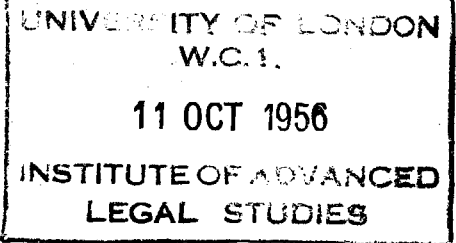


In the Privy Council.

No. 19 of 1895.



ON APPEAL FROM THE COURT OF APPEAL
FOR ONTARIO.

BETWEEN FRANK ROSS (Plaintiff) - - - *Appellant,*

AND

W. C. EDWARDS & COMPANY
(Defendants) - - - - *Respondents.*

Case of the Appellant.

1. This is an Appeal from the Judgment of the Court of Appeal for Ontario, given on the 13th November 1894, affirming a Judgment of Mr. Justice Meredith in an action in which the present Appellant was Plaintiff and the Respondents were Defendants.

2. The action was commenced on the 10th November 1891 by the Appellant as the legal representative of the late James G. Ross, to recover damages from the Respondents for the misrepresentations of the Respondents as to the ownership of a quantity of deals hereinafter mentioned.

3. The leading facts of the case are as follows :—

On a date shortly prior to 12th January 1888, the Respondents, who were lumber manufacturers, sold to a firm of N. Hurteau et Frère, lumber merchants, a quantity of lumber (deals) then in Respondents' lumber yard, and on said 12th January, one Lemay, a broker for N. Hurteau et Frère, sold to one William Little, a lumber dealer, a portion of said deals by the following agreement :—

Rec., pp. 7,
44.

Rec., pp. 44,
45.

“ Montreal, 12th January 1888.

“ Agreement between Wm. Little and E. H. Lemay.

Rec., p. 33

“ William Little, of the City of Montreal, buys, and E. H. Lemay, of the same place, sells, the following lumber, now lying at “ W. C. Edwards & Co.'s yard in Rockland, Ontario :—

“ One million feet 3-inch mill cull deals, 12 to 13, and about
 “ 10 per cent. 8 to 11 feet, at (\$7) seven dollars per M.B.M., F.O.B.,
 “ Brockland, Ont., the same being a fair average in width of the
 “ 3,718,718 feet lot.

“ Four hundred and ninety-three thousand, five hundred and
 “ ninety feet 3-inch mill cull deals, 14 to 16, at \$7.50, F.O.B.,
 “ Rockland, Ont.

“ Terms—six months' note from 1st December 1887, with three
 “ months' interest at 7 per cent. added to invoice ; to deliver to teams
 “ any of the above lot in case Wm. Little so desires, before opening of
 “ navigation.

“ E. H. LEMAY.

“ W. LITTLE.”

Rec., p. 7, 8,
29, 45.

4. On the 18th of the same month, Lemay gave to Little an order upon
 the Respondents for the lumber which he had so sold, in the following terms:—

“ Montreal, January 18th 1888.

“ Messrs. W. C. Edwards & Co.,
 “ Rockland, Ont.

“ Gentlemen,

“ Please deliver to Wm. Little, Esq., or order, the
 “ following lumber in your yard to my order, viz. :

“ One million feet B. M. 3-inch mill cull deals, 8 to 13; 493,590
 “ feet B. M. 3-inch mill cull deals, 14 to 16, and oblige

“ W.

“ Yours truly,

“ E. H. LEMAY.”

Rec., p. 8.

And the Respondents, on the 20th of that month, accepted the same by writing
 across the face of the order as above shown, and returned the order to Little.

(By clerical error, the acceptance in the Record is printed as being dated
 “ 21st,” instead of, as it actually was, “ 20th.”)

Rec., pp. 14,
18, 19.

5. In the month of February following Little applied to the said James
 G. Ross, then doing business as a merchant in the name of Ross & Co., for a
 loan of \$7,500 upon the lumber which he represented to Ross he then had in
 the Respondents' yard at Rockland, and he produced to Ross as evidence of his
 having the said lumber, the order of 18th January above set forth, with the
 acceptance of the Respondents thereon.

6. Ross relying upon the said acceptance of the Respondents, agreed to
 make the advance requested by the said Little, and upon the terms mentioned
 in the memorandum following:—

“ Quebec, 28th February 1888.

Rec., p. 29.

“ Mr. Wm. Little proposes to draw on Ross & Co. to the extent of
 “ (\$7,500) seven thousand five hundred dollars to be paid within four
 “ months from this date, and as collateral security for the said advances

“pledges Edwards & Co., Rockland, Ontario, warehouse receipt for 1,493,590 feet cull pine deals. It being agreed and understood that the whole advance with a commission of 2½ per cent. and any interest thereon at the rate of 7 per cent. per annum be paid as above stated, otherwise Ross & Co. shall have full power to sell the deals or any portion of them at the best price they can get, and credit Mr. Little with any surplus there may be or collect from him any loss.

“WM. LITTLE.

“Mr. Little will send fire policy insured in the Guardian Company.”

7. The accepted order above set out, and which was referred to in the agreement as a warehouse receipt, was thereupon transferred by Little to Ross, with the indorsement following:— Rec., p. 19.

“Please hold the within mentioned quantity of deals subject to order of Ross & Co., Quebec. Rec., p. 29.

“WM. LITTLE.

“28th February, 1888.”

and was forwarded by Ross to the Respondents, and thereupon Ross made the advances as agreed. Rec., pp. 14, 15, 19.

8. In due course said accepted order was returned to Ross by the Respondents with the further indorsement upon it as follows:— Rec., pp. 8, 15, 19.

“Will hold within deals subject to order of Messrs. Ross & Co., as above authorised. Rec., p. 29.

“W. C. EDWARDS & Co.

“Rockland, March 15th, 1888.”

9. A small portion of the lumber mentioned in the order having in the spring of 1888 been sold by Little, it was, upon the order of Ross, duly delivered by the Respondents to the purchaser, and the purchase money therefor was received by Ross, but the Respondents refused to deliver the remainder of it pursuant to the order of Ross, alleging that they so refused in obedience to a notice from N. Hurteau et Frère, who claimed to be entitled to hold the same as unpaid vendors, the said Little having made default in payment to them of the purchase money therefor, and having then become insolvent. Rec., p. 16.
Rec., pp. 9, 16, 27, 31, 32.

10. Upon the application of the Respondents an Interpleader Issue was directed to be tried between the said Ross and said N. Hurteau et Frère, to determine which of them was entitled to the lumber, and by order of the Court the lumber was sold and the proceeds thereof paid into Court to await the result of the Issue. Rec., pp. 12, 13, 27, 34, 39.

11. The Issue was tried with the result that it was adjudged that the lumber was, as between N. Hurteau et Frère and Ross, the property of Rec., pp. 38, 40, 41.

N. Hurteau et Frère, and that Judgment was affirmed on Appeal, and the proceeds of the sale of the lumber were paid out to N. Hurteau et Frère.

Rec., pp. 37,
41, 42.

12. No order was made in the Interpleader proceedings barring or enjoining Ross in respect of any remedy which he had or might have against the Respondents by reason of their representation as to Little being the owner of the said lumber by acceptance of the Lemay order, or by reason of their attornment to said Ross or otherwise, and Little having made default in repayment of said loan by Ross, the Appellant brought the present action as the legal representative of said Ross (who departed this life in October, 1888) to recover the damages, \$6,538.79, sustained by said Ross, being the amount of said loan and interest thereon up to June 6th, 1888, after deducting the proceeds of the small portion of said lumber sold and delivered on the order of said Ross as above mentioned, and also to recover interest on said \$6,538.79 since June 6th, 1888.

Rec., p. 33.

Rec., p. 6.

13. The Appellant alleged that relying upon the representation of the Respondents, that they held the lumber in question in their yard for Little and subject to his order, as shown by the acceptance by them of the Lemay order transferred by Little to Ross, Ross had made the loan, which representation turning out to be untrue the Appellant was entitled to recover the value of the said lumber, or if the same should exceed the balance due on the said loan together with interest thereon then the balance of the amount of said loan and interest.

Rec., p. 9.

14. The Respondents defended by alleging that the interpleader proceedings and the Judgment or Order therein constituted a complete bar to all rights of action by the Appellant against the Respondents in respect of the transactions in question and denying the making of the alleged representation and any liability to the Appellant in respect thereof.

Rec., p. 46.

15. The Action was tried on the 25th April 1893 by Mr. Justice Meredith and judgment was given dismissing it with costs, upon the grounds that the question of the actual ownership of the lumber was determined by the interpleader proceedings, and that, assuming that there might be liability on the part of the Respondents by way of estoppel notwithstanding that N. Hurteau et Frère were the actual owners of the lumber or otherwise and that the interpleader proceedings would not constitute a bar to such right of action, the facts of the case showed that Ross had not made the loan on the faith of Respondents acceptance but upon the faith of Little's actual rights to the lumber of which Ross had full notice and that Ross took no higher rights than Little.

Rec., p. 58.

16. The Court of Appeal for Ontario dismissed the Appeal with costs, and although the judgment of Mr. Justice Meredith was thus affirmed the Judges of the Court of Appeal did not, as will be seen on reference to their reasons for judgment, agree with the reasons given by Mr. Justice Meredith, as they held that the interpleader proceedings constituted no bar to the Appellant's

Rec., pp. 50,
52, 54, 56.

right of action against Respondents if any ever existed based upon estoppel or otherwise by reason of their acceptance of the order in question, but they held that the Appellant had no cause of action by estoppel on the facts of the case.

Rec., pp. 51,
55, 57, 58.

17. The Appellant submits that the Judgment of the Court of Appeal is erroneous and ought to be reversed for the following amongst other

REASONS.

1. Because the Respondents are estopped from denying as against the Appellant, whose testator advanced his money on the faith of the receipt, that the deals in question were the property of Little.
2. Because the Respondents having attorned to Ross in respect of the said deals are estopped from denying that the deals were held by them for him.

D'ALTON McCARTHY.

A. FERGUSON.

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