affirming judgment of BOYD, C., 4 O. W. R. 460, in favour of plaintiffs.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A., STREET, J.

C. Millar, for defendant.

W. N. Tilley, for plaintiffs.

OSLER, J.A.:—The ground of defence chiefly relied upon before us is that which Anglin, J., considers in his written judgment, namely, that there was a conversion by plaintiffs of defendant's stock by the pledging of it not merely for the amount which remained unpaid thereon by defendant, and which plaintiffs had advanced on his account, but also for their own general indebtedness to the bank. This, if true, would not be an answer to the action, though it might result in considerably reducing the amount which plaintiffs have been held entitled to recover, if the stock was, at the date plaintiffs pledged it, of any substantial value.

I do not think that there is any real difference between the Judges of the Divisional Court on the point of law. Their diverse conclusions seem to have arisen from the different views they took of the effect of the evidence, the majority holding it to have substantially proved that plaintiffs, notwithstanding the hypothecation referred to, were always ready and able to deliver his stock to defendant, had he come in to redeem it, while Anglin, J., thought the evidence was not sufficiently clear and definite to warrant that conclusion.

On the whole, after a careful consideration of the evidence, I see no reason to differ from that view of the facts which commended itself to Britton, J., who delivered the prevailing judgment in the Divisional Court.

Defendant did not, either by his pleadings or at the trial, clearly set up that there had been a conversion of his stock by the manner in which plaintiffs had dealt with it. That contention was really first put forward in the Divisional Court. Had it been distinctly raised at the trial while plaintiffs' witnesses were under examination, it is quite probable that the precise terms under which the stock had been pledged to the bank would have been so fully brought out as to have left no room for the suggestion that plaintiffs were not in a position to control the bank to the extent of having the right