1892
Oct. 21.
*Dec. 13.

F. A. FAIRCHILD AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

FERGUSON & NOLAN (PLAINTIFFS)..RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Promissory note—form of—"We Promise to Pay" and signed by manager of co.—Descriptive words—Liability of members of co.

The manager of an incorporated co'y, in payments for goods purchased by him as such, gave a promissory note beginning "sixty days after date we promise to pay" and signed "R., manager O. L. Co." In an action against the individual members of the co'y the defence was that R. alone was liable on the note and that the words "manager," etc., were merely descriptive of his business.

Held, affirming the decision of the court below, that as the evidence established that both R. and the payees of the note intended to make the co'y liable; and as R. had authority, as manager, to make a note on which the co'y would be liable; and as the form of the note was sufficient to effect that purpose; the defence could not prevail and the holders of the note were entitled to recover.

APPEAL from a decision of the Supreme Court of the North-west Territories affirming the judgment for the defendants at the trial.

The plaintiffs, Ferguson & Nolan, are merchants, doing business at Calgary, N. W. T. The defendants are residents of Winnipeg and carry on a lumber and mill business at Otter Tail, B.C, under the name of The Otter Tail Lumber Co. This company was not incorporated but defendants had entered into articles of partnership among themselves.

The manager of the company was one of the partners, W. D. Rorison.

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*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 1 N. W. T. Rep. Part 3 p. 41.

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The action was brought on an account for goods sold to the company and also upon a note in the following form :—

Sixty days after date we promise to pay Dolan & Barr, or order, four hundred and seven 29-100 dollars, at the Imperial Bank here, value received.

W. D. RORISON,
Manager Otter Tail L. Co.

This note was endorsed by the payees, Dolan & Barr, to the plaintiffs. Rorison was not made a defendant to the action.

The defence to the action as to the note was that it was the note of Rorison only and that the words "Manager Otter Tail L. Co." were merely words of description; that to hold the company liable the note should show on its face that it was signed on behalf of the company; and that evidence of intention must be gathered from the contract itself and not otherwise.

The majority of the court below held the defendants liable on the note but not on the claim for goods sold. The defendants appealed.

Ewart Q.C. for the appellants. The words "Manager Otter Tail L. Co." are descriptive merely. *Thomas* v. *Bishop* (1); *Lennard* v. *Robinson* (2); *Leadbitter* v. *Farrow* (3); *Lindus* v. *Melrose* (4).

As to the significance of the word "we," in the note, see *Alexander* v. *Sizer* (5); *Dutton* v. *Marsh* (6); *Hagarty* v. *Squier* (7).

The rule as to notes made by an agent is laid down by different text writers in the same way, namely, that the note must state on its face that it is made for another. Byles on Bills (8); Chitty on Bills (9); Chal-

(1) 2 Str. 955.
(2) 5 E. & B. 125.
(3) 5 M. & S. 345.
(4) 2 H. & N. 293.
(5) L. R. 4 Ex. 102.
(6) L. R. 6 Q. B. 361.
(7) 42 U. C. Q. B. 165.
(8) 15 ed., pp. 40, 42 and 43.
(9) 11 ed., p. 33.

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mers on Bills and Notes (1); Daniel on Negotiable Instruments (2).

Ferguson Q.C. for the respondents cited *Trueman* v. *Loder* (3); *Young* v. *Schuler* (4); *Calder* v. *Dobell* (5); *City Bank* v. *Cheney* (6)

STRONG and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Patterson.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

GWYNNE J.—The defendants and one W. D. Rorison, carried on business in partnership together as saw-mill owners and manufacturers of logs into lumber, at a place called Otter Tail, in the North-west Territories, under the name of the Otter Tail Lumber Company. Of this firm Rorison was the managing partner, residing at Otter Tail where the mills of the partnership were and their business was carried on. The defendants resided at Winnipeg, in Manitoba, where one of them acted as secretary of the partnership firm. Upon the 21st September, 1889, a clerk of Rorison, in Rorison's name, addressed and sent to the secretary at Winnipeg, a letter in which it was communicated to the defendants that the lumber company had become and were then indebted to a firm, named Dolan & Barr, for logs delivered to the company, in the sum of $1,066.90 and that Rorison had given to persons trading under the name and firm of Carlin, Lake & Co., a promissory note for $300 to settle bills of Dolan & Barr to that amount. About the 9th October, 1889, Dolan & Barr were indebted to the plaintiffs for cer-

(1) 4 ed., p. 65.
(2) 4 ed., secs. 300-1.
(3) 11 A. & E. 589.
(4) 11 Q. B. D. 651.
(5) L. R. 6 C. P. 486.
(6) 15 U. C. Q. B. 400.

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tain goods purchased from the plaintiffs. This fact was communicated to Rorison and he suggested to the plaintiffs as a mode by which they could secure payment of the goods, that if they would get Dolan & Barr's note the lumber company would endorse it as they were indebted to Dolan & Barr, and that the plaintiffs could get the note, so endorsed, discounted by the bank. The defendants, however, instead of getting Dolan & Barr's note, drew a note in blank payable to Dolan & Barr for the purpose of its being signed by the lumber company, and got Dolan & Barr to endorse it and then sent it to Rorison for the company's signature. Rorison having signed the note returned it to the plaintiffs. The note as signed is as follows:

CALGARY, 9th October, 1889.

$407.29.

Sixty days after date we promise to pay to Dolan & Barr, or order, four hundred and seven $\frac{29}{100}$ dollars at the Imperial Bank here, value received.

W. D. RORISON.
Manager Otter Tail Lumber Co.

And the sole question is: Are the defendants who, it is not disputed, are members of the Otter Tail Lumber Company liable upon this note, or, on the contrary, is Rorison the only person liable, and is all after his name to be read only as descriptive of his person? This raises a question of the intent of the parties to the note, which is a matter of evidence, and in the view which I take many of the cases cited have little bearing upon the subject.

There can be no doubt that *primâ facie* it was quite competent for Rorison, as managing partner of the lumber company, to bind the company by a promissory note, given by him in the name of the company for goods delivered to the company in the course of the business of which he was the managing partner, nor can there be any doubt that

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evidence of all the circumstances surrounding the making of an instrument as to the intent with which, and the consideration for which, it was executed is admissible for the purpose of showing who was or were the party or parties bound by it if there be anything on the face of the instrument which creates any ambiguity in the matter. *Lindus* v. *Melrose* (1), and *Young* v. *Schuler* (2), are sufficient authorities on this point.

Now the evidence is express and unequivocal that the intent of all the parties to the note, and of the plaintiffs who were to receive it when made for full value given to their payees, was that the lumber company who had received the consideration for which the note was given were to be the parties to be bound by it. Then the words "we promise" &c. upon the face of the note indicate that more persons than one were contemplated to be makers of the note.

It was argued by the learned counsel for the appellants that the use of these words "we promise," &c., made no difference for that if, as he contended, a note so framed had been signed by one person only as maker, as he contended the note in question was, that person would be alone bound, and so if the note had been framed "I promise," &c., and had been signed by several that all would be bound, and he argued that the note should be read as if it were written and signed as follows:

> We the manager of the Otter Tail Lumber Company promise, &c.,
> W. D. RORISON.

in which case, he asked, could there be a doubt that Rorison alone would be liable? But without inquiring what should be the construction of a note so framed it is a sufficient answer to such an argument to say that it would be more consistent with the un-

(1) 2 H. & N. 293. (2) 11 Q. B. D. 651.

doubted intent of the parties to the note, and with the consideration for which it was given, and with the use of the words "we promise," etc., and more natural and more reasonable to read the note as if written and signed as follows:—

We, The Otter Tail Lumber Company, promise, &c., &c.
W. D. RORISON,
Manager.

in which case there could be no doubt that the lumber company would be the persons represented on the note as the makers, and this is the way in which, in my opinion, the note can and should be read, and so construing it the appeal should be dismissed with costs. It is unnecessary to refer to the contention of the defendants that by a clause in the articles of partnership Rorison was restricted from signing notes in the name of the company, or to put a construction upon that clause, for it is not suggested that Dolan & Barr or the plaintiffs had any notice whatever of their being any such clause in the articles of partnership.

PATTERSON J.—This is an action brought by the respondents as endorsees of a promissory note, charging the appellants as makers of the note. There was also a claim for goods sold and delivered upon which the respondents recovered. The appeal relates only to the promissory note.

The appellants all reside at Winnipeg. In April, 1889, they formed a partnership between themselves and one W. D. Rorison for carrying on a lumber business at Otter Tail, in the North-west Territories, where the appellants had timber limits and machinery. A written agreement was entered into by which, amongst other things, it was provided that Rorison was to devote his whole time to the business at Otter Tail, and by which it was also stipulated

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that he should not incur any liability, debt or obligation in the name of the co-partnership or that should bind the members thereof either jointly or severally. The business was to be conducted in the name of the Otter Tail Lumber Company.

Rorison accordingly conducted the business at Otter Tail, and occasional debts were incurred.

Money became due to persons named Dolan & Barr for saw-logs. Their account as kept by the lumber company, which is in evidence, runs from the 15th of June to the 30th of September, 1889, with items on both sides of the account, those on the credit side being, all except one, for logs. There is in evidence a letter written by the defendant Bathgate, who acted as secretary of the company at Winnipeg, to Rorison at Otter Tail, in which the writer says:

> We have a telegram this morning from Dolan & Barr *re* money due them. As you will learn by my last the Company here have no knowledge of the exact amount due them until they get your statement and see the contract.

That letter is dated the 7th of October, 1889. Two days later Rorison made the promissory note in question which is in these words:

> $407\frac{29}{100}$. CALGARY, 9th October, 1889.
>
> Sixty days after date we promise to pay to Dolan & Barr or order Four Hundred and Seven $\frac{29}{100}$, Dollars at the Imperial Bank here. Value received.
>
> W. D. RORISON,
> *Manager Otter Tail L. Co.*

Dolan & Barr at once endorsed the note to the plaintiffs. Indeed, as we learn from the evidence of the plaintiff Ferguson, the note was made for the purpose of its being used in that way. The plaintiffs wanted money from Dolan & Barr who had to get it from the lumber company. We have seen that they were telegraphing for it and, as Ferguson says, it was slow in coming. Rorison suggested to Ferguson that

he should get a note from Dolan & Barr and the company would endorse it. That suggestion was acted on but the note was made to Dolan & Barr and indorsed by them, which put the transaction in a more appropriate shape.

The question is whether the defendants are properly held liable on the note.

There is no suggestion that Dolan & Barr or the plaintiffs knew of any restrictions on Rorison's authority, as between himself and his partners, to do any act in the conduct of the business which a partner may ordinarily do.

I say this without intending to imply that by giving the note Rorison violated his agreement not to incur any liability, debt or obligation in the name of the copartnership. There is no reason to suppose that he was in any way to blame for the incurring of the debt to Dolan & Barr. He merely gave a note at sixty days for an overdue debt, and I form no opinion on the question between him and his partners.

At the trial the appellants were held liable on the note and the Supreme Court of the North-west Territories affirmed that decision, one of the learned judges dissenting and holding that Rorison alone was liable.

The appellants urge that, by reason of the form in which the note is made, Rorison is individually liable upon it, and that neither the plural pronoun "we" nor his designation "Manager Otter Tail L. Co." would avail to save him. They support their contention by decisions of weight which convinced the dissenting judge in the court below, while the majority of the court, relying on other cases as precedents, and on the principle which they deduced from all the cases, held a different opinion.

I do not propose to devote much discussion to questions which might arise if Rorison alone were sued as

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maker of the note. We have to do with the liability of his partners and only indirectly with his individual liability. If it were conceded, for the purpose of the argument, that Rorison could properly be held individually liable as sole maker of the note, which I am not prepared to admit except for the purpose of the argument, it would not follow that his partners are not also liable.

There can be no doubt that, as a matter of fact, Rorison made the note, and was understood by the plaintiffs as well as by Dolan & Barr to make it, on behalf of his company.

Under the well settled doctrines that apply to contracts in general the principal may be liable upon a contract made by the agent in his own name and on which the agent is himself also liable.

The rule applies not only to the case of principals whose name or whose existence is undisclosed at the time of the making of the contract, though it was once supposed to be confined to cases of that class, but it equally applies when the principal is known. That was decided in *Calder* v. *Dobell* (1), by the Court of Common Pleas, whose judgment was affirmed in the Exchequer Chamber in 1871.

It had been decided thirty years earlier that, contrary to an idea that had previously prevailed, the rule applied to written contracts and not to oral contracts only, so that a dormant partner whose name did not appear in the firm was held liable on a written contract made in the names of and signed by the ostensible partners. *Beckham* v. *Drake* (2), in which that question was settled by the Court of Exchequer, is a singular case in one respect, viz., that the court differed, as to the liability of the dormant partner, from a decision of the Court of Common Pleas pronounced

(1) L.R. 6 C.P. 486. (2) 9 M. & W. 79.

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three years earlier upon the same contract and between the same parties, in *Beckham* v. *Knight and Drake* (1).

The rule was, however, supposed not to apply to negotiable instruments. Parke B. said in *Beckham* v. *Drake* (2):

> The case of bills of exchange is an exception which stands upon the law merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument, by their name or firm, be made liable in an action upon it.

And Lord Abinger C.B. used language which, though in terms directed to bills of exchange only, would seem to apply to promissory notes which are made negotiable by the statute of Anne. Referring to the Common Pleas decision as being placed on grounds contrary to the doctrines he had been just enunciating, he said (3):

> The only cases cited by the judges who follow the Lord Chief Justice are cases of bills of exchange which are quite different in principle from those which ought to govern this case, and in which, by the law merchant, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it and with no other party whatever.

The reason thus given for the exception of bills of exchange from the general rule does not seem to be accepted in more modern cases.

In *Alexander* v. *Sizer* (4) Kelly C.B. points out the distinction between bills of exchange and promissory notes in the particular in discussion. Speaking of bills he says:

> The acceptor, though he may purport to accept in some manner limiting his personal liability, becomes liable if he does accept. He cannot vary or limit his liability on the contract; and by his acceptance of the bill, which is addressed to him, it becomes his contract, and words of mere description or qualification are not enough, according to the usage of merchants, to exonerate him. If express words of

(1) 4 Bing. N.C. 243.
(2) 9 M. & W. 79, 96.
(3) P. 92.
(4) L.R. 4 Ex. 102.

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exclusion were to be used the result might be different, but then the acceptance would, in fact, be no acceptance at all. Bills of exchange are all drawn on the intended acceptor in a personal character, and if he accept them he must be held to have done so in that character, and will be held liable no matter what words of mere description may be added to his name.

In reference to promissory notes a well known commentator says (1):

These instruments are, by the statutes 3 & 4 Anne c. 9, and 7 Anne c. 25, made capable (if payable to order or bearer) of assignment, and placed in all respects upon the same footing with inland bills of exchange, so that every point of law which applies to the one may be taken generally as applicable to the other, with only this difference, that as a note is originally made between but two parties, viz., the maker and payee, and there is no third party or drawee, as in the case of a bill, so all those legal incidents of a bill which regard the position of the drawer and the nature and effect of an acceptance are, of course, foreign to a note.

In Pollock on Contracts (2) the author, discussing the technical rule as to a deed executed by an agent in his own name, which ordinarily binds the agent only, remarks that

A similar rule has been supposed to exist as to negotiable instruments; but modern decisions seem to show that when an agent is in a position to accept a bill so as to bind his principal, the principal is liable though the agent signs, not in the principal's name, but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand.

In *Lindus* v. *Bradwell* (3) a bill had been drawn on William Bradwell, and it was accepted by his wife in her own name, "Mary Bradwell." The husband was held liable on the bill on proof of the authority of his wife to act as his agent.

In *Edmunds* v. *Bushell and Jones* (4) the question was the liability of Jones on a bill drawn on "Bushell & Co." and accepted by Bushell in the name of "Bushell & Co." Cockburn C.J. said:

(1) 2 Stephen's Com. 171.
(2) P. 99.
(3) 5 C.B. 583.
(4) L.R. 1 Q.B. 97.

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The defendant (meaning Jones) carried on business both at Luten and in London. In London the business was carried on in the name of Bushell & Co., Jones at the same time employing Bushell as manager. Bushell was, therefore, the agent of the defendant Jones, and Jones was the principal, but he held out Bushell as the principal and owner of the business. That being so, the case falls within the well established principle that if a person employs another as an agent in a character which involves a particular authority, he cannot, by a secret reservation, divest him of that authority. It is clear, therefore, that Bushell must be taken to have had authority to do whatever was necessary and incidental to carrying on the business; and to draw and accept bills of exchange is incidental to it, and Bushell cannot be divested of the apparent authority as against third persons by a secret reservation. I think Jones was properly held liable on the bill.

In *Penkivil* v. *Connell* (1), decided in 1850, there was a promissory note in these words:

THE ROYAL BANK, LONDON.

£200. 19th FEBRUARY, 1845.

We, the directors of the Royal Bank of Australia, for ourselves and the other shareholders of this Company, jointly and severally promise to pay G. H. Wray or bearer, on the 19th of February, 1850, at the Union Bank of London, the sum of £200 for value received, on account of the Company.

T. W. SUTHERLAND,
JOHN CONNELL,
M. BOYD,
A. DUFF.
} Directors.

Connell was sued alone upon the note, and he moved to stay proceedings until the plaintiff should have made proof of his debt before the master appointed to wind up the affairs of the Royal Bank of Australia which was an unincorporated company. His motion was refused on the ground, as I understand the decision, that the note was not the note of the company. Pollock C.B. said:

The defendant is sued individually in respect of a joint and several promissory note of which he is the maker. * * * It would be a fraud upon some one if such a note were allowed to be proved against the funds of the company. The note, as sued upon, has no connection whatever with the company.

(1) 5 Ex. 381.

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Maclae v. *Sutherland* (1) in 1854. was an action on precisely similar notes against six shareholders of the company, one of whom was a director who had signed the notes, another was a director when, by his authority, the notes were issued, but the other four were only shareholders. The defendants were held liable. Lord Campbell C.J. said :

> The decision of the Court of Exchequer in *Penkivil* v. *Connell* (2) we entirely concur in. Each director who signs the notes is liable to be sued separately upon them ; but this does not in any degree affect the joint liability of the shareholders.

The cases which chiefly influenced the dissenting judge in the court below were the English case of *Dutton* v. *Marsh* (3) and the Ontario case of *Hagarty* v. *Squier* (4). The latter was a very plain case. Squier as inspector of a fire insurance company had adjusted the amount of a loss with Hagarty, and he drew upon his company at thirty days, in favour of Hagarty, for the amount agreed upon, stating in the draft that it was the amount of the claim under the policy. He signed the draft "A. Squier, Inspector." On the face of that transaction the company could have been party to the bill only as acceptors. Squier personally was the drawer.

Dutton v. *Marsh* (3) was a case on a promissory note very like the notes in the Royal Bank of Australia cases of *Pinkivil* v. *Connell* (2) and *Maclae* v. *Sutherland* (1), except that the makers of the note were directors of an incorporated company. The note was as follows :—

> ISLE OF MAN, 7th January, 1864.
>
> We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay John Dutton, Esq., the sum of £1,600 sterling, with interest at the rate of 6 per cent per annum until paid, for value received.

(1) 3 E. & B. 1.
(2) 5 Ex. 381.
(3) L. R. 6 Q B. 361.
(4) 42 U.C.Q.B. 165.

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It was signed by the four defendants, the word chairman being written after the name of Richard J. Marsh, and at the left hand side of the paper it had the seal of the company with the words "witnessed by Leslie Lochart."

The decision was that the defendants were personally liable on the note, just as in the Royal Bank of Australia cases the directors who signed the notes were personally liable, and it might perhaps be an authority for holding Rorison personally liable in this case, though I am not prepared to say that in that respect the cases are on all fours; but as to the actual question, viz., whether the partners of Rorison are not liable, as were the shareholders in the Royal Bank of Australia, nothing is decided by *Dutton* v. *Marsh* (1).

The case of *Alexander* v. *Sizer* (2), on which the judgment of the majority in the court below was to a great extent founded, is much more to the purpose as a precedent, the decision being that the person who signed the note was not liable upon it.

The note was in this form:

£1,500.

On demand I promise to pay Messrs. Alexander & Co., or order, the sum of £1,500 with legal interest thereon until paid value received the 16th of August, 1865.

For Mistley, Thorpe and Walton Railway Company.

JOHN SIZER,
Secretary.

Witness,—Charles Taylor.

Lindus v. *Melrose* (3), is also a strong authority for the view acted on by the court below. If that case is well decided the present one I should say is so *a fortiori*. The note there was:

Three months after date we jointly promise to pay Mr. Frederick Shaw, or order $600 for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited.

(1) 3 E. & B. 1.
(2) L.R. 4 Ex. 102.
(3) 2 H. & N. 293.

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It was signed James Melrose, G. N. Wood, John Harris, directors, and had at the left hand side and under the body of the note the words :

Payable at the London Joint Stock Bank Company, Princes St. Mansion House. EDWIN GUESS, Secretary.

Then there were the words " we jointly promise," with three signatures of gentlemen with the one word " directors " added. Yet those gentlemen were held not to have bound themselves personally, the other things contained in the paper being taken to show that they acted only for their company.

We may note that in *Lindus* v. *Melrose* (1) the word " directors " was not treated as merely descriptive, nor was the word " secretary " in *Alexander* v. *Sizer* (2), the court holding that the use of those words showed that the parties signed as directors and as secretary.

Here we couple the words " we promise," which are not appropriate to a promise by one man, with the designation " manager of Otter Tail L. Co.," and we go no further than the authorities warrant when we read the promise, according to what it was in fact intended to be, as the promise of the company, and the signatures as being written as manager.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants : *Davis, Costigan & Bangs.*

Solicitors for respondents: *Lougheed, McCarthy & McCaul.*

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(1) 2 H. & N. 293.

(2) L. R. 4 Ex. 102.