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*May 16.

THE AYR AMERICAN PLOUGH COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

WILLIAM B. WALLACE (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Promissory note—Liability on—Maker or indorser—Intention—Evidence.

W. having agreed to become security for a debt wrote his name across the back of a promissory note drawn in favour of the creditors and signed by the debtor. The note was not endorsed by the payees, and no notice of dishonour was given to W. when it matured and was not paid. An action was brought against W. as maker of the note jointly with the debtor, on the trial of which a nonsuit was entered with leave reserved to plaintiffs to move for judgment in their favour, if there was any evidence to go to the jury as to W.'s liability.

Held, affirming the judgment of the court below, that there was no evidence to go to the jury that W. intended to be liable as a maker of the note, and plaintiffs were rightly nonsuited.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the judgment of nonsuit at the trial.

The action in this case was against the respondent and one Clark as joint makers of four promissory notes. Clark allowed judgment to go against him by default, and the trial of the action against the respondent resulted in a nonsuit with leave reserved to plaintiffs to move to have it set aside and judgment entered for them, "if there was any evidence which should have been left to the jury of defendant's (respondent's) liability." This appeal is from the judgment of the Supreme Court of New Brunswick sustaining the nonsuit.

* PRESENT :—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

The following statement of facts is taken from the judgments of the court below:—

It appeared by the evidence on the part of the plaintiffs that they were manufacturers of agricultural implements in Ontario, and in May, 1887, sent Archibald B. Walker to this province as their agent, to effect sales. He called on the defendant Clark, who agreed to purchase a quantity of the goods. Walker, (whose evidence was taken under a judge's order previous to the trial) says that he sold the goods to the defendant Clark; that in conversation with the defendant Clark about the sale he told Clark that he required security for the payment, and that Clark said he would give satisfactory security, that he would give W. B. Wallace (the other defendant). Wallace was not present at the time, but on the following day Walker met both the defendants in Wallace's office when the matter of the sale of the goods was talked over, and the arrangement was that Wallace was to become security for the payment by Clark; that he (Walker) said to them that he was selling the goods cheap and that he wanted absolute security, and that Clark and Wallace agreed to give him their obligations. He also stated that he told Wallace that he would not sell the goods to Clark without security. That Wallace then commenced to draw a note payable to his own order when Walker interposed and said that the plaintiffs advised him always to take notes on their forms, which they had printed, and he produced some of the printed forms and gave them to Wallace who struck out some parts which he considered objectionable and filled in the date, amount, and time of payment, and Clark signed them, and Wallace indorsed them and delivered them to him (Walker).

The printed forms which Walker gave to Wallace to fill up were in the following form:

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" On or before the 1st of , 188 , I promise to
" pay to THE AYR AMERICAN PLOUGH COMPANY
" (Limited), or order, at the sum of
" for value received, with interest at 7 per cent. per
" annum until due, and 10 per cent after due, till
" paid "

(Then followed a condition that the title to the goods sold should not pass from the company till the note was paid with interest, and that the company had power to take possession of the goods at any time they might deem themselves insecure.)

Before the notes were signed Wallace struck out with a pen that portion of them relating to the payment of interest, and to the power of the company to take possession of the goods if they considered themselves insecure.

At the trial the parties directly contradicted each other as to what took place when the notes were signed. The respondent swore that he only intended to become an indorser, and that he told the agent Walker that until the notes were indorsed by the company he, Wallace would not be liable. Walker, on the other hand, swore that nothing was said about indorsing, that he only asked for security and was accustomed to take joint notes in such cases and thought that he was getting such in this transaction.

In the court below the judges were equally divided, the Chief Justice and Mr. Justice Tuck, who had tried the case, being of opinion that the nonsuit should be set aside and judgment entered for the plaintiff, Palmer and King JJ., giving judgment in favour of affirming the nonsuit.

Earle Q.C. for the appellant. There was evidence to go to the jury that Wallace intended to become

liable as maker. See *Piers* v. *Hall* (1); *Bell* v. *Moffatt* (2); *Good* v. *Martin* (3); *Singer* v. *Elliott* (4).

In a New Brunswick case the court will follow the decision of the courts of that province.

Currey for the respondents.

Sir W. J. RITCHIE C.J.—I cannot see that there is any evidence whatever to be presented to the jury that Wallace intended to be a maker of these notes. He was to become surety as an indorser, and the notes would have been drawn in the usual form payable to his order but for the interposition of Mr. Walker himself, who would not have them drawn in that way but insisted on having them on the form used by the company. I do not say that the plaintiffs could not have maintained an action if they had given due notice of dishonour, but however that may be, as they have chosen to proceed without it, and as I cannot see that Wallace ever intended to be a maker, the plaintiffs' action fails and this appeal must be dismissed.

STRONG J.—I am of opinion upon authority of *Ex parte Yates* (5) and *Steele* v. *McKinlay* (6) that the respondent might have been made liable as an indorser of the notes if proper notice of dishonour had been given to him. As no such notice was, however, given he was discharged. The parol evidence was not, I think, admissible, though if taken into consideration it would have shewn that the respondent never intended to come under any other liability than that of an indorser. *Steele* v. *McKinlay* (6) is a strong authority against the admissibility of this parol evidence.

(1) 2 P. & B. 34.
(2) 4 P. & B. 121.
(3) 95 U.S.R. 90.
(4) 4 Times L.R. 524.
(5) 2 DeG. & J. 191.
(6) 5 App. Cas. 754.

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The want of a memorandum in writing sufficient to satisfy the Statute of Frauds would have been a defence available to the defendant if it had been sought to charge him as a guarantor. In the case of *Singer* v. *Elliott* (1) cited in the argument, the defendant was held liable as a guarantor upon a letter written and signed by him after he had indorsed the bill.

As the law now stands since the Dominion Bills of Exchange Act, 1890, it is clear that under section 56 the respondent would have been liable as indorser, but only as indorser. It has been frequently said as regards the English Act (Bills of Exchange Act, 1882), that it was not intended by it to enact new law but merely to declare and codify the law as it stood when the act was passed. Section 56 of the English act is identical in words with the same section of our act. This seems to me conclusive.

The appeal should be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—If the question had been whether there was evidence to go to a jury that the defendant signed as an indorser, if he had been sued as such, the answer must have been that there was abundant evidence. But the defendant was sued as maker, and I concur that there was no evidence to go to the jury in support of the issue upon the plea of *non fecit*, and that therefore this appeal must be dismissed and the nonsuit maintained.

PATTERSON J.—After hearing all that Mr. Earle has been able in his very full examination of the case to urge to the contrary, the evidence seems to me consistently to show that Wallace was to be indorser of the

(1) 4 Times L. R. 524.

notes, and I find no evidence that he was to be maker, or that he was understood by Walker, or represented himself, to be signing otherwise than as indorser. That is the view of two of the four learned judges who heard the case in the court below, and unless I misunderstand the opinions expressed by the learned Chief Justice and Mr. Justice Tuck, who took a different view, they would have agreed with the other members of the court if they had not been impressed by the idea that unless Wallace was liable on the notes as maker he was not liable at all. Under that idea they seem to have treated his defence as evidence of a dishonest contrivance from the imputation of which they shielded him by holding that, because there was proof of his intention to be surety for the purchaser of the goods, there was evidence of his being liable as joint maker of the notes. I am not able to concur in those views.

I see nothing to have prevented the plaintiffs as payees of the notes indorsing them, expressing the indorsement to be without recourse if they chose to do so though under the circumstances that would not have been essential, thus creating in Wallace the legal character of indorsee from them and indorser to them (1). I am not aware that the legal right of parties in the position of the plaintiffs to do this was ever questioned. It was not questioned in the case of *Bell* v. *Moffatt* (2) on which Mr. Earle relied so much. We find from the report of that case in 3 P. & B. that in one count the declaration charged that Fulton made his note payable to Bell or order, and that Bell indorsed the note to the defendant who indorsed it to the plaintiff. A plea that Bell the payee and Bell the plaintiff were the same person was met by a replication that Bell the plaintiff indorsed the note to the defend-

(1) See *Denton* v. *Peters*, L.R. 5 Q.B. 475. (2) 3 P. & B. 261.

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ant without recourse, and that replication was held good on demurrer as is stated by Wetmore J. at p. 267 of the report. The report relates to another replication, pleaded perhaps to meet the facts more fully, by which the plaintiff stated his title through an intermediate indorsement and not as indorsee direct from Bell. That replication was properly held bad as a departure from the declaration. Mr. Justice Wetmore referred to a number of cases, one of which, *Smith* v. *Marsack* (1) was a case of demurrer to a replication as a departure, which pleaded the same essential facts which would exist if the plaintiffs had in this case indorsed the notes without adding the words "without recourse," but relying on the fact that the defendant had indorsed for the purpose of being surety to them for the maker of the note. The replication in *Smith* v. *Marsack* (1) was held good. No question of circuity of action could arise here unless the defendant would have had recourse against the plaintiffs as prior parties to the note, but indorsing as he did as surety to the plaintiffs he had no such recourse against them. The report of *Bell* v. *Moffatt* in 4 P. & B. (2) and the case of *Piers* v. *Hall* (3), bear on the present discussion in the way in which they were used by Mr. Earle as showing that a man may write his name on the back of a note and yet be liable as maker of the note. That is a question of fact more than of law. The evidence in those cases proved the intention to be maker while here the whole evidence is that he was to be indorser.

Appeal dismissed with costs.

Solicitor for appellants: *A. C. Fairweather.*

Solicitors for respondent: *Currey & Vincent.*

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(1) 6 C.B. 486.

(2) 4 P. & B. 121.

(3) 2 P. & B. 34.