J. P. McLAUGHLIN (PLAINTIFF) .... APPELLANT; 1935 * June 14, 17.

AND

ISAAC W. C. SOLLOWAY AND HARVEY MILLS (DEFENDANTS) .... RESPONDENTS. 1936 * Feb. 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Agency—Broker—Conversion—Secret profit—Company law—Liability of directors—Customer employing brokerage company to buy shares on margin, and depositing other shares as collateral security—Company failing to carry shares for customer and thereby, and by use of customer's shares, and by buying in on falling market for delivery to customer, making profit for itself—Claim by customer against directors of company—Customer's retention of shares delivered to him, as election precluding claim for conversion—Basis of claim, form of action and essentials for right to recover.

Defendants S. and M., who had as partners conducted a brokerage business, turned it over, on May 31, 1928, to a Dominion company, which they had organized and of which they were officers and almost the sole shareholders. That company, on November 30, 1928, transferred the Ontario portion of the business to an Ontario company which S. and M. had organized and of which they were high officials and directors. The Dominion company owned practically all the shares of the Ontario company.

On October 16, 1929, plaintiff employed the Ontario company (hereinafter called the company) as his agent and broker to buy 7,000 shares of a certain stock on the Toronto Stock Exchange at market prices on margin, and deposited, at varying intervals, in all, 14,000 shares of the same stock (hereinafter called the collateral) as security to maintain the margin. This Court found, or accepted findings of, the following facts: The company, while it did go upon the Exchange and buy 7,000 shares, virtually nullified that purchase by selling shares on its own account, the effect of this, under the Stock Exchange practice, being that the company took delivery of few, if any, of the shares so bought, and it did not get or carry shares from which it could make delivery to plaintiff if and when required. Though any asserted marginal requirement was always met by plaintiff promptly, the collateral was disposed of, in most instances, immediately it was deposited; in all, 11,800 of said 14,000 shares were disposed of for about $65,320. On January 13, 1930, plaintiff called for delivery of the 7,000 shares. The company bought upon the market (which had fallen) 7,000 shares for about $25,000 and delivered them to plaintiff as and for the shares which he had ordered in October. Plaintiff accepted the shares and paid the amount demanded ($50,334.92 for price, brokerage and interest), believing that the shares were those which he had ordered in October. The company also repurchased upon the market 11,800 shares for about $32,000, and these, along with the 2,200 shares which it had not sold, it delivered to plaintiff as the collateral, retaining the secret profit of about $33,320 which it had made on the sale and repurchase. The company's conduct, both as to

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

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the 7,000 shares and the collateral, was in pursuance of a general system, which had been inaugurated by S. and M. when partners as aforesaid, and which had been carried on continuously since by the successive owners and operators of the business. S. and M. controlled and directed all the business and practices of the company.

A judgment against the company and S. and M. (for the difference between what the company charged plaintiff for the 7,000 shares and what it acquired them for when delivery was requested, and for the difference between what the company received and paid for the collateral; with adjustment for interest and brokerage) was, as to S. and M. reversed by the Court of Appeal for Ontario, which dismissed the plaintiff's action as against S. and M. Plaintiff appealed to this Court.

Held: (1) As to the 7,000 shares: Under the terms of the accepted order to buy and the representations regarding its execution, there was a legal duty on the company to get delivery of the shares bought and to carry always a sufficient number of shares available for delivery to plaintiff when demanded (*Conmee* v. *Securities Holding Co.*, 38 Can. S.C.R. 601; *Solloway* v. *Blumberger*, [1933] Can. S.C.R. 163, at 167); which duty was not fulfilled. The October order to buy was never fully executed and so came to naught. This relieved plaintiff of any contractual obligation to take any shares at any price. He was not obliged to take or retain the shares bought in January, but he had by his conduct after discovering the facts elected to retain the shares, thereby adopting the company's action in buying the shares as his agent, and defeating his claim, which he might otherwise have had, for conversion (his retention of the shares being a denial that they had passed to anyone else, and, further, the retention after election amounting in law to waiver of the conversion, not only against the converting company, but against all who participated—the waiver extending to the entire cause of action, absolving all the joint tortfeasors—*Buckland* v. *Johnson*, 15 C.B. 145). Plaintiff's remedy was for a strict accounting as agent. On the pleadings (and rejecting any claim for conversion) plaintiff's claim must be taken as based on agency, the purchase adopted as that of January, and the claim as being for the overcharge against him for the shares then bought by the company. This claim plaintiff was entitled to recover from the company, and was now merged in his judgment against it. Although that judgment stood unchallenged, it could not be regarded as the measure of the directors' liability in respect of the frauds (*Solloway* v. *Johnson*, [1934] A.C. 193, at 206). Before a director can be held liable for the acts of his company there must be established, (1) 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 (*Solloway* v. *Johnson*, *supra*, at 207-8). In the present case, both fraud of the company and loss or damage (consisting in the excess or overcharge paid by plaintiff as aforesaid, the return of which he had been unable to secure) were established. Plaintiff should have judgment against S. and M. (and the company) to the extent of the moneys paid by him to the company for the 7,000 shares in excess of the actual market price as paid by the company for them on January 13, 1930, and the proper brokerage charges based on that price; and interest on that excess from January 13, 1930.

(2) As to the collateral: Plaintiff's claim for damages for conversion was defeated by his retention of the shares delivered to him as return of

the collateral. As to a claim based on agency: Judgment, obtained against the company, for the profits, could be obtained against the directors only on proof of the two elements aforesaid, fraud and loss, "loss" including benefit accruing to the directors attributable to the fraud. By retaining the shares plaintiff had elected to treat them as being the very shares that he deposited as collateral. Securing their return had not cost him anything. The withholding of the profits from him was not in itself a loss to him, because any right he might have to recover them was based, not upon a theory that they belonged to him or that he had lost what the agent had gained, but rather upon the broader doctrine of morality,—that good faith and honest dealing forbid an agent to make secret profits and require him to account for any made. (*Parker* v. *McKenna,* L.R. 10 Ch. App. 96, at 118; *Hutchinson* v. *Fleming,* 40 Can. S.C.R. 134). Therefore plaintiff could not be said to have suffered "loss or damage" in respect of the collateral. His claim for the secret profits (necessarily, for reasons aforesaid, based on assumption of agency, and precluding all ground partaking of the nature of tort) could only be allowed against the directors on proof that they had either received the profits or derived some benefit attributable to the fraud. They could not have made profit directly, because they were not, the company alone being, the plaintiff's agent. While plaintiff had a right to sue them for profit (as inferentially appears from *Solloway* v. *Johnson, supra,* at 207), yet no foundation was laid, either in the pleadings or evidence, upon which a conclusion could be based that they secured profits, or any benefit to themselves attributable to fraud. On this branch, therefore, plaintiff's appeal failed.

Judgment of the Court of Appeal for Ontario, [1934] O.R. 464, reversed in part.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), which (Macdonnell J.A. dissenting) allowed the appeal of Solloway and Mills, the present respondents (defendants), from the judgment of Kerwin J. (2), who (subject to a correction in the amount for which judgment should be entered) dismissed their appeal from the report of the Assistant Master (by whom the action was tried, pursuant to an order that the action be referred to the Master of the Supreme Court of Ontario at Toronto for trial, under s. 67 of *The Judicature Act,* R.S.O. 1927, c. 88), in favour of the plaintiff (as against Solloway, Mills & Co. Ltd., a company incorporated under the laws of the Province of Ontario, and the said Solloway and Mills, for the difference between what the plaintiff was charged by said company for certain 7,000 shares in question and what the said company acquired them for when

(1) [1934] O.R. 464; [1934] 4 D.L.R. 36.

(2) [1934] O.R. 464, at 466-469.

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delivery was requested, and for the difference between what the said company received when it disposed of certain collateral and what it paid for it when required for delivery to plaintiff; with adjustment for interest and brokerage).

By the said judgment of the Court of Appeal for Ontario, the action was dismissed as against the present respondents, Solloway and Mills.

The material facts of the case are sufficiently stated in the judgment now reported.

J. C. McRuer K.C. for the appellant.

A. G. Slaght K.C. and *R. I. Ferguson* for the respondents.

The judgment of the court was delivered by

DYSART J. (*ad hoc*)—This appeal from the Court of Appeal of Ontario has to do with claims made by a customer against directors of a stock brokerage company, arising out of fraudulent dealings by the company, instigated by the directors, in connection with, (1) shares which the company bought, and delivered to the customer in professed execution of the customer's previous order to buy such shares for him on margin, and (2) shares which the customer deposited with the company to secure that margin. For convenience, the two groups will be considered separately.

The action, as commenced by the customer, was against four defendants,—Solloway, Mills & Co. Ltd. (hereinafter referred to as the Dominion Company), Solloway, Mills & Co. Ltd. (to be called the Ontario Company), Isaac W. C. Solloway and Harvey Mills. Before trial, the Dominion Company, being then in bankruptcy, was eliminated as a defendant because leave to proceed against it had not been obtained as required by the *Bankruptcy Act*. The trial took place before the Assistant Master of the Court on a reference, and judgment was obtained for a large sum in favour of the plaintiff against the Ontario Company and the two individual defendants. On appeal, that judgment was affirmed by Kerwin J. for the sum of $55,922.98, but was subsequently reversed as to the two individual defendants by the Court of Appeal, Macdonnell J.A. dissenting. From that reversal this appeal is taken by the customer.

Dealing with the first group of shares: On October 16, 1929, the Ontario Company agreed to act as the agent and broker of the customer in purchasing for him 7,000 shares of the Sudbury Basin Mines Ltd. on the Toronto Stock Exchange at market prices on margin. In due course, the company, by a series of "bought notes," notified the customer that it had bought for his "account and risk" the ordered shares, and had charged his account with the price thereof, namely, $48,937.50, plus brokerage fees. The bought notes also stated that the purchases were

> made subject in all respects to the rules, by-laws and customs existing at the time at the Exchange * * *

and

> with the distinct understanding that the actual delivery is contemplated,

and that

> all securities * * * may be loaned * * * or * * * pledged * * * for the sum due thereon or for a greater sum * * * without further notice to the customer.

The company thereafter rendered periodical accounts showing the customer's indebtedness for the above sums together with interest thereon, and showing nothing to suggest that the marginal securities were in any degree inadequate to satisfy the marginal requirements. This state of things continued until the transaction was closed in January, 1930.

Under the terms of the accepted order for purchase, and the representations regarding its execution, there was a legal duty upon the company to get delivery of the shares so bought for its customer, and to carry them ready for delivery to him whenever that delivery might be demanded (*Conmee* v. *Securities Holding Company* (1)); or, at least, bearing in mind that, in contemplation of law, one share of stock is as good as another share of the same denomination, and that physical certificates themselves are merely evidence of the shares, the company was bound to have and to keep on hand at all times a sufficient number of such shares available for that delivery (*Solloway et al.* v. *Blumberger* (2)).

Contrary to its contractual duty and to its representations, the company did not fully execute the customer's

(1) (1907) 38 Can. S.C.R. 601.

(2) [1933] Can. S.C.R. 163, at 167.

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order. True, it did go upon the Exchange and buy 7,000 shares of the ordered stock, but at the same time it virtually nullified that purchase by selling shares of the same denomination on its own account. The consequence of this selling was that, in accordance with the Stock Exchange practice, the company's sales of each day were set off *pro tanto* against its purchases of the day, and only the excess, if any, of the purchased shares over the sold shares were, at the close of the day's trading, delivered to the company. In the result, the company took delivery of few, if any, of the shares so bought for the customer. Nor did it have on hand or carry other such shares from which it could make delivery if and when required. Thus the company did not fully execute the customer's order in that, although it bought, it did not get or carry, the shares so ordered.

On January 13, 1930, the customer called for delivery of the 7,000 shares. He was then told that the total amount owing for price, brokerage and interest, was $50,334.92. The company at the same time went upon the market and bought 7,000 shares of the stock for approximately $25,000 and delivered them to the customer as and for the shares which he had ordered on October 16, 1929. The customer accepted the shares, and paid the amount demanded, believing that the shares were those which he had ordered on October 16, 1929, and that he was contractually bound to accept and pay for them.

All that the company did in connection with these shares in breach of its duty, was done in pursuance of a general scheme or system whereby the company sold shares when its customers bought, using the customers' shares to make delivery of its own sales. This system was so extensively practised that the company was at times "short" 100,000 shares of this particular stock. The system had been inaugurated by these two individual defendants some years before when as partners under the name of Solloway, Mills & Co. they conducted the brokerage business which in substance was continued through successive transfers down to the date of the transactions now under review. The first of these transfers took place on May 31, 1928, when the partners turned their Dominion-wide business over to the Dominion Company, which they had organized to take over the business; and the second was on November 30, 1928, when the Dominion Company transferred the Ontario portion of the business to the Ontario Company which the original partners had likewise organized to accept this transfer. There is some question as to the completeness of these transfers, but there is no doubt that the "system" was carried on without change or interruption by the successive owners and operators of the business.

The active participation of the individual defendants in the fraudulent scheme or system as conducted by the Ontario Company was made possible and probable by the facts that, as officers and almost the sole shareholders of the Dominion Company, which in turn owned practically all the shares of the Ontario Company, they stood to benefit substantially from all profits or gains made by the Ontario Company; and that, as high officials and directors of the Ontario Company, they controlled and directed all the business and practices of that company, including this system of making profit. Positive evidence was given at the trial that the directors did take an active part in directing the operations of the system, and, although available at the trial, they did not give testimony in denial—a reticence on their part from which strong inferences may properly be drawn. The Assistant Master has expressly found as a fact that the fraud was the concerted action of the Ontario Company and the two directors—a finding that is amply supported by the evidence, and has not been questioned in any of the appeal judgments.

Before examining the claims put forward in this action, it will be helpful to consider briefly what remedies were open to the customer, and how far they were affected or circumscribed by his own conduct. In the first place, it is clear that on discovering the fraud, the customer had the choice either of retaining the shares or of rejecting them. If he retained them he would thereby ratify or adopt the action of the company; in other words, would acknowledge that in so buying the shares the company acted as agent for him under some authority which, if not previously given, would then be conferred so as to relate back to the time of the purchase; and the only remedy open to him would be to hold the company to a strict accounting as his

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agent. The customer here did elect to retain the shares—he had previously taken delivery of them, and he never afterwards returned them, nor offered to return them. A further consequence of his retention of the shares would be to deprive him of the right which he otherwise would have had to sue for the conversion of the shares, because conversion presupposes that title to the shares had passed from him to someone else, whereas his retention of them was a denial of that supposition. Further, retention after election amounts in law to a waiver of the conversion, not only against the converting company, but against all who participated in the conversion, including the two directors; because the waiver extends to the entire cause of action, absolving all the joint tort-feasors; *Buckland* v. *Johnson* (1).

The purchase which was adopted must have been either that of October 16, 1929, or that of January 13, 1930. It could not possibly be both, because there could not in this transaction be more than one purchase of these shares by the company for the customer. The adoption of one purchase necessarily means that the other was not adopted, and so was left on the company's hands as its own, and disappears from the case. If the October purchase were adopted, it would have to be on the assumption that, contrary to the facts, but consistent with the company's representations, the company acquired the shares in October, and thereafter carried them until it delivered them on January 13; if, on the other hand, the purchase of January were adopted, it would assume that the shares had not been purchased for the customer prior to January. In either case, the customer's remedy would be based not on conversion but on agency, and would seek to recover from the agent all secret profits made during the agency.

We shall now see how the customer framed his action. In his statement of claim he alleges, *inter alia,* that on October 16, 1929, he employed the company as his agent and broker to buy for him 7,000 shares; that the company repeatedly represented that it had executed the order; that in fact the company never fully executed the order; that on January 13, 1930, the company, without knowledge or

(1) (1854) 15 C.B. 145.

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acquiescence of customer, bought 7,000 shares and delivered them to him; that the company then by false representations induced him to pay for these shares a sum far greater than the actual price it had paid for them; and that the company so acted in pursuance of a system of fraud in which the directors actively participated. In his prayer for relief he asks for,—

(*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.

This pleading also contains averments that the company "converted and sold" the shares in October, and asks for general damages.

It is to be observed that the customer here seeks to pursue two divergent courses, one based on agency, the other on tort. The conversion claimed is stated only in a secondary way, and at any rate is defeated by the retention of the shares; and if the agency claim, which is stated more explicitly, is to stand, the conversion claim must be rejected, because no one may on the same set of facts sue in tort and agency at the same time, such causes of action being so different, if not opposite in their natures, as to be incompatible with each other: *Smith* v. *Baker* (1); *Rice* v. *Reed* (2).

The action must therefore be considered as having been laid in agency. It is also clear that the purchase which has been adopted is that of January, and the claim is for the overcharge made on that day. As thus regarded, the claim is entirely consistent with the retention of the shares, as well as with the adoption of the agency, and entitles the customer on proof submitted in support thereof to recover from the company all moneys which on January 13 he paid in excess of the actual price, plus proper brokerage fees. That claim is now merged in the judgment which stands against the company, and which to that extent is hereby affirmed.

Although the judgment against the company stands unchallenged, it cannot be regarded as the measure of the directors' liability in respect of the frauds, because, as

(1) (1873) L.R. 8 C.P. 350. (2) [1900] 1 Q.B. 54.

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stated by Lord Blanesburgh in delivering the judgment of the Judicial Committee in *Solloway* v. *Johnson* (1), a case in which similar questions were under consideration, and in which the appellant was a director,

> So far their Lordships have been dealing with the case as it affects indifferently both the defendant company and the appellant. But the actual liability of the appellant is a thing distinct and apart from that of the company, and the judgment, even if well founded as against the company, may be incapable of support as against him.

Before a director can be held liable for the acts of his company two facts must be established: (1) 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 (*Solloway* v. *Johnson, supra,* at pp. 207-8).

In the case under review the fraud of the company is clearly established. The loss would seem to be no less clear. The customer was induced by misrepresentations of his agent to part with a large sum of money (over and above the actual amount which he should have paid), and has not since been able to secure the return of that excess. Surely that sum represents loss or damage to him. In the Court of Appeal it was said that the customer suffered no damage because "he got the shares that he purchased at the price at which he agreed to purchase them." With this view I cannot agree. The shares which the customer got and retained had not been purchased by him, nor at any agreed price. The order of October to buy at October prices was never fully executed and so came to naught, and relieved the customer of any contractual obligation to take any shares at any price; and no order for purchase was subsequently given by him. The January purchase by the company was at January prices; but here again there was no order, and so no obligation on the customer to take or retain the shares at even January prices,—certainly not at October prices. By electing to retain these shares after discovering the facts, the customer bound himself to recoup his agent for the actual price it had paid for the shares, and to compensate it for its brokerage services. That is the position he now takes. The excess or overcharge, as collected by the agent, resulted in something to the cus-

(1) [1934] A.C. 193, at 206.

tomer that cannot be designated as anything less than direct loss or damage.

The customer is therefore entitled to recover from the director in respect of this first group of shares.

Turning now to the second group, namely, the 14,000 shares of Sudbury Basin Mines Limited deposited as security to maintain the margin: The plaintiff deposited 3,500 of these shares with the company on October 16, 1929, when placing his order to buy, and thereafter, keeping pace with the company's calls for additional margin in a falling market, he deposited at varying intervals other shares of the same stock in smaller lots, until by December 16th he had put up a total of 14,000 shares. This collateral, in the language of the Assistant Master, "was disposed of, in most instances, immediately it was deposited." In all 11,800 of the shares were so disposed of for sums approximating $65,320. Then on January 13, 1930, in order to satisfy the customer's demand for the return of his securities when closing out his account, the company went upon the market and repurchased 11,800 of the shares for about $32,000, and these, along with the 2,200 shares which it had not sold, it delivered to him as and for the shares which it had received from him on deposit. The company retained the secret illegal profit of about $33,320 which it had made on the sale and repurchase of this collateral.

There never was at any time the slightest possible right in the company to sell the collateral shares, because (1) there was no margin to sustain where the October order to buy had not been fully executed; and (2) even apart from that, the falsely asserted marginal requirements had always been met by the customer promptly and fully and to the satisfaction of the company.

The sale and repurchase of these shares had been carried out in pursuance of another branch of the same general scheme or system which has already been described, and were, in the finding of the Assistant Master, fraudulently perpetrated by the concerted action of the company and the directors.

The discussion in regard to the first group of shares will serve to shorten the consideration of this group. On dis-

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covering the fraud the customer had the right to (1) reject and return the 11,800 shares, and sue the company and its directors as tort feasors for converting his shares, claiming the proceeds of the conversion sale or the value of the shares; or (2) to retain the shares and sue the company as his agent for the profits secretly made by it in the course of the agency and to include as parties to the action the directors who benefited from the fraud.

In his statement of claim on this branch of the case, the customer alleges only that the company "wrongfully converted and sold" the shares in pursuance of a conspiracy existing between itself and its directors, and claims generally for damages. The pleading also lays some indirect foundation for the specific prayer in which he asks for secret profits in these terms:—

28. (*a*) The sum of $33,320, 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.

The claim for damages for conversion is defeated by the retention of the shares, and must be rejected. The specific claim for "profit" remains alone for consideration; and although direct allegations in support of the claim are wanting in the pleading, there are, it would seem, sufficient indirect allegations which, when coupled with the retention of the shares and the general evidence offered, may serve to form a basis for dealing with this group of shares upon an agency footing.

The judgment obtained against the company for the profits, although not challenged by the bankrupt company, can be upheld as against the directors only upon proof of the two elements already discussed, namely, fraud and loss. Loss, as we have seen, includes benefit accruing to the directors attributable to the fraud. By retaining the shares the customer has elected to treat them as being the very shares that he deposited as collateral. But, in order to secure their return, he did not, as he did in the case of the 7,000 shares, pay any money, nor part with anything else, nor enter into any obligation to give or do anything. Assuming that he is entitled to the profits, the withholding of the profits from him is not in itself a loss to him, because any right that he may have to recover those

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profits is based upon the theory, not that they belong to him, nor that he has lost what the agent has gained, but rather is based upon the broader doctrine of morality,—that good faith and honest dealing forbid an agent to make secret profits out of the agency, or, if he has made profits, demand that he account for them to his principal: *Parker* v. *McKenna* (1); *Hutchinson* v. *Fleming* (2). On no ground, therefore, is it conceivable that the customer can be said to have suffered " loss or damage " in respect of these shares.

He is, however, entitled to the secret profits, but only by proving that the directors have either received the profits, or have derived some benefit attributable to the fraud. This claim for profits, it may be repeated, is based on the assumption of agency, and precludes all ground partaking of the nature of tort. In his prayer, the customer asks for " the profit made by the defendants "; and this may be taken as an indirect allegation that the directors derived benefit through the company, and not that they made profit directly. They could not have made profit directly, because they were not the agent of the customer—their company alone was the agent, as the customer alleges. If they directly participated in making the illegal profit, they might have been guilty of tort, but that has been waived. The right to sue them for such profit is very well established. In *Solloway* v. *Johnson, supra* (3), a case in which the customer claimed profit against a director, the claim was refused, because, in the language of Lord Blanesburgh, at p. 207,

> as has already been pointed out, no loss or damage attributable to the fraud is here proved: no benefit from any proved fraud is shown to have accrued to the appellant.

Inferentially, if proof had been furnished in that case, the claim would have been allowed. In the case before us no foundation is laid, either in the pleadings or in the evidence, upon which a conclusion could be based that the directors secured any benefit to themselves attributable to fraud; least of all that they have secured profits. If a contrary conclusion were drawn, it would be solely upon the assumption that the profits made by the Ontario Company found

(1) (1874) L.R. 10 Ch. App. 96, at 118.

(2) (1908) 40 Can. S.C.R. 134.

(3) [1934] A.C. 193.

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their way through the Dominion Company to the directors, but that is not shown; in the absence of the Dominion Company as a party to this action, it would not be feasible or possible to establish that as a fact.

On this branch of the case, therefore, the appeal must fail.

The general result, therefore, is:—

The appeal should be allowed and the judgment of Mr. Justice Kerwin restored with respect to the group of 7,000 shares, but only to the extent of the moneys paid by the customer to the Ontario Company in excess of the actual market price as paid by that company for the shares on January 13, 1930, and the proper brokerage charges based on that price. Interest on this excess is allowed to the customer from January 13, 1930.

In respect of the group of 14,000 shares, the appeal should be dismissed.

As to costs: The appellant should have the costs of the action against the respondents, Isaac W. C. Solloway and Harvey Mills, except the costs exclusively attributable to the issue on which the appellant fails. The appellant should pay to the respondents the costs of the appeal to Mr. Justice Kerwin and of the appeal to the Court of Appeal. The appellant should have his costs of the appeal to this Court.

Appeal allowed in part, with costs.

Solicitors for the appellant: *McRuer, Mason, Cameron & Brewin.*

Solicitors for the respondents: *Slaght & Cowan.*