88, 1937

No. 69 of 1936.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

ISAAC W. C. SOLLOWAY and HARVEY MILLS (Defendants) - - - - - - - - - *Appellants*

AND

J. P. McLAUGHLIN (Plaintiff) - - - - - *Respondent*

AND

SOLLOWAY MILLS & CO. LIMITED and SOLLOWAY MILLS & CO. LIMITED (A Company incorporated under the laws of the Dominion of Canada) (Defendants not appearing)

AND BY WAY OF CROSS-APPEAL

BETWEEN

J. P. McLAUGHLIN (Plaintiff) - - - - - *Appellant*

AND

ISAAC W. C. SOLLOWAY and HARVEY MILLS (Defendants) - - - - - - - - - *Respondents.*

Case for the Appellants RESPONDENTS ON

ON APPEAL AND CROSS-APPEAL.

CASE FOR THE APPELLANTS ON APPEAL AND CROSS-APPEAL.

RECORD.

1. This is an appeal and cross-appeal from a judgment of the Supreme Court of Canada dated February 28, 1936, allowing in part the Respondent's Appeal from a judgment of the Court of Appeal for Ontario dated the 5th day of June, 1934. The Court of Appeal had allowed the Appellants' Appeal from a decision of the Supreme Court of Ontario, which, p. 262. p. 260. p. 247.

p. 237. confirming but varying the Report of an Assistant Master, had awarded damages and interest amounting to $55,922.98. By the judgment of the Supreme Court of Canada, the judgment of the Supreme Court of Ontario, awarding damages against the Appellants, has been restored
p. 262. and the amount of such damages and interest is $32,569.44.

2. The questions for decision in this appeal are inter alia :—

(A) Whether a principal, having recovered against an alleged tort feasor on the basis of an account and thereby waived the tort, can nevertheless recover damages in tort against other alleged joint tort feasors ;

(B) Whether in tort, profits made by an alleged tort feasor can be recovered as damages by the injured party who had suffered, in fact, no damage ;

(C) Whether secret profits made by an incorporated company acting as an agent can be recovered as damages from a director of the agent company without identification of such profits and without proof that such profits came into the hands of the director ;

(D) Whether a principal, whose instructions to buy and hold shares has not been strictly carried out by a brokerage company, can wholly repudiate the purchase, adopt as his own a later purchase not made on his account and then sue the directors of the company for alleged fraud in respect of the wholly repudiated transaction and that without proof of loss ;

(E) Whether, where parties have agreed to refer an action to a named person, viz., the Master of the Supreme Court, that person can validly delegate the hearing to a subordinate, namely, the Assistant Master ;

(F) Whether the facts of the case justified any judgment against these Appellants.

p. 1. 3. The action was originally brought against (A) Solloway Mills & Co. Limited (Ontario), a company carrying on business in Ontario as stock brokers, (B) Solloway Mills & Co. Limited (Dominion), which carried on business in the United States and throughout the Dominion of Canada, except in Ontario, and (C) the present Appellants, of whom the first named Solloway was President and the second a Director of both Companies. The Dominion Company owned all but five of the shares
p. 44, ll. 3-14. p. 253, ll. 36-43. of the Ontario Company and the Appellant Solloway at all material times
p. 44, ll. 17-24. after November 1929 all but four of the shares of the Dominion Company.
p. 238, ll. 16-20. The action was abandoned as against the Dominion Company at the trial
p. 237, l. 24. and the Ontario Company is not a party to this Appeal. In November 1929
p. 44, l. 6.

the Appellant Mills transferred all his holdings save one share in each company to the Appellant Solloway, pursuant to a contract made earlier in the year.

4. The action arises out of the purchase of 7,000 shares of Sudbury Basin Mines Limited by the Ontario Company as brokers for the Respondent and the deposit of 14,000 shares of the same stock by the Respondent with that Company as margin or cover to finance the transaction. This Appeal concerns the liability of the Appellants, directors of the Ontario Company, for the dealings of the Ontario Company with the 7,000 shares purchased for the Respondent and the cross-appeal with similar dealing with the 14,000 shares deposited by him to finance that purchase. It is in the Appellants' submission incontrovertible that had the Ontario Company not dealt with the Respondent's stock as in the Appellants' submission it was fully entitled to do, the position of the Respondent would have been exactly the same as in the event it was. It is submitted that the action is the attempt of an unsuccessful gambler to take advantage of alleged irregularities to recover, not damage, but his own speculative or market losses.

p. 25, ll. 9-17. p. 314. p. 285. p. 253, ll. 3-5. p. 35, ll. 32-33.

5. The positions and history of these Companies were as follows :—

(A) Prior to the incorporation of the Dominion Company the Appellants Solloway and Mills had conducted a brokerage business with branches throughout Canada ;

p. 288, 289.

(B) On or about 31st May, 1928, the Dominion Company took over that business.

p. 288, 289.

(C) In the course of trading the Dominion Company went " short " in various stocks and shares. The position on or about the 30th of November, 1928, in respect of Sudbury Basin Mining shares, the subject of this action, being that it appeared in its books as short 67,512 shares against which it showed in its books cash $552,644.11 as the sale price.

Photostatic copies of Exhibits, p. 58 bottom.

(D) The Ontario Company was incorporated on December 20, 1928, and immediately by agreement with the Dominion Company took over the business of the latter Company in Ontario, including the seats on the Stock Exchange. Thereafter the Dominion Company ceased to do business as brokers in Ontario.

p. 292. p. 293. p. 294, l. 32.

(E) Thereafter the Dominion Company was entered in a separate account as a customer of the Ontario Company. The Dominion Company was debited in the Ontario Company's books with the shares short and credited with the cash value and the Ontario Company was correspondingly credited and debited in

p. 203, l. 46 ff. Photostatic copies p. 82. Photostatic copies p. 95.

Photostatic copies p. 95.

the Dominion Company's books. The Ontario Company took over the cash in hand to the full extent of the short position in Ontario and all shares on hand.

p. 206, l. 1. p. 207, ll. 7-17.

p. 206, ll. 1-15.

p. 205, ll. 35-40. Photostatic copies Ex., p. 95. p. 205, ll. 43-48. p. 110, l. 40.

(F) The result of this arrangement was that all profits arising out of sale and purchase of shares for the Dominion Company (i.e., out of the short account) belonged to that Company, and conversely the Dominion Company was under obligation to make good any losses and to replace in the hands of the Ontario Company any stock borrowed from customers. From the inception of the Ontario Company, the Dominion Company continued to make purchases and sales on its own account through the Ontario Company and other brokers. The Ontario Company acted as the Dominion Company's agents in taking delivery of shares purchased by the Dominion Company through brokers and on the exchange, and placed these shares in its own box with like shares and likewise made deliveries of shares sold for the Dominion Company out of like shares in its general box. The resulting net balance in shares in all cases where the Dominion Company had sold more shares than it owned was shown on both Companies' books as shares owing by the Dominion Company to the Ontario Company, in other words, as shares loaned by the Ontario Company to the Dominion Company, and conversely when the Dominion Company had purchased more shares than it had sold, the books of both Companies showed shares owing by the Ontario Company to the Dominion Company.

p. 206, l. 14. p. 97, ll. 36-39.

p. 81, ll. 1-40.

p. 82, l. 6.

6. It must be remembered that in Canada shares are not earmarked for customers and that one share is for the purposes of delivery as good as another, and this is recognized both in dealings by brokers and by the courts of Canada and in practice all shares of the same company are put in a box by the broker and treated as " stock in hand," each being good delivery for any client.

7. The result of the dealings referred to above was, at the time of the Respondent's transaction, that the Dominion Company was " short " to the Ontario Company which had (1) the power to call these shares at any time (2) cash in hand or owing to the Dominion Company to a sum greater than the market value of the shares.

p. 210, l. 20.

p. 210, ll. 24-30.

8. The Ontario Company never made sales or purchases of stock on its own account and never used any stock purchased for customers for its own purposes and, if the stock loaned to the Dominion Company by the Ontario Company be calculated as available for delivery by the Ontario Company to its customers, the Ontario Company always had on hand sufficient shares of all stocks to satisfy its liabilities to all its customers.

9. This being the position, the Respondent, on October 16, 1929, ordered the Ontario Company to purchase for him 7,000 shares Sudbury Basin Mines Limited " on margin " depositing 3,500 shares of the same stock as margin. All such shares were regularly purchased on the Exchange on the same day and confirmations were sent to the Respondent bearing the following terms. p. 25, ll. 1-22.

BOUGHT NOTE.

" We have this day bought for your account and risk as undermentioned." p. 297. p. 298.

J. P. McLaughlin — Oct. 16, 1929
29 Munroe Park Ave. — 1,800 Sud. Basin

Price	Amount	Brokerage	Total
7.00	12,600.00	135.00	12,735.00

Crang. Col. But.
Dob. Stobie
Scott, Sol. B3,
New Account HO754 Rob.

Purchases or sales are made subject in all respect 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 parties giving the orders agree to its 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 understood and agreed that on marginal business the right is reserved to close transactions without further notice when margins are unsatisfactory. Stock selling at 40c. or less per share may not be carried on margin. Cash must be paid for this and delivery taken by client.

SOLLOWAY MILLS & CO. LIMITED.

The Respondent at no time complained of nor repudiated the terms above set forth. p. 31, l. 5. p. 30, l. 27.

10. In the Appellants' contention the power to loan involved a power in the borrower to deal with the shares for otherwise, it is submitted, the mere physical possession of certain pieces of paper called certificates could confer no advantage.

11. The rules of the Stock Exchange provide for balanced deliveries through the Stock Exchange Clearing House. Thus, if a broker sells 100 shares and buys 100, the transactions are recorded on the Exchange p. 174, ll. 3-46.

and Clearing House but there is no delivery of shares. If he sells 1,000 and buys 1,500 the balance of 500 only is delivered from the Clearing House. Delivery must be made within three days though it may be deferred by agreement, and all clearances must be through the Exchange Clearing Office. Thus the delivery of shares earmarked for a particular "buy" or "sell" was in practice impossible.

p. 129, ll. 17-22.
p. 131, ll. 10-13.
p. 131. l. 30.

12. There was another recognized method of dealing called a "put through." A broker who has both a buying and a selling order may offer both on the Exchange. If he does not find another broker willing to deal he acts as sole broker, the sale from one customer to the other is recorded on Exchange, and no clearance of certificates is made. Under this method the purchase of 350 shares for the Respondent was satisfied by the sale of an equivalent number of shares of other customers of the broker. The purchase of 305 shares for the Respondent was satisfied in Clearing by the sale of an equivalent number of shares of other customers and recorded on the opposite side of the Clearing Sheet. The sales and purchases other than put throughs were recorded on their respective sides of the Clearing Sheets and set off against each other, the difference between the two sides only being received or delivered.

p. 174, l. 32.
p. 178, l. 45.
0, l. 22.
4, ll. 10-46.

13. The shares purchased for the Respondent were delivered to the Ontario Company and the Respondent's purchase satisfied as follows:—

The Respondent purchased 7,000 shares and one other customer purchased 10.		
Total shares purchased for all customers (the Respondent and one other customer) on October 16		7,010
Satisfied by sales "put throughs"	360	
Satisfied by sales recorded on Clearing	305	
Delivered by Clearing House to Solloway Mills & Co. Ltd. on October 17, 1929	5,995	
Delivered by Clearing House to Solloway Mills & Co. Ltd. Oct. 18, 1929	200	
Delivered by Clearing House to Solloway Mills & Co. Ltd. on Oct. 24, 1929	100	
Delivered by Clearing House to Solloway Mills & Co. Ltd. on Nov. 15, 1929	50	
	7,010	7,010

), l. 28.
9, ll. 16, 21, 7.
9, ll. 1-6.
0, l. 22.
0, l. 20.
2, l. 32.
1, l. 42.
6, ll. 15-25.
6, ll. 30-36.
7, ll. 5-24.

14. Of the certificates representing 5,995 shares delivered by the Clearing House as above, 5,900 were delivered from stock in the course of

4, l. 6.
6, l. 21.
15, p. 307.

business by the Company dealing for customers on the Exchange or delivered to other brokers for sales made by the Dominion Company over a period extending from October 16 to October 21, 1929.

15. On October 16 the Dominion Company sold on its own account by actual sales, not on the Stock Exchange but "over-the-counter," 3,500 shares of Sudbury Basin. Delivery was effected by the Ontario Company, as the Dominion Company's Agent, of shares taken from its box; these included 2,500 shares represented by actual certificates received from the Respondent as margin and 1,000 shares represented by other certificates. The general short position of the Dominion Company was thereby increased from 88,880 to 92,365 and it is submitted the Ontario Company was empowered by the contract to loan these shares to the Dominion Company; and this transaction was entirely independent of, and had no effect on the purchase set out above.

p. 148, l. 27. p. 149, l. 2. Ex. 42, p. 304. Ex. 25, p. 303. p. 300, ll. 23-29. Ex. 44, p. 305. p. 151, ll. 27-33. Photostatic copies of Ex., p. 75. Photostatic copies of Ex., p. 68.

16. The market price of Sudbury Basin steadily declined and the Respondent, whose dealing was marginal, was called on for further cover and furnished this by delivering a further 10,500 Sudbury Basin shares and $8,000 cash by December 20, 1929. At that time, therefore, the Ontario Company showed his holding in its books as 21,000 shares and his debt as $42,142.92.

p. 314. p. 309, l. 20. p. 310, l. 30. p. 311, l. 1. p. 311, l. 20. p. 312, l. 20. p. 313, l. p. 313, l. p. 314.

17. Of the collateral shares 2,200 were deposited in safe deposit. The remainder went into the Ontario Company's box and were delivered in the course of trading transactions by the Ontario Company, pursuant to contracts made for the Dominion Company and other customers.

p. 140, l. p. 136, l. l. 22.

18. The Ontario Company always had shares of Sudbury Basin at hand and at no time was the demand for delivery of any share to any customer not promptly satisfied. Taking into account the shares owed by the Dominion Company, the Ontario Company was never "short."

19. On January 14, 1930, the Respondent called for delivery of his shares and on the same day certificates for 21,000 shares were delivered to his bank, which then paid the balance due, $42,334.92.

p. 140, l l. 10. p. 143, l. /. p. 29, l. 10. p. 34, l. 46.

The share certificates actually delivered were — p. 307.

2,200	of original collateral	p. 143, l. 6.
5,700	received from J. R. Gordon Jan. 13	p. 141, ll. 4-47.
10,000	from Stobie Forlong loan Jan. 13	p. 142, ll. 2-20.
2,700	from Royal loan Jan. 13	p. 142, ll. 22-45.
400	from transfers Jan. 13	p. 142, l. 46.
21,000		

p. 29, l. 10.
p. 34, l. 47.
p. 141, l. 4.
p. 265, l. 10.

These shares were all received before the demand for delivery and there is no evidence to show that they were bought or, if bought, at what price. This is most material, in view of the finding of the Supreme Court that the shares were purchased pursuant to the demand, a finding which, in the Appellants' submission, rests on no basis of evidence.

p. 1, l. 1.

20. The Respondent investigated his account with the Ontario Company and on January 27, 1931, more than a year after the delivery of the shares to the Respondent he took action. He did not then or thereafter offer to return the shares.

p. 3, l. 42.

21. By his Statement of Claim, as finally amended, the Respondent claimed that the Ontario Company did not purchase the said 7,000 shares and did not hold the same on his account and that the Ontario Company

p. 4, l. 7.

had, on January 13, purchased 7,000 shares to satisfy his demands for delivery at prices ranging from $2.90 to $3.40 a share and had likewise purchased shares to replace the 11,800 shares deposited as collateral and sold by the Ontario Company.

p. 4, l. 23.

22. He further alleged that the Appellants agreed and conspired to carry on the business of the Ontario Company as "an ostensible brokerage business" but agreed with the Company that it should not purchase shares which it should contract to purchase on margin and that it should make counter sales for House or cross sales so as to neutralize purchases and that they further agreed and conspired to sell and convert stock deposited as margin and to use the profits to pay dividend and that when demand was made for delivery by customers, such shares should be repurchased at lower prices without accounting for the profit or the difference and they further alleged—

p. 5, l. 3.

> "(25) (A) It was further agreed between the defendants that the defendant Company should dispose of shares of stock deposited with it as collateral security or purchased for the account of clients to the defendant, the Dominion Company, and should sell the same for the account of the defendant, the Dominion Company, whereby the defendants Isaac W. C. Solloway and Harvey Mills would receive the benefit of such transactions.
>
> (26) It was further agreed between the defendants that the money realized on the transactions carried on by the defendant company should be paid over to and become the property of the defendants and the defendant Company was organized by the defendants Solloway and Mills for the purpose of distributing the said profits under a cloak of apparent legality by way of dividends on shares held by them in the defendant company.

(27) The plaintiff further alleges that the defendants conspired and agreed together to do all the acts herein mentioned and to represent to the public and those wishing to deal with the defendant company that it was carrying on a reputable and legal brokerage business, while in fact it was organized for the purpose of, and was carrying on business in violation of the provisions of the Criminal Code in respect to gaming in shares of stock. p. 5, l. 15.

(27) (A) By reason of the conspiracies and agreements herein alleged, the plaintiff has suffered damage and has been induced to deal with the defendants as herein set out, to the injury and detriment of the plaintiff. The damage so suffered by the plaintiff is the loss on the money invested through the defendants as indicated in the defendants' books of account, the loss of interest on the same, the loss of the money owing by the defendants to the plaintiff as may be found on an accounting herein, and the loss of the use of the same." p. 5, l. 21.

The Respondent claimed—

"(A) The sum of $33,320.00, being the profit made by the defendants on the sale of 11,800 shares of Sudbury Basin Mines Limited stock delivered by the plaintiff to the defendant company, and sold by it and repurchased for delivery to the plaintiff at a lesser price. p. 5, l. 29.

(B) The recovery of $28,637.50 paid by the plaintiff to the defendant company upon the representation that the defendant company had paid for the account of the plaintiff the sum of $48,937.50 for 7,000 shares of Sudbury Basin Mines Limited purchased for the account of the plaintiff, when in fact it paid $20,300.00.

(C) The sum of $525.00 paid to the defendant company for brokerage.

(D) The sum of $680.32 paid to the defendant company for interest.

(E) Interest on the above amounts.

(F) The sum of $100,000.00 damages."

23. The Appellants by their defences denied that they had any business transaction with the Plaintiff, that they made any representations to him or that they conspired as alleged or at all. p. 11.

24. Thereafter by order dated 24th February, 1932 and made on consent, the action was ordered to be tried by the Master of the Supreme Court at Toronto who, subsequently, and, as the Appellants submit, without p. 17. p. 18.

jurisdiction for the reasons hereinafter appearing ordered the same to be
p. 18. tried by the Assistant Master, Mr. Lennox. The said Mr. Lennox had previously tried certain other proceedings against the Appellants and was not a person to whom the Appellants agreed or would have agreed to submit the trial of the action.

p. 20, l. 11.
p. 248, l. 19. 25. The Appellants at the outset submitted that the substitution of the Assistant Master for the Master was improper and throughout objected to his jurisdiction. The objection was throughout overruled. It was based in the lower Courts on the lack of consent and it was submitted that subsequent retroactive Statutes set out below, empowering the Assistant Master to perform all or any of the functions of the Master, were immaterial and impotent to substitute for a person agreed on by the parties a person not so agreed on.

The Statutes were—22 *Geo. V, Chap.* 53, *Sec.* 10.

"(1) Section 1 of the Judicature Act is amended by adding the following clause:

(v) 'Master of the Supreme Court' shall include Assistant Master.

(2) This amendment shall come into force and take effect as and from the 1st day of January, 1932."

This Statute received the Royal assent on 29th March, 1932.

24 *George V, Chap.* 54, *section* 13:

"13. Section 79 of The Judicature Act is amended by adding thereto the following subsection:—

'4. Where under any statute, rule or order, or in any action or proceeding anything is directed to be done by the Master of the Supreme Court, any Assistant Master shall have, and shall be deemed to have always had power to act as fully and effectually as the Master of the Supreme Court.'"

26. Despite the submission of these Appellants that the Assistant Master had no jurisdiction, he proceeded to hear evidence and reported
30, l. 10. upon the case. It was in evidence that the Respondent had no prior
25, l. 27. dealings with the Ontario Company and that he had no personal dealings or meetings with either Appellant. There was no evidence that either Appellant knew of his transactions.

31, l. 20—p. 33, l. 20. 27. During the course of the hearing the Appellants' Counsel sought to cross-examine with a view to showing that the Respondent was

in the whole transaction acting merely as an agent for others and had no beneficial interest in the transaction, but the Assistant Master wrongly, it is submitted, disallowed the cross-examination.

28. The Assistant Master's Report, which under the practice of the Supreme Court of Ontario stands as a Judgment unless appeal be had against it, was dated January 30th, 1933, and was filed on the 27th of February, 1933. The Assistant Master found that the amount due from the Defendant, Solloway Mills & Co. Limited (the Ontario Company) and Isaac W. C. Solloway and Harvey Mills is the sum of $65,129.92, together with costs to be taxed. The tenor and effect of the Judgment was that the Ontario Company and the two Appellants became jointly and severally liable to the Respondent to satisfy it. The Judgment against the Ontario Company was one for secret profits presumably made by the Ontario Company by the sale and re-purchase of the Respondent's stock. The Judgment against the two Appellants as Directors was for damages (the Assistant Master found the secret profits to be the measure of the Respondent's damage) presumably sustained by the Respondent. p. 237. p. 243. p. 237, l. 33.

29. In his reasons for Judgment the Assistant Master found:

(A) "The contention of the Plaintiff is that the Defendant Company did not purchase the 7,000 shares in question and hold them for his account; and that 11,500 out of the 14,000 shares deposited as collateral were converted by the Defendants for their own use. The Defendants, it is alleged, thereby made a secret profit for the benefit of the Defendants Solloway and Mills, who conspired together to dispose of customers' shares and re-purchase such shares later at a lower price and not to account for the difference in price at which the stock was sold and the price at which it was re-purchased. The Plaintiff now claims such difference in price and damages for conspiracy." p. 238, l. 31.

(B) "The records show, in fact it is conceded, that his order was purchased regularly on the Standard Stock and Mining Exchange, and cleared in the approved fashion. A further examination, however, reveals the Defendant Company or its sister Company, the Dominion Company, which one, incidentally is the most pertinent issue here, sold on their own account 3,500 shares." p. 239, l. 4.

It should be pointed out that the sale (alleged in some way to nullify the purchase of the 7,000 shares) was an actual sale of the collateral and was effected by actual delivery of the certificates and in no way affected the receipt of the 7,000 shares.

(C) He disregarded the separate existence of the two Companies and proceeded as if the Dominion Company had been before the

p. 240, l. 38—p. 241, l. 4.
p. 242, l. 17.

Court at the trial. In his view it was not necessary to determine which Company was short. He found that, because of the short position, the Ontario Company, although properly purchasing and paying for the 7,000 shares, could not be said to hold these shares. In his opinion, if a broker has not sufficient shares on hand to satisfy the demands of all his customers he is guilty of a conversion when he allows share certificates received from or for a customer to leave his custody or control.

p. 243, ll. 16–24.
Ex. 47, p. 318.
p. 238, l. 41.

(D) He charged the Ontario Company with the difference between the market price of the shares on the date they left the Ontario Company's custody, and January 13, 1930, as the measure of its profits on the assumption that it had acquired the shares on the latter day at the market price for the purpose of delivering them to the Respondent.

(E) He found that the Ontario Company was liable to account to the Respondent for secret profits made on the sale and repurchase of the Respondent's shares. He based his decision not as their Lordships in the Supreme Court of Canada seem to have thought, on any theory that the shares were not purchased, but on his findings that the shares although acquired properly were not held for the Respondent but converted to the Company's use. The Assistant Master charged the Ontario Company with the profits presumably on the assumption that it was the Ontario Company and not the Dominion Company to whom such profits accrued, although he finds that "it could not be said that the Ontario Company actually commenced operations as brokers."

p. 238, ll. 31, 32.
p. 239, ll. 38-47.
p. 241, l. 38.

(F) He dealt with the claim for general damages by pointing out that if they were to succeed there would have to be evidence that the Appellants' dealings had depressed the market. There was no such evidence.

p. 243, l. 25.

30. The position as to the Appellants' receipts was that on the 14th day of December, 1929, the Dominion Company declared a dividend of $30.00 per share. The Appellant Mills received the sum of $30.00 and the Appellant Solloway the sum of $749,880.00. On the 28th day of August, 1930 the Dominion Company declared a dividend of $35.00 per share. The Appellant Mills received the sum of $35.00 and the Appellant Solloway $874,860.00. It should be pointed out that there was no evidence that Mills knew about the short position or about the Ontario or Dominion Company's method of trading.

p. 244.
p. 247.

31. These Appellants appealed from the Report of the Assistant Master to a Judge of the Supreme Court of Ontario and the appeal was heard by Mr. Justice Kerwin who, by Judgment dated the 13th day of June, 1933,

reduced the amount awarded against the Appellants and the Ontario Company from $65,129.92 to $55,922.98, but otherwise confirmed the Assistant Master's Report.

32. By his reasons for Judgment the learned Judge first dismissed the objection of the Appellants to the Assistant Master's jurisdiction. He found that: p. 248, l. 19.

(A) The Ontario Company never acted as a broker. p. 249, l. 22.

(B) It never made sales on its own account.

(C) It never owned any shares.

(D) He found that the short position was the most cogent evidence of the conspiracy to injure prospective customers—though in what respect he did not indicate—and in the same connection refers to the short position as resulting in profits, not losses, and he dismissed summarily the Appellants' contention that the Respondent having obtained judgment against the Ontario Company for money had and received had thereby waived the tort, namely, the conspiracy. p. 249, l. 42. p. 250, l. 18.

33. It is in the Appellants' submission somewhat difficult to see how the learned Judge's findings justified a Judgment against the Appellants for conspiracy.

34. These Appellants then appealed to the Court of Appeal for Ontario which (Mulock C.J., Riddell, Middleton, Davis JJ., Macdonnell J. dissenting) allowed the appeal and set aside the Master's award against these Appellants. p. 250. p. 252. p. 260.

35. In his Judgment, in which the other learned Judges, constituting a majority, concurred, Mr. Justice Davis agreed with the findings of the Assistant Master that the Ontario Company had properly acquired the 7,000 shares, but regarded the subsequent use of the Respondent's stock as a conversion. He held that the claim and recovery of the profits of the sale and re-purchase was substantially equivalent to recovering the same by an action for money had and received. But even if the Judgment against the Ontario Company could not be correctly regarded as equivalent to an action for moneys had and received, it was as a matter of fact a clear affirmance of the wrongful dealing of the Company with the shares and the Respondent had waived any claim in damages, if such a claim existed, against the Appellants. p. 252, l. 28. p. 254, ll. 22-32.

36. Pointing out that the Respondent was entitled no doubt to an account and for Judgment against the Ontario Company for the profit which that Company made, he said that the profit could only be payable p. 254, ll. 7-21.

to the Appellants by reason of their being Shareholders in the Dominion Company, and that the question might well be raised as to the right in any event of the Respondent to obtain a personal Judgment against the Appellant Solloway in the absence of the Dominion Company.

37. So far as the claim for damages was concerned, he held that because the 7,000 shares were in fact purchased and came into the Ontario Company's possession, and those shares and the 14,000 shares of collateral were delivered to the Respondent on demand, the Respondent, therefore,
p. 256, l. 4. suffered no damage by reason of their conversion " he got the shares he purchased at the price he agreed to purchase them," and, in the absence of damage sustained by the Respondent, it was difficult for him to understand how there could be a cause of action in tort against the Appellants.

p. 256. 38. In his dissenting Judgment, Mr. Justice Macdonnell having mentioned the objection to the Assistant Master's jurisdiction, said that the exact relations between the Companies were difficult to determine
p. 257, l. 40. and he did not determine them. He found that the 7,000 shares were
p. 258, l. 28. in fact purchased. He found that the Assistant Master, for the reasons given by the majority of the Court, erred in the way he arrived at his conclusion and in giving Judgment for damages against the Appellants.
p. 258, l. 30. He found that the Respondent, although in one sense he dealt only with one of the Defendants, the Ontario Company, in reality dealt with all; that the Companies were mere agents or tools for Solloway and Mills; that the transactions throughout were theirs and that when the transactions were completed " they had made the profits " and he found that the Respondent was entitled to damages against the Appellants not for instituting or directing the transaction but for " instigating their Company in January 1930, not to pay what was then due by way of moneys received and profits made," which meant, as he put it, not first affirmation and then repudiation of the transactions had, but affirmation of the transactions down to January 1930, demand then for payment of the amount due, and damages against Solloway and Mills for their instigating the avoidence of payment, the damages being the amount of the debt unpaid.

39. It is humbly submitted that this method of severing a transaction and approbating part and reprobating the other part cannot stand, and that the cause of action upon which the learned Judge founded his Judgment was never made in the pleadings, was wholly unsupported by any evidence, was totally inconsistent with any case made by the Respondent and had no foundation in law. It is further submitted that this Judgment in effect gives as damages, not the Respondent's loss, but the Company's profits, and makes Directors, who for any reason defer payment of a debt due by their Company, liable personally for damages for conspiracy to the amount of the debt.

40. The Judgment of the Supreme Court of Canada (the Chief Justice Lamont, Cannon, Crocket and Dysart (ad hoc) JJ.) was delivered by Dysart J. (ad hoc). p. 263, l. 30.

41. The learned Judge after pointing out that the Ontario Company agreed to act as broker and that it was its duty to get delivery of the shares bought and to hold them for delivery, found that the Company, although it did go on the Exchange and buy the 7,000 shares, it did not fully execute the Respondent's order, for having sold "on its own account" shares of the same denomination on the same day it virtually nullified the purchase and took delivery of "few if any of the shares bought by the purchaser." p. 264, l. 16. p. 264, l. 43.

42. This finding it is submitted is directly in conflict with all the evidence and the concurrent findings of the Courts below and it is difficult to see how a sale by a broker of 3,500 shares with delivery of relative certificates nullifies a purchase of 7,000 shares, also with delivery of relative certificates. The effect is that a broker employed by one client to buy cannot, either for another client or for himself, sell or deal with the same kind of shares apparently so long as the first client has marginal transactions open.

43. His Lordship found that the dealings with the purchased shares were in breach of duty and in pursuance of a general scheme inaugurated by the Appellant and subsequently carried on by the Companies: that the actual participation of the Respondent in the system as conducted by the Ontario Company was made possible and probable by the fact that as officers and almost the sole shareholders they stood to benefit substantially and as high officials directed all the business of the Companies. p. 265, l. 18. p. 265, l. 37.

44. His Lordship added that positive evidence was given at the trial that the Directors did take an active part in directing operations, although no such evidence was given as to the Appellant Mills and it is submitted that there was no evidence submitted to justify this finding against the Appellant Solloway. p. 265, l. 42.

45. His Lordship proceeded to hold that by retaining the shares after discovering "the fraud," the Respondent elected to retain them and that he could not sue in conversion either against the Company or the individual Directors. After pointing out that no one may on the same set of facts sue in Tort and Agency at the same time he pointed out that by his Statement of Claim the Respondent claimed on the basis of agency and adopted the purchase of 13th January, 1930, and claimed for "the overcharge made on that day." That claim was merged in the judgment against the Company. p. 266, ll. 3–22.

p. 267, l. 47. 46. The Order of October, he proceeded, " had come to naught." The Purchaser had adopted the January purchase and was bound to recoup the agent—the Ontario Company—the price it had paid: his only remedy was to hold the Company to a strict accounting as his agent. The excessive overcharge resulted in something to the customer that cannot be designated as anything else than direct loss to him.

47. His Lordship then dealt with the collateral and found that
p. 268, l. 34. it had been returned to the Respondent and he had suffered no loss by its conversion and could therefore not incur damages. The Respondent
p. 269, l. 29. had no cause of action against the Appellants. He could not recover the profits from them because he had not contracted with them, and profits could not be recovered from the Appellants on any theory that they were loss or damage.

48. This Judgment in respect of the 7,000 shares purchased it is submitted proceeds on the basis of the adoption by the Respondent of an imaginary purchase, nowhere proven, in January, 1930, at prices nowhere proven; it says that the Respondent was entitled to disregard the purchase actually made on its behalf in October, not because the purchase was not properly made, but because thereafter the Ontario Company failed to hold the shares purchased. He finds the Appellants liable apparently for instigating the Company not to pay what was due for moneys received and profits made in respect of an imaginary purchase in January, although no profits could have come into calculation without adopting the earlier purchase, and it finds the Appellants liable for instigating nonpayment of moneys arising in a transaction as to which there was no evidence, and with knowledge of which neither of them was fixed, and moreover payment of such monies could only become legally due upon waiver of tort and there was no evidence that the tort was waived before action brought or that after waiver the Appellants instigated anything.

49. The Appellants submit that:—

(A) Even assuming, contrary to the facts proved, the existence of a conspiracy the measure of damages is, as in every case of tort, the loss of the person whose rights are infringed, not the profits of the tort feasors, and that, the Respondent having got his shares at the prices he agreed to pay, having received back his collateral securities undamaged, showed no damages on which to ground an action in tort.

(B) That the Respondent, having proceeded against and secured against the Ontario Company, a Judgment which subsists upon the basis of an account for secret profits had once and for all elected and has waived the tort: and that it is impossible in law for a Plaintiff to succeed upon an account against one of joint

tort feasors and upon tort against the other, for it is the tort that is waived by election to proceed in assumpsit, not the remedy against the individual.

(C) That the evidence in the case shows indeed a profit made by the Dominion Company (not a party to the action) but fails to show any loss by the Respondent, and that therefore the Respondent failed to show any cause of action against the Appellants and the Appellants' submission that the case should have been dismissed was right.

(D) That the argument that the Appellants, having as Shareholders in the Dominion Company received dividends, in some way became liable to account, ignores the separate and corporate existence of the Ontario Company, and makes the Company, in every case where dividends have been paid, the agent of the shareholders.

(E) That even if any form of tracing order were possible, it could not succeed in the absence of the Dominion Company, and of any identification of moneys passing from one Company to the other: and that no identification of moneys was possible or was attempted in the present case.

(F) And that, in effect, moneys paid as dividends cannot be the subject of such an order.

(G) That the contract between the parties permitted the loaning of shares and that therefore each and every transaction with the shares, both purchased and collateral, was justified by the terms of the contract between the parties.

The Appellants therefore humbly submit that the Judgment of the Supreme Court of Canada was wrong and should be reversed in so far as the 7,000 shares purchased are concerned, and that the Judgment of the Supreme Court of Ontario was right and should be restored for the following amongst other

REASONS.

(1) BECAUSE there was no evidence of any conspiracy.

(2) BECAUSE, if there was any such evidence, the Respondent proved no damages.

(3) BECAUSE the profits of a tort feasor cannot be recovered as damages, but only the loss of the injured party.

(4) BECAUSE the Respondent, never having contracted with the Appellants, had only one possible cause of action against them, namely, in Tort and the Respondent having suffered no loss had therefore no cause of action whatever against the Appellants.

(5) BECAUSE the Respondent, by recovering Judgment on the ground of money had and received and /or account of profits against the Ontario Company, waived the tort, if any.

(6) BECAUSE the Assistant Master had no jurisdiction to hear the action.

(7) BECAUSE the Assistant Master wrongly rejected and disallowed the cross-examination of the Appellants' Counsel.

(8) BECAUSE the findings of fact of the Supreme Court were not justified by the evidence in the case.

(9) BECAUSE the transaction upon which the Judgment of the Supreme Court of Canada was based—a purchase of shares by the Ontario Company in January, 1930—was never shown to have taken place.

(10) BECAUSE the Judgment of the Supreme Court of Canada ignores the separate existence of the Dominion and Ontario Companies.

(11) FOR the reasons set forth in the Judgment of the majority of the Court of Appeal for Ontario.

CROSS-APPEAL.

50. The Appellants crave leave to refer to their case upon appeal and to the facts therein set out.

51. By his cross-appeal the Respondent appeals against so much of the Judgment of the Supreme Court of Canada as adjudged that he was not entitled to recover damages in respect of the sale of 11,800 shares of the Sudbury Basin Mining Company deposited by him as margin in respect of the purchase more fully set out in the Appellants' case upon Appeal.

Ex. 44, pp. 305 306.

52. The said shares were used at dates between October 16th, 1929 and December 16th, 1929 as follows : 3,100 were delivered to clearing for

customers, 900 to branch offices for customers, 1,000 were sent to transfer (for what purpose does not appear in evidence), the balance, 6,800, was delivered to other brokers against house sales.

53. The Appellants submit that the said shares were deposited as, for and in lieu of a cash margin and that the intent and purport of the said deposit was that the said Company should be entitled by selling or mortgaging the same to protect itself against the fall in the market price of the shares purchased for the Respondent but not paid for by him, that the said Company was at all times entitled to realise the said margin and to hold the proceeds of sales above to meet the difference, if any should arise, between the purchase price and market price of purchased shares.

54. The Appellants further submit that the customs of brokers permitted the Company in the ordinary course of business to make use of any shares in its custody for the account of a customer, and to replace them with other like shares. p. 81, ll. 1-40. p. 82, ll. 6-22.

55. The Appellants further say that in pursuance of the terms of the confirmation the Ontario Company was entitled so to sell the said shares and so to apply the proceeds of sale subject only to the liability in either case to deliver to the Respondent a like number of the said margin shares upon payment by him of the full purchase price of the shares purchased, and that the said confirmation expressly authorized the loaning of such shares which could only be for the purpose of sale by the bailee. p. 297, p. 298.

56. The evidence showed that the said shares were used by the Ontario Company either for customers in the ordinary course of business or were loaned to and sold on behalf of the Dominion Company and there was no evidence, even if contrary to the Appellants' contention such a sale constituted a conversion, that such sale was made by or on behalf of the Appellants or that they or either of them at any time knew of the deposit of the shares or the sale thereof or authorized or were in any way responsible for the sale or that they as directors or otherwise incurred any personal liability by reason of such sale. It is submitted that upon no principle of law can the Directors of a Company be liable otherwise than in Tort for the actions of the Company.

57. The Appellants further say that on or about January 14th, 1930, 14,000 shares of Sudbury Basin were delivered to the Respondent as and for such shares deposited as margin, and such shares so delivered were accepted and retained by the Respondent and that such delivery was a good delivery of the shares deposited as margin and that the obligation of the Ontario Company was completely and wholly fulfilled by such delivery.

58. There was no evidence that the Respondent having received delivery of his marginal shares suffered any damage by the alleged conversion, and the Appellants submit that the Supreme Court was right in its finding that the Respondent could not recover as damages for conspiracy or for conversion the profits, if any, made by the Ontario Company upon the sale of the said marginal shares. No evidence was given tracing to the Appellants any or all of the moneys received for the sale of the said marginal shares and it is submitted that no liability can be imposed upon them in respect of such sales in the absence of such evidence. The Appellants, therefore, submit that the cross-appeal should be dismissed for the following amongst other

REASONS.

(1) BECAUSE the Ontario Company was entitled to sell the marginal shares.

(2) BECAUSE such sale was not made by or on behalf of the Appellants.

(3) BECAUSE if the said shares were converted the Respondent suffered no damage thereby.

(4) BECAUSE the Respondent accepted delivery of the marginal shares and other shares in substitution therefor.

(5) BECAUSE the profits made by the alleged conversion were made by the Dominion Company against which Company the case was abandoned.

(6) BECAUSE the alleged profits made by the Dominion Company were not loss or damage suffered by the Respondent and cannot be recovered from the Appellants, Directors of that Company, as damages.

(7) BECAUSE there was no evidence that the profits of the alleged conversion came into the hands of the Appellants.

(8) FOR the reasons set out in the Judgment of the Supreme Court of Canada.

WILFRID BARTON.

No. 69 of 1936.

In the Privy Council.

ON APPEAL

From the Supreme Court of Canada.

BETWEEN

ISAAC W. C. SOLLOWAY and HARVEY MILLS (Defendants) - *Appellants*

AND

J. P. McLAUGHLIN (Plaintiff) - *Respondent*

AND

SOLLOWAY MILLS & CO. LIMITED and SOLLOWAY MILLS & CO. LIMITED (A Company incorporated under the laws of the Dominion of Canada) (Defendants not appearing)

AND BY WAY OF CROSS-APPEAL

BETWEEN

J. P. McLAUGHLIN (Plaintiff) - *Appellant*

AND

ISAAC W. C. SOLLOWAY and HARVEY MILLS (Defendants) - *Respondents.*

Case for Appellants on Appeal RESPONDENTS ON AND CROSS-APPEAL.

GARD, LYELL & CO.,
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