

At the trial, the action was dismissed by MEREDITH, C.J.C.P., and the plaintiff appealed.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. H. Shaver, for the appellant.

No one appeared for the defendant Doucette, the respondent.

RIDDELL, J., delivering judgment, said that this was apparently a simple action in detinue, but a perusal of the evidence shewed that "borrowing" in stockbroking circles does not imply a return of the very stock certificates borrowed—the loan is repaid by the delivery of stock certificates of the same amount and kind. On such a borrowing, also, the borrower has the right to return the stock or any part of it at any time and demand the return to him of the amount of money paid by him as security or an aliquot part.

In substance, the defence to the action was an offer by the defendant and a refusal by the plaintiff.

So long as stock so lent is lower than the price at which it is lent, the lender will not be desirous of a return of his loan—but the borrower will wish to return the stock and get his money. That was what took place. Doucette asked the plaintiff several times to take up the stock; part of it was taken up; the stock has now gone up to \$22. When the stock was low, the plaintiff was "jollyng" the defendants "along"—he wanted to hold the money as long as he could. Doucette had the stock, and wanted to return it, but the plaintiff would not accept it. Accordingly, when the stock came up again to the price at which it was borrowed, the defendant sold it—that was in March or April, 1915.

The performance of the contract of Doucette (or Ford) to deliver the stock to the plaintiff, the plaintiff prevented; and he could have no damages for the non-delivery. He could not claim to be in a better position than if he had carried out his contract to receive the stock when the other party desired to return it. Then he would have had the stock, but he would have been obliged to repay the sum of money he had received; and this would be not less than the value of the stock he would receive. In such a case, no formal tender is necessary.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD, J., agreed in the result.

KELLY, J., also agreed in the result, for reasons stated in writing.

Appeal dismissed without costs.