1, 1934

In the Privy Council.

No. 25 of 1933.

ON APPEAL
FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN

ISAAC WILLIAM CANNON SOLLOWAY *(a Defendant)* - *Appellant*

AND

W. T. JOHNSON, Trustee of the Estate of Theo. Frontier and Company Limited, in Bankruptcy *(Plaintiff)* - *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal by the Defendant, Isaac William Cannon Solloway, from a judgment of the Court of Appeal for British Columbia, dismissing an appeal from the judgment of the Supreme Court of British Columbia in favour of the Plaintiff against all the Defendants, excepting Solloway Mills (B.C.) Limited.

2. The action was brought in the Supreme Court of British Columbia by the Plaintiff against the Defendants, Solloway Mills and Company Limited (hereinafter called "the Solloway Company"), Isaac William Cannon Solloway (hereinafter called "the appellant Solloway") and Harvey Mills, for a return of all monies paid by Theo. Frontier and Company Limited (hereinafter called "the Frontier Company") on account of the purchase and sale of divers mining and oil shares on the ground that the said Defendants were guilty of fraud and breach of trust. p. 1.

3. The defence was a denial of the above allegations with a plea that in the buying and selling of the said mining and oil shares, the Solloway Company acted in pursuance of the customs and usages of the Vancouver Stock Exchange. pp. 10–11.

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RECORD.

p. 361n. p. 361o. p. 361w. 4. At the trial, judgment was given in favour of the Plaintiff by Mr. Justice Fisher for the amount paid by the said Frontier Company to the Solloway Company, namely, $103,666.34, plus interest at 5%, making a total of $118,086.44. This judgment was upheld by the Court of Appeal, Mr. Justice M. A. Macdonald dissenting in part.

p. 520. 5. The Plaintiff is the Trustee in Bankruptcy of the Frontier Company.

p. 154, ll. 37–38. p. 521. 6. The Frontier Company conducted a real estate, insurance and stock brokerage business at the City of Kamloops in the Province of British Columbia, until on or about the 17th day of September, 1929, when it made an authorized assignment under the Bankruptcy Act, being Chapter 11 of the Revised Statutes of Canada, 1927.

p. 148, ll. 29–37. p. 294, ll. 10–15. 7. Early in the year 1928, the Frontier Company commenced to buy and sell, through the agency of the Solloway Company, divers oil and mining shares which were listed or traded in on the Vancouver Stock Exchange of Vancouver, British Columbia, the Calgary Stock Exchange of Calgary, Alberta, and the Standard Stock and Mining Exchange of Toronto, Ontario. Most of such buying and selling was done on the Vancouver Stock Exchange.

p. 451, ll. 15–19. 8. The Solloway Company had branch offices throughout the Dominion of Canada, but dealt " only in mining and oil stocks listed on the Vancouver Stock Exchange, the Calgary Stock Exchange and the Standard Stock and Mining Exchange at Toronto."

9. The learned trial judge found that the Solloway Company stood in the relationship of agent to the Frontier Company. His Lordship said :

p. 361D, ll. 24–48. p. 451, ll. 11–14. p. 170, ll. 11–18. p. 451, ll. 13–14.

> " The contract between the defendant Company and Frontier and Company may be described as one under which the defendant Company was to purchase and carry for the plaintiff shares of stock on payment by Frontier and Company of a percentage (1/3) on the purchase money of the stock called " margin " and Frontier and Company was to keep up its margin in case of a fall in the value of the stock and it is apparent that it was agreed that the defendant Company, which was also to sell for Frontier as ordered, would either advance or borrow the money to take care in the meantime of the balance of purchase money for which Frontier and Company would pay interest at 8 per cent."

p. 148, ll. 40–46. p. 149, ll. 1–3. p. 127, ll. 23–43. p. 527. 10. As orders to buy or sell shares were given by the Frontier Company to the Solloway Company, the former Company was promptly notified by " confirmations " of the latter Company that such shares had been bought or sold, as the case might be. The " confirmation " forms are important as showing that a transaction on the Stock Exchange was contemplated and that a fee was charged by the Solloway Company for performing a brokerage service.

11. During times material to the action, namely, from about the month of May, 1928, to the month of October, 1929, the Frontier Company

remitted to the Solloway Company by cheque or draft on account of " margin " the sum of $120,063.48 made up of twenty-one payments. Because presumably the margin account of the Frontier Company in January 1929 was secured in excess of its " margin " requirements, the Solloway Company refunded to it a sum of $5,000.00. In addition to this, the Solloway Company, by arrangement with the Frontier Company, allowed the latter one half of the brokerage fees earned in regard to the transactions carried out as agent for the Frontier Company and remitted same monthly to the latter. In all, these remittances amounted to $16,461.89. After deducting these two sums of $5,000.00 and $16,461.89, the net amount paid by the Frontier Company to the Solloway Company on account of " margin " transactions amounted to $103,666.34, for which judgment was given, with interest.

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p. 424.

p. 424.

12. The learned trial judge, whose findings on these points were unanimously accepted by the Court of Appeal, found that the Solloway Company was guilty of fraudulent breaches of trust and that its betrayal of its trust consisted in the following particulars :

p. 361K, ll. 13–16.

13.—(*a*) The Solloway Company systematically refrained from buying on the stock exchanges the shares which it was ordered to buy by the Frontier Company, while representing to the Frontier Company in writing that the orders received from that company had in fact been executed.

p. 361E, ll. 29–31.
p. 361H, ll. 7–13.

14.—(*b*) The Solloway Company pretended to execute the orders of the Frontier Company by going through the form of buying the shares from certain brokers on the stock exchange, to whom it immediately sold the same number of shares outside of the stock exchange, or of selling shares on the stock exchange to these brokers while immediately buying the same shares from these brokers outside of the stock exchange; the brokers, of course, participating in these fraudulent transactions.

p. 361E, ll. 18–28.
p. 80, ll. 31–41.
p. 81, ll. 35–45.
p. 82, ll. 1–10.

15.—(*c*) The Solloway Company itself traded in the same shares as its clients for the purpose of making a profit.

p. 361G, ll. 46–47.
p. 361H, ll. 1–6.

16. The evidence to support the finding (*a*) is as follows :

Exhibit 57 contains the " day's business " of the Vancouver office of the Solloway Company on certain dates indicated below. These dates were chosen at random except that they were days on which orders to buy shares were given by the Frontier Company to the Solloway Company :

p. 281, ll. 41–46.

DATE.		SHARES.
1928.	November 19	Grandview.
		Pend Oreille.
	December 22	Cotton Belt.
1929.	January 16	Grandview.
	January 19	Reeves McDonald.
	January 22	Mohawk.
		Oregon Copper.
	January 26	Georgia River.

RECORD.	DATE.	SHARES.
1929.	February 14	Topley Richfield.
		Whitewater.
		A. P. Consolidated.
		Golconda.
		Mayland.
	February 15	Pend Oreille.
		Reeves McDonald.
	March 13	A. P. Consolidated.
		Fabyan.
		Freehold.
		Illinois Alberta.
		Regent.
		Whitewater.
	March 15	Devenish.
	April 15	A. P. Consolidated.
		Home Oil.
	April 18	South West Petroleums.
	May 29	Associated Oils.
		Mercury.
	July 19	South West Petroleums.

p. 47, ll. 3–6.

It was impossible to prepare a synopsis of the business of days earlier than November 19, 1928, for the reason that the Solloway Company's books covering the period prior to that date were not produced.

On each of these days, Exhibit 57 proves that, with the exception of Pend Oreille shares on November 19, 1928, the Solloway Company did not purchase sufficient shares to fully execute orders received from its customers. To illustrate: Exhibit 57, at page 419: "Customers" buying orders for Topley Richfield shares on the 14th of February, 1929, amounted in all to 2,400 shares. Shares actually purchased on the Vancouver Stock Exchange by the Solloway Company on that date amounted to 1,200 shares, leaving a "shortage" of 1,200 shares.

p. 105, ll. 29–35.
p. 109, ll. 9–33.
p. 296, ll. 32–36.
p. 116, ll. 35–40.
p. 314, ll. 12–16.

Oral evidence of this practice was given by former employees and the chief trader Willins. The witness Beck seeks to excuse such practice by saying it resulted from pressure of business on certain days, but it appears that during the period under consideration, this was the normal condition of their business.

p. 361G, ll. 8–15.

The Solloway Company, by reason of this practice, was never in a position to deliver shares to the Frontier Company, and the learned judge so found. This practice, it is submitted, has been condemned as illegal in both England and the United States.

Rothschild v. *Brookman* (1831) 5 *Bligh's* 165 at p. 195–196.

Charles H. Meyer "Stock Exchanges and Stockbrokers" 1931 *Edition, p.* 324–325.

McCarthy and Meaney, 183 *N.Y.* 190 *at* 191.

17. The evidence to support the finding (*b*) is as follows :— RECORD.

This practice consists of cancelling or (as the Exchange jargon has it) " washing " purchases or sales made on the Stock Exchange through certain conniving brokers by sales or purchases made outside of the Exchange through the same brokers. The Solloway Company's employee Beck testifies that he was instructed to carry out such an arrangement with other brokers. " Confirmations " selling back shares outside of the Exchange to the same brokers from whom the Solloway Company had bought shares on the Exchange, were marked : " Sold to." The reverse of the transaction, namely, selling on the Exchange to certain brokers and buying back outside of the exchange, from the same brokers, showed confirmations marked " Bought from."

In the thirty transactions recorded in Exhibit 57 the practice of " washing " sales and purchases occurred with regard to twenty-three thereof.

p. 297, ll. 40–47.
p. 298, ll. 1–28.
p. 120, ll. 40–43.
p. 80, ll. 31–41.
p. 81, ll. 35–47.
p. 83, ll. 20–25.
p. 99, ll. 29–39.

18. The evidence to support the finding (*c*) is as follows :—

The evidence clearly establishes that the Solloway Company itself speculated for its own account in the same shares as those in which it traded as broker for its customers.

It is submitted that such a practice constituted a breach of duty by the Solloway Company. The customer is entitled to the disinterested services of the broker, free from any temptation to make a personal profit.

Rothschild v. *Brookman* (1831) *V. Bligh N.S.* 165 *at p.* 197–198.
Robinson v. *Mollett* (1875) 7 *E. & I. App.* 802 *at* 829.
In re *Solomon & Company* 268 *Fed.* 108 *at* 112.
Prout v. *Chisolm* 21 *App. Div.* 54 *at* 56.

p. 296, ll. 5–30.
p. 133, ll. 10–16.
p. 311, ll. 29–47.
p. 312, ll. 1–2.
p. 75, ll. 28–47.
p. 76, ll. 1–13.
p. 102, ll. 3–12.

19. Obviously the Solloway Company found it necessary to keep, and did in fact keep, some record of the extent of its obligations to customers to whom it had issued false " confirmations " that shares had been purchased when in fact no such purchases had been made. The Solloway Company had such a document in the form of a private ledger, which the employees of the Solloway Company referred to in their evidence variously as the " house account," the " house ledger " and the " trading ledger " and referred to the Solloway Company as " the house." This " house ledger " was not produced at the trial, unfortunately, nor was its absence satisfactorily accounted for. Had it been available, the actual " position " of the Vancouver office of the Solloway Company on any day material to this action would have been readily ascertained.

The evidence is clear that on those occasions when the Solloway Company neglected to buy shares as explained under trading practice (*a*), or purchased shares and then " washed " or cancelled the purchase as explained under trading practice (*b*), the " house account " was debited with the number of shares which should have been purchased and thus the " house account " recorded the extent of the obligation of the Solloway

pp. 296–297.
p. 89, ll. 4–7.
p. 328, ll. 19–21.
p. 296, ll. 38–47.
p. 297, ll. 1–6.
p. 298, ll. 2–28.
p. 88, ll. 44–47.
p. 89, ll. 1–7.

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p. 309, ll. 40–44. p. 132, ll. 42–47. p. 133, ll. 1–47.

Company to its customers in connection with shares which had not been purchased. This share obligation is spoken of as the " short position " of the Solloway Company or that the Solloway Company was " short " in the shares in question.

p. 92, ll. 20–47. p. 93, ll. 1–47. p. 94, ll. 1–40.

20. The evidence is that during the period under review in this action, the Vancouver office of the Solloway Company invariably had less shares on hand than it was obligated to deliver to customers. For the period from

p. 133, ll. 35–47. p. 135, ll. 6–47. p. 136, ll. 1–3.

September, 1928, to January, 1929, the evidence showed that the Solloway Company had on hand on an average only between 30 per cent. to 50 per cent. of the number of shares shown in its ledger as carried for " marginal " clients.

21. Counsel for the appellant Solloway argued at the trial and on

p. 92 *et seq.* p. 132 *et seq.*

appeal that a burden rested upon the respondent to show that the " short position " which was proved to have existed in the trading of the Vancouver office also extended to its other trading offices in Calgary and Toronto. The respondent submits that as most of the trading of the Frontier Company

p. 294, ll. 10–15. p. 94, ll. 12–47. p. 95, ll. 1–3. p. 300, ll. 28–36. p. 306, ll. 30–36.

was in shares listed on the Vancouver Stock Exchange; that as all shares traded in on the Vancouver Stock Exchange were kept at the Vancouver office of the Solloway Company; and that as the appellant Solloway endeavoured to keep the trading in the various offices uniform, evidence of a " short position " in the Vancouver office was sufficient to cast the burden upon the defendant to meet this evidence by showing a corresponding contrary or " long position " in the other offices. However, in any event, it is submitted that there was ample evidence of a " short position " in the Calgary and Toronto offices to support the learned trial Judge's finding

p. 361G, ll. 5–7.

that " the defendant company was continually in a short position with respect to all the active stocks in which the Frontier Company was dealing."

p. 361G, ll. 35–45. p. 96. p. 97, ll. 1–20. p. 98, ll. 10–20.

22. The fact of the Solloway Company being " short " had a peculiar and most important significance in view of the fact that no shares were " earmarked " for individual customers. All shares received by the Solloway Company, whether received from other brokers, from customers,

p. 96.

or from the clearing house of the Stock Exchange, were put into one portfolio or " bin " indexed under the name of the particular shares and were dealt with like bank notes. *See Duel* v. *Hollins* 241 *U.S.* 523 *at* 528. The effect of this practice, it is submitted, is that each " margin " customer who has purchased shares in which the Solloway Company was in a " short position," has a right to relief, even if on any day sufficient shares were purchased by the Solloway Company on the Stock Exchange to fill the

p. 96, ll. 8–35. p. 97, ll. 4–20. p. 98, ll. 10–20.

order of any particular customer. As no shares purchased were ever ascribed to or earmarked for any individual customer, the Solloway Company while occupying a " short position " could not have on hand or under its control sufficient shares to meet the demands of all its " marginal " customers.

Such practice constitutes a breach of the broker's duty to his customer.

Conmee v. *Securities Holding Company* (1907) 38 S.C.R. 601.
Davis, J., p. 607; Duff, J., p. 617.
Rothschild v. *Brookman* (1831) 5. *Bligh's*, 165 at 195 and 196.
Duel v. *Hollins*, 241 U. S. 523.
Katz v. *Nast* 187 *Fed.* 529 at 536.
Richardson v. *Shaw* 209 U. S. 365 at p. 375.
Charles H. Meyer "*Stock Exchanges and Stockbrokers*" 1931 *Edition*, pp. 312 and 313.
Markham v. *Jordon* 41 N. Y. 235.
Taussig v. *Hart* 58 N. Y. p. 425 at 429.

23. The defence called no witness, although the record shows that past officers were in Court. p. 95, ll. 12–22.

24. This evidence was accepted by both courts and it remains to consider whether the appellant Solloway is personally liable.

25. The evidence shows that the appellant Solloway and the Defendant, Harvey Mills, transferred the partnership business of Solloway and Mills to the Solloway Company and received in exchange in their joint names 24,995 shares of the issued capital of 25,000 shares. pp. 433–434.

Five shares were issued to others to qualify them as directors, but were paid for by the appellant Solloway and the Defendant Harvey Mills. p. 434, ll. 10–13.

On the 23rd of August, 1928, the appellant Solloway and the Defendant Harvey Mills transferred 4,000 of their shares to one G. W. Staats. p. 435, ll. 15–21.

These 4,000 shares were re-transferred to the appellant Solloway and the Defendant Harvey Mills jointly on the 29th of November, 1928. p. 440, ll. 10–13.

On the 12th of November, 1929, the said 4,000 shares and the said 20,995 shares which were held jointly in the names of the appellant Solloway and the Defendant, Harvey Mills, were transferred to the appellant Solloway. p. 443, ll. 19–25.

Thus on this date the appellant Solloway was the holder of all the issued share capital with the exception of the qualifying shares.

26. The minute book of the Solloway Company discloses that the appellant Solloway attended meetings of directors of the Solloway Company on December 7, 1927; May 30, 1928; May 31, 1928; August 23, 1928; November 20, 1928; November 27, 1928; November 29, 1928; March 19, 1929; November 12 1929; December 14, 1929 and December 23, 1929. pp. 426–449.

27. He became a director and president of the Solloway Company and remained so at all times material to this action. p. 428, ll. 35–36.

28. At a meeting of date the 19th day of March, 1929, the appellant Solloway was granted a salary of $60,000.00 a year and travelling expenses of $49,878.65. On December 14, 1929, a dividend of $30.00 a share was declared which resulted in the appellant Solloway receiving $749,750.00 on his 24,995 shares. p. 441, ll. 30–32. p. 442, ll. 6–9.

RECORD.

29. The chief trader, Willins, was called, not by the appellant Solloway, but by the Respondent, and testified that the appellant Solloway visited Vancouver twice during the year 1929.

p. 299, ll. 5–10.

Willins stated that in the Vancouver office he discussed trading matters with the appellant Solloway.

p. 299, ll. 10–11.

Willins stated that the appellant Solloway knew of the " position " of the Vancouver office of the Solloway Company in active shares and sought information from him concerning the shares in which the Vancouver office was trading.

p. 299, ll. 18–28.

The appellant Solloway kept in touch with Willins by private wire and letters passing between them, and these private wires and letters contained information relative to general business matters and relative to trading.

p. 298, ll. 39–47.

Willins saw the appellant Solloway in the Hotel Vancouver twice in 1929 and discussed trading matters with him and general market conditions.

p. 299, ll. 40–42.

Willins stated that on the occasion of these Hotel Vancouver meetings, he produced a document showing the " trading position " of the Vancouver House Account.

p. 300, ll. 24–28.

p. 299, ll. 43–47.

At this Hotel Vancouver meeting the appellant Solloway produced a general report on the whole system, made up by the Chief Trader, Kimberley.

p. 300, ll. 8–11.

At this meeting, too, the question of closer co-operation between the offices was discussed and the appellant Solloway had before him information relative to the other offices, the idea being, according to Willins, to help the latter in connection with his duties.

p. 300, ll. 28–37.

Willins gave further important evidence that there were documents produced at this Hotel Vancouver meeting which disclosed to the appellant Solloway and himself that the Solloway Company was short in active stocks.

p. 301, ll. 11–25.

In September or October, 1929, Willins was sent to Toronto to obtain a better insight into the business of the Solloway Company.

p. 303, ll. 19–21.

p. 298, ll. 29–30.

At this meeting in Toronto, the chief trader, Kimberley, his assistant, Parkes, the appellant Solloway and the said Willins were in attendance.

p. 304, ll. 1–10.

There was produced at this meeting a statement of the Vancouver House Account for the preceding month and discussions pertaining to the same took place.

p. 304, ll. 13–18.
p. 304, ll. 43–44.

Willins stated that at this Toronto meeting they had a general discussion with regard to questions of trading, and again added that one of the objects of the discussion was to bring about better unanimity or continuity between the different offices.

p. 306, ll. 30–35.

The evidence in regard to closer cooperation between the offices is, it is submitted, particularly significant. As Willins stated above at p. 300 ll. 28–37, the appellant Solloway gave to the said Willins information relative to the other offices, so as to help him in trading matters. It is submitted, therefore, that the reasonable conclusion is that the Solloway Company did not propose to be " short " in the Vancouver office and " long " in other offices, as such a practice would nullify their efforts to trade for a profit; and that the appellant Solloway was the person who was

directing the trading practices of the three offices, having in view that the trading practice of one should not conflict with another, or the " short " position of one office should not be cancelled by a " long " position in another. RECORD.

Willins admitted that at the Toronto meeting they had a discussion about the " short " position of the Solloway Company, and again gives evidence of the fact that there were records placed before the appellant Solloway which would show the " short position " of the Vancouver office of the Solloway Company. p. 307, ll. 9–10. p. 307, ll. 40–44.

Willins also gave evidence to the effect that the appellant Solloway took an active part in these discussions in Toronto. p. 309, ll. 20–23.

It is to be noted that counsel for the appellant Solloway did not cross-examine the witness Willins on his evidence that the appellant Solloway discussed the question of the trading practices of the Solloway Company; that the appellant Solloway had knowledge of the " short " position of the Solloway Company in active stocks, and that it was he who was directing the matter of closer cooperation in trading between the offices.

The appellant Solloway did not attend the trial nor give evidence, keeping at all times during the pendency of the action out of the Province of British Columbia.

The learned trial judge, and three of the four learned judges of the Court of Appeal, have found that the appellant Solloway took an active part in the operation of the affairs of the Solloway Company in bringing about the cooperation necessary for the " short position " as aforesaid; that he knew of the " short position " of the Solloway Company with respect to at least some of the active stocks traded in by the Frontier Company and other clients; and that " he was a party to the wrong." p. 361L, ll. 40–43.

30. It is significant that the appellant Solloway, through his solicitor, claimed privilege from production of documents on the ground that such documents would tend to incriminate him, and refused to answer interrogatory No. 5 on the same ground, and while the Court may not draw an inference of criminal guilt, it is submitted that the learned Judge in a civil proceeding was entitled to draw all proper inferences from the appellant Solloway's claim for privilege from production of the said books and documents and from his refusal to answer interrogatory No. 5. p. 33, ll. 19–43. p. 274, ll. 16–42.

31. Mr. Justice M. A. Macdonald who dissented in part from the judgment given on appeal, does so on the ground that the respondent had not satisfied the burden of proof which, in his Lordship's opinion, rested upon the respondent so far as the liability of the individual directors is concerned. It is respectfully submitted that the learned judge failed correctly to evaluate the evidence given implicating the appellant Solloway in the general scheme of operations conducted by the Solloway Company in which he occupied a prominent position. Furthermore, it is submitted that the learned judge failed correctly to appreciate the particular nature of the wrong complained of, that is, a participation by the appellant Solloway in a breach of trust. The rights and remedies given to a principal where the relationship between p. 361v.

RECORD. him and the agent is fiduciary in character, are fully discussed in the case of *Nocton* v. *Ashburton* (1914) *A. C.* p. 932.

32. Certain subsidiary matters remain to be considered.

33. The examination for discovery of the defendant Mills, and in
pp. 459, 461, 464, 466 and 496. particular certain letters passing between the appellant Solloway and the defendant Mills, which were proved upon the said discovery, were tendered in evidence. A point arises as to whether they are admissible against the appellant Solloway. It is submitted that the Rules of the Supreme Court of British Columbia, 1925, which appear to be a unique code of practice, permit the reading of the evidence on discovery of one defendant against his co-defendant. Marginal Rules 370 (c), 370 (i) and 370 (r) are the relevant Rules.

Marginal Rule 370 (*c*) :

" (1). In the case of a corporation, any officer or servant of such corporation may, without any special order, and any one who has been one of the officers of such corporation may, by order of a Court or a Judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination or any part thereof may be used as evidence at the trial if the trial Judge so orders."

Marginal Rule 370 (*i*) :

" (1). Any one so examined may be further examined on his own behalf, or on behalf of the body corporate of which he is or has been an officer, in relation to any matter respecting which he has been examined in chief; and when one of several plaintiffs or defendants has been examined, any other plaintiff or defendant united in interest may be examined on his own behalf or on behalf of those united with him in interest, to the same extent as the party examined.

" (2). Such explanatory examination shall, unless by leave of the Court or a Judge, be proceeded with immediately after the examination in chief, and not at any future period.

" (3). Any one examined orally under these Rules shall be subject to cross-examination and re-examination; and the examination, cross-examination, and re-examination shall be conducted as nearly as may be as at a trial."

Marginal Rule 370 (*r*) :

" (1). Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the Judge may look at the whole of the examination, and if he is of

opinion that any other part is so connected with the part to be so used that the last-mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence." RECORD.

Rules similar to Marginal Rules 370 (c) and 370 (r) are in force in Alberta (being Rules 201 and 224). These Rules have been interpreted by the Court of Appeal of Alberta in the case of :—

Carte v. *Dennis* (1900) 5 *Territories Law Reports*, 30.

The following remarks of Whitmore, C. J., at page 41, are quoted :—

" The object of Rule 201 is for discovery, to obtain from a party to the suit opposed in interest to the examining party, evidence, not merely as against the party examined, but for the purpose of the case, and Rule 224, which allows the evidence to be put in does not limit the effect of such testimony or provide that it may only be put in as against the party examined. Why should it be necessary to recall the party examined and reswear him and go all over the ground again ? "

All defendants herein had the same solicitor. The Defendant Mills following his examination by counsel for the respondent, was examined by the counsel for himself and his co-defendants. The practice in England, it is submitted, which precludes the reading as against a co-defendant of evidence comprised in answers to interrogatories, is based on the principle that the co-defendant has no opportunity to cross-examine. p. 11, ll. 35–36. p. 361, ll. 6–36.

Wych v. *Meal* (1734) 3 *P. W.* 310.

Morse v. *Royal* 12 *Ves. Jun.* p. 355 at p. 361.

The right to cross-examine or re-examine is expressly given by Marginal Rule 370 (i) and furthermore, this rule would appear to be meaningless if the right to read the examination of a defendant against his co-defendant did not exist.

It is submitted that this was the practice in Chancery in connection with the use of evidence taken on examination :—

Lord v. *Colvin* (1855) 3 *Drew* 222 and particularly at 226 where it is stated by the Court :—

" The opinion then of the whole of the judges is that a defendant may cross-examine a co-defendant's witness. When the evidence is taken, whether it be examination in chief or cross-examination, the whole is common to all parties."

The case of *Allan* v. *Allan* (1894) pp. 248 is also relied upon, particularly the judgment of Lopes, L.J., at p. 251, where the English practice is discussed :—

" In the Courts of common law, in the case of co-defendants, one co-defendant would have the right to cross-examine another co-defendant called as a witness and the examination of one would be evidence against the other."

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For these reasons it is submitted that the examination for discovery of the defendant Mills and the letters in question are evidence against the appellant Solloway.

p. 459, ll. 30–37.
p. 461, ll. 35–40.
p. 462, ll. 1–10.
p. 463, ll. 1–10.
p. 466, ll. 23–28.
p. 466, ll. 39–40.
p. 467, ll. 1–4.
p. 497, ll. 33–44.
p. 498, ll. 1–10.

The letters above referred to show the guiding hands of the appellant Solloway and the defendant Mills in the trading operations of the Solloway Company, and disclose clear breaches of trust.

34. One further point was argued by counsel for the appellant Solloway in the Court of Appeal. He contended that the Trustee in Bankruptcy of the Frontier Company had no right to sue and relied on Section 23 of the said Bankruptcy Act, which reads, inter alia, as follows :— 10

> " The property of the debtor divisible among his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars :—
>
> " 1. Property held by the debtor in trust for any other person."

The Frontier Company had a number of customers in Kamloops from whom it received orders to buy shares " on margin." Counsel for the appellant Solloway contends that all or most of the money which the Frontier Company sent down to the Solloway Company was trust money belonging to customers of the Frontier Company, the right to recover which did not vest in the Trustee in Bankruptcy, as representing creditors of the 20 Frontier Company. The Frontier Company carried on its business in the City of Kamloops, where there is no stock exchange, and did not have a seat on a recognized stock exchange, its business being transacted through other brokers who had. This is a common practice in Canada and the United States. Charles H. Meyer's text book " Stock Brokers and Stock Exchanges," 1931 Edition, the latest American authority, clearly defines this relationship and his statements at page 490 are adopted by the respondent :—

p. 171, ll. 5–10.

p. 181, ll. 12–15.

> " Security and commodity brokers frequently find it necessary or convenient to transact the business of their customers through 30 other brokerage houses. If the broker is not himself a member of the Exchange on which the order is to be executed, he must of course employ another brokerage house to execute it and to " clear " the trade, that is, assume charge of delivery and payment. Even if he is a member of the exchange and executes the order himself, he may find it advantageous, on account of his own limited facilities, to employ other members of the exchange to do his clearing. New York is the principal market in the country for the transaction of business in corporate securities. Brokers located elsewhere frequently are unrepresented on exchanges in New York where securities are 40 most commonly bought and sold. They, therefore, find it essential to employ New York correspondents to conduct business for them on those exchanges. In these cases it is usual for the broker who is not a member of the exchange, or who does not wish to do his own

clearing, to have an account with the broker who executes the order or clears for him. **The latter broker knows only the former in their business with each other. He is unacquainted with the former's customers and has no dealings with them.*

"*In cases of this type, each broker has his own business. The first broker makes his own arrangements with his customer. With these arrangements the second broker has no concern.* The first broker receives the order from the customer and transmits it to the second broker for execution. The second broker follows the instructions of the first broker in the execution of the order and carrying out its terms. The first broker receives the customer's margin and in turn re-hypothecates it with the second broker as security for his indebtedness to the second broker.

*"*In such a case, as between the two brokerage houses the relation is that of customer and broker, the first broker being the customer of the second. Their relations are no different from what they would be if the first broker were dealing solely for his own account. The first broker has all the rights against the second that are granted by law to customers against their brokers, even though his dealings with the second broker are in fact not for his own account but for the account of his customers.*"

And at page 492 :—

"The first broker, that is, the one who received the order from the customer, cannot be deemed the agent of the second broker who executes the order and clears it. **There have been many cases where, upon the insolvency of his own broker, the customer has sought to hold his broker's correspondent as his broker's principal. Whenever it was shown that the businesses of the two brokers were independent, such efforts have proved unsuccessful, whether the second broker was the local correspondent of an out-of-town broker, or whether he merely cleared for another broker in the same locality.* The word "correspondent" by itself does not denote agency. It merely signifies business engagements between the parties which may or may not involve the relation of agency, depending upon the facts in each case."

American authorities supporting the text are :

Noble v. *Kendall* 182 *App. Div.* 801 *at* 804 appeal dismissed 225 *N.Y.* 673; and

Lipkien v. *Krinski* 192 *App. Div.* 257 *at* 261.

The evidence establishes the fact that the monies remitted by the Frontier Company to the Solloway Company were not treated as held in trust for the former's customers and that the Frontier Company was the principal of the Solloway Company :—

(*a*) All monies paid to the Frontier Company by its customers were placed in its general banking account, which was also operated p. 180, ll. 26-32. p. 176, ll. 20-26

* The italics are those of the Respondent.

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in connection with its real estate and insurance business and on which cheques for wages, rent and current expenses of the business as a whole were drawn.

pp. 518, 529. (*b*) Of the total amount of margin paid, $15,000.00 was paid by the Trustee in Bankruptcy himself out of the funds of the Estate of the Frontier Company.

(*c*) The collateral security which is included in the marginal payments, namely, $5,064.75, set out in Exhibit No. 57 at page 424,

p. 292, ll. 28 -31. is proved to have belonged to the Frontier Company and not to its customers.

(*d*) When the Frontier Company asked for samples of order forms to send to its customers, the Solloway Company specifically

p. 485, ll. 11 -13. stipulated that the name of the Solloway Company was not to appear.

p. 341, ll. 3-6.
p. 340, ll. 2-9.
p. 360, l. 40.
p. 311, ll. 6-11.
p. 311, ll. 40-45. (*e*) The evidence of past employees and officers of the Solloway Company is explicit that the Frontier Company was the principal and was treated in the same manner as any other customer.

(*f*) All confirmations were addressed solely to the Frontier

p. 527. Company and stated " we are buying or selling '*for your account*' " The effect of the words " for your account " is noted in *Gadd* v. *Houghton* (1876) 1 *Ex. D.* 357.

(*g*) The Solloway Company, according to its own books of account, dealt exclusively with the Frontier Company and not with the latter's customers, and filed a proof of claim in bankruptcy

p. 236, ll. 13 -18. with the Trustee of the Frontier Company for the amount which its books showed to be owing to it on the balance of trading between the two companies.

35. A further answer to this contention of the appellant Solloway is that the Frontier Company had an interest in the contract with the Solloway Company other than as representing its customers, and the authorities would appear to support the contention that " if at the time of bankruptcy, the bankrupt possessed the possibility of an interest from which a benefit to his creditors might result; if he had a legal interest in any property and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole could pass by the assignment."

St. Thomas Hospital v. *Richardson* (1910) 1 *K.B.* 271 at p. 276–277.

36. The appellant Solloway took objection to an order made by the

p. 44, ll. 18-47. learned trial Judge for the production of the books and documents of the

p. 45, ll. 1-4. Solloway Company, after counsel for the appellant Solloway and his co-defendants claimed privilege on the ground that such books and documents would tend to incriminate the appellant Solloway and his co-defendants. The appellant Solloway seeks an allowance of the appeal on the ground of the wrongful admission of evidence. Counsel for the respondent who had given notice to produce books and documents disclosed in the affidavit of

p. 21. documents, asked the learned judge for an order at the trial for production

of the said books and documents. Counsel for the appellant Solloway objected to such an order on the ground that production of the books and documents would tend to incriminate the appellant Solloway and his co-defendants. After argument was heard on this point, the learned trial judge made an order that the books and documents of the Solloway Company be produced. Thereupon such books and documents were produced and were put in as exhibits by the respondent, and counsel for the respondent and the appellant Solloway and his co-defendants examined and cross-examined upon the same.

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p. 33, ll. 25–35.
p. 44, ll. 18–47.
p. 70 *et seq.*
p. 111.
p. 117.

The respondent contends that if the rule which the appellant Solloway invokes has any application on the trial of an action, he failed to bring himself within the rule, in not himself pledging his oath that production would have this effect.

Boyle v. *Wiseman* (1854) 10 *Exchequer Reports* 647.

Webb v. *East* (1880) 5 *Ex. D.* 108.

Lamb v. *Munster* (1882) 10 *Q.B.D.* 110.

Counsel's statement that the books and documents will tend to incriminate is not sufficient.

Taylor " *Evidence* " 11*th Ed. paragraph* 1465, pp. 1006–1007.

Nor may the appellant rely upon a claim for privilege in the affidavit of documents, as the claim for privilege must be renewed under oath at the trail.

Waterhouse v. *Barker* (1924) 2 *K.B.* 759 at pp. 766–777.

37. The respondent submits that the appeal should be dismissed for the following amongst other reasons :—

REASONS.

1. Because the defendant, the Solloway Company, occupied a position of trust, and betrayed its trust;
2. Because the personal defendants were guilty of complicity in the fraudulent breaches of trust committed by the Solloway Company;
3. Because the judgment appealed from rests on concurrent findings of fact by both the Courts below;
4. Because the learned trial judge properly ordered the production of the books and documents of the Solloway Company;
5. Because the learned trial judge was right in holding that the plaintiff was entitled to sue.

G. L. FRASER

In the Privy Council.

No. 25 of 1933.

ON APPEAL

FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN

ISAAC WILLIAM CANNON SOLLOWAY
(*a Defendant*) *Appellant*

AND

W. T. JOHNSON (*Plaintiff*) *Respondent.*

CASE FOR THE RESPONDENT.

WHITE & LEONARD,
Bank Buildings,
Ludgate Circus, E.C.4.
Respondent's Agents.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C. 4.