# REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NOVA SCOTIA. VOL. III.-PART I

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Reports of Cases Argued and Determined in the Supreme Court of Nova Scotia. Vol. III.-Part I
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# REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NOVA SCOTIA. VOL. III.-PART I

Trieste

# JUDGES OF THE SUPREME COURT

OF THE

## PROVINCE OF NOVA SCOTIA,

DURING THE PERIOD INCLUDED IN THE ENSUING REPORTS.

CHIEF-JUSTICE.

THE HONORABLE SIR BRENTON HALLIBURTON, K. C. B.

ASSISTANT JUDGES.

THE HONORABLE WILLIAM BLOWERS BLISS.

THE HONORABLE EDMUND MURRAY DODD.

THE HONORABLE WILLIAM FREDERICK DESBARRES.

THE HONORABLE LEWIS MORRIS WILKINS.

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# CROWN OFFICERS.

ATTORNEY GENERAL.

HONORABLE JAMES W. JOHNSTON.

SOLICITOR GENERAL.

HONORABLE W. A. HENRY.

PROTHONOTARY.

J. W. NUTTING, ESQ.

# LIST OF CASES.

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# PROVINCE OF NOVA SCOTIA.

TRINITY TERM, 1859.

[There being no official Reporter this Term, the arguments of Counsel, in the following case is necessarily omitted.]

## MORTON ET AL. *v.* CAMPBELL ET AL.

Where three defendants signed a promissory note upon the back, and the remaining defendant upon the face, held that they cannot be made jointly liable with him as makers. WILKINS, J. dissentiente.

BLISS, J. This was an action upon a promissory note by the payees. The note is as follows:

£717. Three months after date I promise to pay *Sylvanus Morton, Thomas R. Patillo, Francis W. Collins, John Mitchell, Thomas Rees,* directors of the Liverpool Insurance Association, or order, seven hundred and seventeen pounds, value received.

*Liverpool, Jan.* 10*th*, 1854.

(Signed) ARCHIBALD J. CAMPBELL.

(Indorsed) COLIN CAMPBELL.
M. MCLEARN.
JOHN CAMPBELL.

The four defendants, parties to this note, were all sued as makers of the note.

*Archibald J. Campbell* suffered a judgment by default. The other three pleaded, severally denying that they had made the note. The case against them was tried before WILKINS, J. at Liverpool, in May last, when a non-suit was ordered by consent, and a rule was granted to set the same aside, which came on for argument before the Court during the last Trinity Term.

I am of opinion that this rule must be discharged. I am unable to distinguish the present case from *Grinnell* v. *Herbert*, 5 Ad. & Ellis, 456. There the note was signed by *Herbert Herbert*, payable to *William Grinnell*

or order, and indorsed by the defendant, *Edward Herbert*,—just as here the note was signed by *Archibald J. Campbell*, payable to the plaintiffs or order, and indorsed by the other defendants. In the former case, as in this, the payee had not endorsed the note, but the party who indorsed was, as here, a stranger to the note, and in that case, as in this, was sued as the maker of the note. That case, therefore, is, in every respect completely identical with this; and the Court of Queen's Bench, pointing out the distinction between a bill and a note, held that, in the latter case, such an indorser could not be sued as a maker. The Courts in the United States appear to have taken a different view; the cases, however, cited to us from them were previous to the decision of *Grinnell* vs. *Herbert*. Whether this would induce them to reconsider their judgment, I cannot say; but we, at all events, are bound by the authorities of the Courts of our own country, and their decisions must govern ours. Independently, however, of this authority so binding upon us, I should never have had, I confess, great doubts how far these indorsers could be considered as makers. It is said that they ought to be so held, inasmuch as they cannot be liable as indorsers, for want of the previous indorsement of the payee, and that as they obviously intended to make themselves liable in some way, this is the only one by which that can be effected. Whether they can or cannot be held liable as indorsers, or would be estopped from contesting this, I do not think it necessary to inquire,—for admitting that they could not be sued as indorsers, I cannot think that a sufficient reason for treating them as makers of the note. The maker of a note is one who signs it—that is, who signs on the face of it. An indorser, as the word denotes, is one who puts his name on the back of the note. The signature in the two situations is obviously for different purposes, and the indorsement has thus acquired a well known legal meaning and effect, altogether distinct from the signing. To transfer, then, the language of promise from the body of the note, where it is applicable to the signer of it, to the indorser, would be a confusion of terms, and, what is of still greater consequence, it would impose on the indorser a contract of a very different character—one of a more extensive obligation than that which the law affixes to his indorsement, and which he must be supposed to have intended by it.

But besides this intention to *indorse* in its legal technical meaning, and not to *make* the note, which is to be inferred from the indorsement itself, appears to me to be pretty clearly shewn by the evidence that such only was the intention here, and such it was understood by the parties.

The note was given for the cargo of a vessel which was sold at auction by the Association of which the plaintiffs were directors. It was knocked down to *Archibald J. Campbell*, though it would seem that the other defendants were in some way interested in the purchase,—and so far, perhaps to some extent, might be considered as primary liable for the cargo purchased. But

when the note, then drawn and indorsed, was brought to the broker of the Association—who, as auctioneer, had sold the property—he says he first charged the note to *Archibald Campbell's* account, and only afterwards transferred it to the names of all the defendants, at the request of *Archibald Campbell*—so that it was then treated, in the first instance, as if made by *Archibald Campbell* only. It also appears that the terms of the sale were a note, *with approved indorsers*,—and *Patillo*, one of the plaintiffs, and a director, states that they held the note at their office, their security being *drawer* and *indorsers*.

It thus seems clear that the three defendants were looked upon—as indeed they were—as indorsers alone; indorsers in the proper, legal meaning of the word. As such, their liability would only arise upon failure of payment by the party who made the note, and on due notice of it to themselves. As makers, they would be liable in the first instance; to hold them, therefore, to be such would be as much opposed, I think, to the true intention of the parties themselves, both indorsers and payee, as it would be to the legal meaning and effect of such an instrument.

It would create great confusion, and might well cause alarm, too, in every mercantile community, I think, if a contrary decision should be held on this subject.

DODD, J. The sole question in this case is, whether three of the defendants, who signed their names on the back of the note, upon which this action is brought, can be considered and made liable as joint and several makers of the note with the other defendant, *Archibald J. Campbell*, who signed it in the usual manner as a maker, five or six days before they did. The note, on its face, bears strong evidence of the fact, that when prepared by *Roberts*, the broker of the Company, and signed by *Campbell*, that it was not intended to be a joint and several note, the language of the note being "I promise to pay," &c., thereby clearly showing in what light *Roberts* viewed it, and how he expected it to operate. The conditions of sale were a note with approved bill—meaning, I suppose, a note with approved security. The note was first entered on the books of the Company by the broker in the private account of *Campbell*, but at his request subsequently transferred it to an account in the names of all the defendants. The broker, then, at the inception of the transaction, treated and considered the defendants as standing in different situations towards the plaintiffs, and so the plaintiffs considered them, for *Patillo*, one of the plaintiffs, in referring to the transaction, in his evidence says: "We held note at our office, our security being drawer and indorsers." After the note arrived at maturity, it was attempted to be enforced against *Campbell* by an attachment levied on his vessel, but, for reasons which are unnecessary to elucidate this case, the attachment was set aside, and this action subsequently brought. It is evident, from

these facts, that the parties most interested in the transaction considered *Campbell* alone the drawer, and primarily liable upon the note, and the other defendants from having indorsed it, their security for its payment. If this was their conception of the case, it would be unjust to alter the relative situation of the defendants.

In the construction of all contracts, the first and principal object is so to construe them, if their language will permit it, that the intention of the parties to them shall be carried out. In the present case I would apply this general principle, unless estopped by some decision to be found in the books conflicting with it. I have, however, not found any case that will give any other interpretation to the note than that put upon it by the parties themselves.

The cases in the Courts of the United States referred to in the arguments, showing that in that country, where notes have been indorsed as in the present case, the parties so indorsing them have been held the makers, and actions have been maintained against them in that character, are conflicting with other decisions in the same Courts, so that they cannot be relied upon as authorities in this case for the plaintiffs, and more particularly so when we refer to *Grinnell* vs. *Herbert*, 5 Ad. & Ellis, 436, which is an English authority in point against them. This case carries out the general principle as laid down by the text writers on the subject. In *Chitty* on bills, page 9, in referring to the signature of the drawer, says the bill would evidently be imperfect if the drawer's name did not appear on the face of the instrument. In *Taylor* v. *Dobbins*, 1 Strange, 399, it is said a formal signature at the foot is not essential,—if inserted in the body it will suffice.

If the note in question had been prepared as a joint and several note, and all the parties to it had signed their names on the back, either from the want of space on the face, or from any other sufficient cause, I am not prepared to say they would not be held liable as makers of the note; but, in that case, the intrinsic evidence of their intention to make themselves drawers would be complete, whereas the evidence is equally strong in this case to show that no such intention existed. In *Grinnell* v. *Herbert*, the note was payable to the plaintiff or order, but not indorsed by him, but indorsed by the defendant, who was in no other respect a party to it, and the plaintiff attempted to make him liable as maker. I do not see any important distinction between that case and the one under consideration. Here we have *Campbell* signing the note as maker, payable to the plaintiffs, and five or six days afterwards the other defendants put their names on the back of it as indorsers, and the plaintiffs, by the present action, attempt to make them liable as drawers. The cases are identical, and the law, as laid down by the Court of King's Bench in the one case must prevail in the other—and there the Court decided the defendant could not be sued as maker, so here the indorsers of the note are not makers, and cannot be made liable in

that character. The plaintiffs' therefore, having mistaken their action, the rule for setting aside the non-suit must in my opinion be discharged.

DesBarres, J. The defendants are sued as the makers of a promissory note signed by *Archibald J. Campbell* at the foot, and indorsed by the other three defendants in blank. It is made payable to the plaintiffs or order, for £717, three months after date,—and the question is whether the three defendants who have so indorsed the note are liable with the other defendant as joint makers. It is contended by the defendants counsel that this indorsement renders the indorsers liable as sureties for *Archibald J. Campbell*, and, in support of this position our attention has been directed to several American cases, among which that of *Moies* v. *Bird*, 11 Mass. R. 436, is chiefly relied upon. This was an action on a promissory note signed by *Benjamin Bird*, payable to *Moies* the plaintiff or order, for a sum of money due him for the purchase of land, and it was indorsed by *Abraham Bird*, the defendant, in blank, as the note in the present case is. It was there held that the defendant had made himself responsible for *Benjamin Bird* the principal, and that he was rightly sued as maker of the note. There was evidence in that case to show that the indorsement or security of the defendant was one of the grounds of the bargains between the plaintiff and *Benjamin Bird*, and that the plaintiff had parted with his land without taking a mortgage, on the faith of receiving a note so secured; and it appears that the learned Judge (Parker, C. J.) who delivered the opinion of the Court, regarded the signature of the defendant, under these circumstances, as furnishing evidence that there had been a previous agreement on his part to aid his brother in the purchase by lending his name. The decision of the Court, therefore, would seem to have been in a great measure, if not altogether, founded on the evidence which the transaction furnished, of a previous undertaking and arrangement between the parties, that the defendant should sign the note as surety; and, if there was such evidence, the fact of his having signed his name on the back, instead of the bottom of the note, would be immaterial, and ought not to change the character of the signature from that of a maker to that of an indorser. It must, however, be admitted that some of the American cases certainly do lay down the principle contended for on the part of the defendant—that an indorsement in blank by a party who is not the payee, and when there is no prior indorser, is, in the absence of any controlling circumstances, equivalent to a signature as maker; yet there is nothing to be collected from these cases that will warrant the conclusion, that when a party, by his signature or indorsement, intends to bind himself as an indorser or guarantor, he can be chargeable as maker contrary to his intention. That would be inconsistent with a principle which seems to be admitted by, and is said by a learned jurist to pervade, all the American authorities. In *Story* on promissory notes, section 479, it is laid down, "that the interpretation ought to be just such