

by Herman, and Barff signed that. It reads: "I, Mr. Thomas Barff, agree with L. Smith to pay The Yussel Comition 2½% for selling my property 6-8-10 Stanley Ave. in the City of Toronto. April 3rd, 1911. Thomas Barff."

The cheque was either handed over to or simply left with the defendant as the deposit—as I have said, there is a conflict as to whether it had been taken away after the day interview.

There is a difference of recollection as to what was said about the cheque; but, like the other conflict, it is, in my view, quite immaterial. The plaintiff's story is: "I said, 'Mr. Barff, would you like to pay me my commission right away?' I said, 'My commission is \$195, and you sign that cheque and I will give you cheque for \$5,' and I went down to the bank and bank refused to pay." The defendant's account is: "I had the cheque in my hand, and Mr. Smith said, 'You can give me that and I will get it cashed for you.' He said, 'You can give me that and I will get it cashed for you.' Q. Is 'cashed' the last word he said? A. Yes, and with that they took it away."

The defendant's counsel before us contended that this was an agreement on the plaintiff's part to accept the cheque endorsed by the defendant as payment of his commission. If the plaintiff agrees, we should let him accept the cheque as in payment of commission, amend his pleadings now, sue upon the cheque, and be awarded the amount with County Court costs of action and appeal—that is, if the defendant does not object.

Notwithstanding the argument of the defendant's counsel, I do not see that there was such an accord and satisfaction as is contended for. The whole transaction is, I think, clearly nothing more than the plaintiff being anxious to get his commission, saying to the defendant, "Give me the cheque: I shall get it cashed, pay myself out of the proceeds and pay you the balance"—it is at least clear that any offer on his part to accept the cheque as payment of his commission and to give his cheque for \$5 was not accepted.

Heller seems to have changed his mind almost at once, thought he had paid too much for the property—the day after the cheque was handed to Smith, he went to the bank—the bank said "call around later on and the cheque will be all right," but later on payment was refused, as they had been instructed not to pay it.

Smith brought back the cheque and appears to have given it to Mrs. Barff.

At the time of the contract for sale the defendant had given the purchaser the name of his solicitor, but Mrs. Barff wanted to make a change, and went down town early to prevent the