

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Glyn Osler, for the appellant.

R. S. Robertson, for the plaintiff, respondent.

The judgment of the Court was read by FERGUSON, J.A., who said that the parties were all stockbrokers, and the cheque was given by McCuaig for the cash payment under an agreement for the sale by Sutherland to Harris of a one-half interest in 900,000 shares of a mining company, the whole price being \$67,500. It was agreed between Harris and McCuaig that McCuaig should unite with Harris in his purchase, and that McCuaig should make all the payments provided for in the Harris-Sutherland agreement. The cheque sued on was signed by McCuaig on a Saturday afternoon, and was then handed to Harris's solicitor, and, after endorsement by Harris, was handed to Sutherland on the following Wednesday. Before the cheque was presented at the bank, McCuaig stopped payment of it, taking the position that it was not to be used until share-certificates had been deposited with a trust company—that the cheque was handed to the solicitor in escrow, to be delivered to Harris when the Sutherland-Harris agreement should have been signed and the share-certificates deposited. Sutherland sued as a holder in due course.

The learned Justice of Appeal, after reviewing the evidence, said that the trial Judge had not chosen to discredit Sutherland; and, in view of Sutherland's positive statement "that he had not any notice of anything from McCuaig affecting the cheque or relating to it in any way, or anything relating to the agreement he had with Harris, or of any instructions that were given by McCuaig to the solicitor or Harris, with reference to the cheque, except that he was told by Harris and the solicitor that when the agreement was signed they were to hand over the cheque," and also in view of the authorities which forbid an appellate Court to substitute its finding for that of the trial Judge, where his finding of fact is based on the credibility of witnesses, the Court should not now interfere with the finding made by the trial Judge that Sutherland had no knowledge of the equities which attached to the cheque in the hands of Harris.

Appeal dismissed with costs.