

The County Court Judge seems to have treated the case more upon the pleadings than upon the evidence—the only issue is whether plaintiff can recover without shewing that he presented the cheque for payment. The money lies in the bank awaiting his sending the cheque, so the whole matter involved is one of costs—each side standing upon its strict rights. Plaintiff's action was launched upon the assumption that defendants had the cheque in their possession when the solicitors' letter was written asking for payment; this was an error. It seems perfectly clear upon the authorities, as well as upon established custom, that a bank cannot be expected to pay the cheque of a customer without its production, when it can be produced, and defendants in this case are entirely justified in taking the position they did, and refusing to pay the solicitors until the cheque was presented or sent in to them in due course.

The appeal should be allowed and the action dismissed, both with costs.

MAGEE, J., gave reasons in writing for the same conclusion, basing it upon the assent of plaintiff's agent to the return of the cheque by defendants to the Bank of Toronto.

BOYD, C., agreed in the result, for reasons given in writing, in which he referred to *Hansard v. Robinson*, 7 B. & C. 90, 94; *Gaden v. Newfoundland Savings Bank*, [1899] A. C. at p. 285; *Keene v. Beard*, 8 C. B. N. S. 372; *Barough v. White*, 4 B. & C. 325; *Smith v. Mercer*, 6 Taunt. 76; *Wilkinson v. Johnson*, 3 B. & C. 428; *Coolidge v. Brigham*, 1 Metc. (Mass.) 547; *Brockmeyer v. Washington National Bank*, 19 Pac. R. 855; and suggested that, to avoid further misunderstandings, the cheque should be properly authenticated by the signature of plaintiff as his property and delivered to the bank, upon payment of the amount of what is due upon the cheque (without interest, for no proper demand has been made for payment), less the costs of action and any reserved costs and costs of appeal, and that the satisfied cheque should then be returned in due course to the drawers, Pulling & Co., according to the usual practice of banks.