not return until the end of October, 1917. He then offered to return the stock and demanded his money. This being refused, he brought this action in November, 1917.

If the $400 paid on the 1st May, 1916, was in reality marking up, the plaintiff, it was admitted, must succeed; if it was a closing out of the account, admittedly he must fail.

The defendants asserted that they had on the Monday bought shares to replace the lent shares, at 80, and that they had sent the ordinary notice to the plaintiff—"We have this day bought for you 2,600 shares of Temiskaming at 80 cents"—but the plaintiff did not know of the purchase, if there was one, and he received no notice till long afterwards. The plaintiff went to the defendants' office intending to pay the $400 for marking up; he knew nothing of the closing out by the purchase of shares or otherwise; he swore that he paid it for marking up, and there was no contradiction. He was cross-examined, but the main object of the cross-examination seemed to be to shew that the money was not paid to the defendant Connell. The plaintiff swore that he gave the cheque to Connell, and Connell neither denied receiving the cheque nor that it was paid for marking up. The trial Judge said that the plaintiff seemed to be mistaken—he must have given the cheque to some clerk in the office. The learned Judge had misapprehended the effect of the evidence (Beal v. Michigan Central R. R. Co (1909), 19 O.L.R. 502). In the absence of contradiction by Connell, the Court should now find that the $400 was paid to him by the plaintiff and for marking up.

The suspicious change in the books of the defendants, and the impossibility of reconciling the alleged buying in for the plaintiff on the 1st May with contemporaneous entries, would cause the Court to decline to accept the defendants' account. No rule forbade the Court from disagreeing with the trial Judge even on questions of fact: Dempster v. Lewis (1903), 33 S.C.R. 292; and this was one of the clear cases in which the Court should disagree with the trial Judge.

The appeal should be allowed, and judgment should be entered for the plaintiff (on his handing back the borrowed shares) for $1,975 and interest from the teste of the writ and costs here and below.

Mulock, C.J. Ex., and Clute and Sutherland, JJ., agreed with Riddell, J.

Kelly, J., read a dissenting judgment.

Appeal allowed (Kelly, J., *dissenting.*)