginal accounts in December and January by the defendant separately from the Pen. Pete. account indicate at least to some extent what was the intention of and understanding of the parties after the transaction and brought about as a result of Clarke's effort to protect his clients. O'Hearn & Co. on the 19th November and for some time thereafter dealt with these marginal accounts as distinct and separate 20 and it was not till early in February that it decided to assume the responsibility of selling out these clients in order that it could pay itself what Clarke owed on the Pen. Pete. purchases. This O'Hearn did, I am satisfied with full knowledge of what the real situation was, and that in doing so wrongfully sought to recover the loss sustained in the Clarke transaction, out of moneys and securities belonging to innocent third parties.

The doctrine as to when a third party dealing with one he knows to be an agent is put upon his inquiry is discussed in the following cases: 30 *Sheffield v. The London Joint Stock Bank, et. al.*, 13 L.R. A.C. 333; *London Joint Stock Bank v. Simons* (1892) A.C. 201; *Cartwright v. Lyster et al.*, (1934) O.W.N. 117.

For these reasons I declare that the defendant firm hold the securities in question in trust for the clients and customers of L. S. Clarke and that the plaintiffs as joint trustees for these customers and clients are entitled to an accounting of all stocks and shares belonging to the said customers and sold by the said defendant firm from the 7th February, 1933 other than the Peninsular Petroleum stock, and damages for the wrongful sale and disposal of the same with a reference to the local Master at North Bay to ascertain the loss occasioned by the said wrongful sale. 40 The amount when ascertained to be paid to the plaintiffs as trustees in a special trust account and to be distributed among the parties entitled as holders of the said securities. The plaintiffs are entitled to the costs of this action, the costs of the reference to be in the discretion of the Master.

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE

MR. JUSTICE KINGSTONE

}

Saturday, the 1st day of

December A. D. 1934.

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Formal
Judgment of
Trial Court
1st December,
1934.

(Seal)
S.C.O.

BETWEEN:

J. A. ALLEN, Trustee-in-Bankruptcy
of the Estate of L. S. Clarke, and
L. S. CLARKE in his capacity as a
Trustee

10

Plaintiffs

—and—

F. O'HEARN AND COMPANY

Defendants.

No. 18.

This action coming on for trial on the 5th and 6th days of April 1934, and on the 30th and 31st days of May, 1934, at the sittings holden at North Bay, for the trial of actions without a jury, in presence of Counsel for all parties, upon hearing read the pleadings and hearing the evidence adduced and what was alleged by Counsel aforesaid, this Court was pleased to direct this action to stand over for Judgment, and the same coming on this day for Judgment.

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2— THIS COURT DOTH DECLARE that the Defendants held the securities in the account of the plaintiff L. S. Clarke and sold by the defendants on or after the 7th day of February 1933 in trust for the plaintiff L. S. Clarke as Trustee or the plaintiff J. A. Allen as Trustee, for the clients and customers of the plaintiff L. S. Clarke, and that the defendants had no right to charge the said securities with the purchase price of 300,000 shares of Peninsular Petroleum stock referred to in the plaintiffs' Statement of Claim herein, and the plaintiffs as joint trustees for these customers and clients are entitled to damages for the wrongful sale and disposal of the securities belonging to the said customers and clients and sold by the defendants on or after the 7th day of February 1933, and doth adjudge the same accordingly.

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3— THIS COURT BOTH ORDER AND ADJUDGE that this cause be referred to the Local Master at North Bay to determine the amount of damages, if any, that the defendants ought to pay for the said

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wrongful sale and disposal of the same and who are the customers and clients so entitled and the amount due to each of such clients and customers for damages accordingly.

4— THIS COURT DOTH FURTHER DIRECT that the defendants do pay to the plaintiffs the amount when so ascertained, and that the same constitute a special Trust Fund to be distributed among the parties entitled as the customers and clients of L. S. Clarke for whom the said securities were sold and doth adjudge the same accordingly.

5— AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendants do pay to the plaintiffs the costs of this 10 action forthwith upon taxation thereof.

6— AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of the reference hereinbefore directed be in the discretion of the Local Master at North Bay.

Judgment signed this 10th day of
January, 1933.

“D’Arcy Hinds”

Registrar
S.C.O.

Entered J. B. 59 Page 495 & 6
January 11, 1933
V.C.

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No. 19
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(Riddell, J.A.)
16th April,
1935.

No. 19

C.A.	}	Copy of Reasons for Judgment of Court of Appeal (Riddell, Fisher and Macdonnell, JJ.A),
A L L E N	}	delivered 16th April, 1935.
v.		
O’HEARN.	}	TILLEY, K.C., and PORTER, for the appeal.
		McRUER, K.C., and BREWIN, contra.

RIDDELL, J. A.:—The defendant is a Company in a large way of business as Stock-Brokers in Toronto; the plaintiff, L. S. Clarke was carrying on the lumber business in the North Country; in 1931, he determined to go into business as a Stock-Broker—“a general brokerage business” as he describes it; or as one of his chief witnesses says, he was “opening up . . . a brokerage office to do business with customers.” He had an interview with the managers of the defendant Company’s business—they understood and contemplated that he “was going to take orders from cus-

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tomers when he started up business up there;" and he "probably mentioned names . . . of certain customers that could probably be interested in the market." Then he signed the following instrument:

"Messrs. F. O'Hearn & Co.

"In consideration of your acting as broker for me, I hereby consent as follows:

"All transactions are subject to the rules, regulations and customs of the exchange or market and clearing house, where executed.

10 "Whenever I am indebted to you or have a short position with you, all securities, commodities and contracts for or in relation to commodities now or hereafter held by you, or carried by you in any account for me either individually or jointly with others, or deposited to secure same, may from time to time and without notice to me be carried in your general loans and may be pledged, repledged, hypothecated or re-hypothecated or loaned by you, either to yourselves as brokers, or to others, separately or in common with other stocks or securities and either for the sum due to you thereon or for a greater sum and without retaining in your possession or control for delivery a like amount of similar securities.

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

"I consent that the monthly debit balance on my account shall be charged with interest or service charge or both in accordance with your usual custom.

"In all transactions for my account I agree to wholly indemnify and save you free and harmless from any loss, damage or liability arising out of such transactions, howsoever same may occur.

40 "This agreement shall continue until revoked by me in writing, such revocation to affect only transactions thereafter entered into between us.

"L. S. Clarke."

Then Clarke opened an office at two Northern towns, having a private wire from the defendants to keep him posted, and describing himself as "correspondent" of the defendants—whatever "correspondent" may mean, it does not mean or connote agency.

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The business carried on in these offices is thus described by Clarke: "A customer would come in and order stock on margin . . . and put up his money, and the money would be sent down to F. O'Hearn & Company . . .". The name or identity of the customer was never stated to the defendants, but the order was simply to buy such-and-such stocks, and the necessary deposit was sent, if it was a case for a deposit.

The defendants then bought for Clarke the stock called for and sent him a Broker's Note in the following form:—

"F. O'HEARN & CO.
11 King Street West,
TORONTO 2

October 5, 1932.

10

TO Mr. L. S. Clarke, N. Bay Margin A/c.

We have this day BOUGHT for your account on the Toronto Stock Exchange

Bought from	Quantity	Description	Price	Amount	Com.	Amount.
Osler & Co.	5	C.P.R.	17½	87.50	1.00	88.50

"Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed; and also with the distinct understanding that the actual delivery is contemplated, and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that, all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice when margins are unsatisfactory.

"F. O'HEARN & CO."

Then Clarke would send to his customer—for it is, I think, clear, that

30

the buyers were customers of Clarke and not of the defendants—a Broker's Note in the following form:

L. S. CLARKE
BROKER
Correspondent
F. O'HEARN & CO.
Toronto
9 Durham St. Sudbury P.O. Box 40

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SUDBURY, Ont., August 25th, 1932.

10 BOUGHT FOR Mr. G. M. Miller,
Sudbury, Ont.

Quantity	Name of Security	Price in N.Y.	Firm on N.Y. Ex. Through Whom Order was executed	Com. N.Y.	Tax	Our Com.	Total
200	Warner Bros.	4	Hutton	\$15.00		\$15.	830.00
MARGIN							

20 "Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange, where executed; and also with the distinct understanding that actual delivery is contemplated, and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close the transactions without further notice when margins are unsatisfactory.

30

L. S. CLARKE."

While the defendants allowed Clarke half their commission on certain sales, when he sent out his Broker's Note, he might charge the customer something more—and he would do that, where the defendants did not allow him anything. Any cash or other collateral was kept in Clarke's office, till it was sent down to the defendants "for the simple reason it was

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just as well down drawing interest." As the Manager of Clarke says: "The cash would be deposited with our office and periodically we settled with F. O'Hearn & Company."

Everything indicates that the real transaction was that everything being carried on under the agreement set out above, the purchases were made for Clarke, as they were in his name; that Clarke bought this stock from the defendants to supply the requirements of his customers, and not that he bought the stock as agent for undisclosed principals, as the learned trial Judge thinks.

I do not say or suggest that these Broker's Notes are absolutely con- 10
clusive of the matter; it is quite clear that the "note does not conclude the question as to what was the real relation between the parties and either the Broker or the client can give evidence to establish the real relationship;" *Stock, &c. v. Galmage* (1887) 3 T. L. R. 808; *Re Wreford, &c.* (1897) 3 T. L. R. 153; but they are strong evidence as to the facts.

No "client" or customer is called to show or indicate that Clarke was anything else than their Broker—no evidence is given by anyone to that effect; and we are left to draw our inference from the transactions them-
selves. And these indicate that Clarke was the real purchaser with whom 20
the defendants dealt. The endeavour to make out that the transactions were for undisclosed principals will be met by the principle that parole evidence will not be admitted to contradict a written document; such evidence may be excluded by the terms of the document; *McAuliffe v. Bicknell* (1835) 2 C. M. & R. 263; *Collins v. Associated &c.* (1930) 1 Ch. 1; *Humble v. Hunter* (1848) 12 Q.B. 350, and like cases, as is said by Sir Frederick Pollock in his *Principles of Contract*, 9th edition, P. 108, "When a party contracts with an agent, whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it." *Collins v. Associated &c.* (1930) A.C. 1 at p. 18; he cannot enforce it "where the agent . . . contracts in such terms as im- 30
port that he is the real and only principal, do. do., p. 19. The case of *Ruderi, &c., v. Drughorn* (1918) 1 K.B. 394; (1919) A.C. 203, Dom. Proc. which was cited as opposed to this principle does not affect it—the ratio decidendi in that case being that the word "charterer" was used merely as a convenient description of the party, not as representing him as the only person who might be considered as being an actual party to take advantage of the contract, nominally in the "charterer's" name.

In the contract, under which these stocks were bought, we have "me," "my," "I" constantly used—the only exception to this personal de-
scription being as to stocks, &c., "You may be carrying for me either in- 40
dividually or jointly with others"—this does not cover the case of stocks, &c., which had been bought for others by Clarke as their agent.

Moreover, if an undisclosed principal claims and is admitted to claim as such, he is bound by the terms of the contract made by his agent unless indeed, they are quite beyond the authority of the agent, which cannot be claimed in this case.

We are pressed with the authority of the case in the Judicial Committee of Solloway v. Johnson (1934) A.C. 195; but an examination of the proceedings shows that that was quite a different case.

In that case, the defendants, Brokers in British Columbia had certain dealings, ostensibly with the Frontier Company; and certain "clients" of the latter Company were allowed to assert claims—or have claims asserted for them as undisclosed principals. There are, however, marked differences between the facts of that case and those of this, as the proceedings show. In the first place, there is no preliminary contract between the two Brokers and the objection that the claim as undisclosed principals cannot be proved by parol does not arise; then it appears from the statement of Counsel, p. 159, that some, at least, recognized the defendants as the principal and went to the Frontier people and had their order "relayed down to" the defendants—that "the money people gave to "the Frontier establishment was given, thinking they were dealing with "the defendants; one employee of the Frontier establishment thinks that "you might term" their business as "purely agency business" (181). The method, too, was different; when an order was filled by the defendants, they sent a Broker's Note in the name of the Frontiers; but the latter did not send out a Broker's Note to the "client" that they had bought for him, the stock required; what was done was to write the name of the "client" on the Note—this, I think, would be sufficient to meet any difficulty occasioned by the form of the Broker's Note.

These considerations, especially the first mentioned, probably account for the non-consideration by the Judicial Committee of the proof of the undisclosed principalship.

Under the established law, I can come to no other conclusion but that these purchases must be considered as made for Clarke.

Upon this finding, I can see no ground for the action, even if otherwise it could have been brought by these plaintiffs, a question into which I do not enter.

I think the appeal should be allowed and the action dismissed with costs, here and below.

FISHER: J.A. This appeal by the defendants from a judgment of the Honourable Mr. Justice Kingstone, brings up for determination several important questions affecting the relationship and liability of one brokerage firm to another, and of the rights of customers purchasing through brokers stocks and grains on margin.

The appellants are Toronto brokers with seats on the Standard Stock Exchange, and Clarke, the respondent,—without any former experience and not a member of the stock exchange—was carrying on the business of a broker at North Bay and Sudbury.

In January, 1931, it appears that the appellants and Clarke entered into an arrangement whereby Clarke was to open offices at North Bay and Sudbury under his own management and expense, and O'Hearn was

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to furnish Clarke's business with private wires free of expense; that the appellants would, upon request of Clarke, purchase for cash or on margin, through the Toronto and Foreign Stock Exchanges, any stocks and grains ordered by Clarke's customers, and Clarke was to receive on all deals put through the Toronto Standard Exchange a certain commission; that Clarke entered in his books at North Bay and Sudbury the names of his customers, with whatever cash was paid on the transaction; that some of the transactions were paid in full and others put through at the request of customers on margin; that as soon as Clarke received orders from his customers these orders were immediately wired to O'Hearn & Co. 10 and they would close the transactions through the Stock Exchanges; that upon O'Hearn notifying Clarke of the purchases, Clarke would remit the cash in full for a completed transaction, and a deposit if a margin transaction. When each transaction was put through by O'Hearn, they forwarded to Clarke the usual broker's note, which reads:—

"F. O'Hearn & Co.
11 King Street West,
Toronto 2.

October 5, 1932.

To Mr. L. S. Clarke, N. Bay Margin A/c. 20

We have this day BOUGHT for your account on the Toronto Stock
Exchange

Bought from	Quantity	Description	Price	Amount	Com.	Amount.
Osler & Co.	2	C.P.R.	17½	87.50	1.00	88.50

"Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed; and also with the distinct understanding that the actual delivery is contemplated, and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that, all securities from time 30 to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice when margins are unsatisfactory.

C. O'Hearn & Co."

and upon Clarke receiving the O'Hearn & Co.'s broker's note he delivered or sent to his customers his broker's note which reads:

"L. S. Clarke
Broker
Correspondent
F. O'Hearn & Co.
Toronto
9 Durham St. Sudbury P.O. Box 40.

SUDBURY, ONT., August 25th, 1932.

10 BOUGHT FOR Mr. G. M. Miller,
Sudbury, Ont.

Quantity	Name of Security	Price in N.Y.	Firm on N.Y. Ex. Through Whom Order was executed	Com. N.Y.	Tax	Our Com.	Total
200	Warner Bros.	4	Hutton	\$15.00		\$15.00	830.00
MARGIN							

20 "Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed; and also with the distinct understanding that actual delivery is contemplated, and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close the transactions without further notice when margins are unsatisfactory.

L. S. CLARKE"

30 On the 21st January 1931, O'Hearn & Company wrote to Clarke the following letter:

"as requested, we beg to enclose herewith copies of the various forms which we use. In regard to the contract forms you will notice that we have one covering several exchanges that the stock is being bought on and you

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could have some printed or you could have the name of the exchange type-written in.

“This is under the Security Frauds Act which we quote for your information—

“15. Every broker who has acted as an agent for a customer shall promptly send or deliver to each customer, for whom any security has been bought or sold by the broker, a written confirmation of the transaction, setting forth—

“(2) the quantity and description of the security,

“(b) the name of the person or company from or to or through 10
whom the security was bought or sold

(c) the day, and the name of the stock exchange, upon which the transaction took place, and failure, without reasonable excuse to comply herewith shall constitute an offence.”

“On one of our confirmation forms we have given you our idea of the heading which you could use on all your forms, and your letterheads could carry the same heading.”

No trouble arose until November, 1932. In September and October of that year, many transactions were put through in a stock known as Pen Oil—a “penny” stock selling under \$1.00 per share. According to the by- 20
laws of the Standard Exchange all purchases of this stock were to be paid in cash. Bayne was Clarke’s manager at North Bay and he wired in to O’Hearn & Co. on the 8th November, 1932, orders for 78,000 shares of Pen Oil Stock and on November 9th, 1932, orders for 246,000 shares of the same stock. O’Hearn & Co. immediately purchased all these shares through the Exchange and a liability on the part of Clarke to O’Hearn & Co. was created, amounting to about \$49,000.

It appears that Clarke—who most of the time was attending to his own private business—knew nothing about these two large orders of the Pen Oil stock, and upon the appellants bringing it to his attention, a personal 30
interview by Clarke with O’Hearn & Co. took place in Toronto. This interview resulted in an agreement—prepared at the request of Clarke—being entered into between a man named Kaatz and O’Hearn & Co. dated November, 1932, under which Kaatz agreed with O’Hearn & Co. to deposit, and he did deposit with that firm 500,000 shares of Pen Oil stock as collateral security to the account of Clarke in so far as that account related to the Pen Oil stock transactions of the 8th and 9th November, 1932.

The agreement provided that O’Hearn & Co. were not to sell any of the stock for less than seven cents per share; that not more than 12,000 40
shares be sold on any one day; that if Clarke’s account with O’Hearn & Co. for these particular shares was settled in full, any shares remaining of the 500,000 were to be returned to Kaatz and under paragraph 5 it was agreed that should O’Hearn & Co. at any time decide to take proceedings against Clarke for any balance owing in connection with these two transactions, O’Hearn & Co. were to return whatever shares they had on hand

of the 500,000 shares to Kaatz, also at Clarke's request O'Hearn & Co. agreed that they would segregate from Clarke's margin account the Pen Oil \$49,000 liability and transfer it to a special account in their books, and as a result of that arrangement, there was entered in the books of O'Hearn & Co. an account, reading as follows:

"Canadian Special Account, L. S. Clarke, North Bay
 Ledger Balance debit \$40,036.36
 Long 679,000
 Pen Pete."

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10 The other account of Clarke in books of O'Hearn & Co. at this time showed a ledger debit balance of \$35,540.30 and the stocks that were held for that account (Exhibit 12).

O'Hearn & Co. after this agreement was signed, sent an account to Clarke on December 6th, 1932, marked "L. S. Clarke, Canadian Special Account 310,500 Pen. Pet."

Clarke swore that the object of the segregation was to avoid any interference with his other clients' accounts and I might note that O'Hearn & Co. were at this time anxious to assist Clarke to continue in business and advanced him \$3,000 in ease of his then financial embarrassment.

20 The market for Pen. Oil was declining and O'Hearn & Co. under the Kaatz agreement could not sell at the prices set out in the agreement, became anxious about their account, wrote Clarke on the 21st January, 1933, pointing out to him that "We feel that your account is in such condition that it does not warrant us delivering any stocks upon the account unless we receive the market price for same. We feel that we have given you every assistance for the past two months to enable you to work out some arrangement whereby you could obtain some additional cash or collateral in order to give us further protection in your account and provide that the market does not have any set back we are willing to wait for a

30 period of two weeks; and further "While we are quite willing to give you this further two weeks to work this matter out it must be definitely understood that in the event of any break in the market we reserve the right to cancel the above extension at any time." In the meantime if you will let us have \$10,000 in cash we feel it would enable us to grant you a further period of time until you may be able to complete your arrangements."

40 On the 25th January, 1933, Clarke — no doubt having consulted his solicitor—wrote to O'Hearn & Co. pointing out for the first time that his stock brokerage business was "not for the purpose of buying and selling stocks for himself but for the purpose of buying and selling stocks for local customers", and also pointing out that "the marginal accounts which are held by you apparently in my name but to your knowledge held for the customers are all properly margined," that "Peninsular Petroleum transactions you will recall at the time certain negotiations occurred looking to the adjustments of the moneys you claim to be owing in these transactions, you agreed with me that the Peninsular Petroleum account would be kept and dealt with by you as an account separate from the marginal

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accounts and all other accounts," that he was enclosing a list of accounts "of customers of the Sudbury and North Bay offices showing in each case the stocks which you hold and to delivery of which those customers are entitled upon payment of the comparatively small debit balance." Then again, "On behalf of these customers I notify you that they are entitled to the stocks listed opposite their names and that delivery must not be declined in any case where the debit balance is paid and delivery requested." Then again, "In event of failure on your part to observe this notice you will be held responsible for any loss or damage which may result."

10

The letter also states that "If you have not already done so you segregate the accounts in respect of the Peninsular Petroleum transactions, not only to carry out your agreement with me, but also because I take the position that our relationship in the Peninsular Petroleum transactions was a different one to that created in the other transactions in the ordinary course of business." Also that "I am not at all satisfied that you are only agent for me in the Peninsular Petroleum transactions."

On the 30th January, 1933, O'Hearn & Co. wrote to Clarke in reply to his letter of the 25th as follows:

"You have signed the usual client's agreement and under that we are entitled to sell any or all of the stocks or commodities held by us whenever we deem it necessary for our protection," and stating that unless they sent on \$25,000 or satisfactory collateral to properly margin their account by February 6th, they proposed selling sufficient stocks "in order to bring your account within our marginal requirements."

O'Hearn & Co. proceeded to sell part of the securities held on margin on the 6th February, 1933, and on the 28th February they wrote Clarke as follows:

"Owing to the decline in stocks held for your account and not receiving any response to our margin calls, we have today sold the following for your account" and they sent Clarke sold note showing what stocks they had sold and the prices received.

Again on the 6th March, 1933, the defendants wrote to Clarke as follows:

"Owing to the decline in stocks held for your account and not receiving any response to our margin calls we have today sold the following for your account."

Then follows a long list of the stocks sold and their prices.

40

On the 4th March, 1933, O'Hearn & Co. wrote the plaintiff Allen the following letter:—

"We beg to confirm our telegram advising that the account of L. S. Clarke requires \$7500 additional margin and requesting you to mail us a marked cheque or telegraph the funds by noon of Monday, otherwise we will be obliged to reduce the account." No money was received and on the

6th March O'Hearn & Co. notified Allen they had sold certain stocks and giving him a list of them.

It appears that on or about the 11th March some arrangement was entered into between Allen and O'Hearn & Co. under which Allen agreed that the remaining stocks and equity in the grains should be sold and the proceeds put into a trust account without prejudice to the legal rights of everyone.

On the 11th March O'Hearn & Co. wrote to Clarke in connection with liquidating the stocks and placing the proceeds to a trust account. 10 In that letter they said, "We note that the Pen Pete stock is not to be sold pending further arrangements and the disposal of the New York stocks held by the estate is to be made when the New York market opens. This is to be without prejudice to your rights to an accounting."

There appears to have been a misunderstanding about this arrangement. O'Hearn & Co. contended that all that was intended to be deposited to the trust account "were to be the proceeds of our liens on the stocks." I do not, however, see that this arrangement with Allen whatever it was has anything to do with the real question for determination on this appeal.

20 Clarke found himself unable to continue in business and on the 28th February, 1933, made an assignment in bankruptcy.

The plaintiff Allen was appointed Clarke's trustee on behalf of all his creditors, and as such brought an action (in which Clarke was joined, as a trustee for his marginal customers) for a declaration that O'Hearn & Co. and Clarke were partners in the North Bay and Sudbury business; for an accounting of all transactions between O'Hearn & Co. and Clarke; and in the alternative a declaration that O'Hearn & Co. held the securities in question in trust for the clients of Clarke or for Clarke as trustee of such clients and customers, and that O'Hearn & Co. had no right to charge 30 the trust account with the purchase price of the 300 Pen Oil stock and for damages.

After a lengthy trial Kingstone, J. gave judgment for the plaintiff holding that Clarke dealt with O'Hearn & Co. as agent for undisclosed principals; that there was privity of contract between Clarke's customers and O'Hearn & Co. and that Clarke representing his customers was a proper party to sue for any stock sold prior to the bankruptcy; that O'Hearn & Co. were agents within well defined limits to purchase for Clarke's customers stocks on margin and when the purchase was completed O'Hearn & Co. became fiduciary agents or trustees for the customer with power to pledge if there was default. 40

The defendant appeals.

The foregoing is, I think, a fair summary of the relevant facts on which we are to be concerned on this appeal. This Court is indebted to both counsel for full and satisfactory arguments, including the citation of many authorities in support. I confess that after a careful review of the evidence, oral and documentary, and a consideration of the cases applicable,

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—I am with much respect unable to agree with the conclusions of the learned trial Judge. The difficulty I have is in discovering a basis for a liability on the part of O'Hearn & Co, unless it is to be found in some arrangement or agreement entered into by O'Hearn & Co. and Clarke subsequent to the purchase by O'Hearn & Co. of the Pen Pete stock on the 8th and 9th November. These orders to purchase Pen Pete came into O'Hearn & Co. from Clarke through his manager Bayne in the ordinary course, and O'Hearn & Co. carried out Clarke's instructions to purchase this stock and to charge Clarke with the purchase price of about \$49,000.

It was argued by learned counsel for the respondent that O'Hearn & Co. should not have purchased this stock before making enquiry and the learned trial Judge seems to have been of that opinion. With respect I cannot agree. Clarke's accounts which are all in the record for September and October, show that they had purchased for clients through O'Hearn & Co. thousands of shares of Pen Pete, and it appears that O'Hearn & Co. on the 14th September sent the following telegram to Clarke: "Would certainly watch your step on Pen Pete."

After that telegram Clarke continued to purchase Pen Pete and sent in the orders in the ordinary course and they were filled by O'Hearn & Co. and charged to Clarke's account. I am therefore unable to understand why when the two orders of the 8th and 9th November came in O'Hearn & Co. were obliged to make any further enquiry before purchasing these stocks. In my opinion it was just the reverse because Clarke had been formerly specially warned about this and O'Hearn & Co. had the right to conclude that Clarke would be careful, and also that Clarke had bona fide purchasers to take up the stock ordered on the 8th and 9th November. It must be remembered that brokers are required to give prompt service to their customers. What might have happened if O'Hearn & Co. delayed making these purchases if in the meantime the stock had shot upward in price? Would Clarke not have said, and rightly so, to O'Hearn & Co., "I am entitled to that stock at the price you could have purchased it when you received the orders."

It appears that the utmost of good faith existed between these parties from January 1931 to November 8th, 1932, and no questions whatever were raised about the execution of the many orders that came in from Clarke to O'Hearn & Co. I confess I am unable to find any reason why O'Hearn & Co, should suffer for a liability created by Clarke through his manager Bayne.

As I see it the relation between these parties may be described that Clarke was his customers' broker and banker in the margin accounts, and O'Hearn & Co. were Clarke's brokers and bankers. Clarke had the right and by his margined customers was expected to finance personally or otherwise his customers purchases over and above the customer's cash deposit, and O'Hearn & Co, to whom Clarke passed on the orders were obliged to do the same thing for Clarke. O'Hearn & Co., as stated, had no actual knowledge of who Clarke's customers were and had no dealings

with them. In all these transactions the customer looked to Clarke and Clarke to O'Hearn & Co. and O'Hearn & Co. to Clarke. In these transactions O'Hearn & Co. had no security other than Clarke's margined accounts to protect them. A pertinent question to be asked is, what were O'Hearn & Co. to do in a declining market? The answer must be that there was no course open for them but to sell, first notifying Clarke that unless he furnished cash or securities they would sell and they had the right to sell under the agreement in writing entered into with Clarke (Exhibit 8) on January 29th, 1931. Clarke acquired his principal's, the customer's, shares as their agent and Clarke in dealing with other brokers (O'Hearn & Co.) had the right so long as Clarke's agency continued, to enforce any contract he had entered into in connection with these deals.

The law is, I think, perfectly clear that O'Hearn & Co. had a lien upon and the right to make use of and sell the stocks pledged to them as security. See *Jones v. Peppercorne* (1858), 28 L. J.C.H. 158; *In re London & Globe Finance Corporation* (1902) 2 Ch. 416 and also see Meyer on the Law of Stock Brokers and Exchanges, at pages 294-296 and 313-317. It was, of course, unfortunate for Clarke's margined customers, who were innocent, to suffer because of the reckless conduct of Clarke or his manager in purchasing this Pen Pete stock, but is that not one of the penalties and risks customers who deal with brokers on margin must assume? Barring panicky markets, an honest broker should not fail or become a bankrupt, but as stated margined customers must assume the risk of their broker becoming bankrupt, acting recklessly or dishonestly and if he does, they are the ones who are most likely to suffer as in this particular case.

I also can find no merit in the contention advanced by Mr. McRuer, that O'Hearn & Co. had agreed to segregate the Pen. Pete transactions from Clarke's other accounts and relieve the margined accounts from Pen Pete liability. In the first place in my view it is unthinkable that O'Hearn & Co.—who were in no way to blame for the orders of the 8th and 9th November—would personally assume a liability of about \$49,000, as that is what it amounts to, the Pen. Pete stock being next to worthless. In the second place the Kaatz agreement and the deposit of collateral thereunder and the segregation and opening of the special account were in my opinion all done and agreed upon at the instance of and for the convenience and protection of Clarke in the hope that the market for Pen. Pete might improve and if it did the margined accounts would not be disturbed. I can find no evidence whatever of any admission of fault or liability on the part of O'Hearn & Co., or any agreement, or a consideration for any agreement, releasing the margined accounts or Clarke from the liability created by the Pen. Pete transactions. The evidence and correspondence having reference to what took place at and subsequent to the Kaatz agreement of the 19th of November clearly indicates, that O'Hearn & Co. were willing to wait provided the market did not in the meantime break.

Solloway Mills v. Johnston (1934) A.C. 193, strongly relied upon by

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Mr. McRuer as conclusive authority for the right of the plaintiffs to recover, has in my opinion no application to the questions arising in this case and no fraud or misconduct is charged against O'Hearn & Co. in the present case as was in the Johnston case against Solloway Mills & Co. In the Johnston case an intermediate broker—Frontier & Co.—became bankrupt and thereafter it was discovered that Solloway Mills & Co. had been guilty of fraudulent practices and it was held that the client, the customer, and not the trustee, had the right of action. If the customers of Clarke were undisclosed principals their right must be limited to the terms of their agent acting on their behalf and their rights could be no higher than those of Clarke whether the right of action lies in them or in the plaintiffs in this action. 10

In this connection I might add that the Court is left without any evidence of any creditor of Clarke that Clarke did not act in accordance with their instructions, and I think it must, therefore, be assumed that Clarke acted within the scope of their instructions.

The remaining question is the right of plaintiffs to maintain this action. Under section 23, chap. 11 of The Bankruptcy Act, R.S.C. (1927) property passing and vesting in a bankruptcy trustee does not include property held by the debtor in trust and, therefore, I am of the opinion that Allen as trustee in bankruptcy has no cause of action. 20

Then again, I cannot see what right Clarke has to sue in his capacity as trustee for customers as he was in fact not a trustee. He took orders from customers to purchase stock then ordered the purchase of these stocks from O'Hearn & Co. under his contract with them and O'Hearn & Co. held the stock as pledgees. In my opinion Clarke could only be a trustee in so far as actual property of his customers in his hands that could be identified.

I would allow this appeal with costs and dismiss the action with costs. 30

MACDONNELL, J.A.: In this matter I agree with my brothers Riddell and Fisher that the appeal should be allowed.

The foundation of the plaintiffs' case is the claim that Clarke, in contracting with O'Hearn & Company, was acting as the agent of undisclosed principals. Undoubtedly O'Hearn & Co. knew that he was conducting a brokerage business on behalf of customers. It was with this object in view that all arrangements were made. But this does not necessarily mean that the customers were undisclosed principals.

An individual customer, for whom an account is opened by his agent with a second broker, may easily be found to be an undisclosed principal, having his individual rights. So also a series of such customers may be found to be a series of undisclosed principals, each having individual rights. That appears to have been the situation in *Solloway v. Johnston*, 1934 A. C. 193. But in the case at bar the situation is quite different. Not only do the written contracts disclose no such relationship, but the surrounding facts are against the view that such a relationship existed. 40

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O'Hearn & Co. could not know the standing of any individual customer on Clarke's books, nor distinguish one customer from another; they could not know the number of customers Clarke had; they could not even know that in any particular transaction there existed a customer at all, for it was open to Clarke to make purchases and sales on his own personal account. So far as O'Hearn & Co. were concerned, all Clarke had to do was to keep with them, from whatever source he got it, an amount on margin sufficient to secure his account with them. Whenever they were not satisfied, they were entitled to sell without notice any securities in their hands.

10

Clarke was under no obligation to treat his customers equally; he might demand cash from one and allow another to deal on margin; the proportion of margin he required might vary with each. He did not necessarily forward to O'Hearn & Co. the cash or other securities he received; the evidence is that he settled with them "periodically." In the event of securities being sold by O'Hearn & Co., no customer could complain that it was his particular stock that was sold. Any adjustment necessary would have to be made by Clarke. Each customer's safety might easily be affected by the dealings of his fellow customers and obviously depended upon the management of Clarke.

20

The whole situation indicates that no customer looked beyond Clarke and that O'Hearn & Co. meant to deal, and were taken as dealing, with nobody but Clarke. That being the case, there is no reason for going beyond the words of the written contracts and finding that the customers were undisclosed principals.

Even if the customers were held to be undisclosed principals, they would be bound by any acts of Clarke within the scope of his authority as their agent. And it is difficult to understand what O'Hearn & Co. did that was not done upon the order of Clarke within the scope of his authority.

30

The plaintiffs' complaint is that O'Hearn & Co. purchased for Clarke on November 8th and 9th, 1932, respectively 78,000 and 247,000 shares of "Pen Pete" and subsequently, when payment (some \$49,000) was not forthcoming, sold the securities in their hands to make good the purchase price. Pen Pete is a "penny" stock i.e. one that according to the rules of The Standard Stock Exchange may not be purchased on margin; also it is said that the orders for these purchases on November 8th and 9th were given under such circumstances as to arouse inquiry. The plaintiffs therefore claim that these purchases should have been kept entirely separate from the general account, which was a marginal one, and that O'Hearn & Co. had no right, in order to reimburse themselves, to resort to the marginal account. This contention appears, however, upon examination to have little force.

40

Purchases of Pen Pete were not made for the first time on November 8th. Almost every day in September this stock was purchased, sometimes in large amounts; on September 6th. 45,000 shares were purchased, on

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September 7th 64,000, on September 8th. 76,000. All through October purchases continued, though the amounts were smaller. On November 1st 45,000 shares were purchased, on November 4th 94,000, on November 5th 25,000, on November 7th. 9,000. Some of Clarke's customers participated in these transactions but no complaint whatsoever is made regarding any of them. O'Hearn & Co. were able to make them without requiring further cash or security and everybody was satisfied.

It may be noted here that no separate account was kept for the purchases of Pen Pete prior to November 8th. Nor is there any evidence that any such arrangement is required by the rules of the Exchange. 10 Those rules provide that penny transactions shall be conducted on a cash and not on a marginal basis. But this may evidently be done without the keeping of a separate account. So far as the evidence discloses, all that is necessary is that in determining the amount of margin required at any time the value of any penny stock held shall not be taken into account. This appears to have been the practice adopted in this case until November 8th; no objection was ever made to it; nor, in fact, is any objection made now. Complaint is made regarding only the transactions of November 8th and 9th.

If Clarke's account had been in such a condition as to enable the purchases of November 8th and 9th to be made without the provision of further margin, presumably nothing would have been heard of the matter. 20 But the account was not in such a condition. What, then, were O'Hearn & Co. to do when the orders of November 8th and 9th came in? It was their duty to deal with them on a cash basis. And no doubt they might have refused to fill them until they had received the purchase price in cash. But there is nothing either wrong or unusual in a broker's making purchases before receiving payment. And why should O'Hearn & Co. not expect payment to be forthcoming? The orders of November 8th were not in any way exceptional; those of November 9th were exceptional only 30 in point of volume; customers of Clarke had participated in the earlier purchases of Pen Pete; why should they not be behind these orders with the necessary cash? Evidence was given as to difficulty in procuring from Clarke smaller amounts of cash than would have been necessary to finance these orders and as to a proposed "drafting-out" agreement by which payment from customers would be secured. This might have justified a refusal to proceed without cash in advance; but it did not necessitate such a refusal. O'Hearn & Co. were quite entitled to make the purchases; all they had to do was to deal with them on a cash basis.

Having made these purchases, and finding that Clarke was unable to 40 provide the necessary cash, what were O'Hearn & Co. entitled to do? Under normal circumstances they might at once have sold the Pen Pete. This would have been dealing on a cash basis. Within a week, however, the market for Pen Pete had dropped from about seventeen cents to about six cents; and throwing an additional large block of stock upon the market would obviously have depressed the price still further. By a sale under

such circumstances O'Hearn & Co. would not have realized sufficient to recover what was owing; and Clarke himself did not want such a sale.

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Were O'Hearn & Co. entitled, then, to resort, as they did do, to the equity in Clarke's account? Did such action amount to a failure to deal with the Pen Pete on a cash basis? The plaintiffs contend that it did; they say that, since the account was a marginal one, resort to the equity in it amounted to dealing with the Pen Pete on a marginal basis. But this does not seem sound. Suppose that Clarke had ordered the sale of the securities in his account and the purchase of the Pen Pete with the proceeds; would anyone suggest that O'Hearn & Co., in completing such a transaction for him, were dealing with the Pen Pete on a marginal basis? Surely not. And if they happened to purchase the Pen Pete before selling the securities, would that alter the character of the transaction? Surely not. In other words, the sale of the securities in the account in order to obtain the purchase price of the Pen Pete does not constitute a dealing with the Pen Pete on a marginal basis.

Why, then, should O'Hearn & Co. not resort to the equity in Clarke's account? The agreement (Ex.8) under which Clarke's account was carried, provided that they might at any time without notice sell such securities as they thought fit or close out the account altogether. When Clarke ordered the purchase of the Pen Pete, why should they not treat his order as meaning that, unless sufficient cash were provided, securities should be sold to make good the purchase price? And if, after purchasing the Pen Pete, they found Clarke indebted to them, why should they not close out his account altogether and off-set what he owed them against what they owed him? I can see no reason.

This is not a case of a broker carrying two accounts for a customer with notice, or under such circumstances as to amount to notice, that the accounts are different in character the one from the other. It is not a case of O'Hearn & Co. carrying one account for Clarke's customers and another for Clarke personally, the one impressed with a trust and the other not. It is true that two accounts were kept, the one for the North Bay and the other for the Sudbury office; but both accounts were of exactly the same character; and no separation was made between cash, penny, and marginal transactions; nor was it ever suggested by anybody, that separate accounts should be kept for different kinds of transactions. There was nothing to indicate that the persons interested in the transactions of November 8th and 9th were different from the persons interested in the earlier transactions. Either the person interested throughout was Clarke or else the persons interested throughout were Clarke's customers; whichever view be taken, the transactions in all instances were conducted for the same person or group of persons. The situation was simply that a certain person or group of persons became indebted to O'Hearn & Company and that the same person or persons had left securities in O'Hearn & Co.'s hands to secure any indebtedness. I am unable

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to understand why, the debt having been incurred, the securities should not be realized.

Clarke's customers have no doubt suffered serious loss. It is clear, however, that this loss is the result of misconduct within Clarke's office. In my opinion it is unreasonable to attach any responsibility to O'Hearn & Company. There is no evidence that they were in any way a party to the misconduct. All they did was to afford Clarke every opportunity to straighten matters out before they resorted to their last possibility of payment.

No. 20
Formal
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IN THE SUPREME COURT OF ONTARIO

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The Hon. Mr. Justice Riddell	}	Tuesday, the 16th day of
The Hon. Mr. Justice Fisher		
The Hon. Mr. Justice Macdonnell		April, A.D. 1935.

B E T W E E N:

J. A. ALLEN, Trustee-in-bankruptcy
of the Estate of L. S. Clarke, and
L. S. CLARKE in his capacity as a
Trustee

(SEAL)

—and—

Plaintiffs

F. O'HEARN AND COMPANY

20

Defendant

No. 20.

UPON MOTION made on the 25th and 26th days of February, 1935, unto this Court by Counsel on behalf of the Defendant by way of appeal from the Judgment pronounced by the Honourable Mr. Justice Kingstone at the trial of this action dated the 1st day of December, 1934, in the presence of Counsel for all parties, upon hearing read the pleadings, the evidence adduced at the trial and Judgment aforesaid, and upon hearing what was alleged by Counsel aforesaid;

THIS COURT WAS PLEASED TO DIRECT this motion to stand over for Judgment and the same coming on this day for Judgment; 30

THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed and the action is hereby dismissed.

AND THIS COURT DOTH FURTHER ORDER that the Plaintiffs do pay to the Defendants their costs of this action and this appeal forthwith after taxation thereof.

JUDGMENT signed this 23rd day of April, A.D. 1935.

"D'Arcy Hinds"

Entered J. B. 62 page 325,
April 23, 1935.

Registrar,
S.C.O.

40

V.C.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE
MR. JUSTICE MIDDLETON
IN CHAMBERS

} Monday, the twenty-seventh day
of May, A.D. 1935.

*In the
Supreme
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Ontario.*

No. 21
Order of
Middleton,
J. A.
Allowing
Appeal to
His Majesty's
Privy Council,
27th May,
1935.

J. A. ALLEN, Trustee-in-Bankruptcy
of the Estate of L. S. Clarke, and
L. S. CLARKE, in his capacity as a
Trustee

Plaintiffs

10

—and—

F. O'HEARN AND COMPANY

Defendant.

No. 21.

UPON the application of counsel for the Plaintiffs, in the presence of counsel for the Defendant, upon hearing read the Notice of Motion herein, the affidavit of F. A. Brewin filed and the exhibits therein referred to, and it appearing from the receipt of The Canadian Bank of Commerce filed that the sum of \$4,209.03 has been paid into Court to the credit of this action by the Plaintiffs as security that the Plaintiffs will effectually

20 prosecute the said appeal and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed, and as security that if the judgment or any part of it is affirmed, the appellant will pay the amount thereby directed to be paid, or the part of it as to which judgment may be affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on the appeal, and upon hearing what was alleged by counsel aforesaid:

2. IT IS ORDERED that an appeal herein from the judgment of the Court of Appeal of Ontario, dated the 16th day of April, 1935, to His Majesty in his Privy Council be allowed.

30 3. IT IS FURTHER ORDERED that execution in this cause upon the judgment of the Court of Appeal of Ontario, dated the 16th day of April, 1935, and upon any certificate of taxation issued in pursuance of the said judgment be and it is hereby stayed until the final disposition of the appeal to His Majesty in Privy Council.

4. AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

"D'Arcy Hinds"
Registrar S.C.O.

Entered O.B. 150 pages 114-5
May 29, 1935.

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A.R.

PART II. EXHIBITS

EXHIBIT 26

(PLAINTIFFS' EXHIBIT)

LETTER F. O'HEARN & CO. TO L. J. BAYNE

F. O'HEARN & CO.
11 King Street West
TORONTO, ONT.

January 21, 1931.

Mr. L. J. Bayne,
General Delivery,
NORTH BAY, Ontario.

10

Dear Sir—

We beg to acknowledge receipt of your letter of January 20th enclosing certificate covering 1000 Bunker Hill Extension and as requested have entered open order to sell at 6 or better for the account of Joe Alemany.

As requested, we beg to enclose herewith copies of the various forms which we use. In regard to the contract forms you will notice that we have one covering several exchanges that the stock is being bought on and you could have same printed or you could have the name of the exchange typewritten in.

20

This is under the Security Frauds Act which we quote for your information—

“15. Every broker who has acted as an agent for a customer shall promptly send or deliver to each customer for whom any security has been bought or sold by the broker, a written confirmation of the transaction, setting forth—

- (a) the quantity and description of the security.
- (b) the name of the person or company from or to or through whom the security was bought or sold.
- (c) the day, and the name of the stock exchange, upon which the transaction took place, and failure, without reasonable excuse, to comply herewith shall constitute an offence.”

30

On one of our confirmation forms we have given you our idea of the heading which you could use on all your forms, and your letterheads could carry the same heading.

We are also attaching copy of practically all our forms that we use and you could have any of them printed that you think advisable.

Yours very truly,

“F. O'Hearn & Co.”

(ENCLOSED FORMS NOT PRINTED BY CONSENT)

40

EXHIBIT 19

(DEFENDANTS' EXHIBIT)

LETTER L. S. CLARKE TO F. O'HEARN & CO.

CLARKE & LOUNSBURY
LTD.

Engineers and Contractors

North Bay, Ont.
Jan. 21, 1931.Messrs. F. O'Hearn & Company,
11 King Street West,
10 Toronto, Ontario.Gentlemen: Attention of T. A. Richardson, Esq.

I beg to advise that in our proposed North Bay Office I shall employ the following:

Mr. L. J. Bayne, North Bay, as Manager,

Mr. Chas. Norton, as operator, and

in the branch office at Sudbury I shall employ the following:

Mr. Fred Woods, Sudbury, as Manager,

Mr. A. J. Wilshire as Bookkeeper,

Mr. Robt. Forde, as operator.

20 Attached you will find financial statements covering my net worth, put up in a conservative manner, and business history of myself, and also those of Mr. Woods, Mr. Wilshire, Mr. Forde, Mr. Bayne, and Mr. Norton.

I beg to advise also that the initial capital for the purpose of transacting this business in Sudbury and North Bay will be \$20,000.00.

Yours very truly,

"L. S. Clarke"

(L. S. Clarke)

LSC:VM

CLARKE & LOUNSBURY
Engineers and Contractors

30

NORTH BAY, Ontario.

Business History of Mr. L. S. Clarke

Employed in lumber business since 1915, supplying Cedar and Red Pine to the Bell Telephone Company of Canada in Ontario and Quebec, being their only supplier; supplying also the Hydro Electric Power Com-

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Ex. 19.Letter,
L. S. Clarke
to F. O'Hearn
& Co.
with Business
History of
L. S. Clarke's
Employees and
Financial
Statement
Enclosed,
21st January,
1931.

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L. S. Clarke
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& Co.
with Business
History of
L. S. Clarke's
Employees and
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Statement
Enclosed,
21st January,
1931.

—continued.

mission with about one-third of their requirements, and other minor customers, under the name of Clarke & Lounsbury, Limited.

Sole owner of Clarke & Lounsbury, Limited, which is in a very liquid position, liabilities being practically nil; liquid assets in good condition.

Any Bank in the City of North Bay or the City of Sudbury could be referred to as to his character and business ability.

CLARKE & LOUNSBURY
Engineers and Contractors

North Bay, Ontario.

Jan. 21, 1931.

10

Business History of Mr. L. J. Bayne.

Mr. Bayne was employed by the Imperial Bank of Canada and held the position of Accountant in the North Bay Branch for a number of years.

He resigned from this position and took a position with Gamble-Robinson of Canada, Limited, as bookkeeper and accountant and was highly regarded by this concern.

When Stewart-McNair & Company opened an office in North Bay he was employed as bookkeeper by this firm. In 1929 when Stewart-McNair saw fit to cut down expenses by decreasing their staff and letting their Manager out, Mr. Bayne was employed as manager and he carried the business there quite satisfactorily. 20

He is a married man and well known in North Bay and has a very good connection.

Any Bank in North Bay, I am sure, would give Mr. Bayne a recommendation.

“L. S. Clarke”

FINANCIAL STATEMENT, January 20th, 1931,
of L. S. Clarke

ASSETS

30

LIQUID

Cash in Bank,	\$ 5,046.00	Bank Loan,	\$2,300.00
Securities at		Accounts Payable,	1,738.20
Market Value	8,575.00	Mortgage,	2,000.00
Interest in Clarke & Lounsbury, Ltd.	85,610.96		

<u>NON LIQUID</u>		Surplus to	
		Balance Sheet	109,393.76
Residence	12,000.00		
Real Estate	4,200.00		
	<hr/>		<hr/>
(of which \$55,000 is in cash.)	\$115,431.96		\$115,431.96
Total Amount of Liquid Assets	\$99,231.96		
Total Amount of Non Liquid Assets	16,200.00		

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Exhibits
Ex. 19.
Letter,
L. S. Clarke
to F. O'Hearn
& Co.
with Business
History of
L. S. Clarke's
Employees and
Financial
Statement
Enclosed,
21st January,
1931.
-concluded.

10 Enclosed Business Histories of Mr. Norton, Mr. Woods, Mr. Wilshire,
and Mr. Forde not printed by consent.

EXHIBIT 28

(PLAINTIFFS' EXHIBIT)

LETTER, F. O'HEARN & CO. TO L. S. CLARKE WITH
SCHEDULE OF COMMISSION RATES ATTACHED.

F. O'HEARN & CO.

Toronto, Ont.

January 22nd, 1931.

Exhibits
Ex. 28.
Letter,
F. O'Hearn to
L. S. Clarke
with Schedule
of Commission
Rates
Attached,
22nd January,
1931.

20 L. S. Clarke, Stock Broker,
Nickel Range Block,
SUDBURY
Ont.

Dear Sirs,—

We are enclosing herewith a commission card showing the regular public commissions on stocks listed on the Standard Stock and Mining Exchange, the Toronto Stock Exchange and Curb and the Montreal Stock Exchange.

30 In this connection you are, of course, familiar with the method of splitting the commissions on stocks listed on the Standard Stock and Mining Exchange. We do a tremendous amount of trading on the Toronto and Montreal Stock Exchanges, but as we do not hold memberships on either of these Exchanges, and, as it is against the rules to split commissions in any case, we are unable to make any allowances on stocks listed on these two markets. We do not, however, charge any over-riding commission on Canadian industrial stocks.

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—
Exhibits
Ex. 28.
Letter,
F. O'Hearn to
L. S. Clarke
with Schedule
of Commission
Rates
Attached,
22nd January,
1931.

—continued.

Relative to stocks dealt over the counter, we might say that Mr. E. W. Brooks, of the Statistical Department, handles any such orders, and we work on a commission basis similar to that of the Standard Stock and Mining Exchange rates. We have found that it is to the advantage of our clients and correspondent offices to deal on the commission basis rather than on the net price. Kindly bear this in mind in case you place any unlisted orders with us.

Mr. Brooks also handles any Bond orders that come into us, and, as he was in the Bond business before he became connected with this firm, he is in a position to give very excellent service along these lines. We work on a commission basis in Bonds, charging \$2.50 per \$1000.00 regardless of the class of Bond or the price at which it sells. 10

Accompanying our letter, also, is a memo. showing the Dominion "Stock Transfer" taxes, the Province of Ontario taxes and the New York taxes.

We are also enclosing sheets showing the regular public commission rates as charged on the New York Curb. As we are members in this market, we do not add any over-riding commission. We are, however, permitted to split the commission, consequently it is a practice of our correspondent offices to add their own over-riding commission at whatever figure they wish to charge their clients over and above our regular rate. 20

We are also enclosing herewith sheets showing the New York Stock Exchange regular commission, plus our over-riding commission as charged to agents, which you will notice to be \$5.00 per 100 shs. regardless of the price of the stock.

In the case of our own public business, we might inform you that our over-riding commission on the public is higher than that charged to the correspondent office in that it scales upward as the price of the stock becomes greater.

As we are members of the Chicago Stock Exchange any business placed with us on that Exchange will be charged the regular commission rates, no split, no over-riding. The regular rates coincide with the regular rates of the New York Stock Exchange. 30

We are members of the Winnipeg Grain Exchange and the Chicago Board of Trade, consequently all business done on either of these two markets in any of the grains is subject to the regular commission rate which is as follows:—

On Board lots, \$2.50 per 1000 bus. round trade, ie. an equivalent to \$1.25 to buy or \$1.25 to sell each 1000 bus. This commission is charged when the trade is completed,—whether the client has been long or short is immaterial; and it is charged in one amount when the trade has been completed. 40

The Board lot in the Winnipeg is equivalent to 5000 bus., job lots, or

in other words, one two, three or four thousand bushels are subject to the same rate of commission.

The regular rate on the Chicago Stock Exchange is \$2.50 per 1000 bushels—a complete trade on the Board lot. Job lots, however, are charged at the rate of \$3.50, completed trade. Note the difference between job lot commissions on the Chicago and Winnipeg Exchanges. The commission, however, is the same on all grains, i.e. wheat, rye, oats, barley, corn, etc.

10 If there is any other point on which you are not clear, please get in touch with Mr. Brooks, of the Statistical Department who will be glad to explain the matter to you.

Incidentally, we might point out that our Statistical Department is well equipped to handle any inquiries from you on Canadian or American mining or industrial stocks, bonds or commodities; and we hope that you will take advantage of these services as we are earnest in our desire to co-operate with you.

Yours very truly,

Encls.

Statistical Dept.

NEW YORK CURB EXCHANGE

20 REVISED COMMISSION RATES—JUNE 27, 1929.

	Stocks selling			under	.50	3%
	" "	at	.50	and "	1.00	2.00
	" "	"	1.00	" "	5.00	5.00
	" "	"	5.00	" "	10.00	7.50
	" "	"	10.00	" "	25.00	12.50
	" "	"	25.00	" "	50.00	15.00
	" "	"	50.00	" "	75.00	17.50
	" "	"	75.00	" "	100.00	20.00
	" "	"	100.00	" "	200.00	25.00
30	" "	"	200.00	"	over	see below

At \$200.00 and over, but under \$250.00—\$30, and for each additional \$50.00 or fraction thereof in price, \$5.00 additional.

Minimum Commission shall be not less than \$1.00 on an individual transaction, unless amount involved is less than \$15.00.

*In the
Supreme
Court of
Ontario.*

Exhibits
Ex. 28.

Letter,
F. O'Hearn to
L. S. Clarke
with Schedule
of Commission
Rates
Attached,
22nd January,
1931.

—continued.

NEW YORK STOCKS COMMISSIONS

In the Supreme Court of Ontario.
Exhibits Ex. 28.
Letter, F. O'Hearn to L. S. Clarke with Schedule of Commission Rates Attached, 22nd January, 1931.
—concluded.

Stocks Selling			N.Y.S.E Brokerage	Our Commission	Total
at	.50	under	.50	\$5.00 per C.	
"	1.00	and "	1.00	5.00 per C.	8.00
"	10.00	" "	10.00	7.50 per C.	12.50
"	25.00	" "	25.00	12.50 per C.	17.50
"	50.00	" "	50.00	15.00 per C.	20.00
"	75.00	" "	75.00	17.50 per C.	22.50
"	100.00	" "	100.00	20.00 per C.	25.00
"	125.00	" "	125.00	25.00 per C.	30.00
"	200.00	" "	200.00	25.00 per C.	30.00
"	200.00	" "	250.00	30.00 per C.	35.00

Total minimum commission to agents \$2.00

EXHIBIT 8

(PLAINTIFFS' EXHIBIT)

PRINTED CONTRACT CARD OF O'HEARN & COMPANY
SIGNED BY L. S. CLARKE.

(Front of card)

Date January 29, 1931. 20

NAME L. S. Clarke
Business Address 19 Main West Phone 2750-1
House Address Phone
Send all mail to me at Box 264 North Bay Ont.
Business or Occupation Broker (Please give name of firm and position held)
Remarks:.....Please sign agreement on reverse side.
(over)

(Back of card)

Messrs. F. O'Hearn & Co.

30

In consideration of your acting as broker for me, I hereby consent as follows:

All transactions are subject to the rules, regulations and customs of the exchange or market and clearing house, where executed.

*In the
Supreme
Court of
Ontario.*

Exhibits.

Ex. 8.
Printed Form
of Contract
with O'Hearn
& Co. Filled
in and
Executed by
L. S. Clarke,
29th January,
1931.

--concluded.

Whenever I am indebted to you or have a short position with you, all securities, commodities and contracts for or in relation to commodities now or hereafter held by you, or carried by you in any account for me either individually or jointly with others, or deposited to secure same, may from time to time and without notice to me be carried in your general loans and may be pledged, repledged, hypothecated or rehypothecated or loaned by you, either to yourselves as brokers, or to others, separately or in common with other stocks or securities and either for the sum due to you thereon or for a greater sum and without retaining in your possession or control for delivery a like amount of similar securities.

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

I consent that the monthly debit balance on my account shall be charged with interest or service charge or both in accordance with your usual custom.

In all transactions for my account I agree to wholly indemnify and save you free and harmless from any loss, damage or liability arising out of such transactions, howsoever same may occur.

This agreement shall continue until revoked by me in writing, such revocation to affect only transactions thereafter entered into between us.

(Signature)

"L. S. Clarke"

(Please fill in information required on other side)

EXHIBIT 20

(DEFENDANTS' EXHIBIT)

COPY OF LETTER, L. S. CLARKE TO F. O'HEARN & CO.

L. S. Clarke Stock Broker North Bay Ont.

F. O'Hearn Co.
11 King St West,
Toronto, Ontario.

Feb. 4th, 1931.

Dear Sirs:—

Please find enclosed cheque for \$5,000. \$2,500 to be credited to our
North Bay branch and \$2,500 to our Sudbury branch and oblige. 10

Yours very truly,
L. S. CLARKE
"L. J. Bayne"
Atty.

EXHIBIT 1

(PLAINTIFFS' EXHIBIT)

LETTER, F. O'HEARN & CO. TO L. S. CLARKE.

F. O'HEARN & CO.

Partners:
T. A. Richardson.
Elly Marks.
Frank O'Hearn.
A. Gardner.

Offices:
Toronto, Sarnia, Owen Sound,
Montreal.
11 King Street West
TORONTO, ONT.

Members:
Standard Stock & Mining Exchange. 20
Winnipeg Grain Exchange.
Chicago Board of Trade.
Chicago Stock Exchange.
New York Curb Exchange
(Associate)
New York Produce Exchange.

June 1, 1931.

L. S. Clarke,
Box 40,
Sudbury, Ontario.

Dear Sirs—

We beg to confirm our message over the wire today reading as follows— 30

"Owing to continued liquidation in all security markets and owing to the increased number of shares selling under \$10.00 on which it is becoming more difficult to get Banking accommodation we have deemed it

In the
Supreme
Court of
Ontario.
Exhibits.
Ex. 20.
Copy of Letter,
L. S. Clarke to
F. O'Hearn
& Co.,
4th Feb., 1931.

Exhibits.
Ex. 1.
Letter,
F. O'Hearn
& Co. to
L. S. Clarke,
1st June, 1931.

necessary to fix our margin requirements on and after Wednesday, the third instant, on dividend paying Mining stocks selling around \$10.00 and under, at 50% margin instead of one-third as heretofore."

We feel that in view of the serious decline in all other markets it would be advisable for you to have ample protection on all margin accounts.

We will advise you on Wednesday should your account require additional margin on the above basis.

Yours very truly,
"F. O'Hearn & Co."

10

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 1.

Letter,
F. O'Hearn
& Co. to
L. S. Clarke,
1st, June 1931.

—concluded.

EXHIBIT 52.

(PLAINTIFFS' EXHIBIT)

LETTER, E. W. BROOKS TO L. S. CLARKE.

Partners:

T. A. Richardson.
Elly Marks.
Frank O'Hearn.
A. Gardner.

F. O'HEARN & Co.

Offices:

Toronto, Sarnia, Owen Sound,
Montreal.

11 King Street West
TORONTO, ONT.

Members:

Standard Stock & Mining Exchange.
Winnipeg Grain Exchange.
Chicago Board of Trade.
Chicago Stock Exchange.
New York Curb Exchange
(Associate)
New York Produce Exchange.

Exhibits.
Ex. 52.

Letter,
E. W. Brooks
to L. S. Clarke,
16th
November,
1931.

20

L. S. Clarke, Esq., Stock Broker.

Box 40,

SUDBURY, Ontario.

November 16th, 1931.

Dear Sir,—

I am enclosing herewith a copy of a chart prepared by Crandall, Pierce & Company, of Chicago. This chart shows a comparison of market value with book value and current assets of leading corporations (U.S.A.) I feel that this is a very excellent chart for you to have either on file or posted on your Bulletin Board as it supplies a quick and ready record of vital

30 information.

Yours very truly,
"E. W. Brooks"
Statistical Dept.

Encls.

EXHIBIT 21

(DEFENDANTS' EXHIBIT)

LETTER L. S. CLARKE TO F. O'HEARN & CO.

Branches
 North Bay, L. J. Bayne, Mgr.
 Sudbury, Fred Woods, Mgr.
 Stocks, Bonds,
 Grain
 Telephones 2750-1

L. S. CLARKE
 BROKER
 Correspondent
 F. O'HEARN & CO.
 Toronto
 19 Main St. West—North Bay

Private Wires
 to
 Toronto, Montreal,
 Winnipeg, New York,
 Chicago.

November 24, 1931. 10

Messrs. F. O'Hearn & Co.,
 11 King St. W.,
 Toronto, Ont.

Gentlemen:

We are forwarding herewith cheque for \$2500.00.

Will you kindly credit this to account of L. S. Clarke, Sudbury.

Yours very truly,
 L. S. CLARKE

Per N. K. Mulligan.

Encl.

EXHIBIT 50

20

(PLAINTIFFS' EXHIBIT)

LETTER F. O'HEARN & CO. TO F. WOOD.

Private Wires
 to all Leading
 Financial Markets
 and Northern Mining
 Centres.

F. O'HEARN & CO.
 Stocks, Bonds, Grain
 11 King St. West
 Toronto, Ont.

Offices:
 Toronto Owen Sound
 Montreal Cobalt
 Hamilton Timmins
 Sarnia Kirkland Lake

August 10, 1932.

Mr. F. Wood,
 c/o L. S. Clarke,
 Box 37,
SUDBURY, Ontario.

30

Dear Mr. Wood—

It has been very noticeable the small amount of business that you are doing on the New York market. The reason, no doubt, is that you have not given it enough thought.

We have sent you some very good messages about New York in the past few weeks. We feel that you have very little or no opposition and as we have been getting some very good information direct from more than one leading New York Exchange house we feel certain that you could develop a very fair amount of New York stock business, which we are fully equipped to handle. We do not think that this business would interfere at all with your mining and grain business which we are, as you know, especially interested in getting.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 50.
Letter,
F. O'Hearn
& Co. to
F. Wood,
10th August,
1932.
—concluded.

10 We would like particularly to point out to you, for your customers' information, that the action on the New York stock market during the past few weeks has been the entire reverse than when stocks were going down. When they were going down they had small rallies and on each decline made a new low price. During the past few weeks it has been the very opposite—good market and big volume with few setbacks. Each rally has taken the stocks into new higher prices than formerly.

We feel the same action is going to continue. Sentiment has altered completely and we would like to point out the stocks suggested to us to buy from our New York information which we have found very reliable, especially recently.

20 OILS—the oil stocks have been acting exceedingly well because the oil companies have been recently doing well under present conditions. We mention Atlantic Refining, Consolidated Oil (which is the old Sinclair) both Standard Oil of New Jersey and Standard Oil of California.

MOTOR STOCKS—we especially mention Chrysler, General Motors, Mack Truck and in the cheaper ones, Packard, Studebaker and Yellow Truck.

UTILITIES—Consolidated Gas, Peoples' Gas (Chicago) Standard Gas and Electric.

30 RAILS—Atchison, Delaware and Hudson, Union Pacific, New York Central Pennsylvania and Southern Pacific.

These stocks are very cheap compared with the prices of six months ago.

Among the specialties we mention Canada Dry, Case Threshing and International Harvester.

All of these stocks we have had pointed out to us as very attractive and we feel sure that with some solicitation on your part that business will result which should prove profitable to your customers.

Yours very truly,

ELLY MARKS
per "M. Salmon"

EXHIBIT 45.

(PLAINTIFFS' EXHIBIT)

CONFIRMATION OF PURCHASE FOR G. M. MILLER OF 200 WARNER BROS.

In the
Supreme
Court of
Ontario.
—
Exhibits.
Ex. 45.
Confirmation,
L. S. Clarke
to G. M. Miller
of purchase of
200 Warner
Bros. Stock,
25th Aug.,
1932.

Branches:
Sudbury, Fred Woods, Mgr.
North Bay, L. J. Bayne, Mgr.
Stocks, Bonds, Grain.
Telephones 3020-1.

I. S. CLARKE
BROKER
Correspondent
F. O'HEARN & CO.
Toronto

Private Wires to
Toronto, Montreal,
Winnipeg, New York,
Chicago.

9 Durham St. Sudbury P.O. Box 40

10

SUDBURY, ONT., August 25th, 1932.

BOUGHT FOR Mr. G. M. Miller,
Sudbury, Ont.

Quantity	Name of Security	Price in New York	Firm on New York Stock Exchange Through Whom Order was Executed	Com-mission New York	Tax	Our Com-mission	Total
200	Warner Bros.	4	Hutton	15.00		15.00	830.00 20
<u>MARGIN</u>							

Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed; and also with the distinct understanding that actual delivery is contemplated, and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close the transactions without further notice when margins are unsatisfactory.

L. S. CLARKE

EXHIBIT 46.

(PLAINTIFFS' EXHIBIT)

CONFIRMATION NOTE, F. O'HEARN & CO. TO L. S. CLARKE
SHOWING PURCHASE ON MARGIN.

Private Wires to all
Leading Financial Markets
and Northern Mining
Centres.

F. O'HEARN & CO.
11 King Street West
EL. 1104
TORONTO 2

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake

October 5, 1932.

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 46.
Confirmation,
F. O'Hearn
& Co. to
L. S. Clarke
of purchase of
5 shares of
C.P.R. on
Margin,
5th October,
1932.

10 TO Mr. L. S. Clarke, N. Bay Margin A/c
We have this day BOUGHT for your account on the Toronto Stock Exchange

Bought from	Quantity	Description	Price	Amount	Com- mission	Amount
Osler & Co.	5	C.P.R.	17½	87.50	1.00	88.50

Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed; and also with the distinct understanding that the actual delivery is contemplated, and that the party giving the orders agrees to these terms.

20 It is agreed between broker and customer, that, all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close the transactions without further notice when margins are unsatisfactory.

F. O'HEARN & CO.

E. & O. E.

EXHIBIT 36

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, GARDNER TO L. J. BAYNE

L.J.B. 1932 SEP 14 AM 9 23

NA

Would certainly watch your step on Pen Pete

G.

In the
Supreme
Court of
Ontario.
Ex. 36.
Copy of
Telegram,
A. Gardner
to L. J. Bayne,
14th Sept.,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, O'HEARN & CO. TO L. S. CLARKE'S 10
NORTH BAY OFFICE

1932 NOV 1 PM 3 48

NA

PLEASE MAIL CK \$7500.00 YOUR ACCT
ADVISING
LAY HN

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
O'Hearn & Co.
to L. S. Clarke's
North Bay
Office, 1st
November,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO O'HEARN & CO.

1932 NOV 2 AM (9 30)

20

LAY

Sending check today

LJB NA

C.K.
A.Y.P.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
O'Hearn & Co.,
2nd Novem-
ber, 1932.

PART OF EXHIBIT 37.
(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. S. CLARKE'S NORTH BAY OFFICE
TO O'HEARN & CO.

1932 NOV 3 PM 1 15

Nick Hn

Would like to get Dely by Monday if possible

Na

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. S. Clarke's
North Bay
Office to
O'Hearn & Co.,
3rd Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

10

COPY OF TELEGRAM, O'HEARN & CO. TO L. S. CLARKE'S
NORTH BAY OFFICE

1932 NOV 5 AM 9 56

Na.

Please mail ck to-nite \$10,000.

Advising

Lay

Hn

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
O'Hearn & Co.
to L. S. Clarke's
North Bay
Office, 5th
November,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

20

COPY OF TELEGRAM O'HEARN & CO. TO L. S. CLARKE'S
NORTH BAY OFFICE

1932 NOV 7 AM 10 28

Na

Did not rec. your ck \$10,000 this am. Now require
\$12,000.

Advise

Lay

H. N.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
O'Hearn & Co.
to L. S.
Clarke's
North Bay
Office, 7th
November,
1932.

EXHIBIT 30.

(PLAINTIFFS' EXHIBIT)

COPY OF TELEGRAM, NORAH (CLERK IN L. S. CLARKE'S NORTH BAY OFFICE) TO O'HEARN & CO.

TELEGRAM, via Private Wires of
L. S. Clarke, Broker,
19 Main Street West—North Bay.

North Bay, Nov. 8 1932

Sent to Nick
Will you please send out today all P. S. you have
on hand also some more draft forms
Norah

10

In the
Supreme
Court of
Ontario.
Exhibits.
Ex. 30.
Copy of
Telegram,
North Bay
Office of
L. S. Clarke to
O'Hearn & Co.,
8th Novem-
ber, 1932.

EXHIBIT 2

(PLAINTIFFS' EXHIBIT)

DRAFT ENVELOPE, O'HEARN & CO.
(Sample)

F. O'HEARN & CO.
Stock Brokers
11 King St. West
Phone Elgin 1104

20

\$
Toronto, 193

On demand pay to the order of CANADIAN BANK OF
COMMERCE 100 Dollars
and Charges

Value received and charge the same to account of
To F. O'HEARN & CO.
..... Per

DOCUMENT ENCLOSED IN THIS ENVELOPE SUB- 30
JECT TO EXAMINATION AND TO BE DELIVER-
ED ON PAYMENT OF DRAFT ONLY.

No protest, If acceptance be refused
please return at once and
report answer given

Exhibits.
Ex. 2.
Sample
Draft
Envelope,
O'Hearn & Co.

EXHIBIT 38.

(PLAINTIFFS' EXHIBIT)

CONFIRMATION OF PURCHASE FROM F. O'HEARN & CO. TO L. S. CLARKE.

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 38.
Confirmation
of purchase,
F. O'Hearn
& Co. to
L. S. Clarke.

Private Wires to all
Leading Financial Markets
and Northern Mining
Centres.

F. O'HEARN & CO.
11 King Street West,
EL. 1104

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake

TORONTO 2,

Nov. 8, 1932

10 TO Mr. L. S. Clarke,
N. Bay—Cash A/C

We have this Day BOUGHT for Your Account on the Standard Stock & Mining Exchange

Bought from	Quantity	Description	Price	Amount	Com- mission	Transfer Fee	Amount
	Crang.	500	Pen Pete	13	65.00	1.25	66.25
	1000 Crang 1000 Colling	2000	" "	13	260.00	5.00	265.00
	1500 Urquhart 1000 Butler						
20	2500 Crang.	5000	" "	13½	675.00	12.50	687.50

30 Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed; and also with the distinct understanding that the actual delivery is contemplated, and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that, all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close the transactions without further notice when margins are unsatisfactory.

F. O'HEARN & CO.

E.&O.E.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, O'HEARN & CO. TO NORTH BAY
OFFICE OF L. S. CLARKE.

1932 Nov 9 AM 9 55

Na

Please mail cheque to-nite \$15,000.

Advising

Lay

HN

10

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, GARDNER TO L. J. BAYNE.

1932 NOV 9 PM 3 50

LJB

NA

Have 54,000 P.S. in today shall we ship you tonite—Plse say what
you mailing us.

Gardner.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO GARDNER.

1932 NOV 9 PM 4 11

Gardner

Hold Pen Pete. Mailing \$10,000.

LJB NA

20

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
O'Hearn & Co.
to North Bay
Office of
L. S. Clarke,
9th Novem-
ber, 1932.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
Gardner to
L. J. Bayne,
9th Novem-
ber, 1932.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne
to Gardner,
9th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, GARDNER TO L. J. BAYNE.

1932 NOV 9 PM 4 22

LJB NA

Re \$10,000. you mailing that leaves all of today's purchases to be paid for and part of yesterday's. What can we expect tomorrow. Would like to get in touch with L. S. C.—Can you say where can reach him.

G.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
Gardner to
L. J. Bayne,
9th November,
1932.

10

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO GARDNER.

1932 Nov 9 PM 4 32

Gardner

Will send as much as can tomorrow, you can get LSC in morning.
LJB NA.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne
to Gardner,
9th November,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, GARDNER TO L. J. BAYNE.

20 LJB NA

1932 Nov 10 PM 2 49

Plse advise what you are mailing us today—require \$40,000. after crediting \$10,000. received this AM.

G.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
Gardner to
L. J. Bayne,
10th November,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, NORTH BAY OFFICE OF L. S. CLARKE
TO MARKS.

1932 NOV 10 PM 3 38

Marks

Mr. Clarke wishes you to stay there for half hour,
he is calling you.

Na

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
North Bay
Office of
L. S. Clarke
to Mr. Marks,
10th Novem-
ber, 1932.

EXHIBIT 29.

10

(PLAINTIFFS' EXHIBIT)

TELEGRAM L. J. BAYNE TO GARDNER

1932 Nov. 10 PM 3 54

Gardner

Have been talking to my party in New York. He is getting cash for
this deal instead of drafts and will wire funds to me, expect some in Satur-
day and will shoot it along to you as fast as I get it, everything O.K.

LJB NA

Exhibits.
Ex. 29.
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
10th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, BAYNE TO GARDNER.

1932 Nov. 12 PM 12 19

Gardner

Have some cash coming today but don't know how much not in yet, will
have to hold the \$10,000 check over till Monday and will wire you what-
ever I get additional on Monday.

Bayne Na

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
12th Novem-
ber, 1932.

20

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, T. A. RICHARDSON TO L. J. BAYNE.

1932 Nov 12 PM 1 03

L.J.B. N.A.

Give us a message before the wire closes as to whether or not you received the telegraphic money.

T.A.R.

*In the
Supreme
Court of
Ontario.*Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
T. A.
Richardson to
L. J. Bayne,
12th November,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

10

COPY OF TELEGRAM, L. J. BAYNE TO T. A. RICHARDSON.

1932 Nov 12 PM 1 16

T.A.R.

Not yet, phoning N.Y. tonight.

Bayne NA

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne
to T. A.
Richardson,
12th November,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, T. A. RICHARDSON TO L. S. CLARKE.

L. S. Clarke

Nov. 12-32

20

North Bay,

You should give this Pete proposition your personal attention. Make sure of your ground, imperative we have money wired here first thing Monday.

T.A.R.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
T. A.
Richardson
to L. S. Clarke,
12th November,
1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER.

1932 NOV 14 AM 9.35

Gardner

Did not get in touch with NY until late last night, so did not call.
Will advise later what I receive, everything O.K.

LHB NA

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
14th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, A. GARDNER TO L. J. BAYNE.

1932 Nov. 14 AM 10 03

LJB NA

What arrangements did you make with NY and are they telegraph-
ing money today and how much can we expect
Gardner.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
A. Gardner
to L. J. Bayne,
14th Novem-
ber, 1932.

10

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, A. GARDNER TO L. J. BAYNE.

1932 Nov. 14 AM 11 57

LJB NA

Would appreciate reply my message this A.M. Plse also say if check
taken care of

Gardner.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
A. Gardner
to L. J. Bayne,
14th Novem-
ber, 1932.

20

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER.

1932 NOV 14 PM 12 25

Gardner
Check will be OK today expect to be talking to NY in short time again
and will advise.

LJB NA

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
14th Novem-
ber 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

10

COPY OF TELEGRAM, A. GARDNER TO L. J. BAYNE.

1932 NOV 14 PM 3 22

LJB NA
Anything to advise

Gardner

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
A. Gardner
to L. J. Bayne,
14th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER

1932 NOV 14 P.M. 3 46

20 GARDNER
Expect to be able to wire you \$5,000. tomorrow.
LJB. N.A.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
14th Novem-
ber, 1932.

EXHIBIT 24.

(DEFENDANTS' EXHIBIT)

LETTER L. S. CLARKE TO F. O'HEARN & CO.

CLARKE & LOUNSBURY
LTD.

Engineers and Contractors

Construction Supplies.

NORTH BAY, Ont.
Nov. 14, 1932.

Attention of T. A. Richardson, Esq.,

Messrs. F. O'Hearn & Co.,
11 King Street West,
Toronto 2, Ontario.

10

Dear Sirs:

Re: Peninsular Petroleum.

I beg to advise that I have thoroughly discussed the matter of the purchase of a quantity of the above stock on Tuesday and Wednesday, the 8th and 9th, of last week with my Manager here. A week ago Friday or Saturday, the 4th or 5th Mr. Bayne, my manager here, tells me he called up your office and said that he was offered the purchase of a big block of this stock and asked whether it would be alright to send this out on individual drafts to New York. He stated that if you happened to be short of this stock in the clearing that he had in his possession over two hundred thousand shares which he would lend you to send down attached to the drafts that were to be sent out. 20

After this stock was purchased on Wednesday your office telephoned Mr. Bayne and told him that they could not handle this on draft as it was too big a thing to handle. There was not sufficient money to be made out of this thing to warrant Mr. Bayne purchasing this stock in any other way except by arrangement with your office, as I had already told Mr. Bayne that no more stock of this type was to be bought unless funds were wired here or an arrangement made with you for drafting this stock to customers. 30

Mr. Bayne immediately on Thursday got in touch by telephone with the representative of this crowd in New York and told him that this arrangement had been voided and that he would have to get around and pay up the money covering this purchase and wire it to us.

I was talking to New York three times today and this representative told me how difficult his task was in getting around to see people who were to receive this stock on draft and explain the different arrangement. However, up to five o'clock this afternoon he had collected \$15,000. and expects to have the balance tomorrow and Wednesday. 40

As I was out of town until late in the afternoon of Wednesday, the 9th, I was not aware of the purchase of this stock.

I am using every means in my power to have funds wired at the earliest hour possible.

I shall leave it to your discretion as to whether you will sell this stock tomorrow or not.

Yours very truly
"L. S. Clarke"

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 24.
Letter,
L. S. Clarke,
to F. O'Hearn
& Co.,
14th Novem-
ber, 1932.
—concluded.

PART OF EXHIBIT 37.

10

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, T. A. RICHARDSON TO L. S. CLARKE

1932 Nov 15 AM 10 17

L. S. C. NA

Your letter received and note your party has collected \$15,000.—
Have him telegraph this to you today and you can wire same to us. On
receipt of this we will carry pending further payments today and Wednes-
day advise.

T.A.R.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
T. A.
Richardson to
L. S. Clarke,
15th Novem-
ber, 1932.

PART OF EXHIBIT 37.

20

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. S. CLARKE TO T. A. RICHARDSON

1932 NOV 15 pm 12 02

TAR

As soon cash comes in will advise you and wire
LSC NA

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. S. Clarke
to T. A.
Richardson,
15th Novem-
ber, 1932.

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
T. A.
Richardson to
L. S. Clarke,
15th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, T. A. RICHARDSON TO L. S. CLARKE

1932 NOV 15 PM 2 36

LSC NA

Plse advise if you have received anything yet from your party. If he collected that yesterday he could have wired you something on a/c by this time. Have you arranged for the \$10,000.—check. What can we expect wired today

TAR

10

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne
to T. A.
Richardson,
15th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO T. A. RICHARDSON

1932 NOV 15 PM 3 51

TAR

Trying to reach party by phone. Told him last night that I required more than \$15,000. and I know he went out early to try and get more, expect to hear from him any time now and will advise you just as soon as we get some action.

LJB NA

20

Exhibits,
Ex. 37 (Part).
Copy of
Telegram,
T. A.
Richardson to
L. S. Clarke,
15th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, T. A. RICHARDSON TO L. S. CLARKE

1932 NOV 15 PM 4 05

LSC NA

We must have at least \$15,000. wired by tomorrow noon—Otherwise our letter of yesterday holds good—please advise.

TAR

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO T. A. RICHARDSON

1932 NOV 15 PM 4 07

TAR

Will phone you tonight what is your number
LJB NA

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne
to T. A.
Richardson,
15th Novem-
ber 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

10 COPY OF TELEGRAM, T. A. RICHARDSON TO L. J. BAYNE

1932 NOV 15 PM 4 10

My number is Hyland 9192—Must have something definite by to-
morrow

TAR

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
T. A.
Richardson to
L. J. Bayne,
15th Novem-
ber, 1932

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO T. A. RICHARDSON

1932 NOV 16 A.M. 9.31

TAR

20 Did not get in touch with party yet so did not call you expect to
hear any time this morning Better call LSC

LJB NA

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne
to T. A.
Richardson,
16th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, T. A. RICHARDSON TO L. J. BAYNE

1932 Nov 16 AM 10 05

LJB N.A.

Re your message—no use calling L.S.C. we propose to start selling by noon unless fair amount money wired us. This is absolutely final.

T.A.R.

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
T. A.
Richardson to
L. J. Bayne,
16th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. S. CLARKE TO T. A. RICHARDSON

1932 Nov 16 AM 11 05

TAR

Wire to F. L. Werhan at 40 Wall Street amount of purchase on November 8 and 9 of Pen Pete for our account. Working with New York gang on this. Hold up until we wire you advise.

LSC NA

T A R phoned

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. S. Clarke
to T. A.
Richardson,
16th Novem-
ber, 1932.

10

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, F. O'HEARN & CO. TO F. L. WERHAN

Toronto Nov 16, 1932

F L Werhan
40 Wall St
New York
U.S.A.

We bought for Clarke North Bay November eighth seventy-eight thousand Pen Pete for ten thousand eight hundred and twentysix twenty five and on November ninth two hundred and forty seven thousand for forty thousand and thirty-five sixty two

Phoned

F O'HEARN & CO

Chg F O'Hearn & Co A/C

20

30

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
F. O'Hearn
& Co. to
F. L. Werhan,
16th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER

1932 NOV 17 AM 9 29

Gardner

Hold up until 10 o'clock will have something by that time
LJB NA

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
17th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

10 COPY OF TELEGRAM, NORTH BAY OFFICE OF L. S. CLARKE
TO A. GARDNER

1932 NOV 17 AM 10 12

Gardner

Mr. Bayne and LSC in conference with party from Toronto now expect
have some news for you in a few minutes.

CN NA

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
North Bay
Office of
L. S. Clarke to
A. Gardner,
17th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

20 COPY OF TELEGRAM, NORTH BAY OFFICE OF L. S. CLARKE
TO A. GARDNER, WITH PENCILLED MEMORANDUM

1932 NOV 17 AM 10 44

Gardner

Mr Bayne calling you by phone in few minutes

Na

Party to give us 500,000 free Stk tomorrow Friday for credit Clarke
a/c and they will try and get buying order in Stk. This to be sold out
against buying orders—Ship 200,000 N.Y.

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
North Bay
Office of
L. S. Clarke to
A. Gardner,
with pencilled
memorandum,
17th Novem-
ber, 1932.

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
A. Gardner to
L. J. Bayne,
17th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, A. GARDNER TO L. J. BAYNE

1932 NOV 17 PM 3 26

LJB NA

Do you want us ship any Pen Pete to E. F. Hutton & Co. and if so what are your instructions regarding same. Do you expect to be down tomorrow.

Gardner

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
17th Novem-
ber, 1932.

PART OF EXHIBIT 37.

10

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER

1932 NOV 17 PM 3 30

Gardner

No do not ship today will be in to see you tomorrow

LJB NA

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
A. Gardner to
North Bay
Office of
L. S. Clarke,
18th Novem-
ber, 1932.

PART OF EXHIBIT 37.

(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, A. GARDNER TO NORTH BAY OFFICE
OF L. S. CLARKE

20

1932 NOV 18 Am 10 51

NA

Did L. J. B. leave for Toronto last nite

G

EXHIBIT 3.

(PLAINTIFFS' EXHIBIT)

AGREEMENT BETWEEN CHARLES M. KAATZ AND F.
O'HEARN & COMPANY.

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 3.
Agreement,
Charles M.
Kaatz and
F. O'Hearn
& Co.,
19th Novem-
ber, 1932.

THIS AGREEMENT made in duplicate this 19th day of November, 1932.

B E T W E E N:

CHARLES M. KAATZ of the City of
Toronto, in the County of York.

10

Hereinafter called the Party
OF THE FIRST PART
—and—

F. O'HEARN & COMPANY, Brokers
of the City of Toronto, in the
County of York,

Hereinafter called the Parties
OF THE SECOND PART

WHEREAS Leslie S. Clarke of the City of North Bay, in the Prov-
ince of Ontario, has an account with F. O'Hearn & Company, Brokers,
20 of the City of Toronto;

AND WHEREAS there have been transactions between Leslie S.
Clarke and the parties of the second part hereto in connection with a
stock known as "Peninsular Petroleum," on November 8 and 9, 1932, for
the purchase of three hundred thousand (300,000) shares of the said stock;

AND WHEREAS Leslie S. Clarke has not taken up at the date here-
of certain shares of the said Peninsular Petroleum stock purchased
through the said parties of the second part;

AND WHEREAS, in order that there may be no loss in the account
to Leslie S. Clarke or to the parties of the second part hereto, or such loss
30 minimized as much as possible, an agreement has been made between the
parties hereto that the party of the first part will deposit five hundred
thousand shares (500,000) of Peninsular Petroleum stock as collateral
security to an account between Leslie S. Clarke and the parties of the
Second Part hereto, in so far as the said account relates to transactions
involving three hundred thousand shares (300,000) of Peninsular Petro-
leum stock;

NOW THEREFORE THIS INDENTURE WITNESSETH that
in consideration of the premises and the sum of One Dollar (\$1.00) now
paid by each of the parties hereto to the other of them, IT IS AGREED

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 3.
Agreement,
Charles M.
Kaatz and
F. O'Hearn
& Co.,
19th Novem-
ber, 1932.
—concluded.

that the party of the first part hereto will deposit the said 500,000 shares of Peninsular Petroleum stock as collateral to the account of Leslie S. Clarke, in so far as 300,000 shares of Peninsular Petroleum purchases are concerned on the following terms and conditions:—

1. That none of the shares of Peninsular Petroleum stock so deposited or now held in the account of Leslie S. Clarke will be sold during the currency of this agreement for a less sum than seven cents (7c) per share.

2. And further that no more than twelve thousand (12,000) shares of the said stock in the Leslie S. Clarke account and of the half million shares herein set out will be offered by the parties of the second part or 10 sold on any one day.

3. AND FURTHER that after the account of the said Leslie S. Clarke, in so far as the aforesaid Peninsular Petroleum share transactions are concerned, has been settled in full, any shares of Peninsular Petroleum stock remaining out of the said 500,000 shares so deposited shall be returned forthwith to the party of the first part hereto.

4. IT IS FURTHER AGREED that in realization of Peninsular Petroleum shares, any shares of the said 300,000 now on hand of Leslie S. Clarke's are to be first resorted to.

5. If the parties of the second part hereto at any time decide to and do 20 take proceedings against Leslie S. Clarke for any balance due them in regard to the said transactions in Peninsular Petroleum shares, then the said 500,000 shares of Peninsular Petroleum stock deposited by the party of the first part hereto, or any balance thereof then in the hands of the parties of the second part shall be forthwith returned to the said party of the first part.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and year first above mentioned.

SIGNED, SEALED AND DELIVERED

in the presence of
"J. C. Labbett"
witness to F. O'Hearn & Co.
signature.

} "F. O'Hearn & Co." (Seal) 30
by T. A. Richardson
partner (Seal)



PART OF EXHIBIT 37.
(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER

1932 NOV 25 AM 9 19

Gardner

Unable to get in touch with my man as he is out but expect him sometime this morning left note at his home to call me and will advise you just as soon as I hear from him

LJB NA

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
25th Novem-
ber, 1932.

10

PART OF EXHIBIT 37.
(DEFENDANTS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER

1932 NOV 25 PM 3 32

Gardner

Talking to party and they considerable buying coming from New York. He is going down to make sure of it also working around district will advise you later anything I get.

LJB NA

Exhibits.
Ex. 37 (Part).
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
25th Novem-
ber, 1932.

20

(PLAINTIFFS' EXHIBIT)

COPY OF TELEGRAM, L. J. BAYNE TO A. GARDNER.

TELEGRAM VIA PRIVATE WIRES OF L. S. CLARKE
BROKER

19 Main St. West—North Bay

sent to
A. Gardner

NORTH BAY Nov. 25/32

Balance for special account \$41,897.60
after sale of 131,500 shares

L.J.B.

Exhibits.
Ex. 31.
Copy of
Telegram,
L. J. Bayne to
A. Gardner,
25th Novem-
ber, 1932.

EXHIBIT 7.

(PLAINTIFFS' EXHIBIT)

OFFICE MEMORANDUM OF A. GARDNER AS TO SPECIAL ACCOUNT

In the
Supreme
Court of
Ontario.
—
Exhibits.
Ex. 7.
Office
Memorandum
of A. Gardner
as to Special
Account.

300,000	Pen Pete —	Nov. 8	78
		" 9	247
<hr/>			
Tfd.	Spcl.		325
<hr/>			
Also	126 (?) —	Sold 16th	
<hr/>			

EXHIBIT 44.

(PLAINTIFFS' EXHIBIT)

10

STATEMENT OF ACCOUNTS L. S. CLARKE TO G. M. MILLER.

Exhibits.
Ex. 44.
Statement of
Accounts,
L. S. Clarke to
G. M. Miller,
30th Novem-
ber, 1932.

SUDBURY, ONT. November 30th, 1932.

Mr. Geo. M. Miller,
Sudbury, Ont.

In Account with

Branches
Sudbury, Fred Woods, Mgr.
North Bay, L. J. Bayne, Mgr.
Stocks, Bonds,
Grain.
Telephones, 3020-1

L. S. CLARKE
Broker
Correspondent
F. O'HEARN & CO.
TORONTO

Private Wires
to
Toronto, Montreal,
Winnipeg,
New York, Chicago.

9 Durham St., Sudbury. P.O. Box 40.

20

<u>1932</u>		New York Account	
Nov. 1	To Balance	807.87	
" 5	Transfer from Can. a/c		140.00
" 30	To Interest	3.96	
" 30	By Balance		671.83
		<hr/>	
		811.83	<hr/>
		<hr/>	<hr/>
To Balance		671.83	
Long	200 U.N.L.A.		
	200 Warner Bros.		

30

SUDBURY, ONT. November 30th, 1932.

TO Mr. Geo. M. Miller,
Sudbury, Ont.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 44.
Statement of
Accounts,
L. S. Clarke to
G. M. Miller,
30th Novem-
ber, 1932.
—concluded.

In account with

Branches:
Sudbury, Fred Woods, Mgr.
North Bay, L. J. Bayne, Mgr.
Stocks, Bonds,
Grain.
Telephones 3020-1

L. S. CLARKE
Broker
Correspondent
F. O'HEARN & CO.
TORONTO

Private Wires
to
Toronto, Montreal,
Winnipeg,
New York, Chicago.

10 9 Durham St., Sudbury. P.O. Box 40.

1932

Canadian Account

Nov. 1	To Balance	1984.99	
4	By Cheque		500.00
5	Transfer to N.Y. A/c	140.00	
5	Prem. N.Y. Exch. 14¼%	19.95	
30	To Interest	9.78	
30	By Balance		1654.72

<u>2154.72</u>	<u>2154.72</u>
----------------	----------------

To Balance	1654.72
------------	---------

20

Long 300 Int. Nickel	2800
	800
	400
	<u>4000</u>
1654.72	2225
671	
<u>2225.72</u>	<u>1775</u>

EXHIBIT 47.

(PLAINTIFFS' EXHIBIT)

STATEMENTS OF ACCOUNTS F. O'HEARN & CO.
TO L. S. CLARKE

STATEMENT

Private Wires
to all leading
Financial Markets
and Northern Mining
Centres.

F. O'HEARN & CO.
Stocks, Bonds, Grain.
11 King Street West
Toronto, Ont.

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake

TO Messrs. L. S. Clarke Nov. 30, 1932 10
Can. Grain
North Bay

Dr.				Cr.			
Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Nov. 17	15 Wpg.	May Wheat	1007.50	Oct. 31		Balance as Rendered	8075.74
24	1 "	Dec. "	145.00	Nov. 7	1 Wpg.	May Wheat	21.25
28	1 "	" "	120.00	9	1 "	" " "	11.25
29	1 "	" "	73.75	26		Deposit	500.00
	16 "	" "	2361.25	30		"	500.00
30	5 "	May "	568.75				20
	5 "	Dec. "	762.50				
	10 "	" "	731.25				
	5 "	" Oats	262.50				
		Balance	3075.74				
			<u>9108.24</u>				<u>9108.24</u>
E. & O.E.				Nov. 30		BALANCE	3075.74

In the
Supreme
Court of
Ontario.
Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
Canadian
Grain
Account,
North Bay.

STATEMENT

Private Wires to all
Leading Financial
Markets and Northern
Mining Centres.

F. O'HEARN & CO.
Stocks, Bonds, Grain.
11 King Street West
Toronto, Ont.

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake

In the
Supreme
Court of
Ontario.
—
Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
U.S. Grain
Account,
North Bay.

TO L. S. Clarke, U.S. Grain
North Bay

Nov. 30, 1932

Dr.		Cr.	
Date	Quantity Description Amount	Date	Quantity Description Amount
10 Nov. 3	Chgo. Brd. 158.15	Oct. 31	BALANCE AS RENDERED 158.15
	Trade Drop. 15.00		
30	BALANCE 143.15		
	<u>158.15</u>		<u>158.15</u>
E. & O.E.		Nov. 30	BALANCE 143.15

STATEMENT

Private Wires to
all leading Financial
Markets and Northern
Mining Centres.

F. O'HEARN & CO.
Stocks, Bonds, Grain.
11 King Street West
Toronto, Ont.

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake

Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
U.S. Grain
Account
(Corrected)
North Bay.

20 TO Messrs. L. S. Clarke
North Bay Corrected
U. S. GRAIN

Dr.		Cr.	
Date	Quantity Description Amount	Date	Quantity Description Amount
Nov. 30	Chgo. Brd. Trade 143.15	Nov. 30	Balance Rend 143.15
	Drop. 15.00		
	Balance (November) 128.15		
	<u>143.15</u>		<u>143.15</u>
30 E. & O. E.		Nov. 30	Balance 128.15

STATEMENT

In the
Supreme
Court of
Ontario.

Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
North Bay,
New York
General
Account.

Offices at:
Toronto, Ontario.
Montreal, Quebec.
Sarnia, Ontario.
Owen Sound, Ontario.

F. O'HEARN & CO.
11 King Street West
Toronto, Ont.

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Standard Stock & Mining Exchange.
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Chicago Board of Trade.
Chicago Stock Exchange.
New York Curb Exchange
(Associate)
New York Produce Exchange.

TO L. S. Clarke
North Bay N.A.
N.Y. A/c

Nov. 30, 1932

Dr.				Cr.			
Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Oct. 31 1932		FORWARD	977.50	Nov. 10 25		Un. Air. Tran.	648.00 10
Nov. 30		Int.	3.29	17 200		Warner Bro.	384.00
	25	Un. Air. Tran.	578.51	30		Balance	527.30
			<u>1559.30</u>				<u>1559.30</u>
Nov. 30		Balance	527.30				

LONG

2 14/50	Auburn		
200	Can. Dry G. Ale		
484/600	El. Bond Sh.		
200	Krug Toll		
E. & O.E.			20

STATEMENT

Exhibits.
Ex. 47.
Statements
of Accounts,
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& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
Canadian
General
Account,
North Bay.

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(Associate)
New York Produce Exchange.

I.
TO L. S. Clarke
North Bay N.A.
Canadian A/c

Nov. 30, 1932

Dr.				Cr.			
Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Oct. 31 1932		FORWARD	41705.95	Nov. 1		Div. 4575 Teck.	686.25
Nov. 1	500	Pen Pete	60.00		300	Sylvanite Del.	

	1500	"	"	183.75	1000	Cap Rouyn	"		<i>In the Supreme Court of Ontario.</i> — Exhibits. Ex. 47. Statements of Accounts, F. O'Hearn & Co. to L. S. Clarke, 30th Novem- ber, 1932, Canadian General Account, North Bay. —continued.
	2000	"	"	245.00	2	500 Tasheta	10.59		
	2000	"	"	245.00		100 W. Harg.	273.16		
	2000	"	"	245.00	3	Div. 50 Holly	2.50		
	2000	"	"	245.00		7 Bell	686.91		
	1000	"	"	122.50		100 Canada 4½ 58	Del.		
	1000	"	"	122.50		3000 Pen Pete	"		
10	2000	"	"	255.00	79000	" "	"		
	2000	"	"	255.00		Deposit	7500.00		
	1000	"	"	130.00	4	500 Arno	10.71		
	10 Nickel			84.25		4400 Pen Pete	Del.		
	3000 Pen		Pete	363.75	5000	" "	"		
	2000	"	"	242.50					
	1000	"	"	121.25	3	100 Canada 5½ 33	101.05		
	1000	"	"	121.25	5	10 Nickel	Del.		
20	1000	"	"	122.50	7	1000 Tasheta	23.92		
	2000	"	"	245.00		100 Noranda	2005.87		
	2000	"	"	245.00		5 L. Shore	146.62		
	2000	"	"	245.00		100 Hud. Bay	407.10		
	2000	"	"	245.00		4000 Pen Pete	Del.		
	2000	"	"	255.00		1000 Man. Bas.	"		
	2000	"	"	255.00		100 Siscoe	85.13		
	Transfer Fees					100 Sylvanite	67.40		
	300 Sylvanite				8	Deposit	10000.00		
30	1000 Cap. Rouyn		.50			19000 Pen Pete	Del.		
	100 Canada 4½ 58		99.89		60000	" "	"		
2	100 Teck		Rec.		3000	Barry	116.73		
	25 C. P. R.		367.50		1000	Pen Pete	142.29		
	250 Pen Pete		29.37		200	Siscoe	Del		
3	100 Ventures		58.00		9	100 Granada	79.14		
40					10	Deposit	10000.00		
						3 Bell Tel.	Del.		
						200 Noranda	4081.77		
						100 Sherritt	43.43		
						300 Ventures	211.20		
				47894.21			36681.77		

E. & O. E.

STATEMENT

In the
Supreme
Court of
Ontario.
Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
Canadian
General
Account,
North Bay.

Offices at
Toronto, Ontario.
Montreal, Quebec.
Sarnia, Ontario.
Owen Sound, Ontario.

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Chicago Stock Exchange.
New York Curb Exchange
(Associate)
New York Produce Exchange.

TO L. S. Clarke
North Bay N.A.
Canadian A/c

II.
Nov. 30, 1932

Dr.				Cr.			
Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
NOV. 3		FORWARD	47894.21	Nov. 10		FORWARD	36681.77
	200	Ventures	117.00		12	100 Barry	4.40
	200	Siscoe	169.50			200 M.C.P. Rites	Del.
4	2500	Pen Pete	281.25		14	500 Tashota	13.09
	2500	" "	281.25			100 Teck	329.72
	1000	" "	112.50		15	Div. 25 Shawinigan	3.00
	3000	" "	337.50			2000 Pen Pete	234.67
	5000	" "	562.50			25 C. P. R.	Del.
	5000	" "	562.50				
	3000	" "	330.00		16	500 Pen Pete	58.66
	2000	" "	220.00			1500 Tashota	39.76
	2000	" "	215.00			2500 Pen Pete	170.98
	2000	" "	215.00			2000 " "	126.80
	3000	" "	322.50			5000 " "	329.50
	3000	" "	322.50			500 " "	36.05
	5000	" "	562.50			1500 " "	102.58
	5000	" "	562.50			1500 " "	100.71
	1000	" "	112.50			1000 " "	68.36
	20000	" "	2300.00			2000 " "	116.82
	3	Bell	296.50			6000 " "	380.45
	19000	Pen Pete	2185.00			10000 " "	684.00
	10000	" "	1125.00			3000 " "	235.11
	100	Canada 5½ 33	Rec.			500 " "	41.68
	500	Tashota	"			2000 " "	199.68
	7	Bell	"			8000 " "	778.90
	50	Granada	"			25 W. Harg	Del.
5	10	Nickel	91.25			10 Nickel	"
	5000	Pen Pete	550.00				40

	5000	"	"	550.00	2000	Pen Pete	136.80	<i>In the Supreme Court of Ontario.</i> Exhibits. Ex. 47. Statements of Accounts, F. O'Hearn & Co. to L. S. Clarke, 30th November, 1932, Canadian General Account, North Bay.	
	5000	"	"	550.00	1500	" "	113.79		
	5000	"	"	550.00	28000	" "	1915.21		
	500	"	"	55.00	3500	" "	256.82		
	4500	"	"	495.00	25000	" "	1709.88		
	500	"	"	56.25	10000	" "	659.05		
	7 1000	"	"	102.50	10000	" "	634.07		
	1000	"	"	105.00	5000	" "	292.08		
10					17 200	Siscoe	Del.		—continued.
					650	Barry	"		
				62192.21			46454.39		

E. & O. E.

STATEMENT

Offices at
 Toronto, Ontario.
 Montreal, Quebec.
 Sarnia, Ontario.
 Owen Sound, Ontario.

F. O'HEARN & CO.
 11 King Street West
 Toronto, Ont.

Members:
 Standard Stock & Mining Exchange.
 Winnipeg Grain Exchange.
 Chicago Board of Trade.
 Chicago Stock Exchange.
 New York Curb Exchange
 (Associate)
 New York Produce Exchange.

Exhibits.
 Ex. 47.
 Statements of Accounts, F. O'Hearn & Co. to L. S. Clarke, 30th November, 1932, Canadian General Account, North Bay.

III.

20 TO L. S. Clarke
 North Bay, N.A. Nov. 30, 1932.
 Canadian A/c

Dr.				Cr.			
Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Nov. 7		FORWARD	62192.21	Nov. 17		FORWARD	46454.39
	1000	Pen Pete	105.00		1000	Tashota	26.42
	2000	" "	210.00		18 500	Nordon	39.71
	1000	" "	105.00		5	Ser. Stat A.	18.95
	1000	" "	102.50		1000	Nordon	79.42
	200	" "	22.50		19 2000	Arno	40.93
	200	" "	22.50		500	Macassa	96.00
	25	W. Harg.	73.00		21 500	Castle	93.50
	2500	Pen Pete	268.75		35	McIntyre	822.09
8	100	Siscoe	Rec.		20	Walkers	134.74
	100	Sylvanite	"		10	McIntyre	236.37
	1000	Tashota	"		400	Holly	2200.40
	2000	Pen Pete	235.00				
	500	" "	61.25				

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
Canadian
General
Account,
North Bay.
—continued.

		Dr.		Cr.			
Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Nov. 8		FORWARD	69180.21	Nov. 24		FORWARD	54600.93
	5000	Pen Pete	687.50		100	Siscoe	Del.
	1000	" "	141.25		10000	Ritchie	"
	9000	" "	1282.50				
	1500	" "	213.75	25	20	Teck	66.42
	3000	" "	427.50		1000	Pen Pete	48.42
	5000	" "	712.50		25	L. Shore	796.35
10	2000	" "	285.00		300	Macassa	Del.
	5000	" "	712.50		1000	Mof. Hall	"
	2000	" "	285.00		5	McIntyre	120.67
					500	Pen Pete	25.44
	9	1500	" "		500	" "	24.19
		1500	" "		500	" "	24.19
		2000	" "		500	" "	24.19
		5000	" "				
		1000	" "				
		1500	" "	26	1000	Mof. Hall	18.93
		8500	" "		300	Holly	1695.30
20		5500	" "				
		4500	" "	28	500	Holly	2825.50
		4000	" "		500	Barry	31.57
		500	" "		25	Holly	141.26
		2000	" "		50	W. Harg.	151.31
		500	" "		100	Ventures	72.40
		2000	" "		100	Waite AK	Del.
		500	" "				
		2000	" "				
		2000	" "	29	25	Dome	347.76
		5000	" "		150	Sylvanite	Del.
30		5000	" "		300	Bret	"
		100	Can. Pandora A.		200	McIntyre	4767.70
		10000	Pen Pete		10	L. Shore	Del.
		10500	" "				
		10500	" "	30	10	Noranda	"
		2000	" "				
		2000	" "				
		4000	" "				
		32500	" "				
		7500	" "				
						BALANCE	79588.87
40							
			94803.96				145371.40
		E. & O. E.					

STATEMENT

In the
Supreme
Court of
Ontario.
—
Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
Canadian
General
Account,
North Bay.

Offices at
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Sarnia, Ontario.
Owen Sound, Ontario.

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Chicago Board of Trade.
Chicago Stock Exchange.
New York Curb Exchange
(Associate)
New York Produce Exchange.

V.

TO L. S. Clarke

Nov. 30, 1932

North Bay, N.A.
Canadian A/c

Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Nov. 9		FORWARD	94803.96	Nov.		FORWARD	145371.40 10
	5500	Pen Pete	866.25				
	500	" "	77.50				
	1000	" "	147.50				
	19500	" "	3071.25				
	21500	" "	3493.75				
	1000	" "	160.00				
	7000	" "	1067.50				
	3500	" "	564.37				
	5000	" "	787.50				
	1500	" "	243.75				20
	37000	" "	6567.50				
	3000	" "	502.50				
	6000	" "	990.00				
	2000	" "	320.00				
	500	" "	78.75				
	1000	" "	162.50				
	500	" "	78.75				
10	8	C. P. R.	Rec.				
12	650	Barry	"				
	200	Siscoe	"				30
	100	Sherritt	"				
14	100	Granada	"				
	50	Teck	167.00				
	50	W. Harg.	146.75				

	15	5 Seagrams	34.75	
	16	100 Pen Pete	11.00	
		1000 " "	66.50	
	7	Tran. Fees 1000		
		Man. Bas.	1.00	
	16	Cheque returned		
		10/11 10000.00		
		4 days 6% Int. above	6.57	
10	17	Tran. Fees 25 W.		
		Harg.	.25	
		1500 Pen Pete	107.25	
		500 " "	34.50	
		500 " "	31.37	
		1000 " "	76.50	
			<hr/>	
			124666.77	
				<hr/>
				145371.40

In the Supreme Court of Ontario.
Exhibits. Ex. 47. Statements of Accounts, F. O'Hearn & Co. to L. S. Clarke, 30th November, 1932, Canadian General Account, North Bay.
---continued.

E. & O. E.

STATEMENT

20 Offices at
Toronto, Ontario.
Montreal, Quebec.
Sarnia, Ontario.
Owen Sound, Ontario.

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Toronto, Ont.

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New York Curb Exchange
(Associate)
New York Produce Exchange.

Exhibits. Ex. 47. Statements of Accounts, F. O'Hearn & Co. to L. S. Clarke, 30th November, 1932, Canadian General Account, North Bay.

VI.

TO L. S. Clarke
North Bay, N.A.
Canadian A/c

Nov. 30, 1932.

Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Nov. 17		FORWARD	124666.77	Nov.		FORWARD	145371.40
		Tran. Fees 1300 Barry					
		" " 200 Siscoe	.50				
30	18	10000 Ritchie	107.50				

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
Canadian
General
Account,
North Bay.

—continued.

19	Cheque	3000.00	
21	100 Bret	15.50	
	300 Macassa	57.75	
	10 L. Shore	317.25	
22	1000 Macassa	Rec.	
	100 Teck	"	
	2000 Arno	"	
	500 Pen Pete	28.25	
	Cheque	3022.49	
23	100 Bret	15.00	10
	100 Waite AK	40.50	
	1000 Tashota	Rec.	
	35 McIntyre	"	
	20 Walkers	"	
	2000 Pen Pete	108.00	
	100 " "	6.25	
	100 Bret	15.25	
	50 Ashley	35.50	
	1 Bell	96.30	
	4 "	387.20	20
24	3100 Barry	Rec.	
	400 Holly	"	
	2000 Tashota	"	
	2000 Pen Pete	103.00	
	5 McIntyre	113.00	
25	1000 Newbec	Rec.	
	1000 Barry	"	
	500 Arno	10.50	
	10 Mont. Power	313.00	
	Cheque	1100.20	30
26	200 Holly	Rec.	
	10 Noranda	208.25	
		<u>133767.96</u>	
			<u>145371.40</u>

E & O. E.

STATEMENT

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Sarnia, Ontario.
Owen Sound, Ontario.

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Chicago Stock Exchange.
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New York Produce Exchange.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 47.
Statements
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke,
30th Novem-
ber, 1932,
Canadian
General
Account,
North Bay.
—concluded.

VII.

TO L. S. Clarke
North Bay, N.A.
Canadian A/c

Nov. 30, 1932

Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
10 Nov. 26		FORWARD	133767.96	Nov.		FORWARD	145371.40
	2000	Pen Pete	103.00				
	28	20 Teck	Rec.				
		10 McIntyre	"				
		500 Pen Pete	25.75				
		100 Nickel	937.50				
		Cheque	4520.80				
	29	25 Holly	Rec.				
		Tran. Fees 150 Sylvania					
		100 Siscoe	.50				
20		Cheque	4767.70				
	30	Int.	406.09				
		50 W. Harg.	Rec.				
		100 Ventures	"				
		800 Holly	"				
		1000 Pen Pete	45.75				
		Cheque	796.35				
			<u>145371.40</u>				<u>145371.40</u>
Nov. 30		Balance	79588.87				
E. & O. E.							

EXHIBIT 32.

(PLAINTIFFS' EXHIBIT)

LETTER, L. J. BAYNE TO F. O'HEARN & CO.

In the
Supreme
Court of
Ontario.
—
Exhibits.
Ex. 32.
Letter,
L. J. Bayne
to F. O'Hearn
& Co.,
5th Decem-
ber, 1932,

Branches:
North Bay, L. J. Bayne, Mgr.
Sudbury, Fred Woods, Mgr.
Stocks, Bonds,
Grain.
Telephones 2750-1.

L. S. CLARKE
BROKER
Correspondent
F. O'HEARN & CO.
Toronto.

Private Wires to
Toronto, Montreal,
Winnipeg,
New York
and Chicago.

19 Main St. West, North Bay

December 5/32. 10

F. O'Hearn & Co.,
11 King St. West,
Toronto, Ontario.

Gentlemen:—

Re: Peninsular Petroleum

		The figures on the PS deal are as follows:—				
Purchases	Nov. 8th	64500	shares	ours	\$49,821.87	
	9th	246000	"	"		
Sales	Nov. 16th	126000	"	"		
	21st	5500	"	"	9,019.67	
Purchases	Nov. 8th	500	"	12		20
		4500	"	12½		
		5000	"	13½		
		1000	"	13-7/8		
		41500	"	14		
		<u>12000</u>	"	14½		
		<u>64500</u>				9147.40
	Nov. 9th	5000	"	13		
		9000	"	13½		
		11000	"	14		
		5000	"	14½		
		16500	"	14¾		30
		21000	"	15		
		500	"	15¼		
		34500	"	15½		
		3000	"	15¾		
		5500	"	15-7/8		
		38500	"	16		
		6000	"	16¼		
		13500	"	16½		

		7500	"	17		
		69500	"	17½		
		<u>246500</u>				39898.22
						<u>49045.62</u>
	Sales	Nov. 16th	7000	shares @	6	
			18000	"	6½	
			15000	"	6¾	
			1500	"	6-7/8	
10			65500	"	7	
			500	"	7-3/8	
			3500	"	7½	
			1500	"	7¾	
			3000	"	8	
			500	"	8½	
			8000	"	10	
			2000	"	10¼	— 126000 8781.54
		Nov. 21st	5500	"	7¾	5500 417.38
						<u>9198.92</u>
20		Total Purchases				\$49,045.62
		Total Sales				9,198.92
		Long 179000 shares				<u>\$39,846.70</u>

In the
Supreme
Court of
Ontario.
—
Exhibits.
Ex. 32.
Letter,
L. J. Bayne
to F. O'Hearn
& Co.,
5th Decem-
ber, 1932,
—concluded.

Yours very truly,
"L. J. Bayne"
L. S. Clarke.

LJB

PART OF EXHIBIT 12.

(PLAINTIFFS' EXHIBIT)

STATEMENT, F. O'HEARN & CO. TO L. S. CLARKE
(SPECIAL ACCOUNT)

Exhibits.
Ex. 12 (Part).
Statement,
F. O'Hearn
& Co. to
L. S. Clarke
(Special
Account),
31st Decem-
ber, 1932,

30 Private Wires
to all Leading
Financial Markets
and Northern Mining
Centres.

F. O'HEARN & CO
Stocks, Bonds, Grain.
11 King Street W.
TORONTO, Ontario.

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake
Noranda

December 31st, 1932.
914.

Mr. L. S. Clarke, North Bay
Dear Sir:

Canadian Special a/c

Our auditors, Messrs. Gunn, Roberts & Co., Chartered Accountants,
705, Excelsior Life Bldg., Toronto 2, are now making their regular exam-

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 12 (Part).
Statement,
F. O'Hearn
& Co. to
L. S. Clarke
(Special
Account),
31st Decem-
ber, 1932.

—concluded.

ination of our accounts. In connection therewith kindly verify the correctness of the statement below as at the close of business on December 31st, 1932 NOTING ANY EXCEPTIONS.

Your prompt compliance by signing the confirmation at the bottom of this form and mailing direct to our auditors will be much appreciated.

A stamped addressed envelope is enclosed for your convenience.

Yours very truly,

F. O'HEARN & CO.

Ledger Balance Debit \$40036.56 Ledger Balance Cr. \$

LONG

10

679000 Pen Pete

The statement of my account, as summarized above, is correct.

L. S. CLARKE
"L. J. BAYNE"
"N. K. MULLIGAN"

PART OF EXHIBIT 13.

(PLAINTIFFS' EXHIBIT)

MONTHLY ACCOUNT, F. O'HEARN & CO. TO L. S. CLARKE
(SPECIAL ACCOUNT)

STATEMENT

20

Offices at
Toronto, Ontario.
Montreal, Quebec.
Sarnia, Ontario.
Owen Sound, Ontario.

F. O'HEARN & CO.
11 King Street West
Toronto, Ont.

Members:
Standard Stock & Mining Exchange.
Winnipeg Grain Exchange.
Chicago Board of Trade.
Chicago Stock Exchange
New York Curb Exchange
(Associate)
New York Produce Exchange.

TO L. S. Clarke
North Bay N.A.
Canadian Special A/c

Exhibits.
Ex. 13 (Part).
Monthly
Account,
F. O'Hearn
& Co. to
L. S. Clarke
(Special
Account),
31st Decem-
ber, 1932.

DR.				CR.			
Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Dec. 6	310500	Pen Pete R/A	49045.62	Nov 30		FORWARD	418.10
	31	Interest	191.06	Dec. 6	126000	Pen Pete R/A	8781.54
						Cr.	.48
					31		40036.56
			<u>49236.68</u>				<u>49236.68</u>
	31	BALANCE	40036.56				
10		<u>LONG</u>					
		679000 Pen Pete					
		E. & O. E.					

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 13 (Part).
Monthly
Account,
F. O'Hearn
& Co. to
L. S. Clarke
(Special
Account),
31st Decem-
ber, 1932.
--concluded.

EXHIBIT 16.

(PLAINTIFFS' EXHIBIT)

LETTER, L. J. BAYNE TO F. O'HEARN & CO.

Branches:
North Bay, L. J. Bayne, Mgr.
Sudbury, Fred Woods, Mgr.
Stocks, Bonds, Grain.
Telephones 2750-1

L. S. CLARKE
BROKER
Correspondent
F. O'HEARN & CO.
Toronto

Private Wires
to
Toronto, Montreal,
Winnipeg, New
York and Chicago.

20

19 Main St. West, North Bay

January 19, 1933

Messrs. F. O'Hearn & Co.,
11 King St., West,
Toronto, Ont.

Exhibits.
Ex. 16.
Letter
to
L. J. Bayne to
F. O'Hearn
& Co.,
19th January,
1933.

*In the
Supreme
Court of
Ontario.*

Gentlemen:

Exhibits.
Ex. 16.
Letter,
L. J. Bayne to
F. O'Hearn
& Co.,
19th January,
1933.

Kindly ship street certificate for 1000 shares of Wright Hargreaves on draft for \$890.00, and oblige.

Yours very truly,
L. S. CLARKE
"L. J. Bayne"
Manager

—concluded.

LJB/NM

Rec. Jan. 23/33

EXHIBIT 15.

(PLAINTIFFS' EXHIBIT)

10

LETTER L. S. CLARKE TO F. O'HEARN & CO.

Exhibits.
Ex. 15.
Letter,
L. S. Clarke
to F. O'Hearn
& Co.,
21st January,
1933.

Branches:
North Bay, L. J. Bayne, Mgr.
Sudbury, Fred Woods, Mgr.
Stocks, Bonds, Grain.
Telephones 2750-1

L. S. CLARKE
BROKER
Correspondent
F. O'HEARN & CO.
Toronto

Private Wires
to
Toronto, Montreal,
Winnipeg, New
York and Chicago.

19 Main St. West—North Bay

January 21st, 1933.

F. O'Hearn & Co.,
11 King St. West,
Toronto, Ont.

20

Dear Sirs:

With further reference to ours of the 18th inst. Mr. A. T. Smith is pressing for delivery of his stocks to be shipped against a draft of \$2300., being the balance he owes on his stock. You can make draft with securities attached direct to Mr. Smith at North Bay or through our office here.

You may follow the same procedure with regard to the 1,000 shares of Wright-Hargreaves which we asked for recently. Draft, as mentioned in our letter, may be made on Mrs. H. Shepherd, North Bay who is the own- 30
er of this stock.

Yours truly,
"L. S. Clarke"

EXHIBIT 14.

(PLAINTIFFS' EXHIBIT)

COPY OF LETTER, O'HEARN & CO. TO L. S. CLARKE.

January 21st, 1933.

PERSONAL

Mr. L. S. Clarke,
Box 264,
North Bay, Ontario.

Dear Sir—

10 The Partners of this firm have had a thorough discussion regarding your account and have to advise you that we feel that your account is in such condition that it does not warrant us delivering any stocks out of the account unless we receive the market price for same. We feel that we have given you every assistance for the past two months to enable you to work out some arrangements whereby you could obtain some additional cash or collateral in order to give us further protection in your account and providing that the market does not have any set-back we are willing to wait for a further period of two weeks in order that you may have a little longer time to try and work out some plan to improve the account.

20 While we are quite willing to give you this further two weeks to work this matter out it must be definitely understood that in the event of any break in the market we reserve the right to cancel the above extension at any time. We also reserve the right to treat the account strictly on a day to day basis.

We sincerely trust that you will be able to work out some solution. In the meantime if you would let us have \$10,000 in cash we feel that it would enable us to grant you a further period of time in which you may be able to complete your arrangements.

Yours very truly,

30 REGISTERED.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 14.
Copy of Letter,
O'Hearn & Co.
to L. S. Clarke,
21st January,
1933.

EXHIBIT 4.

(PLAINTIFFS' EXHIBIT)

LETTER L. S. CLARKE TO F. O'HEARN & CO.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 4.
Letter,
L. S. Clarke
to F. O'Hearn
& Co.,
25th January,
1933.

Branches:
North Bay, L. J. Bayne, Mgr.
Sudbury, Fred Woods, Mgr.
Stocks, Bonds,
Grain.
Telephones 2750-1

L. S. CLARKE
BROKER
Correspondent
F. O'HEARN AND CO.
Toronto

Private Wires
to
Toronto, Montreal,
Winnipeg, New York
and Chicago.

19 Main St. West—North Bay

F. O'Hearn & Co.,
11 King Street W.,
Toronto, Ont.

January 25, 1933.

10

Dear Sirs:

I have your letter of the 21st inst.

Since at least February 1931 you, of course, have always been aware that the stock brokerage business carried on at North Bay and Sudbury is a brokerage business not for the purpose of buying and selling stocks for myself, but for the purpose of buying and selling stocks for local customers. Your monthly statements in which you have charged half commissions on various transactions clearly indicates your understanding of 20 the capacity in which I have dealt with you.

You state in your letter that you decline to make any further deliveries of stocks held by you representing transactions of the North Bay and Sudbury offices unless you receive the market price for same. At the same time you require me, within two weeks, to furnish certain cash to you in part satisfaction of the monies for which you claim I am indebted to you.

In your letter you made no mention of two facts which I would like to recall to you; first, that the marginal accounts which are held by you apparently in my name, but to your knowledge held for the customers, are 30 all properly margined; secondly, that the amount which you claim to be owing by me represents an alleged debit balance in respect of transactions aggregating about three hundred thousand shares of one stock—Peninsular Petroleum, which is not a stock traded on margin, and which transactions occurred during the first two weeks of November 1932.

In connection with the Peninsular Petroleum transactions, you will recall that at the time certain negotiations occurred, looking to the adjustment of the monies you claim to be owing on these transactions, you agreed with me that the Peninsular Petroleum account would be kept and dealt with by you as an account separate from the marginal accounts 40 and all other accounts.

I am enclosing herewith a list of the accounts of customers of the

Sudbury and North Bay offices, showing in each case the stocks which you hold and to delivery of which those customers are entitled upon payment of the comparatively small debit balance which may be owing in the respective accounts. On behalf of these customers I notify you that they respectively are the persons entitled to the stocks listed opposite their names, and that delivery must not be declined in any case where the debit balance is paid and delivery requested either by the customer or by me on the customer's behalf. In event of failure on your part to observe this notice and to give effect to the request here made, you will be held responsible for any loss or damage which may result.

You will also be held responsible for any loss or damage which may result to the customers named in the enclosed lists or any of them, or to me, by reason of any steps which you might take to sell any of the stocks set out in the lists as a means of liquidating in whole or in part the amount which you claim to be owing in respect of the Peninsular Petroleum transactions.

And I demand that, if you have not already done so, you segregate the account in respect of the Peninsular Petroleum transactions, not only to carry out your agreement with me, but also because I take the position that our relationship in the Peninsular Petroleum transactions was a different one to that created in the other transactions in the ordinary course of business, and I am not at all satisfied that you are only agent for me in the Peninsular Petroleum transactions.

Anything here stated is quite without prejudice to any and all rights which I may have to decline responsibility either in whole or in part for the transactions in Peninsular Petroleum stock or to any question which I may desire to raise with regard to the relationship of the business carried on at North Bay and Sudbury to your own firm.

Yours truly,
"L. S. CLARKE"

30

EXHIBIT 5A.

(PLAINTIFFS' EXHIBIT)

LIST OF L. S. CLARKE'S SUDBURY CLIENTS.

SUDBURY ACCOUNTS

(Addressed in each case Sudbury unless otherwise specified)

Mrs. S. Abraham

1000 Siscoe
500 Ventures
1000 Sylvanite

40 G. J. Almankaas

1500 Sullivan (ordered out)

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 4.

Letter,
L. S. Clarke
to F. O'Hearn
& Co.,
25th January,
1933.

--concluded.

Exhibits.
Ex. 5A.

List of
Sudbury
Clients of
L. S. Clarke,
25th January,
1933.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 5A.
List of
Sudbury
Clients of
L. S. Clarke,
25th January,
1933.

-continued.

David Bannon	500 Falconbridge	
H. A. Burke	20 B. A. Oil	
	25 Walkers Com.	
Thomas P. Bannon	100 I. K. N.	
	100 Hollinger	
	400 Teck Hughes	
	100 Walkers Com.	10
John Chyka	50 I. K. N.	
	1000 Macassa	
	2000 Kirkland Lake	
P. A. Coates	30 B. A. Oil	
	100 Mining Corp.	
A. Cecchetto	100 I. K. N.	
	200 Chemical Research	20
	100 Hudson Bay	
	100 Falconbridge	
Elzear Charette	100 Noranda	
	100 Chemical Research	
	503 Falconbridge	
	100 Distillers S.	
	200 Eldorado	
	25 Walkers Pre.	
	25 Walkers Com.	30
E. J. Curry	50 Teck Hughes	
R. A. Cormack	200 Teck Hughes	
Wm. Duncan	50 Lake Shore	
Mrs. H. Dyer	15 I. K. N.	
	1 Smelters	
	50 Falconbridge	40
	100 Kirkland Lake	
W. J. Elliott	1500 Mining Corp.	
	3000 Brett	
	5000 Tashota	
	1000 Kirkland Lake	

	100 I. K. N.
Mrs. N. Fitzgerald	
	800 Falconbridge
Thomas Fraser	
	75 Hudson Bay
	300 Sherritt Gordon
Mrs. A. Guisti	
	100 I. K. N.
F. Hubbs	
10	25 Walkers Pre.
	25 Walkers Com.
T. W. Hull	
	300 Mining Corp.
	60 Ashley
	1000 Macassa
D. H. Haight	
	25 Noranda
Dr. Jones	
	2000 Mining Corp.
20	400 Ashley
J. E. Jacques	
	50 Brazil
H. Klein	
	100 Prospectors Airways
	100 San Antonio
L. Konnasto	
	30 I. K. N.
J. E. Lafferty	
	400 Falconbridge
30 M. Lapcynski	
	400 W. Hargreaves
	100 Mining Corp.
	500 Vipond
Thos. Linton	
	200 Ashley
Z. Lesoer	
	100 Teck Hughes
	100 Falconbridge
W. J. Mead	
40	300 Falconbridge
	200 Vipond
	200 Sherritt Gordon
	100 W. Hargreaves
Mrs. Murray	
	100 Falconbridge

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 5A.
List of
Sudbury
Clients of
L. S. Clarke,
25th January,
1933.

—continued.

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 5A.
List of
Sudbury
Clients of
L. S. Clarke,
25th January,
1933.
—continued.

G. M. Miller	300 I. K. N.	
H. McKee	100 Teck Hughes	
J. McVeigh	20 I. K. N.	
Mrs. Porri	25 I. K. N.	
	200 Sylvanite	
	20 Consol. Oil (N.Y.)	10
George Rowland	75 Chem. Research	
C. Rippington	100 Ajax	
	500 Ventures	
John Ruff	100 Teck Hughes	
John Syved	20 Teck Hughes	
Alex. Suszek	75 I. K. N.	20
	100 Falconbridge	
R. Sims	400 Sylvanite	
	200 Hudson Bay	
	100 Falconbridge	
M. Solie	100 Hollinger	
	100 Falconbridge	
	1000 Brett	30
	100 Standard Brands (N.Y.)	
J. P. Taillon	20 Noranda	
J. F. Woods	400 Chemical Research	
	200 W. Hargreaves	
A. A. Willsie	100 Ajax	
	400 Teck Hughes	40
	200 Kirkland Lake	
R. Weir	1000 Sherrit Gordon	
Mrs. Wallace	100 Falconbridge	
	25 I. K. N.	

T. A. Wilson	25 I. K. N.
	25 Lake Shore
R. A. Wylie	
	500 Kirkland Lake
Mrs. K. Wagner	150 I. K. N.
	500 Siscoe
	200 Falconbridge

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. SA.
List of
Sudbury
Clients of
L. S. Clarke,
25th January,
1933.

—continued.

10 NEW YORK ACCOUNTS

Mrs. S. Abraham	50 Anaconda
A. E. Aunaha	50 Radio
H. E. Aboud	20 A.F.W.
Mrs. Bennett	10 C.T.M.
David Bannon	400 W.B.P.
20	100 P.X.
Dr. Bruser	10 U.S. Steel
	10 Gen. Motors
I. T. Bowman	50 Aconda
A. G. Bell	100 P.X.
Elzear Charette	100 Cons. Oil
30	10 E.B.S.
	10 U.S. Steel
	50 U.L. & P.
	1/5 Auburn
J. E. Cahoon	15 Vanadum
Wm. Duncan	150 Montgomery Ward
Mrs. H. Dyer	5 U.S. Steel
40	
Geo. Davidson	15 U.S. Steel
Ralph Downey	40 Northern Pacific

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 5A.
List of
Sudbury
Clients of
L. S. Clarke,
25th January,
1933.
- concluded.

Dr. Fraser	50 C.T.M.	
William Glennie	15 3/5 Auburn	
A. Heiskanen	100 Paramount 10 Beth. Steel	
W. J. Law	21 31/50 Auburn	
G. M. Miller	200 U.L. & Power 200 Warner Bros.	10
W. A. McDonnell	40 40/50 Auburn	
Geo. Rowland	100 Warner Bros.	
J. M. Regan	100 Radio	
Miss Scully	5 Mont. Ward 30 Briggs 10 Radio	20
J. F. Woods	200 Warner Bros. 50 Y. Cab 10 10/50 Auburn	
R. A. Wylie	7 17/50 Auburn	

SUDBURY GRAIN ACCOUNTS
being May Wheat and July 30

(Addresses in each case Sudbury unless otherwise specified.)

<u>Name</u>	<u>Customer's equity January 25,1933.</u>	
A. C. Boyle	39.00	
Elzear Charette	211.25	
J. Ferguson	987.50	
W. B. Plannt	536.00	
J. E. Pacquette	313.00	
J. Smith	75.00	
M. Tait	115.00	40
Geo. Tonkovitch	375.00	
Edd White	180.00	
	<u>2831.75</u>	

EXHIBIT 5B.

(PLAINTIFFS' EXHIBIT)

LIST OF NORTH BAY CLIENTS OF L. S. CLARKE.

NORTH BAY ACCOUNTS

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 5B.
List of
North Bay
Clients of
L. S. Clarke,
25th January,
1933.

	Aubin, A. L., Sturgeon Falls		100	Granada 100 Base Metals
	Barber, W., Nipissing		100	Teck Hughes
	Bailey, Gordon J., North Bay		5	Gurds
	Beham, Mrs. Geo., Temiskaming			Nil
	Clarke, L. S., North Bay		270	Abitibi
10			28000	Pen Pete
		Can.	5000	Algonquin,
			14000	Moffatt Hall
		N.York	1-3/50	Auburn
		#3	10000	Moffatt Hall
			200	Kruger
	Connell, D. F.	"		
	Chaput, Mrs. H.	"	500	Wright Hargraves
			500	Sherrit G.
			1800	Teck Hughes
20			500	Kirkland Lake
			1000	Pen Pete
	Collins, B. I.	"	25	Shawinigan
	Caldwell, Wm. C.	"	300	Howey
			500	Cent. Patricia
	Duncan, Geo. W.	"	N.York	1-3/50 Auburn
		Can.	1000	Kirkland Lake
	Dellain, Dr. R. H., Powassan		50	Coniorum
	Dorsee, Victoria, North Bay		2	C. P. Ry.
	Frederick, I.V.	" "	100	Howey
30			10	Ford A.
	Flurgold, L.	" " N.York	25	United Aircraft (Short)
	Gordon, S. J.	" "	20	Dome
	Ginn, F. E.	" "	50	Wright Harg.
			1000	Arno
	Hanson, J. P.	" "		
	Hagan, James, Powassan		1000	Teck Hughes
	Imperial Bank Trust, North Bay		1000	Acme
	Kennedy, N. E.	" "	10	Noranda
	Maund, W. H.	" "	50	Noranda
40	McDonald, L. M.	" "	25	Noranda
	McBeth, E.	Callendar	50	B. A. Oil
	McBean, A. P.	North Bay	75	Teck Hughes

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 5B.
List of
North Bay
Clients of
L. S. Clarke,
25th January,
1933.

—concluded.

McGilliard, N.	"	"	1000	Teck Hughes	
Nott, Dr. B. F.	"	"	970	Wright Hargraves,	
			10	McIntyre	
Pearce, C. L.	"	"	50	B. A. Oil	
			100	Wright Hargraves	
Plaus, Mrs. O.	"	"	500	Ventures	
			200	Eldorado	
			25	Noranda	
			200	Mining Corp.	
			200	Hudson Bay	10
Reed, Walter W.	"	"	400	Sylvanite	
Rosenbaum, L.	"	"	500	Sylvanite	
Rosenbaum, Mrs. A.	"	"	200	Wright Hargraves	
Ross, A. C.	"	"	100	Teck Hughes	
Reed, H. O.	"	"	5	C. P. Ry.	
Rosenbaum, Harry	"	"			
St. Pierre, D.	"	"	250	Chemical Research	
			1400	Wright Hargraves	
Sanders, C. J.	"	"	115	Hinde & Dauch (Cash)	
Shillington, A. W.	"	"	10	McIntyre	20
Saladis, Gus,	"	"	20	Nickel	
Smith, A. T.	"	"	100	Int. Pete	
			500	Wright Hargraves	
			200	Canada Dry	
Shepherd, Mrs. M. C.	"	"	1000	Wright Hargraves	
Williamson, P.	"	"			
Wright, Geo.	"	"	200	Noranda	

NORTH BAY GRAIN ACCOUNTS

Barber, W., North Bay		2000	Wpg. May Wheat	
Duncan, Geo. W.		(3000	" " "	30
		(5000	" " Rye	
" " "	Chic.			
Frederick, I. V.,	"	4000	Wpg. May Wheat	
Gordon, S. J.	"		Nil	
Jessup, W. H.	"		Nil	
McIntosh, A. A.	"	4000	Wpg. May Wheat	
Ross, A. V.	"	5000	Wpg. May Wheat	
Richardson, M. W.	"	10000	Wpg. May Wheat	
Shillington, A. W.	"	1000	Wpg. May Wheat	
Wright, G. E.	"	10000	Wpg. May Wheat	40

EXHIBIT 6.

(PLAINTIFFS' EXHIBIT)

COPY OF LETTER, F. O'HEARN & CO. TO L. S. CLARKE.

Mr. L. S. Clarke,
Box 264,
NORTH BAY, Ontario.

January 30, 1933.

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 6.
Copy of
Letter,
F. O'Hearn
& Co. to
L. S. Clarke,
30th January,
1933.

Dear Sir— REGISTERED

In reply to your letter of the 25th inst. we beg to state that we do not agree with your contention with reference to your account with us.

10 You have signed the usual client's agreement and under that we are entitled to sell any or all of the stocks or commodities held by us whenever we deem it necessary for our protection.

Unless we receive from you \$25,000.00 or satisfactory collateral security in order to properly margin your account, or instructions to transfer the securities held by us in your account to either a Bank or other parties, against payment of the debit balance due to us, by 10 o'clock on February 6th, we propose to commence selling sufficient stocks in order to bring your account within our marginal requirements.

20 This letter is notice to you of our intention to sell the above stated unless you make satisfactory arrangements.

Yours very truly,

PART OF EXHIBIT 33.

(PLAINTIFFS' EXHIBIT)

MONTHLY STATEMENT OF ACCOUNT, F. O'HEARN & CO.
TO L. S. CLARKE.
(SPECIAL ACCOUNT)

STATEMENT

30 Private Wires to all
Leading Financial
Markets and Northern
Mining Centres.

F. O'HEARN & CO.
11 King Street West
TORONTO, Ont.

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake
Noranda

January 31, 1933

To Mr. L. S. Clarke
North Bay

Special a/c

Exhibits.
Ex. 33 (Part).
Monthly
Statement
of Account,
F. O'Hearn
& Co. to
L. S. Clarke
(Special
Account),
31st January,
1933.

<i>In the Supreme Court of Ontario.</i>		DR.		CR.	
		Date	Quantity Description Amount	Date	Quantity Description Amount
<i>Exhibits. Ex. 33 (Part). Monthly Statement of Account, F. O'Hearn & Co. to L. S. Clarke (Special Account), 31st January, 1933. —concluded.</i>		Dec. 31	Balance 40036.56	Jan. 31	Balance 40274.58
		Jan. 31	Interest 238.02		
			40274.58		40274.58
		Jan. 31	Balance 40274.58		
			<u>Long</u>		
		679,000	Pen Pete		
		E. & O. E.			

OTHER ACCOUNTS OMITTED BY CONSENT

10

PART OF EXHIBIT 23.

(PLAINTIFFS' EXHIBIT)

LETTER, KILMER, IRVING & DAVIS TO F. O'HEARN & CO.

KILMER, IRVING & DAVIS
Barristers and Solicitors

F. O'Hearn & Co.,
11 King St. West,
Toronto 2, Ontario.

Cable Address, Kilmaur
10 Adelaide St. East.,
TORONTO, Canada.
February 4, 1933.

Dear Sirs:—

Re—L. S. Clarke—
Without Prejudice

20

We send you a statement which we have received from Mr. Clarke and Mr. Wood, which we understand shows the customers' equity in the accounts at the North Bay and Sudbury offices respectively.

The suggestion is that you will check these statements against the balances showing in the marginal accounts which you carry, in order to ascertain Mr. Clarke's equity in the stocks as a broker.

Yours very truly,
Kilmer, Irving & Davis,
Per: L. A. Landriau.

LAL/D
Encls.

30

Attached List of Clients of L. S. Clarke & Co. Omitted by Consent.

EXHIBIT 17.
(PLAINTIFFS' EXHIBIT)

TELEGRAM, L. S. CLARKE TO F. O'HEARN & CO.

F O'Hearn and Co

North Bay Ont Feb 6th 1933

11 King St West Toronto Ont

Have advice from Toronto that according to regulations the approximate three hundred thousand shares Peninsular Petroleum stock bought for me being a cash stock should have been offered for delivery by draft or otherwise within 48 hours after purchase am also advised that it was illegal for you on account of this to sell any part of this stock or to hold up customers margin accounts stop investigation being made immediately as to whole matter and writs will follow

L S Clarke

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 17.
Telegram,
L. S. Clarke
to F. O'Hearn
& Co.,
6th February,
1933.

EXHIBIT 9.
(PLAINTIFFS' EXHIBIT)

STATEMENT OF STOCKS SOLD, F. O'HEARN & CO.
TO L. S. CLARKE.

Exhibits.
Ex. 9.
Statement of
Stocks Sold,
F. O'Hearn
& Co. to
L. S. Clarke,
7th February,
1933.

20 L. S. Clarke
N. A.

Owing to your a/c not being sufficiently margined we have to-day sold the following stock for your a/c.

<u>N.A.</u>		
40	BA Oil	7 $\frac{5}{8}$
100	Hud. Bay	3.75
200	Howey	85
50	Int'l Pete	11
100	Min Corp.	163
100	Noranda	23.75
30 300	Sylv.	108
		{ 1300-450
1500	Teck	{ 100-452
		{ 100-455
		{ 100-467
1000	W. H. G.	{ 600-468
		{ 300-470
500	Macassa	31 $\frac{1}{2}$
		{ 400-47
500	Kirk. Lake	{ 100-46 $\frac{3}{4}$
40 100	E. B.	145
100	Chem Res.	66

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 9.
Statement of
Stocks Sold,
F. O'Hearn
& Co. to
L. S. Clarke,
7th February,
1933.
—concluded

S.B.

75	AAC.	42	$\frac{1}{8}$	
40	Anaconda	6	$\frac{1}{2}$	
10	Smelters	12	$\frac{1}{2}$	
30	Be M Steel	13	$\frac{7}{8}$	
20	Colgac	14		
20	Case	42		
50	El B & S	14	$\frac{5}{8}$	
75	Mortz W.	12	$\frac{5}{8}$	
75	Radio	4		10
50	Std. Brands	14	$\frac{3}{4}$	
100	WL & PA	3	$\frac{3}{8}$	
25	Vanadin	11	$\frac{1}{8}$	
300	Ashley	{	100-133	
			200-132	
100	Brazil	8	$\frac{1}{8}$	
300	Chem R.	{	200-66	
			100-67	
1000	Falcon	{	900-200	
			100-204	20

S.B.

100	Hud. Bay	365		
1000	Kirk. Lake	46		
300	Min. Corp.	163		
700	Min. Corp.	160		
60	Noranda	2335		
200	JK	885		
200	"	880		
300	SJ	167		
200	"	166		30
300	Sylv.	103		
500	"	104		
200	"	105		
500	Sherr F	40		
300	Teck	450		
100	"	454		
100	"	452		
500	V.R.	110		
75	Walkers	4	$\frac{1}{2}$	
50	Seagrams	4		40

“F. O’HEARN & CO.”

PART OF EXHIBIT 34.
(PLAINTIFFS' EXHIBIT)

STATEMENT OF ACCOUNTS, F. O'HEARN & CO. TO
L. S. CLARKE.
(SPECIAL ACCOUNT)

STATEMENT

Private Wires to
all Leading Financial
Markets and Northern
Mining Centres.

F. O'HEARN & CO.
Stocks, Bonds, Grain.
11 King Street West
TORONTO, ONT.

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake
Noranda

10

February 28, 1933

TO L. S. Clarke,

North Bay
NA Canadian Special a/c

DR.

CR.

Date	Quantity	Description	Amount	Date	Quantity	Description	Amount
Dec. 31		Forward	40036.56	Feb. 28	679000	Pen Pete Reg. a/c	40490.84
Jan. 31		Interest	238.02				
20 Feb. 28			216.26				
			<u>40490.84</u>				<u>40490.84</u>

EXHIBIT 10.

(PLAINTIFFS' EXHIBIT)

STATEMENT OF STOCKS SOLD, F. O'HEARN & CO.
TO L. S. CLARKE

Feb. 28, 1933

N.A.

Owing to the decline in stocks held for your a/c and not receiving any
response to our margin call, we have to-day sold the following for your
30 a/c.

In the
Supreme
Court of
Ontario.

Exhibits.
Ex. 34 (Part).
Statement
of Accounts,
F. O'Hearn
& Co. to
L. S. Clarke
(Special
Account),
28th February,
1933.

Exhibits.
Ex. 10.
Statement of
Stocks Sold,
F. O'Hearn
& Co. to
L. S. Clarke,
28th February,
1933.

*In the
Supreme
Court of
Ontario.*
Exhibits.
Ex. 10.
Statement of
Stocks Sold,
F. O'Hearn
& Co. to
L. S. Clarke,
28th February,
1933.

—continued.

NA.

25	B. A. Oil	8	200	
50	Hud. Bay	330	165	
100	Howey	67	67	
500	K. Lake	33 ½	165	
100	S.J.	142	142	
50	Noranda	22.85	1140	
		{ 5-8.35		
15	JK	{ 10-8.50	125	
400	Sylv.	87	345	
(200		404		10
(200	Teck	405	2415	
(200		406		
500	Vipond	31	150	
		100-101		
200	VR	100-100	200	
500	WHG	415)	2890	
200	"	416)		

SB.

100	Amer. Super.	3	300	
25	Auburn	32 ⅞	800	
10	Beth. Shell	11 ⅜	110	
20	Anaconda	5	100	
50	Amer. Metals	3	150	
50	Cans. Oil	5 ⅛	250	
10	Std. Brands	14 ⅜	140	
25	Elec. B & S	11 ⅝	275	
10	Case	33 ⅜	330	
25	Mont. W	9 ½	225	
10	No. Pac	11 ½	110	
50	Radio	3	150	
10	WX	20 ⅝	200	
10	Col Gas	11 ⅜	110	
20	Van.	8 ⅛	160	
10	X	24 ⅝	240	
100	Brazil	7 ¾	760	
20	B. A. Oil	8	160	
600	Falconbridge	200-238	1200	
		100-236		
		100-240	13770	
		100-242		
		100-245		

40

	<u>SB</u>		
	Sold		
	50 Holly	690	340
	100 Hud. Bay	341	340
	1000 K. Lake	33	330
	20 L. Shore	34.25	680
	700 Min. Corp.	135	935
	500 Macassa	30	150
	100 Nor.	22.75	2260
10	150 JK	850	
	100	855	2100
	20 Seagrams	4	80
	400 SJ	142	560
	400 Sylv.	85	340
	500 Sherr F	39	195
	200 Teck.	405	800
	500 VR.	{ 100-101 400-101	
			500
	75 Walkers	4 3/8	320
20	20 "	Pfd. 9 3/8	180
	200 W.H.G.	416	830
			10940

*In the
Supreme
Court of
Ontario.*

Exhibits
Ex. 10.
Statement of
Stocks Sold,
F. O'Hearn
& Co. to
J. S. Clarke,
28th February,
1933.

-- concluded.

"F. O'HEARN & CO."

Pencilled memo. omitted by consent.

PART OF EXHIBIT 49.
(PLAINTIFFS' EXHIBIT)

Exhibits.
Ex. 49 (Part).
Copy of
Telegram,
F. O'Hearn
& Co. to
J. A. Allen,
4th March,
1933.

COPY OF TELEGRAM, F. O'HEARN & CO. TO J. A. ALLEN.

March 4, 1933

30 J A Allen Custodian
L S Clarke
North Bay Ont

Owing further decline in markets the account of L S Clarke requires seventyfive hundred dollars unless you can mail us marked cheque today or telegraph funds by noon Monday we shall be obliged to further reduce stocks held by us as collateral

F O'Hearn & Co

Chg F O'Hearn & Co A/C

PART OF EXHIBIT 49.

(PLAINTIFFS' EXHIBIT)

COPY OF LETTER, O'HEARN & CO. TO J. A. ALLEN.

March 4, 1933

Mr. J. A. Allen,
Custodian, L. S. Clarke,
NORTH BAY, Ontario.

Dear Sir —

We beg to conform our telegram advising that the account of L. S. Clarke requires \$7500.00 additional margin and requesting you to mail us 10 marked cheque or telegraph the funds by noon on Monday, otherwise we will be obliged to reduce the account.

Yours very truly,

 EXHIBIT 39.

(PLAINTIFFS' EXHIBIT)

LETTER, F. O'HEARN & CO. TO J. A. ALLEN.

Private Wires
to all Leading Financial
Markets and Northern
Mining Centres.

F. O'HEARN & CO.
Stocks, Bonds, Grain
11 King St. West
Toronto, Ont.

Offices:
Toronto Owen Sound
Montreal Cobalt
Hamilton Timmins
Sarnia Kirkland Lake

20

March 6, 1933.

Mr. J. A. Allen,
Custodian, L. S. Clarke,
NORTH BAY, Ontario.

Dear Sir—

As we did not receive any reply to our telegram of Saturday requesting an additional \$7500., owing to the decline in the collateral held by us for the account of L. S. Clarke Estate, we have to advise that we were obliged to further reduce the account and beg to enclose herewith confirmation notices covering the sales made today.

30

Yours very truly,

"F. O'HEARN & CO."

PART OF EXHIBIT 49.
(PLAINTIFFS' EXHIBIT)

MEMORANDUM OF STOCK SOLD MARCH 6th, 1933.
FURNISHED BY F. O'HEARN & CO. TO J. A. ALLEN.

*In the
Supreme
Court of
Ontario.*

Exhibits
Ex. 49 (Part).
Memorandum
of Stocks Sold,
furnished by
F. O'Hearn
& Co. to
J. A. Allen,
6th March,
1933.

Stock Sold March 6/33

N.A.

	40	Ba. O.	8	320
	100	Em.	126	126
	10	Ford A.	6	60
10	50	Nor.	20.65	1030
	600	Teck	3.83	2280
		(100	3.91)	
	700	Whg. (600	3.95)	2730
	1000	Gat. 6/41	.45½	455
	100	Howey	.62	62
	25	Pete	.10¾	268
	20	Nickel	8.30	166
	500	Sylv.	.78	390
	10	WK Peg	52 Split	500
20	2	RK Peg	35⅛	100
				<hr/>
				7887

S.B.

			507½	
	100	Brazil	507⅝	750
	200	C. Research	62	120
	500	Falcon.	{ 200-230	
			{ 300-228	1140
			400-120	
	500	McP.	100-121	600
30			15-20.75	
	30	Nor.	15-20.60	615
	200	Nickel	8.35	1650
	400	Siscoe	1.34	528
	300	Teck	3.85	1140
	500	Ventures	.97	485
			200-3.90	

<i>In the Supreme Court of Ontario.</i>	300	Whg.	100-3.91	1170		
Exhibits. Ex. 49 (Part). Memorandum of Stocks Sold, furnished by F. O'Hearn & Co. to J. A. Allen, 6th March, 1933.	30	Walkers	4	120		
				8318	5400	
				7887	950	
—concluded.	3	WK Peg 52 $\frac{1}{8}$	150	16205		\$6350
	3	WN Peg 53 $\frac{1}{4}$	150			
	2	MF Peg 80 $\frac{3}{4}$	100			
			950			

 EXHIBIT 40

(PLAINTIFFS' EXHIBIT)

10

COPY OF LETTER, J. A. ALLEN TO F. O'HEARN & COMPANY.

Toronto March 11th, 1933.

Messrs. F. O'Hearn & Company,
11 King Street West,
Toronto.

Dear Sirs:

Re L. S. Clarke Estate

As arranged with you this morning, you are in order to avoid carrying this account and the speculation involved, to liquidate the account as soon as reasonably possible, and the proceeds from sale of stocks and the equity in the Grain Account, to be paid into a Trust Account in the Canadian Bank of Commerce, Head Office, to remain pending investigation by the trustee and inspectors of the estate, and to be disbursed upon cheques drawn by you and countersigned by the trustee. 20

All this to be without prejudice to all legal rights of the estate and to your legal rights whether in accounting or otherwise.

Pursuant to our arrangement Pen Pete stock is not to be sold pending further arrangements and New York stocks will be dealt with when the New York market opens.

Yours very truly,

EXHIBIT 41.

(PLAINTIFFS' EXHIBIT)

LETTER, F. O'HEARN & CO. TO J. A. ALLEN.

Private Wires
to all Leading
Financial Markets
and Northern Mining
Centres.

F. O'HEARN & CO.
Stocks, Bonds, Grain
11 King St. West
Toronto, Ont.

	Offices:
Toronto	Owen Sound
Montreal	Cobalt
Hamilton	Timmins
Sarnia	Kirkland Lake

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 41.
Letter, F.
O'Hearn & Co.
to J. A. Allen,
11th March,
1933.

March 11, 1933

Mr. J. A. Allen, Trustee,
10 L. S. Clarke Estate,
North Bay, Ontario.

Dear Sir:

We beg to acknowledge receipt of your letter of March 11th instructing us to liquidate the account of L. S. Clarke estate as reasonably as possible and that the proceeds from sale of stock and the equity in the grain account to be put into a trust account in the Canadian Bank of Commerce Head Office, and to be dispersed upon cheques drawn by us and countersigned by the Trustee.

20 We note that the Pen Pete stock is not to be sold pending further arrangements and the disposal of the New York stocks held by the Estate is to be made when the New York Market Opens. This is to be without prejudice to your rights to an accounting.

Yours very truly,
F. O'HEARN & CO.

EXHIBIT 42.

(PLAINTIFFS' EXHIBIT)

*In the
Supreme
Court of
Ontario.*

Exhibits.
Ex. 42.
Letter,
McRuer & Co.
to F. O'Hearn
& Co.,
1st April, 1933.

LETTER, McRUER, EVAN GRAY, MASON & CAMERON TO F.
O'HEARN AND CO.

McRUER, EVAN GRAY, MASON & CAMERON
Barristers and Solicitors,

J. C. McRuer, K.C. V. Evan Gray, M.A., LL.B.

J. A. R. Mason, B.A. A. J. P. Cameron

F. A. Brewin

Cable "Ruermas" Toronto
Telephone ADEL. 4391

10

Sterling Tower,
TORONTO 2, Canada.
April 1, 1933.

F. O'Hearn and Co.,
11 King St. West,
Toronto.

Dear Sirs:

Re: L. S. Clarke Estate

We have been advised by the solicitors for the Estate that the full sum realized from the sale of the stocks which you were holding for Mr. Clarke, has not been deposited in the Canadian Bank of Commerce, but only the equity. 20

Our correspondence was quite clear on this matter, and we would ask you to complete this deposit at once. There are complications in winding up an estate of this sort, and this is the only practical way of protecting the Trustee.

We will be glad to hear from you on Monday that the deposit has been completed.

Yours truly,
McRuer, Evan Gray, Mason & Cameron
Per "J. C. McRuer."

30

JCM:L

EXHIBIT 43.

(PLAINTIFFS' EXHIBIT)

COPY OF LETTER, O'HEARN & CO. TO McRUER, EVAN GRAY,
MASON & CAMERON.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 43.
Copy of Letter,
F. O'Hearn
& Co. to
McRuer & Co.,
3rd April, 1933.

April 3, 1933

Messrs. McRuer, Evan Gray, Mason & Cameron,
Sterling Tower,
TORONTO 2, Ontario.

Re: R. S. Clarke Estate
Without Prejudice

10 Dear Sirs—

We beg to acknowledge receipt of your letter of April 1st, in regard to the amount deposited in the Canadian Bank of Commerce by us for the above estate.

Our understanding, as well as that of Mr. Fennell, of Messrs. Fennell, Porter & Davis, is that the amounts we were to deposit in the Canadian Bank of Commerce were to be the proceeds of the sale of the stocks held by us, after deducting the amount of our lien on the stocks.

Yours very truly,

F. O'Hearn & Co.

20

EXHIBIT 22.

(DEFENDANTS' EXHIBIT)

STATEMENT OF TRANSACTIONS IN PEN PETE MADE BY L.
S. CLARKE THROUGH F. O'HEARN & CO.

L. S. CLARKE, NORTH BAY, Ontario

PENINSULAR PETROLEUM LTD.

BOUGHT

Exhibits.
Ex. 22.
Statement of
Transactions in
Peninsular
Petroleum
Stock,
L. S. Clarke,
through
O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932.

1932			
September 3rd	1000	Francis	5 1/2
	500	Lorsch	„
30	2000	Butler	5 3/4
	<u>3500</u>		

<i>In the Supreme Court of Ontario.</i>	September 4th	500	Crang	6 1/2	
		500	"	"	
		2500	"	"	
	Dated	500	"	"	
	September 6th	1500	Colling	"	
		2000	Stratton	"	
		7500			
	September 6th	2000	Crang	6 7/8	
		3000	Stratton	6 1/4	
		2000	Butler	7 1/2	10
		2000	Crang	"	
		2000	Colling	"	
		1000	Butler	"	
		1000	Crang	8	
		6000	Roadhouse	8	
	1000	Cannon	8		
	4000	Butler	8		
	1000	Crang	7 7/8		
	1000	Butler	7 3/4		
	1500	Crang	7 1/2	20	
	1000	Stratton	"		
	2000	Butler	"		
	2000	Stratton	"		
	2500	Crang	"		
	1000	Butler	7 3/8		
	2500	"	7 1/4		
	100	"	7		
	200	F. O'Hearn & Co. on order	7		
	2500	Colling	7	30	
	3000	Leslie	7		
	500	Colling	7		
	500	Cannon	7		
	<hr/>				
	45,300				

SHEET No. 2

1932				
September 7th	10000	F. O'Hearn & Co. on order	8	
	2000	Francis	8	
	2500	F. O'Hearn & Co. on order	8	40

	September 7th	1000	Crang	8
	(Continued)	1000	Colling	8
		1500	F. O'Hearn & Co.	
			on order	8
		3500	Roadhouse	8
		500	Colling	8
		500	F. O'Hearn & Co.	
			on order	8
10		1500	Crang	8
		2000	Crang	8 $\frac{1}{4}$
		1500	Crawford	7 $\frac{7}{8}$
		1000	Francis	8 $\frac{1}{4}$
		4500	Stratton	8 $\frac{1}{2}$
		1000	Colling	"
		1000	Francis	"
		500	Crang	"
		850	"	"
		150	Crawford	"
20		3000	Crang	"
		1000	Butler	8 $\frac{7}{8}$
		1000	Roadhouse	"
		1000	Butler	9
		10000	Stratton	9
		2000	Roadhouse	9
		7000	Leslie	9
		2000	Colling	9
		1000	Crang	9
		<hr/>		
		64,500		
30	September 8th	2000	Roadhouse	9 $\frac{1}{2}$
		5000	Francis	9 $\frac{1}{2}$
		1000	Butler	9 $\frac{1}{2}$
		500	Stratton	9 $\frac{1}{2}$
		2000	Roadhouse	9 $\frac{1}{4}$
		2000	"	9 $\frac{3}{8}$
		10000	Colling	9 $\frac{3}{4}$
		2000	Crang	9 $\frac{3}{4}$
		500	Butler	9 $\frac{3}{4}$
40		10000	Colling	9 $\frac{7}{8}$
		2000	Roadhouse	9 $\frac{7}{8}$
		2000	"	9 $\frac{7}{8}$
		1000	Colling	9 $\frac{7}{8}$
		1000	Butler	8 $\frac{3}{4}$
		500	Stratton	8 $\frac{3}{4}$
		1000	Grassett	9

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 22.
Statement of
Transactions in
Peninsular
Petroleum
Stock,
L. S. Clarke,
through
O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932.

—continued.

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 22.
Statement of
Transactions in
Peninsular
Petroleum
Stock,
L. S. Clarke,
through
O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932.
—continued.

September 8th
(Continued)

1000	Butler	9
1000	Crang	9
2500	Roadhouse	9
2000	Crang	9
2000	Stratton	9
500	"	9
2500	Roadhouse	9 7/8
1000	Colling	9 7/8
1000	Roadhouse	9 7/8
2000	"	9 7/8
5000	"	9 7/8
3000	"	9 7/8
2500	Francis	9 7/8
2000	Crang	9 7/8
2500	Francis	9 7/8
1000	Crang	9 7/8
2500	Dobie	9 7/8
<hr/>		
76,500		

10

SHEET No. 3

1932
September 9th

10th

1000	Stratton	10 1/2
5000	Colling	14
5000	"	14
2000	Coulter	14
1000	Butler	14
400	Cannon	14
100	Crang	14
4000	Francis	14
5000	Colling	14
5500	Stratton	14
1500	Coulter	14
5000	Colling	14
1000	Butler	14
1000	Francis	14
1000	Coulter	14
1000	Dobie	14
1000	Butler	14
500	Leslie	14
<hr/>		
40,000		

20

30

	September 12th	1000	Butler	20
		1000	"	20
		500	Crang	15
		1500	Francis	15
		3500	"	15
		500	"	15
		1000	Crang	15
		1000	"	15
10		5000	Francis	16
		2000	Crang	17
		500	Crawford	17
		500	West	17
		3000	Fields	17
		500	Coulter	17 ½
		1000	Butler	17 ½
		<hr/>		
		22,500		
	13th	2500	Williams	14
		1000	Butler	14 ½
		1500	Cannon	14 ½
20		1000	Crawford	15
		1500	Cannon	15
		500	F. O'Hearn & Co.	
			on order	16
		2000	Crawford	16
		2000	Hogg	13 ¼
		300	Crawford	15
		3000	Butler	15
		1000	Dobie	15
		500	Roadhouse	15
30		500	Crang	15
		<hr/>		
		17,300		

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 22.
Statement of
Transactions in
Peninsular
Petroleum
Stock,
L. S. Clarke,
through
O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932.

—continued.

SHEET No. 4

	1932			
	September 14th	500	Crang	15
		500	Crawford	15
		500	Stratton	14 ½
		1000	Butler	14 ½
		1000	"	14 ½
		1000	"	14 ½
40		2000	Stratton	14 ½

	September 17th (Continued)	1000	Crang	13 1/4	<i>In the Supreme Court of Ontario.</i> — Exhibits. Ex. 22. Statement of Transactions in Peninsular Petroleum Stock, L. S. Clarke, through O'Hearn & Co., 3rd September, 1932, to 30th Novem- ber, 1932, —continued.
		1000	"	13 1/4	
		500	"	13 1/2	
		1000	"	13 1/4	
		500	"	13 1/4	
		1000	"	13 1/4	
		2000	"	13 1/4	
		1000	"	13 1/4	
		500	"	13 1/2	
10		<hr/> 14,000			
<u>SHEET No. 5</u>					
	1932 September 19th	1000	Crang	13 1/2	
		1500	"	13 1/2	
		1000	"	13 1/2	
		1000	"	13 1/2	
		500	"	13 1/2	
		2000	"	13 1/4	
		2000	Coulter	13 1/4	
20		1000	"	13 1/4	
		1000	Crang	13 1/8	
		1000	"	13 1/8	
		500	"	13 1/8	
		1000	"	13 1/8	
		1000	"	13 1/8	
		500	"	13 1/8	
		1000	"	13 1/4	
		500	"	13 1/4	
30		3500	Francis	13 1/4	
		500	Butler	13	
		<hr/> 20,500			
	21st	500	Williams	10 1/2	
		2000	Crang	10 1/2	
		<hr/> 2,500			
	22nd	500	Crang	11 1/2	
		500	Evans	12	
		1000	Dobie	11 1/2	
		500	Butler	11 3/4	
		500	Evans	12	

*In the
Supreme
Court of
Ontario.*
—
Exhibits.
Ex. 22.
Statement of
Transactions in
Peninsular
Petroleum
Stock,
L. S. Clarke,
through
O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932,
—continued.

September 22nd
(Continued)

23rd

24th

26th

27th

1932
September 28th

29th

500
500
500
500
100

5,100

2500
500
2000
1000

6,000

100

2000
500
500

3,000

1000
1000
1000

3,000

SHEET No. 6

3000
2000
4000
1000
5000
5000
2000

22,000

4000
1000
500

Coulter 12
Butler 12
Dobie 12
Crawford 12
F. O'Hearn & Co. 12
on order

Dobie 12
Crang 12
Dobie 12
Butler 11 5/8

Butler 12 1/2
Francis 13 1/4
Colling 13
Butler 13 1/4

Colling 13 1/4
" 13
Butler 13

Colling 12
" 12 1/4
" 12 1/4
Dobie 12 1/4
Colling 12 1/4
" 12 1/4
" 12 1/4

Francis 13
Eastwood 13
Butler 13

10

20

30

	September 29th (Continued)	500	Scott	13
		500	Colling	13
		500	Francis	13
		1000	Colling	12 1/2
		1000	"	12
		2000	Crawford	12
		3000	Colling	12
		5000	"	12 1/2
		4500	"	12 1/2
10		2000	Butler	12 1/2
		500	Dobie	12 1/2
		500	Roadhouse	12 1/2
		2500	Colling	12 3/4
		500	"	12 3/4
		500	"	12 3/4
		<hr/>		
		30,000		
	30th	2500	Francis	12
		5000	"	12
		500	Roadhouse	13
20		500	Colling	13
		100	F. O'Hearn & Co. on order	13
		100	Butler	13
		1000	Francis	13
		1000	Colling	13
		3500	"	13
		2500	"	13 1/4
		500	"	13
		1000	Crang	13
		<hr/>		
30		18,200		

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Statement of
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Petroleum
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O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932,

—continued.

L. S. CLARKE, NORTH BAY, ONTARIO.

PENINSULAR PETROLEUMS LTD.

BOUGHT

	<u>1932</u>		
October 1st	1000	Francis	12 1/2
	1000	"	"
	1000	"	"
	1000	"	"

<i>In the Supreme Court of Ontario.</i> — Exhibits. Ex. 22. Statement of Transactions in Peninsular Petroleum Stock, L. S. Clarke, through O'Hearn & Co., 3rd September, 1932, to 30th Novem- ber, 1932, —continued.	October 1st	400	Butler	13		
	(Continued)	1000	"	12 ½		
		5400				
	October 4th	1000	Stratton	12 ¼		
		500	"	12		
		1500				
	October 5th	500	Butler	12		
		1500	"	12 ¼		
		500	Roadhouse	11 ½		
		2500				10
	October 6th	4000	Crawford	11 ½		
		1000	Stratton	11 ¼		
		5000				
	October 7th	500	Butler	11 ¾		
		500	"	"		
		1000	"	12		
		500	Crawford	"		
		500	Coulter	"		
		3000				
	October 11th	500	Stratton	11		20
October 12th	100	Crang	11			
	300	"	"			
	200	Colling	"			
	600					
October 15th	100	Cannon	11			
	100	Cannon	11 ¼			
	200					
October 17th	1000	Colling	13			
	500	Stratton	"			
	1000	Colling	"		30	
	500	Coulter	13 ½			
	3000					

SHEET No. 2

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Ex. 22.

Statement of
Transactions in
Peninsular
Petroleum
Stock,
I. S. Clarke,
through
O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932.

—continued.

	1932			
	October 18th	500	Dobie	14
		500	Crang	"
		500	"	"
		500	"	"
		500	Dobie	"
		500	F. O'Hearn & Co.	
10		500	on order	13 ¾
			Butler	13
		<u>3500</u>		
	October 19th	1500	F. O'Hearn & Co.	
			on order	13 ½
		1000	Roadhouse	"
		500	Francis	"
		500	Colling	"
		<u>3500</u>		
	October 21st	500	F. O'Hearn & Co.	
20			on order	15
		500	Crang	14 ½
		500	"	"
		500	F. O'Hearn & Co.	
			on order	14 ¾
		500	Colling	15
		500	F. O'Hearn & Co.	
			on order	14 ½
		500	"	"
		<u>3500</u>		
	October 24th	500	Butler	15
30	October 26th	2000	Dobie	12 ½
		1000	"	"
		1000	Roadhouse	13 ¼
		500	Stratton	13 ½
		500	Colling	"
		100	Roadhouse	14
		500	Stratton	13 ½

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ber, 1932.
—continued.

October 26th	1500	Roadhouse	13 ½	
(Continued)	1000	"	13 ¾	
	1000	"	"	
	500	Colling	13	
	100	Butler	"	
	1000	Roadhouse	14	
	1500	Butler	"	
	5000	Francis	"	
	500	Urquhart	"	
	500	Crang	"	10
	500	Grassett	"	
	500	Francis	14 ¼	
	500	Urquhart	14 ½	
	500	Crang	"	
	500	Butler	13 ⅞	
	500	Moore	"	
	1000	"	"	
	1000	Crang	"	
	500	"	13 ½	
	500	"	"	20
	3500	"	14	
	1000	Roadhouse	12 ⅞	
	1000	"	"	
	1000	"	12 ½	
	<u>30700</u>			

SHEET #3

1932				
October 27th	2000	Francis	12	
	2000	"	"	
	2000	"	12 ½	30
	<u>6000</u>			
October 28th	1000	Francis	12 ½	
	1000	Dobie	11 ½	
	<u>2000</u>			
October 29th	1000	Roadhouse	12 ½	
	500	Moore	"	
	1000	Roadhouse	12	
	1000	Leslie	"	

October 29th	50	Roadhouse	"
(Continued)	200	Butler	12 1/2
	200	Roadhouse	13
	<u>3950</u>		

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1932, to
30th Novem-
ber, 1932.

continued.

	<u>1932</u>		
10	November 1st.	500	Moore
		1500	"
		2000	Francis
		2000	"
		2000	"
		2000	"
		2000	"
		1000	"
		1000	"
		1000	Roadhouse
20		2000	Francis
		1000	"
		1000	Cannon
		1000	Francis
		3000	"
		2000	"
		1000	"
		1000	"
		1000	"
		500	"
30		500	Stratton
		2000	Francis
		2000	"
		2000	"
		2000	"
		2000	Stratton
		2000	"
		2000	Francis
		2000	"
		<u>45000</u>	
	November 2nd	250	Roadhouse

11 3/4
12
"
"
"
"
"
"
"
11 7/8
12 1/2
"
"
12 3/4
11 7/8
"
"
"
12
"
"
"
12
"
"
12 1/2
"

SHEET #2

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Petroleum
Stock,
L. S. Clarke,
through
O'Hearn & Co.,
3rd September,
1932, to
30th Novem-
ber, 1932.

—continued

1932				
November 4th,	2500	Dobie	11	
	1000	Roadhouse	"	
	1500	Stratton	"	
	1000	Roadhouse	"	
	2000	"	"	
	1000	"	"	
	5000	Stratton	"	
	1000	Dobie	"	10
	1000	Roadhouse	"	
	1000	Stratton	"	
	500	Crang	"	
	1500	Stratton	"	
	3000	"	10 $\frac{3}{4}$	
	2000	"	"	
	2000	"	10 $\frac{1}{2}$	
	2000	"	"	
	3000	"	"	
	3000	"	"	20
	5000	"	11	
	4500	"	"	
	500	Chisholm	"	
	1000	Stratton	"	
	5500	Francis	11 $\frac{1}{4}$	
	5000	"	"	
	3500	Cannon	"	
	2500	Dobie	"	
	1500	Lorsch	"	
	1000	Hogg	"	30
	1000	Roadhouse	"	
	6000	Francis	"	
	6000	Hogg	"	
	6000	Lorsch	"	
	1000	Roadhouse	"	
	4500	Dobie	11	
	5500	Francis	"	
	94000			
November 5th	5000	Francis	10 $\frac{3}{4}$	
	5000	"	"	40
	5000	"	"	
	5000	"	"	

November 5th	500	"	"
(Continued)	4500	"	"
	500	Roadhouse	11
	<u>25500</u>		

SHEET #3

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ber, 1932.

—continued.

1932			
November 7th	1000	F. O'Hearn & Co.	
		on order	10
10	1000	Moore	10 ¼
	1000	Crang	"
	1500	"	"
	500	F. O'Hearn & Co.	
		on order	"
	500	Crang	"
	500	Moore	"
	1000	Roadhouse	10
	200	"	11
	200	"	"
20	500	Coulter	10 ½
	500	Moore	"
	500	Roadhouse	"
	1000	Urquhart	"
	<u>9900</u>		
November 8th	2000	Roadhouse	11 ½
	500	Francis	12
	1000	Crang	"
	1000	Urquhart	"
	1500	Francis	"
30	500	Moore	"
	1500	"	"
	1000	Francis	"
	1000	F. O'Hearn & Co.	
		on order	"
	500	Colling	"
	500	Colling	"
	500	Urquhart	12 ½
	1000	"	"
	1000	Francis	"
40	500	Dobie	"
	500	Butler	"

<i>In the Supreme Court of Ontario.</i> Exhibits. Ex. 22. Statement of Transactions in Peninsular Petroleum Stock, L. S. Clarke, through O'Hearn & Co., 3rd September, 1932, to 30th Novem- ber, 1932. —continued.	November 8th	1000	Roadhouse	"		
	(Continued)	5000	Dobie	14		
		1500	Crang	"		
		1000	Roadhouse	"		
		1000	Francis	"		
		1000	"	"		
		500	F. O'Hearn & Co.	"		
			on order	"		
		500	"	"		
		2000	"	"		10
		500	"	"		
		1500	Butler	"		
		1000	Cannon	14 ½		
		1000	Crang	"		
		1000	"	"		
		1000	"	"		
		1000	Urquhart	"		
		500	Butler	"		
		500	Roadhouse	"		
		500	Colling	"		20
		500	Crang	"		
		500	"	"		
		500	Hogg	"		
		500	Butler	"		
		500	Cannon	"		
		1000	Cannon	"		
		1000	Moore	"		
		1000	F. O'Hearn & Co.	"		
		on order	"			
	<hr/>					
	42000				30	

SHEET #4

1932				
November 8th—				
Brought Forward—	42000			
	500	Crang	13	
	1000	"	"	
	1000	Colling	"	
	1000	Butler	13 ½	
	1500	Urquhart	"	
	2500	Crang	"	40
	1000	Butler	13 ⅞	

	November 8th	5000	Roadhouse	14	<i>In the Supreme Court of Ontario.</i> <i>Exhibits. Ex. 22. Statement of Transactions in Peninsular Petroleum Stock, L. S. Clarke, through O'Hearn & Co., 3rd September, 1932, to 30th Novem- ber, 1932.</i> <i>—continued</i>
	(Continued)	1000	Crang	"	
		1000	Crang	"	
		1000	Colling	"	
		1000	"	"	
		1500	Coulter	"	
		500	"	"	
		500	F. O'Hearn & Co.	"	
			on order	"	
10		1000	"	"	
		1000	Crang	"	
		2500	"	"	
		2000	Dobie	"	
		500	Grassett	"	
		2000	Crang	"	
		2500	"	"	
		1000	"	"	
		1500	Urquhart	"	
		500	Coulter	"	
20		1500	Crang	"	
		<hr/>			
		78000			
	November 9th	1000	Butler	14 $\frac{3}{4}$	
		500	Grassett	"	
		1500	Colling	"	
		1000	Moore	14 $\frac{1}{2}$	
		500	"	"	
		500	Stratton	"	
		500	Crang	"	
		3000	Chisholm	13 $\frac{1}{2}$	
		1000	"	"	
30		1000	Cannon	"	
		1000	Crang	"	
		1000	Crang	14	
		1500	Roadhouse	15 $\frac{1}{2}$	
		1000	Coulter	15	
		1000	Moore	15	
		1000	Cannon	15	
		1500	Crang	15	
		1500	Crawford	15	
		500	Butler	15	
		500	"	15	
40		500	Colling	15	
		500	Urquhart	15	
		500	Stratton	15	
		1000	Crang	15	
		1000	Cannon	15	

November 9th (Continued)	4000	Colling	16	<i>In the Supreme Court of Ontario.</i> <i>Exhibits. Ex. 22. Statement of Transactions in Peninsular Petroleum Stock, L. S. Clarke, through O'Hearn & Co., 3rd September, 1932, to 30th Novem- ber, 1932.</i>
	1000	Dobie	16	
	500	Coulter	16	
	1000	Stratton	16	
	2000	Cannon	16	
	2000	Colling	16 1/2	
	1500	Stratton	"	
	1000	Coulter	"	
	500	F. O'Hearn & Co.	"	
		on order	"	
10	500	Leslie	"	
	5000	Crang	"	
	2000	"	15 1/2	
	2000	Butler	15 7/8	
	1000	Butler	16	
	1000	Stratton	16	
	500	Crang	16	
	1500	Grassett	16	
	2000	Moore	17 1/2	
	3000	Crang	"	
20	1500	Lorsch	"	
	1000	Dobie	"	
	1000	Cannon	"	
	2000	Crang	"	
	2000	Butler	"	
	2000	Stratton	"	
	1000	Coulter	"	
	500	Urquhart	"	
	500	Crawford	"	
30	2000	Coulter	"	
	1000	Colling	"	
	13000	Francis	"	
	4500	F. O'Hearn & Co.	"	
		on order	17	
	2500	Francis	17	
	500	Crang	17	
	5000	Crang	15 1/2	
	500	F. O'Hearn & Co.	"	
		on order	15 1/2	
40	500	Crang	15 1/4	
	1000	Crang	14 1/2	
	<hr/>			
	138000			

(CARRIED FORWARD)

	November 16th	1000	F. O'Hearn & Co. on order	6 1/2
		100	Roadhouse	10 1/2
		<u>1100</u>		
	17th	500	Crang	7
		1000	F. O'Hearn & Co. on order	7
		500	Butler	6 3/4
		500	Roadhouse	6 1/8
10		1000	Moore	7 1/2
		<u>3500</u>		
	22nd	500	Nicholson	5 1/2
	23rd	1000	Roadhouse	5 1/4
		500	"	"
		500	Francis	"
		100	Roadhouse	5 3/4
		<u>2100</u>		
	24th	2000	F. O'Hearn & Co. on order	5

20

SHEET #7

	1932			
	November 26th.	1000	Roadhouse	5
		1000	Francis	5
		<u>2000</u>		
	28th.	500	Crang	5
	30th.	500	Dobie	4 1/2
		500	Roadhouse	4 1/2
		<u>1000</u>		

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ber, 1932.
concluded.

PART OF EXHIBIT 35.

(DEFENDANTS' EXHIBIT)

LEDGER STATEMENT, L. S. CLARKE FOR GREENWOOD ACCOUNT.

L. S. CLARKE
 Greenwood A/c Account No. G 29
 Ap't 24—101 Vaughan Rd., Toronto

Date	Particulars Bt.Sld.	Dr.	Cr.	Dr. or Cr.	Balance	PS
10 1932						
Sept. 10	20000 Pen Pete	14 2900.00		Dr.	2900.00 2	119 20000
12	Cheque Rec.		1500.00	Dr.	1400.00	
	6000 Pen Pete	17 1050.00		Dr.	2450.00	26000
	1500 " "	17½ 270.00		Dr.	2720.00 1	56 27500
13	2000 " "	13¼ 275.00		Dr.	2995.00	29500
	1500 " "	15 232.50		Dr.	3227.50 1	65 31000
14	500 " "	14¼ 73.75		Dr.	3301.25	31500
		3500 15¾				
	5000 " "	1000 15½	811.25	Dr.	4112.50 2	36500
		500 16				
20	16 1000 " "	14 145.00		Dr.	4257.50	37500
	4000 " "	14¼ 590.00		Dr.	4847.50	41500
	5000 " "	14 725.00		Dr.	5672.50	46500
	2500 " "	13¼ 343.75		Dr.	5916.25	49000
	5000 " "	14¼ 737.50		Dr.	6653.75 3	170 54000
19	Cheque Rec.		1500.00	Dr.	5153.75	
	500 Pen Pete	13 67.50		Dr.	5221.25	54500
	5000 " "	13½ 700.00		Dr.	5921.25 2	250 59500
21	1500 " "	10½ 165.00		Dr.	6086.25 1	125 61000

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Date	Particulars Bt.Sld.	Dr.	Cr.	Dr. or Cr.	Balance	PS
22	Cheque Rec.		2500.00	Dr.	3586.25	1 75
23	Draft		1475.00	Dr.	2111.25	48500
	12500 Pen Pete Del					
	Cheque (Stronach E.W.)	2750.00		Dr.	4861.25	
	Cheque Rec.		2000.00	Dr.	2861.25	5 295
27	20000 Pen Pete Del					28500
10 28	5000 Pen Pete	12¼	637.50	Dr.	3498.75	2 140 33500
30	2500 " "	13¼	343.75	Dr.	3842.50	1 85 36000
			12877.50			
			8975.50			
						13.75
	SEPT. 30, 1932		13.75	Dr.	3856.25	
Oct. 26	1000 Pen Pete	12½	130.00	Dr.	3986.25	25 19.80
	2000 " "	12⅞				
			267.50	Dr.	4253.75	
	1000 " "	13½	140.00	Dr.	4393.75	
	3500 " "	14	507.50	Dr.	4901.25	
20	2500 " "	13⅞	359.37	Dr.	5260.62	1 107 46000
Oct. 27	2000 Pen Pete	12½	260.00	Dr.	5520.62	48000
	2000 " "	12	250.00	Dr.	5770.62	1 118 50000
28	Cheque Rec. (Wire)			Dr.	4020.62	3 247
	12500 Pen Pete Del.					
	(Barkell)					37500
31	Exchange & Tel		11.14	Dr.	4031.76	
	Sept. Telephone		19.45	Dr.	4051.21	1 83
			14776.21			
			25.35			25.35
	OCT. 31, 1932			Dr.	4076.56	
30 Nov. 1	1000 Pen Pete	11⅞	123.75	Dr.	4200.31	38500

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Exhibits.
Ex. 35 (Part).
Ledger State-
ment, J. S.
Clarke for
Greenwood
Account,
10th Septem-
ber, 1932, to
February,
1933.
—continued.

Exhibits -
 Ex. 33 (Part).
 Ledger State-
 ment, L. S.
 Clarke for
 Greenwood
 Account,
 10th Septem-
 ber, 1932, to
 February,
 1933.
 -continued.

Date	Particulars Bt.Sld.	Dr.	Cr.	Dr. or Cr.	Balance	PS
	1000 " "	12	125.00	Dr.	4325.31	39500
	1000 " "	12	125.00	Dr.	4450.31	40500
	1000 " "	12 $\frac{3}{4}$	132.50	Dr.	4582.81	41500
	2000 " "	12 $\frac{1}{2}$	260.00	Dr.	4842.81	43500
	2000 " "	12 $\frac{1}{2}$	260.00	Dr.	5102.81	45500
	2000 " "	11 $\frac{7}{8}$	247.50	Dr.	5350.31	47500
10	2000 " "	12	250.00	Dr.	5600.31	49500
	2000 " "	12	250.00	Dr.	5850.31	51500
	2000 " "	12	250.00	Dr.	6100.31	53500
	2000 " "	12	250.00	Dr.	6350.31	55500
	2000 " "	12	250.00	Dr.	6600.31	57500
			6600.31			
4	45000 Pen Pete Del.					12500
	1500 Pen Pete	10 $\frac{1}{2}$	165.00	Dr.	6765.31	14000
	3000 " "	10 $\frac{1}{2}$	330.00	Dr.	7095.31	17000
20	5000 " "	11	575.00	Dr.	7670.31	22000
	1000 " "	11	115.00	Dr.	7785.31	23000
	5000 " "	11	575.00	Dr.	8360.31	28000
	5000 " "	11	575.00	Dr.	8935.31	33000
	1000 " "	11	115.00	Dr.	9050.31	34000
	19000 " "	11 $\frac{1}{4}$	2232.50	Dr.	11282.81	53000
5	5000 " "	10 $\frac{3}{4}$	562.50	Dr.	11845.31	58000
	5000 Pen Pete	10 $\frac{3}{4}$	562.50	Dr.	12407.81	63000
	5000 " "	10 $\frac{3}{4}$	562.50	Dr.	12970.31	68000
3	Cheque Rec.		12970.31			
7	5000 Pen Pete (Coll & Coll)	12	625.00	Dr.	10470.31	73000
30	Cheque Rec.					
	1000 Pen Pete	10 $\frac{1}{4}$	107.50	Dr.	8095.31	
	2000 " "	10 $\frac{1}{4}$	215.00	Dr.	8202.81	74000
					8417.81	76000

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Date	Particulars Bt.Sld.	Dr.	Cr.	Dr. or Cr.	Balance	PS
8	35000 Pen Pete Del (McGuire)					41000
10	25000 " " " "					16000
		13917.81				
	Cheque Rec.		750.00	Dr.	7667.81	
	" "		2850.00	Dr.	4817.81	2 198
10 12	" "		1000.00	Dr.	3817.81	
			10100.00			
10 30	Gran Loss Bayne	762.50		Dr.	4580.31	
	" " " } on a/c					
		718.75		Dr.	5299.06	19 20.69
						38.41
	NOV. 30, 1932	38.51		Dr.	5337.57	31 38.51
	DEC. 31, 1932					33.99
Jan. 1	To my acct.	33.99		Dr.	5371.56	
	Jan. Int. 24.83		5371.56			
	Feb. " 22.40					

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In the
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Court of
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Exhibits.
Ex. 35 (Part).
Ledger
Statement.
L. S. Clarke,
for Greenwood
Account,
10th St., Tem-
per, 1932, to
January,
1933.
—concluded.

Exhibits.
 Ex. 35 (Part).
 Ledger
 Statement,
 L. S. Clarke,
 for Smith
 Account, from
 September,
 1932, to
 January, 1933.

PART OF EXHIBIT 35.
 (DEFENDANTS' EXHIBIT)

LEDGER STATEMENT, L. S. CLARKE FOR SMITH ACCOUNT

L. S. CLARKE
 Smith A/c Account No. S 40
 334 Lauder Ave., Toronto, Ont.

Date	Particulars Bt.Sld.		Dr.	Cr.	Dr. or Cr.	Balance	PS
10	<u>1932</u>						
Sept. 10	20000 Pen Pete	14	2900.00		Dr.	2900.00 2	119 20000
12	Cheque Rec.			1500.00	Dr.	1400.00	
	1500 Pen Pete	15	232.50		Dr.	1632.50 1	33 21500
13	2500 " "	16	412.50		Dr.	2045.00	24000
	4000 " "	15	620.00		Dr.	2665.00 1	54 28000
14	2500 " "	15½	400.00		Dr.	3065.00	30500
	3000 " "	15	465.00		Dr.	3530.00	33500
	2000 " "	14½	300.00		Dr.	3830.00 2	157 35500
16	4000 " "	14½	600.00		Dr.	4430.00	39500
20	500 " "	13½	70.00		Dr.	4500.00 1	92 40000
17	500 " "	13½	70.00		Dr.	4570.00	40500
	5000 " "	13½	700.00		Dr.	5270.00 3	363 45500
19	Cheque Rec.			1500.00	Dr.	3770.00	
	1500 Pen Pete	13¼	204.37		Dr.	3974.37	47000
	1000 " "	13¼	136.25		Dr.	4110.62	48000
	2500 " "	13¼	340.62		Dr.	4451.24	50500
	5000 " "	13¼	687.50		Dr.	5138.74	55000
	5000 " "	13¼	687.50		Dr.	5826.24 2	239 60500
21	Sold 1000 Pen Pete (Wyatt)			137.50	Dr.	5688.74 1	117 59500
30	22	Cheque Rec.		2500.00	Dr.	3188.74 1	65

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Date	Particulars Bt.Sld.	Dr.	Cr.	Dr. or Cr.	Balance	PS
23	Draft		1850.00	Dr.	1338.74	44500
	15000 Pen Pete Del					
	Draft (Lyons)		1025.00	Dr.	313.74	36500
	8000 Pen Pete Del					
	Draft (McGuire)		750.00	Cr.	436.26	30500
	6000 Pen Pete Del					
10	Cheque Issued (H.M. Anson)	2275.00		Dr.	1838.74 3	113
26	Cheque Rec.		3000.00	Cr.	1161.26	
	" Issued	2150.00		Dr.	988.74 2	40
27	15000 Pen Pete Del					15500
28	5000 Pen Pete	12¼	637.50	Dr.	1626.24 3	99 20500
						1491
		13888.74	12262.50			
	SEPT. 30, 1932	14.91		Dr.	1641.15 25	
20	1000 Pen Pete (D.D.)	1515.25		Dr.	3156.40	30500
	1000 Pen Pete Del (Barkell)					20500
26	500 Pen Pete	13⅞	71.87	Dr.	3228.27	
	8000 " "	14	1160.00	Dr.	4388.27	
	500 " "	14¼	73.75	Dr.	4462.02	
	1000 " "	14½	150.00	Dr.	4612.02	30500
	1000 " "	13⅞	138.75	Dr.	4750.77	31500
	1000 " "	13⅞	138.75	Dr.	4889.52	32500
	1000 " "	13¼	137.50	Dr.	5027.02	33500
	1000 " "	13½	140.00	Dr.	5167.02	843 34500
		17429.52				
30	2000 " "	12½	260.00	Dr.	5427.02	36500
	Cheque Rec.		1100.00	Dr.	4327.02 1	89
27	2000 Pen Pete	12	250.00	Dr.	4577.02 1	94 38500
28	1000 " " (Coll & Coll)					

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Exhibits
 Ex. 35 (Part)
 Ledger
 Statement,
 L. S. Clarke,
 for Smith
 Account, from
 September,
 1932, to
 January, 1933.
 -continued.

Exhibits.
 Ex. 35 (Part).
 Ledger
 Statement,
 L. S. Clarke,
 for Smith
 Account, from
 September,
 1932, to
 January, 1933.
 —continued.

Date	Bt.Sld.	Particulars	Dr.	Cr.	Dr. or Cr.	Balance	PS
			1550.00		Dr.	6127.02	48500
		Cheque Rec. (Wire)		1750.00	Dr.	4377.02	
		12,500 Pen Pete Del (Barkell)					36000
10	31	1000 Pen Pete	12½	130.00	Dr.	4507.02	3 278 37000
		Exchange & Tel.		12.00	Dr.	4519.02	
		Sept. Telephone		19.45	Dr.	4538.47	1 93
			7388.47	2850.00			<u>13.97</u>
		OCT. 31, 1932		13.97	Dr.	4552.44	
	Nov. 1	3000 Pen Pete	11⅞	371.25	Dr.	4923.69	40000
		2000 " "	12	250.00	Dr.	5173.69	42000
		2000 " "	12	250.00	Dr.	5423.69	44000
		2000 " "	12	250.00	Dr.	5673.69	46000
		2000 " "	12	250.00	Dr.	5923.69	48000
		2000 " "	12	250.00	Dr.	6173.69	50000
		2000 " "	12	250.00	Dr.	6423.69	52000
20				9273.69			
		2000 " "	12½	260.00	Dr.	6683.69	54000
		2000 " "	12½	260.00	Dr.	6943.69	56000
		1000 " "	11⅞	123.75	Dr.	7067.44	57000
		1000 " "	11⅞	123.75	Dr.	7191.19	58000
		1000 Pen Pete	12	125.00	Dr.	7316.19	59000
		1000 " "	12	125.00	Dr.	7441.19	60000
		500 " "	11¾	61.25	Dr.	7502.44	60500
		1500 " "	12	187.50	Dr.	7689.94	3 4.74 62000
				10539.94			
30	4	35000 Pen Pete Del					27000
		2000 Pen Pete	10½	220.00	Dr.	7909.94	29000
		2000 " "	10¾	225.00	Dr.	8134.94	31000
		3000 " "	10¾	337.50	Dr.	8472.44	34000
		3000 " "	10½	330.00	Dr.	8802.44	37000

Date	Particulars Bt.Sld.	Dr.	Cr.	Dr. or Cr.	Balance	PS
	5000 " "	11	575.00	Dr.	9377.44	42000
	5000 " "	11	575.00	Dr.	9952.44	47000
			12802.44			
	10000 " "	11	1150.00	Dr.	11102.44	57000
	20000 " "	11¼	2350.00	Dr.	13452.44	1 276 77000
10	5 5000 " "	10¾	562.50	Dr.	14014.94	82000
	4500 " "	10¾	506.25	Dr.	14521.19	
	500 " "	11	57.50	Dr.	14578.69	87000
	3 Cheque Rec.				2500.00	Dr. 12078.69 3 4.96
	7 " "				3000.00	Dr. 9078.69
	35000 Pen Pete Del					52000
	1000 Pen Pete	10	105.00	Dr.	9183.69	
	1000 " "	10¼	107.50	Dr.	9291.19	54000
			16641.19		8350.00	
						12.46
20	9 1000 " "	10¼	107.50	Dr.	9398.69	55000
	10 2500 " "	10½	275.00	Dr.	9673.69	3 597 57500
	25000 Pen Pete Del (McGuire)					32500
	10 Cheque Rec.				750.00	Dr. 8923.69
	" "				2850.00	Dr. 6073.69 26 32.44
			9673.69		3600	
	Lyons A/c 2500 P.P.		482.91	Dr.	6556.60	30 296 35000
	Stronach A/c 2500 P.P.		481.06	Dr.	7037.66	30 297 37500
						56.80
	NOV. 30, 1932		56.80	Dr.	7094.46	31 45.17
30	Dec. 13 15000 Pen Pete Del					22500
	DEC. 31, 1932		45.17	Dr.	7139.63	
	Jan. 1 Iss'd to my acct.				7139.63	
			107.39.		63.	

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In the
Supreme
Court of
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Exhibits.
Ex. 35 (Part).
Ledger
Statement,
I. S. Clarke,
for Smith,
Account, from
September,
1932, to
January, 1933.
---concluded.

PART OF EXHIBIT 11.
(PLAINTIFFS' EXHIBIT)

BYLAWS OF
THE STANDARD STOCK AND MINING EXCHANGE
TORONTO
BY-LAW NO. 38
MARGINAL TRADING

No member, and no firm or Company represented by a member shall purchase on a marginal basis for the account of a client any security selling for less than \$1.00 per share, provided that the Board of Directors may from time to time exempt any specified security or securities from this limitation.

BY-LAW. NO. 41
PLEDGE AGREEMENTS

Sec. 1—An Agreement between a member (or a partnership or company represented by a member) and a customer authorizing the pledging of securities, either alone or with other securities carried for the account of the customer, either for the amount due thereon or for a greater amount, or to lend such securities, does not justify the member (or his partnership or company) in pledging or loaning more of such securities than is fair and reasonable in view of the indebtedness of such customer. 20
