

11 OCT 1956

INSTITUTE OF ADVANCED
LEGAL STUDIESIn the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN FRANK ROSS - - - - - (Plaintiff) APPELLANT,

AND

W. C. EDWARDS & CO. - - - (Defendants) RESPONDENTS.

Case

FOR THE RESPONDENTS.

1. This is an Appeal from the Judgment of the Court of Appeal for the Province of Ontario, affirming the judgment pronounced at the trial by the Honourable Mr. Justice Meredith, dismissing the Appellant's action with costs.

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2. The Respondents are manufacturers of lumber, and carry on business at Rockland in the Province of Ontario.

3. Prior to the 12th January, 1888, the Respondents had sold to the firm of Hurteau Freres all the deals of a certain quality in the yard of the Respondents at Rockland, amounting to about 4,000,000 feet.

Record,
pp. 27 and 28.

4. On the 12th January, 1888, Herteau Freres, by their agent E. H. Lemay, sold to William Little 1,493,590 feet of these Deals upon credit, the agreement of sale being in writing as follows:—

Record,
p. 33, ex. 22.

“ Montreal, 12th January, 1888.

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“ Agreement between William Little, Esq. and E. H. Lemay.

“ 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.

“ 1,000,000 feet 3-inch mill cull deals 12-13, and about 10 per cent. 8 to 11 feet at (\$7) seven dollars, per M.B.M. F.O.B. Rockland, Ontario; the same being a fair average in width of the 3,718,718 feet lot.

“ 493,590 feet 3-inch mill cull deals 14-16 at \$7.50 F.O.B., Rockland, Ontario.

“ Terms, six months note from 1st December, 1887, with three months' interest at 7 per cent. added to invoice; to deliver to teams any

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“ of the above lot in case William Little so desires before opening of
“ navigation.

“ (Signed) E. H. LEMAY,
WILLIAM LITTLE.”

Record,
p. 46, ex. 35.

And on the same day Lemay's authority to make the contract for Hurteau Freres was confirmed by the following letter :—

“ Montreal, 12th January, 1888.

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

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“ Gentlemen,

“ You will please rectify Mr. Lemay's order for one million feet
“ 3-inch mill culls, 8-13 feet, and 493,590 feet 3-inch mill culls, 14-16 feet,
“ sold to Mr. William Little, F.O.B. of barges, with option to draw them
“ from the piles, if he wants some during winter.

“ Yours truly,

“ (Signed) N. HURTEAU ET FRERE.”

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Record,
p. 43, ex. 32.

And an invoice was made out and delivered by Lemay to Little, which will be found on page 43 of the Record.

5. Thereupon Lemay gave to Little a writing in the words and figures following :—

“ Montreal, January 18th, 1888.

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

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“ Gentlemen,

“ Please deliver to William Little, Esq., or order, the following lumber
“ in your yard to my order, viz—
“ 1,000,000 feet B.M. 3-inch M. cull deals, 8-13.
“ 493,590 feet B.M. 3-inch M. cull deals, 14-16.

“ And oblige, yours truly,

“ (Signed) E. H. LEMAY.”

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Record,
p. 29.

And on the 21st January, 1888, the Respondents wrote across the face of this writing the word “ accepted,” with the date and their signature, as indicated in Exhibits 5 and 5½.

Record,
p. 29.

6. On the 28th February, 1888, Little entered into an arrangement with the Appellant's testator, in the words and figures following :—

“ Quebec, 28th February, 1888.

10 “ Mr. William 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 $2\frac{1}{2}$ 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.

“ (Signed) W. LITTLE.

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

7. On the same day Little endorsed upon the writing, Exhibits 5 and ^{Record,}
 5 $\frac{1}{2}$, these words :— _{p. 29, ex. 6.}

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

“ (Signed) WILLIAM LITTLE.”

8. Little proceeded to draw bills upon the Appellant's testator for the
 \$7,500 mentioned in the agreement between them, there being five drafts in all, ^{Record,}
 the first of which was dated 5th March, and accepted the 8th March ; the second _{pp. 30 and 15.}
 dated 8th of March, and accepted the 12th of March ; the third dated the 9th
 March, and accepted the 13th of March ; the fourth dated the 12th of March,
 30 and accepted the 15th of March ; the fifth (for \$1,750) dated the 14th of March,
 and accepted the 17th of March.

9. On the 10th of March, 1888, the Appellant's testator wrote to the ^{Record,}
 Respondents the following letter, enclosing Exhibits 5 and 5 $\frac{1}{2}$, with Exhibit 6, _{p. 30, ex. 9.}
 as above, endorsed thereon :—

“ Quebec, 10th March, 1888.

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

40 “ Gentlemen,

“ We enclose an order accepted by you holding

“ 1,000,000 feet B.M. 3-inch M. cull deals, 8-13,

“ 493,590 do. 14-16.

“ subject to the order of William Little. Mr. Little has transferred the
 “ deals to us as you will see by his endorsement. Please accept this
 “ transfer and return us the order.

“ Yours truly,
 (Signed) Ross & Co., P. J. G.”

Record,
p. 29, ex. 7.

On the 15th March, 1888, the Respondents further endorsed on Exhibits 5 and 5½ the following words :—

“ Will hold within deals subject to order of Messrs. Ross & Co., as
“ above authorised.
“ (Sgd.) W. C. EDWARDS & Co.
“ Rockland, March 15th, 1888.”

Record,
p. 30, ex. 10.

And returned the whole to the Appellant's testator in the following letter :—

“ Rockland, Ont., March 15th, 1888. 10

“ Messrs. Ross & Co., Quebec, P.Q.

“ Dear Sirs,

“ We have accepted transfer of cull deals from Mr. Little to your-
“ selves, and beg to return you the document. You doubtless are aware
“ that we are not the insurers of these deals, Mr. Little attended to it
“ himself.

“ Yours truly,

“ (Sgd.) W. C. EDWARDS & Co. 20

“ Insured for \$11,000, we have policy.”

Record,
p. 16.

Which letter reached the Appellant's testator on the 17th March, after the acceptance by him of all Little's drafts, except perhaps the last draft for \$1,750.

10. Subsequently, and in the month of June, 1888, Little suspended payment, not having paid the firm of Hurteau Freres for the deals in question, and the deals not having been, up to this time (with the exception of a small quantity received by the Appellant's testator) separated from the bulk in the Respondent's yard. 30

Record,
pp. 16 and 31.

11. Hurteau Freres thereupon notified the Respondents not to make any further delivery of the deals to Little's order, while the Appellant's testator, on the other hand, demanded delivery in pursuance of the foregoing arrangement and correspondence.

12. Matters being in this position, the Respondents brought an action in the High Court of Justice, on the 21st June, 1888, making the Appellant's testator and Hurteau Freres parties Defendant, setting out the facts as above, stating the adverse claims made by Hurteau Freres and the Appellant's testator, and asking for relief by way of interpleader, and subsequently on the 17th July, 1888, by consent of all parties, a judgment was pronounced in the action so brought, by which it was provided that the Respondents should set apart, from their stock of lumber, lumber of the quality in question to the amount undelivered, out of the 1,493,590 feet, that the lumber so set apart should be sold and the proceeds paid into Court, and that the Appellant's 40

Record,
pp. 34, 35, 36,
and 37, ex. 24.

Record,
pp. 37 and 38,
ex. 25.

testator and Hurteau Freres should proceed to the trial of an issue, to determine the title to the lumber, or the proceeds thereof. The judgment also provided for the payment of the Respondents' costs of the interpleader action, and reserved further directions, and "the question of the rights of the Defendants as between themselves" until after the trial of the said issue.

10 13. The issue thus directed was tried by Mr. Justice Ferguson, who gave judgment in favour of Hurteau Freres, which was affirmed on appeal to the Court of Appeal for Ontario, and on a further appeal to the Supreme Court of Canada, the result being that the proceeds of the sale of the lumber were paid out of Court to Hurteau Freres. Record,
pp. 41 and 42,
ex. 29.

20 14. Subsequently (the Appellant's testator having died) the present Plaintiff, Appellant, brought this action against the Respondents, alleging that the \$7,500 advanced by his testator to Little, as above set out, was so advanced upon the security of and relying upon the undertaking of the Respondents of the 15th March, 1888, above set out; that, by such undertaking the Respondents represented to the Appellant's testator that the deals in question were the property of Little, and had undertaken and agreed that the same would be delivered to the Appellant's testator when demanded; that the Appellant's testator, relying on such representation and believing the same to be true, made the said advances to Little on the strength thereof; and that the representations were false and untrue, the deals in question not being the property of Little as represented by the Respondents. Record,
pp. 5 and 6,
Statement of
Claim.

15. As an alternative case, the Appellant alleged a conversion by the Respondents of the deals in question.

30 16. The Respondents set up the facts as above stated, denied that they had any notice or knowledge of the terms of the Agreement between Hurteau Freres and Little, or of the transactions between Little and Appellant's testator, save in so far as the correspondence and documents above set out gave them notice or knowledge thereof; that the Appellant's testator, when dealing with Little, was fully aware that Little had not paid for the deals, and what Little's title thereto really was, and that the alleged acceptance and undertaking of the Respondents was not intended to be nor did the Appellant's testator ever suppose it to be more than an agreement or undertaking to treat the Appellant's testator as assignee of such title as Little possessed.

40 17. The Respondents further set up the interpleader action and judgment as a bar to any recovery by the Appellant.

18. At the trial, which took place before Mr. Justice Meredith at Ottawa, on the 25th April, 1893, it was proved that the Appellant's testator was aware, when he entered into the agreement to make advances to Little, that the note, given by Little on the purchase of the deals, was outstanding, and that Little was a purchaser who had not paid his purchase money; and that the Appellant's testator dealt with him with that knowledge; and it was also shewn that the Record,
p. 18.

agreement between Lemay and Little was produced by Little to the Appellant's testator at the time of the dealing between them.

19. It was also proved that all the advances made by the Appellant's testator, except the last bill of exchange for \$1,750, were made before the Appellant's testator received the alleged attornment by the Respondents to him, and that the accepting of the draft for the last advance of \$1,750 was not dependent in any way upon such alleged attornment, but would have been made if the attornment had not been received.

Record,
p. 19.

20. The Interpleader proceedings were also proved at the trial.

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21. The Hon. Mr. Justice Meredith delivered Judgment, dismissing the Appellant's action, holding that the question of the actual ownership of the deals was determined by the Interpleader proceedings to which the Appellant's testator had submitted, that there was no liability by way of estoppel, because as he found the advances were not made on the faith of the acceptance or alleged attornment, but upon the faith and security of Little's actual rights to the lumber, of which he found the Appellant's testator had full knowledge.

Record,
p. 46.

22. The Appellant thereupon appealed to the Court of Appeal for Ontario, where the appeal was argued on the 2nd and 3rd days of April, 1894, and Judgment was delivered on the 13th of November, 1894, dismissing the Appellant's appeal and affirming the Judgment of Mr. Justice Meredith, dismissing the action. The Chief Justice rested his Judgment on the ground that nothing done by the Respondents was sufficient to raise an estoppel, that the acceptance by the Respondents of the order in favour of Ross & Co. had not the legal effect of a warehouse receipt, that it did not contain any representation of any fact, that the Appellant's testator knew all about Little's title, that Little gave to him no higher title than he possessed, namely, a right, subject to the unpaid vendor's lien, until severance from the bulk, that what the Respondents had done amounted to no more than an agreement that if the Appellant's testator legally acquired a right to the unsevered deals, the Respondents, as bailees, would hold the deals for him, and that the Respondents could not be held to have guaranteed any higher or more indefeasible title than Little had.

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23. Mr. Justice Burton rested his Judgment on the absence of the necessary elements to constitute an estoppel, pointing out that any representation made by the Respondents was made in answer to the letter of the Appellant's testator, which made no allusion to his intention to make advances, but merely informed the Respondents that Little had transferred the deals to him, and asked their acceptance of such transfer; that the acceptance by the Respondents involved no representation that the lumber was free from the Vendor's lien, as to which, indeed, the Respondents had no knowledge, but amounted to a mere recognition of Little's transfer to the Appellant's testator and an undertaking to deliver to him in place of Little; that the Appellant's testator was aware of all the facts in connection with Little's title, and that the finding of the trial Judge, that the advances made by the Appellant's testator

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were not made on the strength of the alleged attornment was fully warranted by the evidence. As to the claim for conversion, Mr. Justice Burton pointed out that the deals were sold under an Order of the Court in a suit to which the Appellant's testator was a party, in August, 1888, and that the conversion complained of was non-compliance with a demand made on the 11th November, 1891, more than three years after the Respondents had ceased to have control of the deals.

10 24. Mr. Justice Osler held that the title to the deals was finally determined between all parties to the interpleader action, by the result of the interpleader issue; that it was incumbent upon the Appellant, in order to maintain this action, to allege and prove the representations said to have been made by the Respondents, to prove that the advances in question were made on the faith of, and in reliance upon, such representations; that such representations were such as he had a right to rely upon, and that they were false, whereby he had suffered damage. And he points out that the evidence fully supports the finding of the trial Judge that the advances were not in fact made upon the faith of the Respondents' acceptance; and that not only was the Appellant's testator aware of the actual character of Little's title to the deals, and that they had not been delivered to him, that the Respondents' possession was still the possession of 20 Hurteau Freres, and that Hurteau Freres were in the position of unpaid Vendors, but it was further proved that the advances, except the last, were made before the Appellant's testator had received the Respondents' acceptance of Little's order, and that the last advance would have been made whether he had received it or not.

30 25. Mr. Justice MacLennan, as to the contention that the Respondents were liable as for a conversion, held the Appellant concluded by the Interpleader proceedings. As to the question of estoppel, he was of opinion that the contention of the Appellant that the Respondents represented the deals in question to be the property of Little, which contention rested upon the two acceptances of the 18th January and 15th March, was not established, that the earlier acceptance amounted to no more than an admission by the Respondents of notice of the sale made by Hurteau Freres to Little, and an undertaking with Hurteau Freres to perform for them the service of delivering the deals to the purchaser in accordance with the terms of the agreement between him and Hurteau Freres. As to the acceptance of the 15th March, he points out that this particular acceptance and undertaking is not distinguishable from the undertaking considered in *Farmiloe v. Bain* 1 C.P.D. 445, which Lord Esher said obviously contained no representation of any fact. He also holds that, 40 upon the facts shown, the Appellant's testator, when he agreed to make the advances, and when he actually made them, was fully acquainted with the precise terms of Little's contract with Hurteau Freres, and was not deceived or misled by the Respondents, or any one else, and further that the Appellant's testator did not act on the faith of the acceptance of 15th March. His conclusion, therefore, upon the case, is that there was no representation made by the Respondents of any existing fact to constitute an estoppel, that if there was the Appellant's testator had full knowledge, and was not misled or deceived,

and that the advances which occasioned his loss were not made, to any extent, upon the faith of the alleged representation.

26. All the Judges in the Court of Appeal concurred in holding that the Appellant was not barred of recourse against the Respondents by the order made in the interpleader action, though the Chief Justice observes that he has no doubt whatever that the order would have barred any such action as this, had such a clause been asked for, and regrets that he cannot hold the order a bar, as he thinks the present attempt to urge against the Respondents a claim which might have been urged when the interpleader order was asked, is unfair, and an after-thought. 10

27. The Respondents submit that the judgment appealed from is correct and ought to be affirmed, upon the following among other

GROUNDS.

- (1) The Appellant's testator before he made any advances to Little was fully aware of the state of Little's title to the lumber in question, and did not rely in making those advances upon any so-called representations by the Respondents. 20
- (2) Under the circumstances disclosed by the evidence there can be no estoppel upon the Respondents.
- (3) The advances made by the Appellant's testator were made before the alleged undertaking by the Respondents on which the Appellant relies.
- (4) The Respondents in and by their writings signed by them and mentioned in the evidence, made no representation whatever as to title ; and they had no knowledge of the transactions between the parties to the said writings except so far as appeared therefrom. 30
- (5) There was no contract between the Respondents and the Appellant's testator beyond possibly a contract to deliver to him if and when Little should become entitled to delivery.
- (6) The acceptance by the Respondents of the order of Hurteau Brothers in favour of Little would not have operated to make the Respondents liable to Little if by reason of the latter's default in payment of the purchase money to Hurteau Brothers they had stopped delivery of the lumber to Little. It cannot be therefore treated as an attornment by the Respondents to Little. The Appellant is in no better position than Little, as he only acquired Little's title, there 40

being nothing in the evidence to warrant any application of the doctrine of estoppel.

- (7) The proceedings in the Interpleader suit brought by the Respondents, and to which the Appellant's testator and Hurteau Brothers were parties, constitute a complete discharge to the Respondents in respect of the matters now in question, and of all claims in this action.
- (8) By the consent given in those proceedings by the Appellant's testator to a particular and specific dealing by the Respondents with the lumber in question, the Appellant is precluded from objecting, as he does in this Action, to the Respondents dealing with the said lumber in accordance with the terms of said consent.

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C. ROBINSON,
of Counsel for Respondents.

In the Privy Council.

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Ontario.*

BETWEEN

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AND

W. C. EDWARDS & CO. - RESPONDENTS.

Case

FOR RESPONDENTS.

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