88, 1937

In the Privy Council.

No. 69 of 1937

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 AND CO. LIMITED (A Company incorporated under the laws of Ontario) and SOLLOWAY MILLS AND 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.

RESPONDENT'S CASE.

CASE FOR THE RESPONDENT.

1. This is an appeal from the judgment of the Supreme Court of Canada dated the 28th February, 1936, and a cross-appeal by the Respondent. Record. PP. 262, 263.

2. The action was brought in the Supreme Court of Ontario on the 27th January, 1931, by the Respondent J. P. McLaughlin against the Appellants and against Solloway Mills and Co. Limited (a Company incorporated under the laws of the Province of Ontario) referred to hereafter

Record. as the "Ontario Company". Solloway Mills and Co. Limited (a company incorporated under the laws of the Dominion of Canada) hereinafter referred to as the "Dominion Company" was added as a defendant pursuant to the Order of the Master dated the 22nd day of April, 1931.

Respondent's Case, P. 6, l.40. 3. The action came on for trial on the 24th January, 1932 before Kelly J. without a jury, and was referred to the Master of the Supreme Court of Ontario for trial under the provisions of the Judicature Act, R.S.O. 1927, chap. 88, s.67.

4. On the 23rd March, 1932, an Order was made for the winding-up of the Dominion Company under the provisions of the Winding-up Act, R.S.C. 1927, chap. 213, and the action against the Dominion Company was stayed by virtue of the provisions of the Winding-up Act. No order for leave to proceed under that Act was obtained, and the Dominion Company did not appear further in the proceedings.

5. The Ontario Company made an authorized assignment in bankruptcy on the 2nd day of April, 1932. On the 12th of May, 1932, leave to proceed with the action against the Company was obtained under the provisions of the Bankruptcy Act, R.S.C., 1927, chap. 11.

6. O. E. Lennox, Esquire, Assistant Master of the Supreme Court of Ontario, tried the action on the 11th, 12th, 13th, 14th and 26th days of October, 1932. On the 30th January, 1933, the Assistant Master made a
P. 237. Report finding that the amount due to the Respondent from the Appellants and the Ontario Company was $65,129.92.

7. The Appellants appealed from the Assistant Master's Report. The Ontario Company did not appeal, and the Report therefore stands confirmed as against the Ontario Company.

P. 247. 8. By judgment dated the 13th June, 1933, the Report of the Assistant Master was confirmed by Kerwin J. with the correction of a mathematical error which reduced the amount found to be payable to the Respondent by the Appellants to $55,922.98.

P. 260-1. 9. The Appellants appealed from the judgment of Kerwin J. to the Court of Appeal of the Province of Ontario. The appeal was allowed and the judgment of Kerwin J. vacated as against the present Appellants, and the action dismissed with costs as against them. The Court of Appeal consisted of Mulock, C.J.O., Riddell, Middleton, Davis and Macdonnell, JJ.A. Macdonnell, J.A. dissented.

P. 262-3. 10. The Respondent appealed from the judgment of the Court of Appeal to the Supreme Court of Canada. The Supreme Court of Canada allowed the Respondent's appeal and restored the judgment of Kerwin J. in part, reducing the amount to which the Respondent was entitled to

$28,281.40 and interest, and varying the judgments below as to costs. The Court consisted of Duff, C.J., Lamont, Cannon, Crocket and Dysart (ad hoc) JJ. The judgment of the Court was unanimous. Record.

11. By Order dated the 24th day of July, 1936, His Majesty in Council granted to the Appellants leave to appeal from the judgment of the Supreme Court of Canada, and leave to the Respondent to cross-appeal from the judgment so far as it did not restore in full the judgment of Kerwin J. P. 285.

12. The Appellants commenced business as stock brokers in the City of Toronto in the Province of Ontario and elsewhere during the year 1927, and carried on business in partnership until the 31st day of May, 1928. Ex. 17B. P. 288.

13. In the month of May, 1928, the Appellants caused the Dominion Company to be incorporated to acquire the business that had been carried on by the partnership. Ex. 17B. P. 288. P. 289-290.

14. The Dominion Company carried on the business in Ontario and elsewhere until the month of December, 1928.

15. In the month of November, 1928, the Appellants caused the Ontario Company to be incorporated and on the 1st of December, 1928, the Ontario Company acquired and carried on the business in Ontario that had been carried on there by the Dominion Company. Ex. 17, P. 291. Ex. 18, P. 292. Ex. 17, P. 293

16. All the shares of the Dominion Company, except five qualifying shares, were held by the Appellants until November 12th, 1929, and by the Appellant Solloway thereafter. All the shares of the Ontario Company, except ten qualifying shares, were held by the Dominion Company. P. 43, l.35. P. 44, l.16. P. 44, ll.17-24.

17. On the 16th October, 1929, the Respondent instructed the employees at a branch office of the Ontario Company in the City of Toronto to purchase for him on the Standard Stock and Mining Exchange in Toronto 7,000 shares of stock of Sudbury Basin Mines Limited on margin at the market price on that date (approximately $7.00 per share). The Respondent deposited 3,500 shares of stock of Sudbury Basin Mines Limited as collateral security, to be held with the shares purchased, as security for the balance owing on his account. P. 25.

18. After the purchase, the Respondent received confirmations of the purchase of the 7,000 shares. P. 25, l.42. P. 26, l.13. Ex. 2-3, P. 297-8.

19. After October 16th, 1929, the market value of the stock of Sudbury Basin Mines Limited fell rapidly, and on the 22nd, 25th and 29th days of October, and on the 16th day of December, 1929, the Respondent, in response to requests for further security, deposited in all 10,500 further shares of the stock of Sudbury Basin Mines Limited as collateral security P. 26, l.16-end. P. 27. P. 28, l.1-34.

Record. for the payment of the purchase price of the 7,000 shares purchased on the 16th October. On the 20th December the Respondent, in response to a further request for additional security, paid to the Ontario Company $8,000.00.

P. 28, l.36-46. Ex. 14, 15,16. PP. 309, 312, 313. 20 The Respondent received each month Statements which purported to show the true state of his account with the Ontario Company.

P. 29, l.4-18. 21. On the 13th January, 1930, the Respondent went to the branch office of the Ontario Company where he had transacted his business, and requested delivery of the 21,000 shares which he was lead to believe had been carried for his account.

P. 314. 22. It was represented to him that a balance was due from him on his account of $42,334.92. This amount was paid to the Ontario Company, and the Respondent received delivery of 21,000 shares of stock of Sudbury Basin Mines Limited.

Ex. 14, 15, 16. PP. 309, 312, 313, 314. Ex. 19. 23. The representation that a balance of $42,334.92 was owing by him was in accordance with the Monthly Statements delivered to him, and the Ledger Statement of the Ontario Company purporting to record all transactions in respect to his shares. These Monthly Statements and the Ledger Account failed to disclose, among other things, the following facts shown in the evidence.

(a) That any purchase of the 7,000 shares which the Respondent ordered the Company to purchase on October 16th, 1929, that may have been made, was nullified by sales of shares, and the shares were not carried for the Respondent's account as ordered by him.

(b) That 7,000 out of the 21,000 shares of stock delivered to the Respondent on the 13th January, 1930, were not shares of stock purchased for him on the 16th October, 1929, at the price of $7.00 per share approximately, but were shares of stock acquired by the Appellants on or about the 13th January when the market price for the shares was approximately $3.70.

(c) That out of the 14,000 shares of stock deposited by the Respondent as collateral security, 11,500 had been disposed of by the Ontario Company as soon as received, and that 11,500 shares of stock had been acquired on the 13th January, 1930 by the Ontario Company for delivery to the Respondent when the price of the shares was much lower than at the dates when sold.

PP. 309, 312, 313, 314. 24. The Monthly Statements sent to the Respondent, and the customer's Ledger Account kept in the books of the Company are designed to show a list of shares sold for the account of the customer. On none of the statements rendered to the Respondent was he credited with the proceeds of the sale of any shares, nor were the same shown in his ledger account. The amount of the proceeds of such sales was not deducted from

the amount of $42,334.92 that the Respondent was required to pay on the 13th of January, 1930 in order to obtain delivery of the shares in question. Record.

25. If the Company had given the Respondent a true statement of what had taken place, it would have shown:

(a) The purchase of 7,000 shares for delivery to him at $3.70 per share, making a total purchase price of $26,180.00, instead of 7,000 shares at $7.00 per share, making a total purchase price of $49,462.50, and (b) The sale of the shares deposited as collateral and the re-purchase of the same number of shares on the 13th January at lower prices, making a profit of $24,375.00 on this latter transaction. Ex. 47, P. 318.

26. The concealment of the transactions that had taken place caused the Respondent to act to his detriment, and he thereby suffered loss.

27. The Ontario Company dealt with the Respondent pursuant to a general scheme or system instituted by the Appellants when they carried on the business as a partnership, and continued by them throughout the lifetime of the business after the incorporation of the companies. P. 265, l.18-26.

28. The course of trading carried on pursuant to this general scheme or system had resulted in October, 1929, in large deficiencies in the amount of shares of various denominations available to meet obligations to customers. The deficiency is known in the trade and referred to in the evidence as a "short position".

29. A record of the "short position" at various times and shares of stock of various denominations is shown in the Trading Accounts as shares owed by "the House" or by the "Dominion Company". Ex. 29, 29a, 30, 30a, 30b. Photostatic copies, PP. 68, 74, 75.

30. The disposal by the Ontario Company of the Respondent's actual certificates could not be justified on the ground that sufficient shares of stock of the same denomination were held by the Company to meet its obligation to customers as the Ontario Company was in a "short position" in Sudbury Basin Mines Limited stock throughout the whole period during which the Respondent dealt with it. Ex. 29a, Photostatic copies, P. 151, l.28-46.

31. The Courts below have all found as a fact that the fraudulent mode of trading was carried on pursuant to a general scheme or system actively directed by the Appellants. P. 242, l.39, 40. P. 243, l. 8. P. 249, l.29. P. 250, l. 2. P. 265, l.18. P. 266, l. 2.

32. The Respondent had no direct dealings with the Appellants, but the fraud perpetrated on him was done in pursuance of the scheme or system which the Appellants instigated and from which, as the sole shareholders of the Dominion Company, which was the sole shareholder of the Ontario Company, they alone could benefit.

33. The Respondent did not learn that the transactions of the Ontario Company with him were not as represented to him until after crim-

Record. inal proceedings had been taken against a number of stockbrokers in Ontario, and the operation of the system described in the evidence, disclosed.

P. 1. 34. In the Statement of Claim, after setting out the facts as described
P. 4, l. 1. above, the Respondent inter alia alleged in paragraph 19:

> "On January 13, 1930 the plaintiff demanded that the defendant com-
> "pany deliver to him the shares of stock which were agreed to be
> "purchased for his account, together with the shares of stock de-
> "posited with it to be held by it as collateral security, upon payment
> "of the balance of $42,143.00 which was represented to be due to it
> "on account of the purchase price of the said 7,000 shares of stock in
> "Sudbury Basin Mines Limited."

P. 4, l. 47. and in paragraph 22:

> "The defendant company repeatedly represented to the plaintiff it
> "was carrying the shares of stock herein mentioned for the account
> "of the plaintiff, and that there was due for interest on his account at
> "various times amounts totalling $680.32, which amount was charged
> "to the account of the plaintiff and paid by him when he closed his
> "account out with the defendant company on January 13, 1930."

and in paragraph 25:

> "And it was further agreed between the defendants that the shares of
> "stock sold as mentioned in the next preceding paragraph, should be
> "repurchased by the defendant company for delivery to customers as
> "and when required and when the same were re-purchased at lower
> "prices than at which they were sold, the defendant company would
> "not account to the customers for the difference between the price at
> "which their stock was sold and the price at which similar stock was
> "re-purchased for delivery."

In paragraph 27a the Respondent alleged that by reason of the conspiracies and agreements set out in the Statement of Claim the Respondent had suffered damage and been induced to deal with the Appellants to the injury and detriment of the Respondent. The Respondent therefore 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 re-purchased for delivery to the plaintiff at a lesser price.
>
> "(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."

and further sums for brokerage and interest, and

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

35. The provisions of the Judicature Act, R.S.O. 1927, chap. 88, s.67 under which the action was referred for trial by Kelly J. to the Master of the Supreme Court of Ontario are as follows:— P. 17.

"67. In an action,

"(a) if all the parties interested who are not under disability consent, and where there are parties under disability the Judge is of opinion that the reference should be made and the other parties interested consent; or,

"(b) where a prolonged examination of documents or a scientific or local investigation is required which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court directly; or,

"(c) where the question in dispute consists wholly or partly of matters of account,

"a Judge of the High Court Division may at any time refer the whole "action or any question or issue of fact arising therein or question of "account either to an official referee or to a special referee agreed "upon by the parties."

36. Pursuant to an Order-in-Council dated May 4th, 1923 passed under the provisions of section 79 of the Judicature Act, the Master assigned the duty of trying the action to the Assistant Master, Mr. O. E. Lennox, an officer who shares the duties of the Master. The first three subsections of Section 79 of the Judicature Act are as follows:—

"79.—(1) There shall be such officers of the Supreme Court as may "be deemed necessary by the Lieutenant-Governor in Council for the "due dispatch of the business of the court, and such officers, subject "to the provisions of section 97 as to special examiners, shall be ap- "pointed by the Lieutenant-Governor in Council.

" (2) The duties of the officers shall be regulated by the rules "and by the terms of any order-in-council governing such officers.

" (3) All persons holding office at the time of the coming into "force of this Act shall continue to hold office until otherwise direct- "ed by order-in-council."

The Order-in-Council is as follows:

"128/216

"TO HIS HONOUR

"Henry Cockshutt, Lieutenant-Governor of the Province of Ontario.

" Report of a Committee of the Executive Council on matter re- "ferred to their consideration.

Record.

" Present
"The Hon. Mr. Drury
" Raney, Smith, Bowman, Rolla, Mills, Carmichael, Grant and
" Nixon.
" On Matters of State
" May it please your Honour
" Having had under consideration the reorganization of the Judi-
"cial and Administrative offices of the Supreme Court at Osgoode
"Hall, and upon the recommendation of the Honourable the Attorney-
"General the Committee of the Council advise
" 1. Re Superannuation
" 2. That the different offices at Osgoode Hall shall be divided
" into two branches,
" (a) The Judicial branch to be known as the Master's Office,
" and
" (b) The Administrative Branch, to be known as the Reg-
" istrar's Office.
" 3. That the Judicial Branch shall be under the supervision and
" direction of the Master of the Supreme Court.
" 4. That the staff of the Master shall consist of G. O. Alcorn,
" E. W. Boyd and A. E. Bastedo. Mr. Alcorn and Mr. Boyd
" to be known as Assistant Masters with salaries at the rate
" of $4,200 and $3,600 per annum respectively and Mr. Bas-
" tedo as Chief Clerk with a salary at the rate of $3,000 per
" annum.
" 5. That all duties heretofore performed in the office of the
" Master in Ordinary and Master-in-Chambers shall be per-
" formed in the Master's Office by the Master and his staff,
" the Master to have the power to assign to each of his said
" staff such duties as he may from time to time deem advis-
" able.
" 6. 7. As to reporting staff.
" 8. 9. As to the Senior Registrar and Assistant.
" 14. That the provisions of this Order shall come into force and
" take effect as and from the 15th May, 1923.
" Respectfully submitted,
" "E. C. Drury,"
" Chairman.
"4th May, 1923
" "C. A. Bulmer"
" C.E.C.
"Approved and Ordered 4th day of May, 1923
" "H. Cockshutt"

37. The Appellants have contended in the Courts below that the Assistant Master had no jurisdiction on the ground that the trial should have been held by I. Hilliard, K.C.

38. The judgment of Kelly J. contained the following clause: P. 17. Record.
"This Court doth order and adjudge that this action be and the "same is hereby referred to the Master of this Court at Toronto "for trial."

39. By Statutes of Ontario, 22 Geo. V., chap. 53, s.10, section 1 of the Judicature Act was amended by adding the following clause:

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

Subsection (2) of section 10, provided as follows:—

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

40. In 1934, by Statute of Ontario, 24 Geo. V., chap. 54, s.13, the Judicature Act was further amended as follows:—

"13. Section 79 of the Judicature Act is amended by adding "thereto the following subsection: Respondent's Case, P. 7, l.17.

" (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."

41. None of the Courts below have given effect to the argument of the Appellants that the Assistant Master had no jurisdiction to try this action.

42. Before the Assistant Master the Appellants contended that the "short position" had been created by loans of shares from the Ontario Company to the Dominion Company. The Assistant Master held that, even if the loan would justify the Ontario Company in disposing of the shares, such a loan was not proved. P. 241, l.41. P. 242, l.12.

43. The Assistant Master found that the shares of stock purported to be purchased for and charged to the Respondent at the price of approximately $7.00, were acquired three months later when delivery was requested, at an average price of $3.70 per share, and that 11,500 shares of stock deposited as collateral security for the balance purported to be owing on the account, were acquired at sums substantially less than those received for their sale. The difference between these amounts, he found, represented the "*secret profit*" of the defendants. P. 243, l.16. P. 243, l.20.

44. The learned Assistant Master found that the measure of damages for conspiracy was precisely the amount of the secret profit. P. 243, l.25-30.

45. The Report of the Master was confirmed on appeal by the judgment of Kerwin J. The finding of the Assistant Master that there was P. 249, l.24-32.

Record. no evidence of loans of shares to the Dominion Company, was concurred in. The learned Judge held that, even if the shares had been loaned, such a position would not avail the Appellants, as it was the result of a conspiracy on the part of the Appellants to defraud such persons as might become customers of the partnership or of either company.

P. 250, l.18-24. 46. The learned Judge refused to give effect to the argument that the Respondent has secured judgment against the Ontario Company on a claim for "money had and received", and that he could not, therefore, sue in tort, holding that a claim for damages for conspiracy was made in the pleadings against all the defendants, and was justified by the evidence.

47. The Honourable Mr. Justice Davis delivered the judgment of the majority of the Court of Appeal, consisting of Mulock, C.J.O., and Middleton, J.A., and himself. Riddell, J.A. agreed in the result reached by Davis, J.A. without giving reasons. Macdonnell, J.A. dissented.

48. Davis J.A. did not question the correctness of the findings of fact of the Assistant Master or Kerwin J. He held, however, that the
P. 254, l.21 et seq. Respondent, in applying for and obtaining judgment against the Ontario Company for the money made by it in the unlawful sale and repurchase of the original shares and most of the pledged shares, affirmed the transactions of the Company, treating it as his agent, and demanding the fruits
P. 254, l.28-33. of the company's dealing with the shares. The learned Judge held that there was a clear affirmance of the wrongful dealings by the company
P. 254, l.34. with the shares. The learned judge points out that the Appellant Sollo-
P. 255, l.28. way contended that by accepting judgment, the Respondent had adopted the "wrongful acts of the company and waived his right, if any, to sue Solloway individually for damages arising out of the tortious acts of the company", but the learned judge does not deal with this contention.

P. 256, ll.1-20. 49. The learned Judge held that the Respondent's right of action was based on a tort and that the gist of such an action is damages, and that as the Respondent received at the end of his dealings with the defendant company the same number of shares and paid the same amount of money as he would have if the company had throughout carried out its duties to hold the shares for him, he sustained no damages from the Appellants' wrongful acts, and was not entitled to recover.

P. 258, l.35. P. 259, l.2. 50. Macdonnell, J.A. dissenting, held that the companies were in fact mere agents or tools of the Appellants, created and governed by them for the purpose of continuing the system developed by the partnership. The transactions throughout were in reality those of the Appellants who instigated every movement and who, when all the operations were completed, had made the profits. When several persons have joined together to convert moneys to their own use, and make *"secret profits"*, transferring the moneys and profits backwards and forwards among each other, none of them can be heard to disclaim liability on the ground that they did not

immediately transact business with the persons wronged. In particular, those who originated and directed the operations cannot be heard to say that they are liable only for what they took directly, not for what they reaped through the agency of their tools or companions now derelict or defunct. Record.

51. The learned Judge further held that the Appellants had instigated the company in January, 1930, not to pay what was then properly owing by way of moneys received and profits made. If A., he says, owes B. money and if C. instigates A. to avoid payment, B. has a good cause of action against C. for damages, the damages being the amount of the debt unpaid. P. 259, 11.10-27.

52. On appeal to the Supreme Court of Canada the judgment of Kerwin J. was restored with respect to the issues in respect to the 7,000 shares ordered to be purchased, but not with respect to the 11,500 shares of collateral sold by the Ontario Company and repurchased at lower prices, and the amount directed to be paid by the Appellants to the Respondent was reduced from $55,922.98, to $28,281.40.

53. Dysart, J., in delivering the judgment of the Supreme Court of Canada, concurred in the findings of fraud against the Appellants. The learned Judge held that the Respondent having retained the shares of stock delivered to him could not sue for their conversion, and that the Respondent was not entitled to succeed on that ground. P. 267, 11.7-9.

54. The learned Judge held that the action could be considered as having been laid in agency, and that the purchase which was adopted by the retention of the shares was that of January, and the claim was made for overcharge on that date. This claim, he held was entirely consistent with the retention of the shares as well as with the adoption of the agency, and entitled the customer on proof submitted in support thereof, to recover from the company all moneys which on January 13th he paid in excess of the actual purchase price. P. 267, 11.14-20.

55. The learned Judge, referring to *Solloway v. Johnson, 1934, A.C. 192, at 207-8*, held that a director could only be held liable for the acts of his company upon proof of two facts, (1) the fraud of the company, and (2) loss or damage to the customer attributable to that fraud, or benefit accruing to the director from the fraud. In this case, he finds, the fraud of the company was clearly established, and that loss would seem to be no less clear. The customer was induced by misrepresentation of its agent to part with a large sum of money over and above the actual amount which he should have paid. He has not since that date been able to secure the return of the excess. That sum represents loss or damage to him. The respondent was, therefore, entitled to succeed in respect to the first group of 7,000 shares. P. 267, 11.28-47. P. 268, 1.10.

Record. P. 268, l.11. 56. With respect to the group of 11,500 shares, the learned Judge confirmed the finding of the Assistant Master and the lower courts, that these shares were disposed of by the Company in most instances immediately after they were deposited without the slightest possible right, and repurchased later when demanded. A secret profit was thereby made of P. 268, l.34. $33,320.00. The sale and repurchase of these shares was part of the general scheme or system already described, and fraudulently perpetrated by the concerted action of the company and the directors.

P. 269, l.7. 57. The claim for damages for conversion of these shares, the learned trial Judge held, was defeated by the retention of the shares. Considering the claim on "an agency footing", the learned Judge held that the judgment against the directors could be upheld only upon proof of fraud and loss, the loss including the benefit accruing to the directors attributable to the fraud. The learned Judge held that there was, with respect to the transactions with relation to these 11,500 shares, no loss or damage to the Respondent, nor any profit to the Appellants. Accordingly the appeal, so far as these shares were concerned, was dismissed. Against this part of the judgment of the Supreme Court of Canada, the Respondent cross-appeals.

58. It is respectfully submitted that the Company misrepresented the facts in regard to the sale and repurchase of the 11,500 shares in the same manner as with regard to the 7,000 shares ordered to be purchased. The accounts presented to the Respondent failed to disclose to him that the 11,500 shares had been sold.

59. The Respondent, on the 13th January, was induced to pay $42,-334.92 as much by the fraudulent concealment or positive misrepresentation with regard to the 11,500 shares as with regard to the company's dealings in relation to the 7,000 shares ordered to be purchased.

60. The Respondent therefore submits that this appeal should be dismissed and the cross-appeal should be allowed for the following among other

REASONS

(a) Because the Appellants created and participated in a fraudulent system or scheme.

(b) Because, pursuant to the fraudulent system or scheme false representations were made to the Respondent on which he acted to his detriment.

(c) Because the Appellants are equally liable with the defendant company for the damage sustained by the Respondent.

(d) Because, pursuant to the scheme or system, fraudulent statements of account were rendered to the Respondent concealing the manner in which his shares of stock had been dealt with.

(e) Because the Respondent is entitled to recover as damages against all parties to the fraudulent scheme or system the amount of the secret profit made by any one of the parties.

(f) Because the Respondent paid to the defendant company $49,462.50 which he would not have paid had a true statement in respect to his account been rendered to him.

(g) Because the Respondent's right to recover damages for the loss caused to him by the fraudulent statements of account presented to him does not depend upon affirmance or disaffirmance of the wrongful disposal of his shares.

(h) Because, if the wrongful disposal by the company of the Respondent's shares of stock was affirmed, the company, pursuant to the fraudulent system, by subsequent and severable false representations as to the condition of the Respondent's account, caused him damage.

(i) Because, if the wrongful disposal by the company of the Respondent's shares was disaffirmed, the company, pursuant to the fraudulent system, made misrepresentations concealing the disposal of his shares of stock on the strength of which the Respondent paid out a large sum of money.

(j) Because the Judgment of the Supreme Court of Canada, in so far as the Respondent is held to be entitled to recover the sum of $28,281.40, is right.

(k) Because the Supreme Court of Canada was in error in holding that the Respondent was not entitled to recover the balance of the amount awarded by Kerwin J. by reason of the fact that he had retained the shares of stock in question.

(l) Because of the reasons for judgment of Macdonnell, J.A.

(m) Because the Assistant Master had jurisdiction to try the action.

J. C. McRUER,

F. A. BREWIN.

In the Privy Council.

No. 69 of 1936

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 AND CO. LIMITED (A Company incorporated under the laws of Ontario) and SOLLOWAY MILLS AND 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*.

RESPONDENT'S CASE

LAWRENCE JONES & CO.,
LLOYD'S BUILDING,
LEADENHALL ST.,
LONDON, E.C.3.