WILLIAM HENRY COY (DEFENDANT) . APPELLANT; 1911

AND

*Mar. 24, 27.
*May 15.

AUGUST POMMERENKE (PLAINTIFF) ..... RESPONDENT.

AND

WILLIAM POPE BATE, WILLIAM J. H. MURISON AND WILLIAM H. DEVEBER ..... DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Sale of land—Principal and agent—Secret profit by broker—Participation in breach of trust—Implied partnership—Liability to account—Purchaser in good faith—Disclosure of suspicious circumstances—Cross-appeal—Parties—Practice.

C., being aware that B. was an agent for the sale of certain lands, entered into an agreement with him for their purchase on joint account in his own name, upon the understanding that they should each be owners of one-half of the lands and share profits equally upon a re-sale. B. transferred one-half of his interest to M., who gave valuable consideration therefor with knowledge, at the time, of B.'s agency for the sale of the lands. Shortly after the conveyance of the lands by the owner, P., to C., they were re-sold to another person at a large profit, and P., having discovered the nature of the transactions, brought action against B., C. and M. to recover the amount of the profits which they had realized upon the re-sale of the lands.

Held, affirming the judgment appealed from (3 Sask. L.R. 417), Fitzpatrick C.J. and Anglin J. dissenting, that the agreement between B. and C. was a partnership transaction; that C. thereby became subject to the fiduciary relationship existing between B. and P. in respect of the sale of the property; that he was dis-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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qualified as a purchaser of the lands which were the subject-matter of B.'s agency, and that he was equally responsible with B. to account to P. for the profits realized from the re-sale of the property.

In regard to M. it was held, also affirming the judgment appealed from, Idington J. dissenting, that as the evidence did not shew that he was other than a *bonâ fide* purchaser for valuable consideration he was under no obligation to account for profits realized upon the sale of the interest in the lands acquired by him under the transfer from B.

Quære.—On the appeal by C. against the judgment declaring him liable to account for illegitimate profits on the transactions in question, had the Supreme Court of Canada jurisdiction to entertain a cross-appeal by P. to obtain recourse against M. who had been exonerated in the court below and was not made a party to the appeal taken by C.? *McNichol* v. *Malcolm* (39 Can. S.C.R. 265) discussed.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1) by which the judgment of Johnstone J., at the trial(2), was varied.

The circumstances of the case are stated in the judgments now reported.

At the trial, the plaintiff's action against the defendants Bate, Coy and Murison (purchasers under the deed of the lands in question from him to Coy), was maintained with costs, and dismissed with costs in regard to DeVeber, who had become purchaser on the re-sale of the property. The defendants Coy and Murison appealed to the Supreme Court, *en banc,* and, by the judgment now appealed from, the judgment at the trial was affirmed in regard to the condemnation against Coy, but was reversed in regard to Murison and the judgment against him was set aside with costs.

The appeal by Coy sought no relief against either Bate or Murison, and neither of them was made

(1) 3 Sask. L.R. 417; *sub nom.* *Pommerenke* v. *Bate.*

(2) 3 Sask. L.R. 51.

a party on his appeal to the Supreme Court of Canada. The plaintiff, however, attempted to obtain relief against the judgment of the Supreme Court of Saskatchewan in so far as it dismissed his action against Murison and, in that respect to have the judgment of the trial court restored.

Chrysler K.C. for the appellant.

Straton for the respondent.

J. Travers Lewis K.C. for defendant Murison, on the cross-appeal.

THE CHIEF JUSTICE (dissenting on the main appeal).—I agree in the opinion stated by Mr. Justice Anglin.

DAVIES J.—At the close of the argument I was strongly of opinion that the judgment appealed from was right and that the appeal and the cross-appeal should both be dismissed. Owing to there being a difference of opinion as to the proper conclusion to be drawn from the evidence, I have gone through it carefully, and my study of it has only tended to confirm the opinion I formed when the argument closed.

I think the transaction between Bate and Coy for the purchase of the land in the name of Coy, but for the benefit of Bate and Coy alike, was a partnership transaction, pure and simple. It was not like the ordinary purchase of a piece of land by two persons in their joint names, each holding a several interest which he could dispose of as he pleased, and where each party had a right to partition.

This purchase was made as the facts shew as a

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speculation with the view of a speedy re-sale. The fact that Bate was the agent for sale of Pommerenke was well known to Coy, who stipulated at the time he entered into the bargain that he (Coy) should share in Bate's commission on the sale of his principal's land. An agreement in writing was entered into between the two partners (and conspirators) providing not only that they should be equal joint-owners of the land, but

> that they should share equally on all profits made on a sale of the same or any part of same, and should each be liable equally for any liabilities in connection with the purchase or sale.

This agreement for the sale was taken in Coy's name alone, and the agreement as to the mutual interests of Bate and Coy in the purchase was post-dated, no doubt to deceive any inquisitive parties into the belief that Pommerenke's agent, Bate, had first completed a sale to Coy and then afterwards re-purchased an interest *bonâ fide* in the lands.

I am satisfied that both parties knew a fraud was being committed upon the owner in the purchase of the land by his agent, Bate, in Coy's name, but for their joint benefit. It is conceded that if the principal, Pommerenke, had discovered the fraud practiced upon him by his agent, Bate, in which Coy participated, before the lands had passed into the hands of an innocent purchaser he could have had the contract of sale rescinded. As he was too late in discovering the fraud to do that it is in my opinion still open to him to make both Bate and Coy restore their illegitimate profits. Bate has not appealed from the judgment against him. The evidence of Coy and Bate alike satisfy me that the land was purchased as a speculation, with the intention of reaping in the near future a rich harvest

through a re-sale, an intention more than realized, and that it was a partnership transaction and intended to be such, both parties sharing alike in the agent's commission and in the net profits; and entering into it with full knowledge of all the facts.

Agreeing, as I do,with the court of appeal on this being the proper conclusion to be drawn from the proved facts, I cannot see any room for doubt that Coy, equally with Bate, is accountable with the plaintiff for the profits made by the partnership in the re-sale of the lands to DeVeber, an innocent purchaser for value.

The authorities, if any were needed, are marshalled in the judgment of the court of appeal, delivered by Mr. Justice Brown, and need not be repeated by me. I adopt his reasoning and would dismiss the appeal with costs.

As far as Murison is concerned I also think the judgment of the court of appeal correct. He stood in an entirely different position from Coy and I agree with the court of appeal that

> the plaintiff had not brought home to Murison any knowledge that Bate was a joint-purchaser with Coy from the plaintiff, or that there had been any breach of trust on his part.

I share with my brother Anglin the grave doubts he has expressed whether the appeal of the respondent Pommerenke from the judgment dismissing the action as against Murison is properly before the court. Murison was not made a party to the main appeal taken by Coy, and is not before us as a party to that appeal. Coy has no interest whatever in the relief sought by Pommerenke against Murison in the cross-appeal, nor has he anything to do with the plaintiff's case against Murison. Murison is brought here, not

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by the appellant Coy, but by the respondent Pommerenke, who does not appeal from the judgment dismissing the action against Murison nor give the necessary security for costs which such an appeal would involve, but seeks to have the judgment in Murison's favour reversed on a notice under rule 100 of this court. I am inclined to think the decision relied upon by Mr. Straton in support of this method of cross-appeal of *McNichol* v. *Malcolm*(1) is not applicable to parties standing in the relative positions of Pommerenke and Murison on these pleadings and appeals.

The facts in that case of McNichol were that McNichol and the Standard Plumbing Company were both defendants in an action for damages brought by Malcolm against them. The plaintiff had obtained a judgment at the trial against both defendants. The Court of appeal confirmed the judgment against McNichol and dismissed the action as against the Standard Plumbing Company. McNichol appealed to this court making his co-defendants respondents on his appeal. It was there held that the plaintiff, respondent, Malcolm was entitled to cross-appeal by notice against the defendant, respondent, the Plumbing Company, in order to have the verdict against them at the trial restored.

The facts of that appeal, I think, fairly distinguish it from this which is an attempt on the part of Pommerenke by way of cross-appeal to bring forward a claim he made in the action against Murison, in which claim the main appellant Coy has no interest.

On the merits, however, and without deciding the point of practice my judgment is that the cross-appeal

(1) 39 Can. S.C.R. 265.

against Murison should be dismissed with costs for the reasons given by the court of appeal.

IDINGTON J. (dissenting on the cross-appeal).—The questions raised in this case are whether or not an agent can, with the assistance of others, buy the property of his principal upon the understanding with each assistant for a division of the profits, to be got by a re-sale, being made between him and each of such others aiding in the purchase; and he or these others be free from liability to account for the profit so made.

Like many other legal questions they are almost answered by a full statement of the facts and the application of a few elementary principles.

The respondent owned a piece of land in Saskatchewan, supposed to be about two hundred and thirty-three acres. One Bate, after several ineffective attempts, induced him, by a letter of the 31st of March, 1906, to agree that Bate should, as agent, sell upon commission said land at the highest price obtainable, but not for less than thirty dollars an acre, and get a commission of five per cent. for the first $1,000, two and a half per cent. for the balance up to $30 an acre, and ten per cent. on such sum as realized over $30 an acre.

Appellant and Bate occupied the same office in Saskatoon, and Bate verbally offered him this land for $35 an acre, and appellant says he verbally accepted it.

Then Bate sent, the same day, the 31st of March, 1906, respondent who lived in Minnesota, the following telegram:

> Sold thirty-five per acre, third cash, deposited, balance four years, mailing agreements and cash according to instructions, on receipt of acceptance wire confirmation.

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No cash had been paid as represented, nor was any agreement then mailed.

On the 2nd of April, 1906, a telegram from respondent to Bate as follows:

> Confirm sale of two hundred and thirty-three and fraction acres at thirty-five per acre,

was received at the telegraph office in Saskatoon, at four minutes past eight in the evening of that day.

Whether it was delivered that evening or next morning is doubtful. But it seems clear that the next step taken was Bate calling on Murison, agent of a bank with which Bate had dealings, early on the morning of the 3rd of April.

Bate's evidence of this is as follows:

> Q. How did you come to make up your mind? In what way—what circumstances ?
>
> A. On the morning of the 3rd passing down to my place of business I called on Mr. Murison. I told him the evening before that I had sold this land to Mr. Coy and we were talking about that and other matters. On the morning of the 3rd, I think it would be before the bank was opened, and talking with Mr. Murison, discussing matters in general, the prospects of a purchaser making anything out of his purchase, and Mr. Murison was of the opinion that this investor was threatened in his investments and there might be a reasonable chance for this property being sold at an advance before very long, and the outcome of our conversation was that I was recommended to ask Mr. Coy if he would allow us to buy a half interest from him.
>
> Q. What did you do in consequence of this ?
>
> A. I went to see him and asked if he would let me have a half interest.
>
> Q. What was the result of that ?
>
> A. He was surprised that I should ask such a question and asked where I was getting the money, and I told him that Mr. Murison had suggested it — that it had been suggested in our conversation, and Mr. Murison was willing to help me to finance a quarter interest and he himself would take a quarter interest and thus become joint purchasers in a half interest from Coy. Mr. Coy objected to having anything to do with Murison.
>
> Q. What did you do as a result of this ?
>
> A. It was agreed between Coy and myself that if I would pur-

chase a half interest from him myself and Murison not appear in it he would make no objection.

Q. Was the agreement put in writing ?

A. Not at that time.

Although he pretends in this to have told Murison the evening before, the latter does not refer to it so as to corroborate him. His cross-examination indicates he did nothing till seeing Murison on the 3rd. In other respects their story seems to conform with the fact of the despatch being received and pondered over by him, before seeing either appellant or Murison. And it seems clear from the evidence of them all that it was only after seeing Murison and arranging with him to see the appellant that the latter saw the telegram. He was asked again, and says:—

Q. Did Mr. Coy want to take all of this property ?

A. Certainly, he wanted to take it all.

Q. Why did he not ?

A. Just because I asked in pursuance of that conversation Mr. Murison and I had, if he would sell us a portion of it.

Later he says as follows:

Q. In your examination for discovery you say that Coy objected to Murison and you shoulder the whole responsibility ?

A. No, he preferred to have another man to deal with.

Q. He did not want to have Murison's responsibility as well ?

A. He did not want to have anything to do with Murison.

The story of appellant on his first hearing of this confirmatory telegram on the 2nd of April, is as follows:

Q. When did he first tell you about receiving this confirmation wire ?

A. On the morning of the 3rd of April in the forenoon.

Q. What else took place at the time he told you he had received the confirming wire ?

A. When he came in he said he had heard from the owner confirming the price of the land, but, he says, I want it to be understood that I am to have a half-interest, and, of course, I kicked against it. I remonstrated; I would not agree. I told him he was not in a position to go into a deal of this kind, and I did

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not want him in; that I did not think he was treating me fair; that he had quoted the price at $30 and had raised it to $35, and now he made it a condition that I could only purchase half of it, and I had not decided the matter any way. I told him what I thought about him; at the time I believed what he told me. He assured me he was the sole agent for the owner.

Q. Was Murison's name brought up ?

A. I asked him how he was going to manage it in view of his financial standing, and he told me Murison was a friend of his and he would furnish the money.

He proceeds to tell that Bate in answer to these and other remonstrances said if he (Coy) would not take the half interest, he, Bate, would turn it over to others who would purchase with him and that it seemed to him (Coy) as if he must submit to such terms as Bate offered, or lose the chance of anything. He did not even know the name of the owner, so much unfinished was Bate's business as agent.

After taking some hours to consider the matter and consult friends, he finally agreed with Bate to buy jointly with him.

The details of the sordid business may be passed. It ended in the following writing being signed by both:

We, William H. Coy and William P. Bate, both of the town of Saskatoon, real estate agents, having jointly purchased from August Pommerenke, of Good Thunder, Minnesota, the N. half of section 34, Tp. 36, R. 5, W. 3rd M., 233 acres, more or less, on agreement of sale dated April 3rd, 1906, and having paid jointly the first payment thereon,

AGREE AS FOLLOWS:

1. That the title to the said land shall remain in the name of William H. Coy.

2. That the said William H. Coy and William P. Bate shall be joint owners of this land equally in all profits made on sale of any part thereof, and are each liable equally for any liabilities, in connection with the purchase or sale thereof.

Signed in duplicate this 5th day of April, 1906.

Witness: E. L. Townsend.

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WILLIAM P. BA__

The commission Bate was to get divided between them so far as this half-interest extended, by Bate agreeing to be satisfied with half of what respondent would have to allow. And appellant the same afternoon gave Bate his cheque for $1,246, being for half the cash payment going to respondent on this half-basis plus this half commission; and the appellant signed the agreement for sale and purchase as if he were sole purchaser and respondent the sole vendor.

On the same day Murison discounted Bate's note in the bank for $400, to help him to make up his share of cash for the other half of the cash payment and gave his own cheque of $623.25, being for a quarter of such cash payment plus the amount of his share of the commission Bate was supposed to be earning on the same basis as appellant had been dealt with.

Then, to accompany the agreement of purchase a draft was got from the bank of which Murison was agent for $2,408 to remit to Pommerenke the cash payment of one-third, less Bate's commission, and the curious can figure out the allowance for bank charges on the draft.

But the honest man forgot the excess commission for the part of the price over $30 an acre.

And to shew his great fidelity to his principal, when this was pointed out he explained his reason thus:

Q. In that case you told Mr. Coy about the five and two and a half per cent., and not about the ten per cent ?

A. No, I could not.

Q. Why did you not tell him ?

A. If I had told him that the whole sale would have been thrown out. I had still to see Pommerenke's interest through.

Q. You were afraid the whole thing was going to fall through if you told him that ?

A. Yes.

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Q. That was in conversation on the 3rd, that this commission was mentioned ?

A. Yes.

Q. So that at that time you did not have the thing so completely closed that Coy could back out if he wanted to do it ?

A. One can always throw away.

The writing above quoted shews that he and appellant considered each other partners, and in his examination for discovery put in as evidence, he refers to Murison as his partner.

Q. On what, Mr. Bate, on the whole land ? Who was interested in that land at the time the money went ?

A. We were all interested.

Q. When you say all, what do you mean ?

A. Murison and I and Coy.

Q. And that was the first payment Pommerenke got ?

A. Yes.

The defendants Bate and Murison entered into the following agreement:

SASKATOON, SASK., April 4th, 1906.

William H. Coy, of Saskatoon, being owner under agreement to purchase from August Pommerenke, of Good Thunder, Minn., the N. half of Section 34, Tp. 36, R. 5, W. 3rd M., 233 1-3 acres, and having purchased from the said W. H. Coy a half-interest in the said land (title remaining with W. H. Coy for the time being) on an agreement made between myself and W. H. Coy whereby I am entitled to receive one-half of all profits made on sale of the said land or any part of it, and whereby I am also liable for one-half of all future payments and charges in connection with the purchase and sale of the said land.

I agree to sell to W. J. Holt Murison, banker, of Saskatoon, for value received, one-half of my interest as above, he being now entitled to receive one-fourth of all profits and bear one-fourth of the charges on account purchase and sale of the above land.

(Sgd.) WILLIAM P. BATE.

Saskatoon, April 4th, 1906.

These several agreements between the parties are by reason of the dates they bear confusing. They may have been made purposly so or by accident.

The learned trial judge finds they were, in fact, all

made on the same day. I think he is correct in substance. Whatever dates they bear they evidently represent the transactions as arranged and concluded on the 3rd of April, 1906. Possibly time did not permit of them all being signed on that date and hence the confusing dates.

It is clear respondent was entirely ignorant of them, and was kept from knowing of them till after the property had been re-sold, as it was, for $125 an acre, in the beginning of August following; and he had been paid the following November the balance and given a deed to the appellant. The parties fell out and had some litigation over the fruits of their ill-gotten gain. Then one of them had the impudence to ask respondent for a ratification to overcome the defect in title to the profits this breach of trust produced.

He then sued to recover the profits unaccounted for to him, and the learned trial judge in a well considered judgment, gave judgment for the plaintiff against each of the several parties for his share of said profits.

Bate did not appeal. But Murison and Coy did, and the court of appeal held Coy and Bate liable, but relieved Murison by dismissing the action against him. And Coy now appeals here, and Pommerenke cross-appeals as against Murison.

In this cross-appeal objection is taken to the jurisdiction, and I will deal with that point hereafter.

Meantime, I will consider the law applicable to the case as it stands on these facts relative to each of the parties. It is well to bear in mind that Bate had concluded no sale or indeed a legally binding bargain of any kind until the agreement of purchase had been executed by appelant and that was not done until

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after Bate had completed with each of his fellow adventurers the bargain for contributions on a settled basis for a division of burdens and for a corresponding division of profits.

The appellant's counsel put forward as his chief argument the interpretation he asks to be given the letters of Bate when tendering his valuable services to respondent. He contended the retainer of Bate was only to find a purchaser, and when that was done his duty ended, and he was as free as any other man to re-purchase. I cannot put the interpretation contended for even an Bate's letters, and we have not the letter from respondent to Bate authorizing the sale. His evidence states it to have been

> to go ahead and sell these lands for the highest price obtainable, etc., etc.,

and Bate's version of it does not differ materially from this.

But in any way one can look at the facts, there was no sale of any kind, that either respondent or appellant could have relied upon until the corrupt bargains now complained of were reached.

Neither party knew who the other was or where he was. No description of the land was given in the telegram, and, in short, nothing to bind the purchaser to be found, or respondent either, unless he was to be held by his assent, induced by a lying telegram, to something that had only a nebulous existence.

It seems simply impossible to maintain any such contention in face of these facts I have stated. It would relieve Bate as well as the appellant, but the former has had the good sense not to try to be so; since he knew the law. It would be needless to quote law to condemn Bate herein, but as there seems to be

a misapprehension of an agent's true position and, consequently, that of those dealing with him, it is necessary to have an accurate statement of the law. Fortunately we have it on undoubted authority. In *Parker* v. *McKenna*(1), at page 125, Sir G. Mellish L.J. in dealing with the question of how far an agent for sale is precluded from purchasing from his own purchaser the property which he is entrusted to sell, says:

> In my opinion, as long as the contract remains executory, and the trustee or agent has power to enforce it or to rescind or alter it, as long as it remains in that state he cannot re-purchase the property from his own purchaser, except for the benefit of his principal. It appears to me that that necessarily follows from the established rule that he cannot purchase the property on his own account.

If we had sought to frame the law to fit the facts which surrounded this bargaining between Bate and his partners, how could it have been more accurately expressed to shew that his position was a false one, and the contracts made with him were founded on a fraud and, until full disclosure to respondent, it was obviously so to the minds of both appellant and Murison, if they had chosen to exercise ordinary business sense and rectitude of purpose.

Appellant's contract seems at first blush the more gross of the two, for he plainly writes himself down as the partner of this unfaithful agent; and avowedly the commission was divided and he believed himself let in on the ground floor by paying half of it for or on account of his half.

But there is a feature of his conduct that deserves at least a passing notice. He bowed to what seemed to him the inevitable if he was to get any interest in

(1) 10 Ch. App. 96.

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the sale. He bribed this agent by allowing him as the reward of his breach of faith, one-half the profits expected to be made, plus or minus, as one looks at it, half the commission.

The law relative to such a case is well expressed by A. L. Smith L.J., in *Grant* v. *Gold Exploration and Development Syndicate,* in appeal(1), at page 244, as follows:

> The case in this court of the *Salford Corporation* v. *Lever*(2) is a clear authority that where an agent, who has been bribed to do so, induces his principal to enter into a contract with a person who had paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies; he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of entering into the contract without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first. This is the head-note of this case, and it accurately describes what was decided thereon.

The law applied here would render the transaction one in which the respondent on this ground alone would have been entitled to sue the agent for the bribe he got, in other words, the profits he made, and also the appellant and him for the damages suffered. It is answered he suffered no damages because at the time of the transaction this land was not worth more in the open market than the respondent got; yet each gave more, to the extent of the half commission at least, than the net money sent him. Besides the mode of reasoning is entirely fallacious. The fact is the bribed agent had no authority in law at all to make such a sale, and the appellant knowing this, and joining in it, never got any valid agreement of sale as against the respondent.

(1) [1900] 1 Q.B. 233. (2) (1891) 1 Q.B. 168.

The result was he had no agreement which in law he could have enforced against the respondent; see *Williams* v. *Scott*(1); *Delves* v. *Gray*(2); and cases cited there, if authority needed for so plain a proposition of law.

And this was the legal position of the matter and the relation of the appellant and respondent at the time when the former made a re-sale of the property and got the profits respondent was entitled to.

It was then, or later, by a continued concealment of the facts, that the respondent was thereby induced to convey the property to appellant and soon after which he reconveyed the land to another who was equally innocent with respondent of the facts.

Surely then is the time when the acts of the appellant and Bate had borne final and definite fruit and the legal wrong was committed upon which damage should be assessed. Until then perhaps no damages could be properly assessed. So long as able to restore the property undeteriorated and undepreciated in value, could he not answer any suit by a tender thereof and costs ?

I am prepared to hold that such is the legal position of both Bate and appellant and that the damages as a result might well have been assessed jointly against them, both on the basis of the entire profits of all concerned being the measure thereof.

But it appears to me there is another and a broader ground upon which the right of relief against appellant may well rest. Bate, by his contract, above set out, with the appellant, constituted himself the constructive trustee of respondent and Coy equally

(1) [1900] A.C. 499.

(2) (1902) 2 Ch. 606.

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became so thereby, also such, if the terse language of Lord Thurlow be good law, as undoubtedly it is, in *Hall* v. *Hallet*(1), at page 139, when he says the court will

> turn Hallet and Scrase (the nominal purchaser there) into trustees for the benefit of the family,

and liable to have his agreement or any deed to him rescinded and hence becomes accountable for all the profits he, or he and his confederates, might make and did make.

It is apparently conceded that if this agent's duty had not ended before the bargain between the agent and the appellant was made and reduced to writing as above, the contract for purchase or deed if given appellant would have been rescindable, but it is persistently urged that when the land passed into the hands of the defendant DeVeber, who took for value and without notice, the respondent had practically no remedy as against any one but the agent.

This is put in two ways. First, it is said the only remedy would be damages assessable as of the date of the bargain. That view I have dealt with. Next, it is said there was no fiduciary relation between the appellant and respondent, and that the cases shew such relation is the basis of the right of recovery of profits an agent may have made.

So is fiduciary relation the basis of the right to recover in most cases of undue influence. There can be no doubt that appellant put himself in the position of a constructive trustee of this property, just as much as if his partner Bate had induced this result by undue influence. The respondent had not, as I have

(1) Cox Ch. 134.

already shewn, become bound in law, and if the deed had been executed and passed to appellant the title on the day before he made the sale with such profits, he could have been compelled to return the property. The court never found itself in such a case so impotent that it could one day thus remedy a great wrong and the next day be powerless to do so. In such cases it proceeds by reaching the proceeds and specially so if the money in the court, as it is said to be herein. The reported cases where proceeds had to be reached in third parties' hands, are not so numerous as those of reconveyance or rescission being found on adequate remedy. The principle, however, is undoubted, and the remedy is identical with what was exercised in the *Imperial Mercantile Credit Association* v. *Coleman* (1) as against Knight; in *Bagnall* v. *Carlton*(2), at page 408, as against C. F. Richardson. But as between the principal and the agent, and latter's nominee, see *McPherson* v. *Watt*(3), at pages 264 and 265; and *Charter* v. *Trevelyan*(4), and its sequel *Trevelyan* v. *Charter*(5).

The law on this subject is well stated in Lewin on Trusts (12 ed.), pages 207, 214, 567, 798, 1099 *et seq.;* Godefroi on Trusts (3 ed.), page 416, but perhaps most aptly by Fry J. in the undue influence case of *Bainbrigge* v. *Browne*(6), at pages 196 to 197, where he says:

> Then the next point which arises is this, against whom does this inference of undue influence operate ? Clearly it operates against the person who is able to exercise the influence (in this case it is the father) and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or

(1) L.R. 6 H.L. 189.
(2) 6 Ch. D. 371.
(3) 3 App. Cas. 254.
(4) 11 Cl. & F. 714.
(5) 9 Beav. 140.
(6) 18 Ch. D. 188.

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with notice of the circumstances from which the court infers the equity.

And I can find no distinction in this regard between undue influence and any other improper means of getting from a man his property. I am not saying it need be rested only on this, or dealt with only in this way, for *In re Gallard*(1) shews how Vaughan-Williams J. found his way to assess damages when he could not justly set aside the whole transaction.

Besides, though the court has in some cases, as in the *Salford Corporation* v. *Lever*(2) case, not found it clear as to the form of action which might lie, whether for damages or for money had and received, some suitable means in law has always been found to remedy such wrongs. But the form of remedy chosen in a given case may limit the extent of relief.

And again the evidence would well warrant a finding that each of these defendants, Murison and Coy, knowingly aided the agent to commit the breach of confidence his principal had placed in him and thus became responsible for the results of such fraud.

The court of appeal has seen its way to relieve Murison, but I cannot agree in the reasons given therefor.

In the judgment of Mr. Justice Brown, speaking for the majority of the court, he says:

> The fact that Murison was aware that Bate had been an agent for the plaintiff in the sale to Coy is not sufficient, it seems to me, to charge Murison with the knowledge that he (Bate) was the purchaser jointly with Coy from the plaintiff. To make Murison liable it must be shewn that he was aware that Bate was secretly purchasing from his principal, or that fiduciary relations between them still existed.

How can it be said that Murison did not know that the fiduciary relations between respondent and Bate

(1) (1897) 2 Q.B. 8. (2) [1891] 1 Q.B. 168.

had still existed when the latter was in the very act of continuing to a close the discharge of his duty as an agent when collecting from Murison his contribution to the cash payment, and at the same instant he was discounting a note to help Bate to make up his share of same cash. Is it conceivable he was so stupid as not to realize what was being thus done and he taking part in ? Or is it conceivable he was not shewn the telegram which it was clearly Bate's mission to the bank so early in the morning of the 3rd to shew, and see if he could get some aid either to contrive against both Coy and Pommerenke, as they did, or financial assistance to carry out what he had already contrived?

If he saw the telegram it told the whole story. He has not seen fit to deny seeing it. And even Bate will not deny shewing it to him. Or how can it be supposed, if Coy was as well able as Bate says he was, to carry the whole load, Murison could imagine he was going to give up half to Bate and himself ?

And are we to suppose a bank agent so blind to the business side of such a transaction as not to inquire in what shape the agreement of sale was, and how he was to be secured for the advance he was making, and the future payments he was undertaking ? And then there is much one cannot help suspecting relative to the blindness as to, or forgetfulness of all the details.

He paid on the identical basis appellant did, which included the division of the commission.

Now he tenders an affidavit by way of laying foundation for a new trial in which he pretends this was an oversight.

Is it conceivable that at the stage things had reached when he gave his evidence under commission,

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he had not yet discovered the bearing of what he now professes was a mistake ?

I rather think there was a mistake of some kind as to this commission, but the mistake is not to my mind in the sense Murison suggests.

For the basis of his dealing was to take with Bate the half of what Coy got.

And the tenor of Bate's evidence, as friendly as possible, goes to shew Bate was the emissary of Murison. Are we to take it for granted he reported nothing of what was said relative to Coy's dislike for having Murison as a partner.

And if told what was the result ? As a business man he needed Coy's sanction and the safety it would carry. But he was content to take the document from Bate which appears above and where does that leave him ?

Clearly he was only entitled to claim such share of the profits as were coming to Coy through Bate. It was for profits he bargained and to be got from a man who had no right to any, and was accountable for them to respondent alone.

Why should any court step in to aid him and frustrate the righteous claim of another ?

The judgment of the learned trial judge was right so far as it went, and Murison is not entitled to be relieved from it.

He may be thankful he has only that limited judgment against him, for the learned trial judge might well have held he was the man to blame for the whole of this disagreeable business. His plain duty, as well as that of appellant, was, if desiring to buy, to have disclosed to the respondent what Bate, his agent, proposed.

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Possibly he might have given either a chance if thus properly treated.

I need not repeat what I have already assigned as reasons against Coy. But may say, barring the bribing feature, not quite so applicable here, the reasoning applies as against Murison.

A question of jurisdiction is raised by Murison's counsel relative to the hearing of this cross-appeal.

The appellant having launched his appeal against the respondent, he in turn gave notice by way of cross-appeal pursuant to rules 60 and 61.

This notice was moved against before me, in chambers, and relying upon the principle upon which *McNichol* v. *Malcolm*(1) had proceeded, and *Pilling* v. *The Attorney-General for Canada,* unreported, must have proceeded, the motion was dismissed.

No appeal was taken from this order, but Murison's counsel now takes the point that the court has no jurisdiction to entertain, as against Murison, a cross-appeal thus founded.

Whatever may be said of the interpretation put upon rule 60, it is somewhat difficult to understand wherein the want of jurisdiction consists.

Section 51 of the "Supreme Court Act" is as follows:

> The court may dismiss an appeal or give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded.

Section 52 enables granting a new trial even if put upon the ground that the verdict was against the weight of evidence.

What do these sections mean ? Has the court no jurisdiction to grant a new trial herein as desired

(1) 39 Can. S.C.R. 265.

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below by Murison, except as between parties named by appellant, unless a substantive appeal for that purpose has been taken ?

That result would be one of the many absurdities implied in holding we have no jurisdiction to hear anything involving Murison.

The language giving jurisdiction is express and ample enough to cover getting aside or varying in any way the judgment of the court appealed from. Why should the jurisdiction be frittered away ?

The judges are empowered by section 109 to make rules for regulating the procedure of the court and the bringing of cases before it from courts appealed from or otherwise and for the effectual execution and working of the Act and the attainment of its intention and objects. This is one of those rules so made for such purposes. But the court has no power to limit its jurisdiction. It can only makes rules conformably to the executing of its jurisdiction. Of course, if parties do not conform to these rules they may have no right to invoke the jurisdiction. That is another matter, but does not touch the jurisdiction. And this rule 60 so far from implying any limitation of jurisdiction assumes it to exist and provides for overcoming even the irregularity of a non-compliance with its terms. How can the question of jurisdiction be raised upon such a rule ? But the point has been expressly passed upon by the court in the case of *Town of Toronto Junction* v. *Christie*(1), where the appeal was from an award and the amount was increased though no cross-appeal notice given.

The late Chief Justice, Sir Henry Strong, pointed out and dealt with this question in clear and com-

(1) 25 Can. S.C.R. 551.

prehensive terms, holding that it was not because the court had no jurisdiction to hear without the notice, but that it was usually fair to require the notice, but entirely in the discretion of the court. The earlier case of *Pilon* v. *Brunet*(1) deprived respondent, who had lodged his substantive appeal and not proceeded by way of notice as rules provided, of any costs but such as latter simple method would have incurred.

It may be said these are only cases between the same parties, but as touching questions of jurisdiction wherein lies the difference ? The rights of an appellant in a judgment cannot be disturbed any more than those of any other party to the suit without jurisdiction. And if an appellant had got on one branch of his case, say one cause of action, a judgment, and failed in another and distinct cause of action, is it to be said, on an appeal in the latter, not touching the former, he cannot be attacked without a substantive appeal ? And that a cross-appeal notice is not enough ?

The purpose of the order was to lessen the costs of such a proceeding and so simplify matters that once an appeal has been launched and the whole case before the court, the simple method the court provides for executing the purpose of the Act and enabling the judgment the court should have given, to be given, is reached thereby.

This principle of acting was adopted in the *McNichol* v. *Malcolm* case(2), and if doing so had stretched the jurisdiction of the court, surely the Judicial Committee of the Privy Council would have granted instead of refusing, as it did, leave to appeal(3).

(1) 5 Can. S.C.R. 318. (2) 39 Can. S.C.R. 265.
(3) 39 Can. S.C.R. vii.

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Then, as pointed out in my judgment disposing of the Chamber motion herein, the decision of the unreported *Pilling Case,* clearly disposed of the question not only of jurisdiction, but of practice. The brief of authorities submitted in that case by counsel moving to quash shew the grounds taken were on the interpretation of the rule and the peculiar nature of the case which I am about to refer to and had no reference to the "Supreme Court Act."

Counsel for Murison suggests now that the appeal in that case was from the Exchequer Court, and hence by the Attorney-General, and hence the motion to quash could not prevail.

It is true it was from the Exchequer Court and by the Attorney-General, but it is just as true (as an inspection of his notice shews) that he neither intended to avail himself of section 84 of the "Exchequer Court Act," nor to pursue any other right than given by rules 60 and 61. The motion was merely that on the hearing of the appeal, which two out of five men affected by a judgment of that court had taken to this court, he (the Attorney-General) would urge that both the appellants and three others who had rested content with the result, and were seeking no relief, should have the judgment as to them all, so varied as to affect each though interested only as to separate amounts; and resting on independent rights, originating, however, in the same cause of complaint.

None of the conditions to be observed in this special right of appeal were, so far as I can find, ever thought of as applicable or observed.

How then can the fact of the Crown having had another right of appeal, which it did not exercise, and could not exercise, save by observing the conditions, affect the matter ?

This court has no power to dispense with statutory conditions precedent to an appeal by the Crown or any one else. Security is only one term from which the Crown may be free. Time and mode binds as others are bound.

I repeat, everything in that case involved the right and power to hear, on a cross-appeal motion, an appeal against those not connected in any way with the main appeal.

Besides it was an extreme exercise of the power.

The proceeding was a winding-up one and each of these five men proved his claim therein, by *primâ facie* proof, and had the case rested there I should have felt the cross-appeal by way of motion could not reach them.

I was only persuaded in that case that by reason of an issue having been framed and tried so far as I could find out, wherein all five joined and made common cause, they fell under the usual practice adopted by the court. All this, including my difficulty, appears in my own opinion judgment in the case.

The case was appealed from here and though leave was refused to appeal on all points save this lastly mentioned point; as to which leave was given.

That is entirely another matter from the question raised here, but does bear directly on the statement and argument presented here.

If the proceeding in the case had been aught but a cross-motion appeal, how could any court have ever supposed there was a want of jurisdiction to hear it? If it had been the substantive appeal the Attorney-General is suggested in this argument to have taken or relied on, how could any one have ventured to ask the Judicial Committee to grant leave on the ground

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of want of jurisdiction ? Yet it was granted because of the ground I suggest, not the ground taken here.

Moreover, in the case of *Bulmer* v. *The Queen*(1) this court refused to hear an appeal taken by the Crown because the proceedings had not conformed to the requirements of these rules 60 and 61, and thus disposes of the argument from another point of view.

It may also be observed that in the case of *Johnston* v. *Town of Petrolia*(2), as an interpretation of the rule claimed to be substantially the same as rule 60, the court exercised the power in the rule to allow the appeal. And the *Cavander's Trusts Case* (3), closely examined does not even touch the practice here questioned. The appellant here was, and is much or might be much affected by respondent Pommerenke's claim against Murison. Is Coy prepared altogether to share the burden for Murison ?

I have no doubt of the jurisdiction to hear the cross-appeal and rectify the error below.

I think the appeal should be dismissed with costs, the cross-appeal allowed with costs, and respondent have his costs in the court of appeal, and the learned trial judge's judgment be restored.

DUFF J.—I think there is sufficient evidence to support the finding of the court below that Coy was a partner of Bate in the purchase and that Bate's commission was divided between them as a part of the profits of the partnership. Coy thus came under a fiduciary relation to Pommerenke in respect of the sale and the legal result of this relation was to disqualify him from purchasing the lands which were the

(1) 23 Can. S.C.R. 488. (2) 17 Ont. P.R. 332.
(3) 16 Ch. D. 270.

subject-matter of the agency without the consent of Pommerenke. He stood, I think, in the same position as Bate. He would be liable to account as Bate was. I think Murison is not implicated in the same way. In his case the proper inference seems to be that drawn in the court below, namely: that he was unaware of the true relation between Coy and Bate, and being unaware of the impropriety of their conduct could, of course, incur no disability on account of his failure to disclose it to Pommerenke. As against Murison, an innocent purchaser, I do not think Pommerenke can deny the authority of Bate to sell.

The appeal and cross-appeal should be dismissed with costs.

ANGLIN J. (dissenting on the main appeal).—Upon the evidence it is well established that the defendant Bate, without the vendor's knowledge, acquired an interest in the property in question while still holding a fiduciary position as vendor's agent, and that he made use of that position to compel his co-defendant Coy to allow him to acquire such interest. Apart from any question of fraud, Bate is, on well-known principles, accountable to the plaintiff for whatever profit he has made upon the re-sale of the property. Against the judgment holding him liable to so account he has not appealed.

It is equally clear that there was an entire absence of bad faith on the part of the defendant Coy, who appeals from the judgment of the Supreme Court of Saskatchewan holding him likewise accountable to the plaintiff for profits made by him on the re-sale of the property. Bate was the sole agent of the plaintiff. Coy had through him agreed to purchase the property

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wholly for himself, at the price at which it was eventually bought, before there was any suggestion that Bate should take an interest in it. His offer had been submitted by Bate to the plaintiff and had been approved and accepted by him. Apart from the Statute of Frauds, and possibly notwithstanding its provisions, Coy had an enforceable contract to purchase. With matters in this position Bate pressed Coy to allow him to acquire a half interest in the purchase. Coy was unwilling to do so; but, upon Bate insisting, fearing that, if he refused, Bate might dispose of the property to another purchaser, he yielded, and agreed to take a half interest only, giving the other half interest to Bate, and stipulating that Bate should give him one-half of the commission which he was to receive from the plaintiff. It is quite clear that Coy had no idea of doing anything which would injure the plaintiff. His conduct is not open to any suggestion of fraud or dishonesty. His fault lay in permitting Bate to become a co-purchaser with him, knowing that Bate was concealing from his principal the fact that he was acquiring an interest in the property.

The learned trial judge and the majority of the learned judges in the court *en banc* have held Coy accountable to the plaintiff for the profit made by him on the re-sale to DeVeber on the ground that he and Bate became partners in the purchase from the plaintiff. It may be that if Coy and Bate were really partners in this transaction, notwithstanding the views upon which the decisions in *Stroud* v. *Gwyer*(1), at page 141, and *Macdonald* v. *Richardson*(2), at page 88, were based, on the authority of such cases as

(1) 28 Beav. 130. (2) 1 Giff. 81.

Flockton v. *Bunning*(1), and *Imperial Mercantile Credit Association* v. *Coleman*(2), the defendant Coy would be accountable to the plaintiff for profits made by him on the re-sale of the property.

But upon the facts in evidence Coy and Bate were, in my opinion, not partners. Notwithstanding the stipulation that the vendor's commission should be divided between them, they were merely co-purchasers who became co-owners or tenants in common of the property. There was no evidence of any intention on the part of Bate and Coy to become partners; each was at liberty without the consent of the other to transfer to a stranger his own interest in the property; each had a right to partition; Lindley on Partnership (7 ed.), pp. 26-7; neither was an agent of the other, *Bullen* v. *Sharp*(3). This case is, therefore, distinguishable from that of *The Imperial Mercantile Credit Association* v. *Coleman*(2), relied upon in the provincial courts. As co-owner with Bate, Coy did not hold towards the plaintiff even a constructive fiduciary position, to which it is said the rule that "a trustee shall not profit by his trust," does not apply. Lewin on Trusts (11 ed.), p. 1159-60.

The view so powerfully stated by James L.J. in *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.*(4), at page 526, that

> any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court,

is, of course, incontrovertible. That the principal whose agent has been tampered with, if he comes to

(1) 8 Ch. App. 323 *n*.
(2) L.R. 6 H.L. 189.
(3) L.R. 1 C.P. 36.
(4) 10 Ch. App. 515.

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the court before rights of innocent third parties have intervened, is entitled to have the contract set aside is equally clear. Nor can a co-purchaser with an agent of the vendor who has bought surreptitiously successfully oppose rescission: *McPherson* v. *Watt* (1), at page 276. If rescission is impossible because the plaintiff has not come to the court in time, or is not sought, he may, says Lord Justice James, have such other adequate relief as the court may think right to give him.

While this is not a case of the agent of the vendor being bribed in the sense in which bribery is ordinarily understood — not a case in which the "other principal" sought in any way to influence the conduct of the agent to the prejudice of his own principal, it is a case in which there was surreptitious dealing between the agent and the other principal. Transactions of that sort are so dangerous — it is so often impossible to ascertain the real truth of the circumstances which surround them, that the prohibition of them by courts of equity is absolute; and where rescission is asked and is possible they will not inquire whether the principal has or has not sustained a loss. Neither does his right to recover from his agent any profits made by him at all depend on that fact. *Parker* v. *McKenna* (2), at page 118.

But I know of no ground on which a co-purchaser in the position of the defendant Coy can be held accountable for profits made by him on a re-sale. If Coy had bribed Bate to sell to him at a figure lower than the agent, if honest, could have got for his principal, his liability, as pointed out by Mr. Justice Newlands, citing *Grant* v. *Gold Exploration and Develop-*

(1) 3 App. Cas. 254. (2) 10 Ch. App. 96.

ment Syndicate (1), rescission being impossible, would have been to pay damages to the vendor for any loss sustained by him by reason of entering into the contract of sale. If the liability of the fraudulent briber is limited to damages — if he is not held accountable for profits, *a fortiori* an innocent co-purchaser, who is not a partner, may not be held so accountable.

Whether without proof of actual fraud on the part of Coy he would be required to pay damages to the plaintiff, had it been shewn that he secured the property at a figure below its market value at the time he purchased it, need not now be considered. The evidence is overwhelming that the plaintiff got for his property all that it was then worth, all that any agent, however energetic or scrupulously honest, could have been expected to obtain for him. I agree with Mr. Justice Newlands that the plaintiff has failed to establish a case against the defendant Coy and am of the opinion that Coy's appeal should be allowed with costs in this court and in the provincial appellate court, and that the action against him should be dismissed with costs.

The case of the defendant Murison, against whom the plaintiff has preferred what he calls a cross-appeal, is still clearer. While the trial judge thought that Murison acquired his interest with knowledge that Bate and Coy were co-purchasers from the plaintiff, the full court thought the evidence consistent with the view that, when Murison acquired his interest, he was unaware that Bate was really a purchaser from Pommerenke and may have believed that he was a sub-purchaser from Coy after the latter had bought from the plaintiff. Although not by any means satisfied

(1) [1900] 1 Q.B. 233.

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that if I had been sitting in the provincial appellate court I would have reversed the finding of the trial judge on this question of fact, neither has a perusal of the evidence convinced me that the view expressed by Brown J., concurred in by the Chief Justice of Saskatchewan and not dissented from by Mr. Justice Newlands, is so clearly erroneous that I would be justified in reversing their judgment — *Demers* v. *Montreal Steam Laundry Co.*(1). But in any case the defendant Murison is entitled to succeed on the same ground as the defendant Coy. He was not a partner of, but merely a co-purchaser with Bate. While he might possibly have been liable to the plaintiff for damages, if any, he is not accountable to him for profits made on the re-sale of the property.

This conclusion as to Murison is satisfactory because I more than gravely doubt whether the appeal of the respondent Pommerenke from the judgment dismissing the action as against this defendant is properly before the court. Murison was not made a party respondent to the main appeal taken by Coy. He is not before the court as a party to that appeal. The appellant Coy had no interest whatever in the relief sought against Murison. He has nothing to do with the plaintiff's case against Murison. Pommerenke gave Murison what purports to be a notice, under rule No. 100 of this court, of his intention to contend on the hearing of the main appeal that the decision of the provincial appellate court should be varied by restoring the judgment of Johnston J., holding Murison liable to account to him for the profits made by him on the re-sale of the land to DeVeber. In his factum

(1) 27 Can. S.C.R. 537.

he prefers his appeal against Murison as a cross-appeal. He has not given the security required by section 75 of the "Supreme Court Act." I very strongly incline to the view that it is not competent for a respondent by a mere notice under rule 100 to bring before this court a person not a party to the main appeal, and to claim against him relief in which the original appellant is not interested. As pointed out by Osler J.A., discussing the corresponding Ontario rule in *Begg* v. *Ellison*(1), at page 269,

> the word "parties" as here used must mean persons who are parties to the action or proceeding in question on the appeal.

The same learned judge says in *Johnston* v. *Town of Petrolia*(2), at page 335, quoting the language of Jessel M.R. in *Re Cavander's Trusts*(3),

> an appeal on a point which does not affect the original appellant cannot be a cross-appeal. * * * It cannot have been intended to enable the respondent to bring forward in this way a case with which the appellant has nothing to do. If he has a case of that kind he must give notice of appeal.

The case of *McNichol* v. *Malcolm*(4) was relied upon by Mr. Straton; and the case of *Pilling* v. *Attorney-General* (not reported), in which the judgment of this court was delivered on the 15th of February, 1910, has also been called to our attention. Without expressing any opinion upon the conclusions reached in these cases I would point out that they appear to be distinguishable from that now before the court. In *McNichol* v. *Malcolm*(4) the notice under rule 100 was given to a person, who, although no relief was claimed against him in the main appeal, had been made a respondent to it. He was, therefore, already

(1) 14 Ont. P.R. 267.
(2) 17 Ont. P.R. 332.
(3) 16 Ch. D. 270.
(4) 39 Can. S.C.R. 265.

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before the court. In *Attorney-General* v. *Pilling,* although the three parties to the proceedings, Lawson, Hasseltein and Bloom, who were not parties to the main appeal, were held to be affected by the relief granted on the cross-appeal, they were in the same interest as the appellant on the main appeal and they had joined with him in the pleadings in the action. That was not an attempt by a respondent by cross-appeal to bring forward a case with which the main appellant had nothing to do. This is.

If rule 100 bears the construction which counsel for the plaintiff Pommerenke seeks to have us put upon it, I am inclined to think that it would be *ultra vires* of the judges of this court to enact it, inasmuch as it would confer a right to launch and maintain what is in reality an independent appeal without complying with the provisions of section 75 of the "Supreme Court Act."

But, in view of the conclusion which I have reached on the merits of the attempted appeal from the judgment dismissing this action as against Murison, it is not now necessary to determine the question whether the plaintiff's so-called cross-appeal has or has not been properly launched. I allude to it merely that it may not appear that I have assented to the regularity of the procedure which has been adopted.

The cross-appeal, so called, should be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *John Milden.*

Solicitor for the respondent: *James Straton.*