

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

MAGEE, J.:—The plaintiffs, a firm of brokers in Toronto, allege that they purchased, on 30th November, 1907, for the defendant and by his order, 1,000 shares of Green-Meehan mining stock at \$1.76 per share, and paid therefor \$1,760 on 8th December, 1907, which they here ask to be reimbursed with interest. The defendant disputed the order and repudiated the transaction. Judgment was given against him after the trial, and from that judgment he now appeals.

So far as direct testimony is concerned, the question whether the order was given lies between the defendant and Mr. Scott, of the plaintiffs' firm. Scott affirms that on Wednesday 28th November, in a conversation over the long distance telephone, the defendant inquired as to the price of Green-Meehan stock, and expressed a desire to buy 1,000 shares at \$1.76, and, on being told that they were then at a higher figure, gave him (Scott) an order to purchase that number at that price, and that the order was expressly stated to be an "open order," that is, not limited to the day on which it was given, but continuing operative till fulfilled or cancelled. He also says that on the following morning (Thursday), on being informed over the telephone by him (Scott) that they had not been able to get the stock at the price, but were doing their best to get it for him, the defendant again said he would take it at \$1.76.

The defendant does not confine himself to a denial that he gave an open order, but asserts that he gave no order whatever at any price, and did not, on either day, mention the price of \$1.76, but only spoke of \$1.75 as that at which he would like to get 1,000 shares.

Had the contradiction between the two been less wide, the trial Judge might possibly have found more difficulty in deciding.

Mr. Scott, in speaking of the Wednesday, says: "He told me he would not pay over \$1.76. I told him it would be impossible to do that at the moment, but, if he would leave an order with us, we would do our best to fill it. He said, 'All right, if you can get 1,000 at \$1.76, I will take it.'" The witness does not here speak of "open order," but, on being asked by plaintiffs' counsel, "then how long was that order for?" replies, "That was an open order," and adds, "As I explained to Mr. Simpson at the time, it was \$1.76,