

again pursuant to an order of Divisional Court of 17th December, 1910, 17 O. W. R. 780; 22 O. L. R. 441; affirmed 19 O. W. R. 645; 24 O. L. R. 282; affirmed 23 O. W. R. 311; 46 S. C. R. 642.

The second trial was on 23rd December, 1912, and 29th January, 1913. In the meantime the evidence of two witnesses, who were about to leave Ontario, had been taken *de bene esse* on 9th November, 1912.

F. Arnoldi, K.C., and E. F. B. Johnston, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and A. McL. Macdonell, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—The transactions giving rise to this action may be summed up as follows:

Warren, Gzowski & Co., the plaintiffs, were brokers upon the Toronto Stock Exchange. S. G. Forst, the defendant, was a broker carrying on business at Toronto under the name of S. G. Forst & Co., but was not a member of the exchange.

Forst, desiring to deal somewhat extensively in Temiskaming, an unlisted mining stock, approached the plaintiff firm—represented throughout in this transaction by Norman G. Gzowski—with a view of obtaining financial assistance. There is conflict upon the evidence as to the exact nature of the transaction.

Forst contends that it was a loan of \$10,000. This is denied by Gzowski.

Gzowski gave Forst \$10,000 and received from Forst 10,000 shares of the stock. The transaction was evidenced by the exchange of bought and sold notes. Forst sent to Gzowski a sold note, stating that he had sold to him 10,000 shares for \$10,000. Instead of sending a corresponding bought note Gzowski sent a sold note, stating that he had sold 10,000 shares of stock for \$10,000 on account of Forst.

It had been agreed that for the use of this \$10,000 for 90 days Gzowski should receive \$900. To evidence this, he sent to Forst a bought note, stating the purchase on account of Forst of 10,000 shares at \$1.09, a total of \$10,900; and Forst on his part sent a corresponding bought note.

The true transaction, I am satisfied, was this: The stock was at that date selling upon the market at \$1.22 or more. Forst sold the 10,000 shares to Gzowski at an arbitrary price of \$1 per share; this price being fixed sufficiently below the