

The appeal and motion were heard in the Weekly Court, Toronto.

Peter White, K.C., and W. T. Evans, for the defendant.
H. A. Burbidge, for the plaintiffs.

ROSE, J., in a written judgment, said that the action was to recover the balance of the price of lumber alleged to have been sold by the plaintiffs to the defendant and the balance of the price of certain other lumber alleged to have been sold by the Consumers' Lumber Company Limited to the defendant, the lumber company's claim having been assigned to the plaintiffs. The defence to the whole claim was that the goods were not sold to the defendant but to one Bryers, who resold to the defendant; and to various items of the claim there were additional defences, such as that the goods were not delivered to the defendant.

As to the claim in respect of the goods sold by the lumber company, there was also the defence, apparently raised for the first time upon the hearing of the appeal, that there was not, before action, any written notice of the assignment, and that the plaintiffs, therefore, could not sue in their own name without making the assignor a party: *McMillan v. Orillia Export Lumber Co.* (1903), 6 O.L.R. 126.

The learned Judge gave leave to add the lumber company as a party plaintiff upon its consent being filed.

The question whether the goods were sold to the defendant or to Bryers was a pure question of fact. The plaintiffs' books and invoices shewed Bryers as the purchaser; but there was abundant evidence to support the finding of the referee that the bargain between the parties was that the purchase should take the form of a sale to Bryers, but that the person to pay should be the defendant. That finding of fact standing, there was no room for the application of the cases cited by counsel for the defendant in support of the proposition that the plaintiffs, by the entries in their books and by the invoices etc., elected to give credit to the agent, Bryers, rather than to the principal, the defendant; there was no right to look to Bryers, and there could not be a valid election to make him liable.

Upon the evidence, the findings of the referee as to the various items in dispute upon the appeal should be affirmed.

The appeal should be dismissed with costs, and the motion to confirm the report allowed with costs; the order should not issue until the lumber company has been made a party, and nothing done in making the company a party is to increase the costs payable to the defendant.