

SECOND DIVISIONAL COURT.

DECEMBER 10TH, 1918.

*JARVIS v. CONNELL.

Brokers—Transactions between—"Borrowing Shares"—Payment Made by Borrower—"Making up" or "Closing out"—Contradictory Evidence—Appreciation of—Cross-examination—Suspicious Circumstances—Reversal by Appellate Court of Finding of Fact of Trial Judge.

Appeal by the plaintiff from the judgment of ROSE, J., at the trial, dismissing the action, which was brought for a return of money paid by the plaintiff to the defendants, who were stock-brokers, as security for a loan of 2,600 shares of Temiskaming Mining Company stock.

The appeal was heard by MULOCK, C.J. EX., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

J. R. Roaf, for the appellant.

C. W. Livingstone, for the defendants, respondents.

RIDDELL, J., in a written judgment, said that the plaintiff on the 23rd February, 1916, borrowed from the defendants 2,600 shares. In such a transaction, the borrower pays to the lender as security the market price of the shares at the time; the lender can at any time call in the loan, and then the borrower must return the shares, receiving his; he has an option, however; and the more usual course is for the borrower to pay the lender an amount which will cover the rise in value of the shares (if any) and allow the loan to continue until a new demand by the lender. This is called "marking up." If the borrower fail to return the stock or to mark up, the lender may buy in to protect himself and charge the borrower with the difference in price.

The plaintiff paid \$1,625 on the day of the loan, and on the 19th April marked up \$300, placing on the face of the cheques "2,600 Temisk." and "margin" respectively. On the 29th April (Saturday) a new demand was made upon the plaintiff, that he should bring the stock in on Monday morning, the 1st May, or the account would be closed up. Early in the following week the plaintiff paid \$400 by a cheque which had no memorandum on its face as to the object for which it was given. This was the sum which he should have paid to entitle him to retain the stock as his own and so close out the account—it was equally the sum which he should have paid to mark up, being the amount by which the stock had risen.

The plaintiff went overseas on the 16th May, 1916, and did