[HIGH COURT OF AUSTRALIA.]

THE COBAR CORPORATION LIMITED AND RUBIND HENRIK CORBETT (TRUSTEE) . . . . . } APPELLANTS;

DEFENDANTS,

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } RESPONDENT.

INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *August* 10, 11, 12, 13, 23.

Griffith C.J., O'Connor and Isaacs JJ.

Stamp duty, action for recovery of—Suit in Equity by Attorney-General—Fine for delay in stamping—Penalty for not stamping, how recoverable—"Action of debt in the Supreme Court"—Assessment by Commissioner—Effect of failure to appeal—Estoppel—Stamp Duties Act 1898 (*N.S.W.*), (*No.* 27 *of* 1898), *secs.* 4, 14, 69—*Stamp Duties* (*Amendment*) *Act* 1904 (*N.S.W.*), (*No.* 24 *of* 1904), *sec.* 17, *Schedule.*

By sec. 6 of the *Stamp Duties Act* 1898 stamp duty is chargeable in respect of certain instruments mentioned in the Act and Schedules, which include agreements, at rates specified. The duty is in some cases a fixed sum in respect of each instrument and in others *ad valorem.* The consequence of failure to stamp in accordance with the Act is in some instances that the instrument is void, in others that the person executing or the person accepting it is liable to a penalty; and no unstamped document is admissible in evidence, except in criminal proceedings, or registrable. There is also (sec. 14) a fine of 20 per cent. payable for delay in payment of stamp duty. In some instances, but not with respect to agreements, there are express provisions having the effect of making the amount of duty a debt due to the Crown from the person mentioned, and sec. 69 provides that any penalty incurred under the Act may be recovered either before justices or by "action of debt in the

Supreme Court in the name of the Attorney-General." The *Stamp Duties (Amendment) Act* 1904, sec. 17, provides that certain instruments mentioned in the Schedule, including certain agreements, shall be stamped within a certain time after execution, and if not so stamped the persons mentioned in the Schedule respectively shall be liable to a "fine not exceeding £25."

Held, that no suit or action would lie for the recovery of the stamp duty chargeable on an agreement or for the fine of 20 per cent. for delay in stamping.

In an information by the Attorney-General in the form of a suit in equity for the recovery of *ad valorem* stamp duty on an agreement alleged to be within sec. 17 of the Act of 1904, together with a fine of 20 per cent. under sec. 14 of the Act of 1898 for late stamping, and a sum of £25 claimed as a "penalty" for failure to stamp within the time prescribed, under sec. 17 of the Act of 1904—

Held, that the suit would not lie for recovery of the stamp duty or for the fine of of 20 per cent., and that even if the £25 chargeable under sec. 17 of the Act of 1904 was a penalty within the meaning of sec. 69 of the Act of 1898, which was doubtful, a suit in equity was not an "action of debt in the Supreme Court" within the meaning of that section, and the suit must therefore fail as to that also.

Sec. 17 of the Act of 1898 provides that the Commissioner of Stamp Duties may, if required by any person, assess the duty payable upon any instrument, and that any instrument upon which the duty has been so assessed shall not be stamped otherwise than in accordance with such assessment. Sec. 18 provides for an appeal from the assessment of the Commissioner to the Supreme Court by case stated.

Held, that requiring the Commissioner to assess the stamp duty on a document did not amount to a submission or undertaking to pay the amount assessed upon which an action or suit for its recovery could be supported.

Quære, how far, if at all, failure to appeal from the assessment in the manner provided by the Act would estop the person who required the assessment from afterwards setting up in a proceeding for the recovery of the amount assessed that the assessment was incorrect.

Decision of *A. H. Simpson*, C.J. in Equity (*Attorney-General* v. *Cobar Corporation*, 26 N.S.W. W.N., 49), reversed.

APPEAL from a decision of *A. H. Simpson* C.J. in Equity of the Supreme Court of New South Wales.

This was an information against the appellants in the form of a suit in equity by the Attorney-General for New South Wales. The claim set out that by an agreement of 30th March 1906 under seal one Anderson agreed to sell to the appellant

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Corbett as trustee for the appellant Corporation, certain mineral lease applications, together with certain options over certain properties, and the benefit of certain negotiations then pending, the consideration for the sale being a number of shares in the Corporation. The appellant Corporation had tendered the agreement to the Commissioner for Stamp Duties of New South Wales to be stamped, and paid £2 10s. as duty upon it, whereas the Commissioner assessed the duty at £750, which was calculated *ad valorem* on £150,000, the estimated value of the consideration. The appellant Corporation did not appeal from that assessment, or proceed further with the stamping of the document. A formal claim was made by the Commissioner for the amount assessed, but the Corporation refused to pay the amount on the ground that they were only liable to pay £1, which was less than the amount already paid. The Attorney-General then brought this suit against the appellants, claiming £747 10s. as the unpaid balance of stamp duty, and £149 10s. as fine by virtue of sec. 14 of the *Stamp Duties Act* 1898, and £25 by way of penalty under sec. 17 of the *Stamp Duties (Amendment) Act* 1904. The appellants in their defence set up that the proper amount of duty was £1, and that therefore the Commissioner had been overpaid, and submitted to the Court the question whether the Commissioner had duly assessed the amount of duty payable. At the hearing of the suit the appellants contended that the correct amount of duty was £1, and that even if the Commissioner was right no action would lie to recover the amount of stamp duty. The respondent contended that the appellants, not having appealed from the assessment of the Commissioner, could not now question it. *A. H. Simpson* C.J. in Equity, before whom the suit was heard, held (1) that the owner of the instrument was liable under the Act in an action to recover the duty, (2) that the instrument was not liable to *ad valorem* duty but to a fixed sum of £1 as a deed, but (3) that the appellants were bound by the assessment of the Commissioner, and therefore that the Attorney-General was entitled to succeed. He therefore found for the informant for the amount of duty claimed and £25 penalty: *Attorney-General* v. *Cobar Corporation Limited* (1).

(1) 26 N.S.W. W.N., 49.

From that decision the present appeal was brought.

Dr. *Cullen* K.C. and *Lingen* (*Mocatta* with them), for the appellants. There is no right of action under the Acts of 1898 and 1904 for stamp duty on agreements. The Acts create a new liability, and no other means of enforcement than those prescribed are open. The tax is on the instrument, not upon the transaction. Different sanctions to secure payment of the tax are provided in different cases; in some the amount of duty is made a debt due to the Crown, in others penalties and disabilities are imposed for non-payment. Sec. 14 imposes a fine of 20 per cent. for delay in stamping. An agreement need not be embodied in an instrument. If it is, then if it is not stamped the holder or person desiring to use it is deprived of certain advantages that he would derive from the stamped document. If he desires to make use of the document he must pay the duty, and the fine for late stamping if he is out of time. He may also be liable to a penalty in addition to the fine. A right of action must be created by clear words, indicating the person liable to be sued. Whenever a particular person is intended to be made subject to a liability the Act expressly says so. A right of action for expenses of valuation is expressly given to the Commissioner against a person indicated in sec. 18 of the Principal Act. There is no precedent in England for an action to recover stamp duty, and the scheme of the English Acts is the same as our own. [They referred to *Stamp Act* (Eng.) 1891, (54 & 55 Vict. c. 39), secs. 15, 59, 115, 116, 118; *Revenue Act* (Eng.), (3 Edw. VII. c. 46), sec. 5; 58 Vict. c. 16, sec. 12: *Finance Act* (Eng.) 1899, (62 & 63 Vict. c. 19), secs. 4, (3), 8, 14; *Alpe, Law of Stamp Duties*, p. 225; *Encyclopædia of Laws of England*, vol. II., p. 696]. In *Inland Revenue Commissioners* v. *Maple & Co. (Paris) Ltd.* (1), as reported in 24 T.L.R. 140, and 97 L.T. 814, Lord *Macnaghten* said, in effect, that the only result of not stamping was that the document was of no value to the holder. It was not suggested that an action lay for the duty. So here the legislature relies on the indirect pressure of fines, penalties and disabilities to secure payment of the duty. [They referred to *Stamp Duties Act* 1898, secs. 4, 5,

(1) (1908) A.C., 22.

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14-16, 18, 23, 27-33, 49-56, 66; *Stamp Duties (Amendment) Act* 1904, secs. 5, 8, 13, 14 (7), 17, 21, 22, 26, and Schedule II.] If there is no liability for the stamp duty there is none for the fine. As to the £25 claimed as a penalty under sec. 17 (*c*) of the Act of 1904, it is very doubtful whether that was intended to be a fine or a penalty, though it is called a fine in the section. But if it is a penalty it cannot be recovered in a suit in equity. Sec. 69 of the Act of 1898 provides the procedure, and must be followed strictly. This is not an "action of debt in the Supreme Court" within the meaning of that section.

[ISAACS J. referred to *Pasmore* v. *Oswaldtwistle Urban District Council* (1).]

The case of *Attorney-General* v. *Anon* (2), on which the Crown relied, was a case of duty on the manufacture of certain spirits, and the only question was when the duty attached under 24 Geo. III. c. 73, an *Excise Act*. It was held that the liability arose as soon as the spirits were distilled. No point was taken as to whether an action lay for the duty: *United States* v. *Lyman* (3), and *Meredith* v. *United States* (4), were cases relating to customs duties chargeable on importation. It was held that the importer having got the benefit of the goods was liable to pay the charges on them.

[ISAACS J.—They may have proceeded upon the common law rule that, where an Act provides that a person shall be liable to pay a certain sum, it may be recovered in an action.]

Even if an action lies, the appellants should succeed because the proper amount of duty was paid. The subject matter of the agreement was the interest in certain mineral lease applications under the *Mining Act* 1874, 37 Vict. No. 13, and certain options over properties. The applications were not mineral claims within the meaning of sec. 14 or Schedule II. of the Act of 1904. They conferred no legal or equitable interest in the properties. There was a chance of them being granted, and no one else could apply while those applications were pending: see 37 Vict. No. 13, sec. 47. There was a mere expectancy. The fact that the agreement was enforceable in equity if the application should be

(1) (1898) A.C., 387.
(2) 2 Anst., 558.
(3) 1 Mason, 482.
(4) 13 Pet., 486.

granted, does not bring them within the words of the Act. [They referred to *Commissioners of Inland Revenue* v. *G. Angus & Co.* (1); *Encyclopædia of Laws of England*, vol. II., p. 701.]

[GRIFFITH C.J. referred to *Stamp Act* (Eng.) 1891, (54 & 55 Vict. c. 39), sec. 59; *Customs and Inland Revenue Act* (Eng.) 1889, (52 Vict. c. 7), sec. 18.

ISAACS J. referred to *Collyer* v. *Isaacs* (2).]

If the correct amount was tendered the appellants were within time, and both fine and penalty must go.

The appellants are not bound by the Commissioner's assessment. It may be that, not having appealed, they would be bound, if they desired to stamp the document, to pay the amount assessed. But there is no estoppel against questioning the assessment in this proceeding. The appellants were not bound to stamp the document, and bringing it up for assessment was not a submission to pay the amount assessed. The decision of the Privy Council in *Taxation Commissioners* v. *Mooney* (3), was based on the fact that there was a duty on the defendant to send in a return, and under the Act then in question certain consequences followed upon failure to send in a return.

[They referred to *The Belfort* (4); *Maple & Co. (Paris) Ltd.* v. *Inland Revenue Commissioners* (5).]

Langer Owen K.C. and *Bethune*, for the respondent. The instrument is an agreement to sell, exchange or transfer a mineral claim or lease within secs. 14, 17 and Schedule II. of the amending Act of 1904, and is therefore liable to *ad valorem* stamp duty. The appellants so treated it and tendered an amount of stamp duty calculated in proportion to the alleged value of the consideration. [They referred to *Mining Act* (N.S.W.) 1874, (37 Vict. No. 4), secs. 2, 15, 33, 38, 39, 56, 59, 61, 63; *Mining Act Amendment* 1896 (N.S.W.), (No. 7 of 1896), sec. 3]. The appellants having brought the document to the Commissioner for assessment, and not having appealed in the manner prescribed, are bound by the Commissioner's assessment: *Knight* v. *Municipal District*

(1) 23 Q.B.D., 579.
(2) 19 Ch. D., 342.
(3) (1907) A.C., 342, at p. 350.
(4) 9 P.D., 215.
(5) (1906) 2 K.B., 834, at p. 843.

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of Rockdale (1); *Borough of Glebe* v. *Lukey* (2). The Commissioner having acted within his jurisdiction, it is immaterial whether his decision was right in law or not: *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (3).

[GRIFFITH C.J.—The Court will not decide these points unless it is necessary. If no suit will lie for the duty and fine, surely you cannot maintain this suit as an action for the recovery of a penalty not exceeding £25 under sec 17 of the Act of 1904, assuming that it is a "penalty" within the meaning of sec. 69 of the Act of 1898. The suit might, perhaps, be made such an action by amendment, but in cases of penal informations the Court never grants an amendment so as to raise what is really a different case altogether].

It is important for the Crown to have a decision on the question whether these instruments are liable to *ad valorem* stamp duty if there is any material before the Court upon which it can entertain the question. This is in fact, so far as the £25 is concerned, an action of debt by the Attorney-General. He may bring his action in any branch of the Court. Information for debt is the Crown action of debt. [They referred to *Robertson, Civil Proceedings by and against the Crown*, p. 172.]

[GRIFFITH C.J.—The question whether a penalty could be recovered in an equity suit came before the House of Lords in *London (Corporation of)* v. *Attorney-General* (4). They avoided deciding the question, but expressed grave doubt about it.]

The appellants were liable for the amount of duty claimed and may be sued for it. Throughout the Stamp Duties Acts there is a clear indication of an intention that stamp duty *shall* be payable in respect of *all* instruments specified, either on execution or when brought before the Commissioner. No special canon of construction is to be adopted in dealing with a taxing Act; the Court has to ascertain the intention of the legislature from the whole Act. [They referred to *Attorney-General* v. *Carlton Bank* (5).]

[GRIFFITH C.J.—But if it is uncertain whether the tax is

(1) 20 N.S.W. L.R. (Eq.), 32, at p. 64.
(2) 1 C.L.R., 158, at p. 178.
(3) 5 C.L.R., 33.
(4) 1 H.L.C., 440.
(5) (1899) 2 Q.B., 158, at p. 164.

imposed or not, the benefit of the doubt must be given to the taxpayer.]

Penalties are imposed and powers of inquiry given to the Commissioner in order to ensure the payment of duty. Even if the Principal Act of 1898 does not indicate who is the person liable to pay the duty, the Act of 1904 makes it clear in the cases enumerated. There is a duty to stamp the instruments within a certain time, and a penalty for default. The person indicated as liable to pay the *ad valorem* duty in the present case is the purchaser: sec. 14, sub-sec. 6 of the Act of 1904; and he is liable to the penalty: sec. 17 and Schedule II. He is also liable to be sued for expenses of valuation: sec. 18. The latter section speaks of "the person liable to pay the duty." If no person is liable the section is inoperative. Sec. 26, which is not in the English Act, implies that the Commissioner has power to insist on payment either on execution or tender of the instrument for assessment. [They referred also to *Stamp Duties Act* 1898, secs. 4-12, 14, 17, 18, 22, 26, 30-33, 35-37, 40-48, 64; and *Stamp Duties (Amendment) Act* 1904, secs. 5, 8-13.] Stamping is, therefore, compulsory, not optional. If there is an obligation "to stamp" there is an action to recover the amount of the debt unless it is expressly excluded. [They referred to *Deakin* v. *Webb* (1).] The person who is to pay the fine or penalty must be the person who has to comply with the statutory duty. Just as in regard to probate duties a provision imposing a penalty for intermeddling except on payment of duty makes the person intermeddling liable to pay the duty: *Attorney-General* v. *New York Breweries Co. Ltd.* (2).

[ISAACS J.—In that case, at p. 211, there is a reference to sec. 57 of the *Crown Suits Act* 1865, as making duty payable by a particular person. There is an important difference between that section and sec. 61 of the *Stamp Duties Act* 1898.]

The only possible object of imposing a penalty is to ensure the payment of the duty by the person on whom the penalty is to fall. There was a special reason for expressly indicating in the Act the persons liable for death duty. That duty was a debt of the estate not of the executors, and provision had to be made for its being met. If there is a liability to pay duty there is a right

(1) 1 C.L.R., 585, at p. 612.

(2) (1898) 1 Q.B., 205, at p. 219.

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of action to recover it. The liability arises on execution, just as in the case of Customs or Excise duties it arises on importation or manufacture. [They referred to *Customs and Inland Revenue Act* 1888 (51 Vict. c. 8), sec. 21; *In re Elementary Education Acts* 1870 and 1873 (1); *Wolverhampton Waterworks Co.* v. *Hawksford* (2); 48 Geo. III. c. 149, sec. 22; *United States* v. *Lyman* (3); *Meredith* v. *United States* (4); *Attorney-General* v. *Ansted* (5); *Attorney-General* v. *Brown* (6).]

[ISAACS J. referred to *Attorney-General* v. *Bradbury & Evans* (7).]

A liability to pay the stamp duty need not be expressly imposed. Necessary implication is sufficient. Absence of precedent is not conclusive against the right of action. It is only a strong argument.

Dr. *Cullen* K.C., in reply, referred to *Stamp Duties Act* 1880 (N.S.W.), (44 Vict. No. 3), sec. 65; *Barraclough* v. *Brown* (8); *Crown Suits Act* 1897, sec. 30; *Baron de Bode* v. *The Queen* (9); *Ex parte Walton*; *In re Levy* (10).

[GRIFFITH C.J. referred to *Selwyn's Nisi Prius*, 12th ed.]

Cur. adv. vult.

August 23.

GRIFFITH C.J. This is a suit brought on the equity side of the Supreme Court of New South Wales by the Attorney-General for that State against the appellants to enforce payment of a sum of money for stamp duty claimed to be due upon a document executed some time before the institution of the suit, and for a fine of 20 per cent. for delay in payment of the duty, and for a further sum of £25 as a penalty for not stamping the document within the time prescribed by law. It is objected that the suit will not lie for recovery of stamp duties. Now, stamp duties were first imposed in England in the reign of *William* and *Mary* during the last decade of the seventeenth

(1) (1909) 1 Ch., 55.
(2) 6 C.B.N.S., 336; 28 L.J.C.P., 242.
(3) 1 Mason, 482.
(4) 13 Pet., 486.
(5) 12 M. & W., 520.
(6) 18 L.J., Ex., 336.
(7) 21 L J. Ex., 12; 7 Ex., 97.
(8) (1897) A.C., 615.
(9) 13 Q.B., 364, at p. 380.
(10) 17 Ch. D., 746.

century. From that time to the present there is no instance of an action or suit for the recovery of stamp duty ever having been brought in any English Court, except in one instance where the action was founded upon an express provision in the Act declaring that the stamp duty should be a debt due to the Crown. That an action will not lie is laid down as accepted law in a passage cited to us by Dr. *Cullen* from the *Encyclopædia of English Law*, vol. II., p. 696. The same proposition was propounded by Lord *Macnaghten* in his speech in *Inland Revenue Commissioners* v. *Maple & Co. (Paris), Ltd.* (1), though it does not appear in the authorized report (2). No point was taken whether, if such a debt exists, it could be recovered by the proceeding now in question or only by action at law. A very similar question was raised about sixty years ago in *Corporation of London* v. *Attorney-General* (3) in the Court of Chancery, where Lord *Langdale* expressed the opinion that a suit for recovery of revenue could be maintained in equity. The matter was discussed in the House of Lords, but their Lordships did not decide the question. But the fact remains that no such suit has ever been brought until this one. And upon a consideration of the scheme of the *Stamp Duties Act* it appears quite natural that that should be so. There is a general rule that when a new right is created by a Statute and a special sanction is also given by the same Statute regard must be had to that sanction, and the obligation can only be enforced in the prescribed manner. That is laid down in many cases, particularly in the well known case *Pasmore* v. *Oswaldtwistle Urban District Council* (4). The *Stamp Duties Act* 1898 follows the same scheme as has been followed by the English Stamp Duties Acts from the first. It imposes stamp duties in respect of documents, not transactions, and provides the consequences that follow if the instrument is not stamped. In some instances the instrument is void. In some instances the person executing an unstamped instrument is liable to a penalty. In others the person who accepts it is liable to a penalty; and in no case is an unstamped instrument available or admissible in evidence except under

(1) 24 T.L.R., 140; 97 L.T., 814.
(2) (1908) A.C., 22.
(3) 8 Beav., 270; 1 H.L.C., 440.
(4) (1898) A.C., 387.

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certain later Statutes relating to criminal proceedings. Delay in payment of stamp duty, or in bringing an instrument to be stamped, or in stamping it, is punished by a fine of 20 per cent. added to the original duty and denoted by an impressed stamp. It is not usual in Stamp Duties Acts to find a provision that the amount of the stamp duty shall be a debt due to the Crown. But when the legislature intends that consequence to follow it has been in the habit of expressly saying so. Two instances that I may mention were in the Act 6 & 7 Wm. IV. c. 76, which by sec. 16 provided that the stamp duty payable for newspapers should be a debt due to the Crown, and of course recoverable as such by action at law, and the Statute 58 Vict. c. 16, sec. 12, which provided that in the case of certain Acts of Parliament, operating as conveyances because property was by them vested in particular persons named, stamp duty should be payable. There was no instrument upon which to impress the stamp, and the Act accordingly provided that stamp duty should be payable by the persons mentioned in the Act, and that in default the amount of the duty should be a debt due to Her Majesty recoverable as such. So in the Act No. 27 of 1898, it is provided by sec. 26 that a stamp duty shall be payable quarterly by a bank in respect of bank notes issued by it, and that section can only be read as providing that the stamp duty payable is to be a debt to the Crown. That is in the nature of a composition duty. Sec. 69, on the other hand, provides that any penalty incurred under the Act may be recovered in a summary way before justices of the peace or by action of debt in the Supreme Court in the name of the Attorney-General. There is no corresponding section with respect to the stamp duty itself. So far as the Act of 1898 is concerned, I think it is clear that the suit could not be maintained. Reliance is placed, however, upon a later Act, the *Stamp Duties Amendment Act* 1904 which contains some additional provisions. Sec. 17 provides, with respect to certain instruments enumerated in Schedule II., that the instrument, unless it is upon duly stamped material, shall be stamped within two months after execution, or after its receipt in the State if executed abroad, unless the assessment of the Commissioner is required by the Principal Act or that Act, and in that case within 14 days after

notice of assessment, and if the instrument is not stamped within those respective periods, the person specified in the Schedule is liable to a fine not exceeding £25. It does not provide that the amount of the stamp duty may be recovered as a debt, but that the person in default shall be liable to a fine not exceeding £25. In sec. 18 there is a provision that certain expenses incurred by the Commissioner with respect to the assessment of stamp duties may be recovered as a debt due to His Majesty, and from the person liable to pay stamp duty. In my opinion these provisions are not sufficient to change the entire scheme of the Stamp Duties Acts, and make what was never before considered a debt a debt due to the Crown and recoverable as such.

It was suggested faintly that asking the Commissioner to assess the stamp duty was in itself some kind of submission to pay the duty as assessed. I do not think that it amounts to an undertaking to pay whatever is assessed. I think that the object of the assessment is merely to ascertain the proper amount of duty. It may be that in some instances the amount of the stamp duty assessed will be altogether beyond the ability of the person tendering the instrument to pay, and he may consequently try to do without the use of the document in evidence. I am of opinion, therefore, that no legal proceeding will lie to recover the stamp duty or its accessory the fine of 20 per cent. for delay in payment, which is also to be denoted by an impressed stamp. That disposes of the real point sought to be raised by this suit.

But it was contended that, although the suit will not lie to recover stamp duty, still this suit, brought *alio intuitu*, may be maintained as an action at law to recover a penalty not exceeding £25, and this Court is invited to deal with the suit upon that footing. That, it is said, is an important question, because in order to determine it the Court must determine three other questions which are of considerable importance, but will probably never arise for any practical purpose, because the instrument in question in this suit probably never will be wanted. One of the questions sought to be raised in the claim for a penalty not exceeding £25 was, what is the amount of duty payable, a question of considerable difficulty on which I offer no opinion.

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Another question raised was this: The appellant asked the Commissioner to assess the stamp duty payable upon the instrument, and it was contended that there was an estoppel, that, as an appeal lay from the assessment of the Stamp Commissioner, the appellants, not having appealed in the manner prescribed, are estopped from saying that the amount assessed was not the right amount. That also is a question which it is not necessary to decide. The third question raised and discussed was whether the 20 per cent. is recoverable in addition to the penalty not exceeding £25. Again I decline to express any opinion on the matter. The only way in which this question could be raised in this suit would be by the Court finding that the appellants had been guilty of delay in stamping the instrument with the proper stamp or offering to do so, and that they were liable to a penalty not exceeding £25 for not doing so. Sec. 17 of the Act of 1904 uses words which give rise to some difficulty. As I have already pointed out, it provides that if the instrument is not stamped within the prescribed time the person specified in the Schedule shall be liable to a fine not exceeding £25. Sec. 69 of the Act of 1898 provides that a penalty incurred under that Act may be recovered in a summary way before justices or by action of debt. Is the fine mentioned in sec. 17 of the Act of 1904 a penalty within the meaning of sec. 69 or not? That is an interesting question, and there are grounds for holding that it is such a penalty. For, on the one hand, we find in the Schedule, in which the persons liable to pay are specified, a column headed "Person liable to penalty." But on the other hand, in several sections of the Act—for instance, secs. 8, 9, 10 and 13—there is a broad distinction drawn between the penalty and a fine. I cannot help thinking that the draftsman did not quite know what he meant in using that language. If it is a fine it is accessory to the assumed principal debt and goes with it. But, assuming that it is a penalty, then sec. 69 of the Act of 1898 provides that it may be recovered in a summary way before justices or by action of debt in the Supreme Court in the name of the Attorney-General. In my opinion this proceeding, whatever it is, is not an action of debt in the Supreme Court within the meaning of that section. In New South Wales, where the distinction between the

two sides of the Court is still to a great extent maintained, there are in the *Equity Act* special provisions as to procedure. Proceedings are commenced by a statement of claim bearing upon it an indorsement in the nature of a summons to the defendant to appear. The defendant is bound to appear and put in his answer upon oath, and various proceedings are to be taken peculiar to that jurisdiction. In my opinion a proceeding in the Court of Equity commenced by statement of claim, which the defendant is required to answer upon oath, is not an action of debt in the sense in which the word was understood in 1898, when the *Stamp Duties Act* was passed. It is contrary to the notion of an action of debt, and therefore the questions sought to be raised cannot be raised in this suit. Upon the other points I think that there is no foundation for the suit at all.

In my opinion, therefore, the appellants are entitled to succeed.

O'CONNOR J. The Attorney-General in this action sues in equity to recover, first, stamp duty payable upon an instrument; secondly, a fine payable on the stamping of the instrument; and thirdly, a penalty for failing to stamp within a certain time after the execution of the instrument. The question raised as to the liability to stamp duty is a very important one, and I propose to add some words to what my learned brother the Chief Justice has said, though I entirely agree with his judgment.

The foundation of the action is the existence of an alleged statutory obligation on the defendants to pay the duty. A statutory obligation, before it can be enforceable against a defendant, must impose an obligation upon him. The Statute never does that *nominatim*. It does it by either fixing the class of persons liable for the duty or by indicating the circumstances in which persons will become liable. In this Statute neither of these courses has been followed. It cannot be said that the Statute indicates any class, within which the appellants have been brought, by whom the duty is to be paid. Nor does it indicate any circumstances in which the duty is payable which are applicable to the appellants on the facts before us. Sec. 4 of the Act of 1898 was relied upon. That provides that "there

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shall be charged, levied, collected and paid for the use of Her Majesty . . . . for and in respect of the several instruments and matters described or mentioned in this Act, and in the said Schedules thereto the several duties or sums of money, and at the several rates specified herein or set down in figures against the same respectively in the said Schedules." That is the general section found in almost every taxing Act which lays or charges a duty. There is nothing in it to indicate an obligation on any person or class of persons to pay the duty. After looking all through the Act and examining the sections to which we were referred by counsel for the Attorney-General, I have been unable to find any foundation for the conclusion which the learned Judge of the Court below seems to have arrived at, that the person indicated by the Act as liable to pay is the owner of the instrument. I gather from the argument put to us that Schedule II. of the Act of 1904 is relied upon. That provides that certain fines are to be paid by certain classes of persons. In some instances it is the maker of the instrument, in others it is the person who receives the instrument. How can any inference as to liability for the tax be drawn from that? In every case in which an instrument is executed there are at least two persons interested in the benefits conferred, the person who makes and delivers it and the person who receives it. There is no indication that I can see in any Schedule of any rule under which either one or the other of these classes of persons is made liable to pay the duty. Some reliance was placed on the case of *Attorney-General* v. *Anon.* (1), and on two others in the United States, viz., *United States* v. *Lyman* (2) and *Meredith* v. *United States* (3). The first of these cases relating to Excise, the two American cases related to Customs. In the *Attorney-General* v. *Anon.* (1) I should gather from the facts, as they appear in the reports and from the Statutes applicable, that there was there a statutory obligation to pay the duty. In the judgment of Mr. Justice *Story* in the two other cases it is quite clear that he founds his conclusion partly upon the general principle which he states, and partly upon the provisions of the Revenue Acts which he does

(1) 2 Anst., 558. (2) 1 Mason, 482. (3) 13 Pet., 486.

not cite. These cases are to my mind no authority for the proposition that has been put before us on behalf of the Attorney-General. As was pointed out by my learned brother the Chief Justice, when in this Act the legislature intend to create a direct liability they create it in express terms. Under the Act of 1898, sec. 26, the composition duty payable by bankers upon the issue of bank notes is made a debt to the Crown. In the sections relating to the duties on the estates of deceased persons the amount of duty is made a debt payable out of the estate. In the Act of 1904 certain persons connected with the management of the estates of deceased persons are directed to deliver an account of the estate, and there is a provision that those persons who are directed to deliver the account must pay the duty within one month after assessment of the duty. It would be indeed extraordinary that the legislature should in express terms impose a liability to pay the duty in these exceptional cases, and yet in the vast bulk of cases from which revenue is to be drawn should make no such provision. Not only is there no direct provision in the Act creating a liability to pay stamp duty as a debt, but it appears to me that to imply such liability would be to run counter to the whole scheme of the Act itself. The scheme, following that of English legislation on the subject, is not to impose a duty in respect of which a liability to pay is created, but to make it to the interest of every person who executes an instrument or is interested under an instrument that it should be stamped. The instrument, if not stamped, confers no rights and imposes no obligations which can be enforced in a Court of Justice. It cannot be registered. If the instrument is not stamped within a certain time, a fine of 20 per cent. is imposed, and the person failing to stamp it, or the person who seeks to use it unstamped, is liable to pay the penalty. The scheme of the Act is to rely upon these inducements appealing to the self interest of persons executing or taking advantage of the instrument. That being so, it seems to me that the legislature of this State, following English legislation, has relied upon these sanctions as sufficient for the effective collection of the tax laid under the 4th section of the Act of 1898. As to the fine, it appears to me to stand exactly upon the same footing as the claim

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for duty. It is imposed in sec. 14 of the Act of 1898 on the stamping of a document after the execution thereof. And all through the Act it is spoken of as a fine on stamping; there is a distinction drawn in many of the sections between the penalty imposed as a punishment for not stamping and the fine on stamping. In other words, the fine on stamping is an amount to be paid as part of the procedure on stamping. I can see no difference between the payment of a fine on stamping and payment of the duty itself. In neither case is the amount of duty or fine made recoverable, but payment is ensured by the sanctions I have already referred to. It was urged on behalf of the Attorney-General that the assessment which was made by the Commissioner bound the defendants to pay this duty. In the Court below, in support of that position, the case of *Mooney* v. *Commissioners of Taxation* (1) was relied upon. That was an appeal from the Supreme Court of New South Wales in reference to the *Land and Income Tax Assessment Act* 1895. There is no similarity or analogy between the point decided in that case and the question now under consideration.

I come now to the question of the fine, and that is material only if it can be established that the proper amount of duty has not been paid. It was contended that the proper amount of duty had not been paid. The Attorney-General claims that the amount of duty is £750. The defendants contend that it is £1. An interesting question was raised in the argument of that matter, as to the meaning of the *Mining Amendment Act* 1902, but that question becomes of no importance if the fine cannot be recovered. As I am of opinion that the fine cannot be recovered in this proceeding for reasons which I will presently state, it is unnecessary for me to enter upon the question whether the Attorney-General or the defendants are right as to the amount of the duty payable. It is sec. 69 of the Act of 1898 which gives the right to recover the penalty, and the remedy is given in these words. [His Honor read the section and continued]: There is no doubt that, apart from statutory provision, the King can bring his information in any Court he thinks fit. But that right may be cut down by the legislature. And where an enactment

(1) 4 C.L.R., 1439.

directs the particular way in which the Attorney-General is to proceed, that is the way in which he must proceed. Now the phrase "action of debt in the Supreme Court" is one which has undoubtedly acquired a special meaning as a legal expression. It is sometimes, however, used in a popular sense. And I think that the expression may, if the context requires such a construction to give effect to the intention of the legislature, be read as applying to any form of action in any branch of the Supreme Court. In order to ascertain which meaning is to be adopted we must look at the surrounding circumstances, the intent and purpose of the Act itself, and the subject matter of the section. The subject matter of the section is punishment by penalty, and the legislature must be taken to have known of the division between the jurisdiction of Courts of equity and Courts of law in New South Wales, recognized as it is in many Statutes relating to procedure. Under these circumstances when the expression "action of debt in the Supreme Court" is used, it seems to me that we must give to the words the meaning which *primâ facie* they have in the State, that is to say, their meaning as a legal expression. It may be well to look for a moment at the difference between the mode in which the power is given to the Attorney-General in England in the Stamp Acts from which these provisions have been taken, and the mode in which the power is given here. The corresponding provision in the English Stamp Acts is to be found in sec. 121 of the Act of 1891, and it provides that all fines shall be recovered by information in the High Court of England in the name of the Attorney-General for England. That leaves it open to the Attorney-General to proceed in any branch of the High Court of England. In New South Wales "action of debt" is well known as a form of common law action, which, according to the procedure in force in New South Wales, is tried, in the Supreme Court, by a jury. Having regard to the very great difference between procedure in equity and at common law for recovery of penalties, it appears to me that we must give effect to the words "action of debt" according to their ordinary meaning in New South Wales procedure, that is, action at common law. Under these circumstances the claim for a fine or penalty, it seems to me, must fail.

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I express no opinion, it is not necessary to do so, as to whether the penalty may be recovered. All that we have to consider is the present form of proceeding. On the whole case I am of opinion that the Attorney-General must fail.

I agree that the appeal must be allowed.

The following judgment was read by

ISAACS J. The appellants' first position is that there is no personal liability for stamp duty. The Crown contends that the direction in sec. 4 of the Act that the duties shall be "charged, levied, collected and paid for the use of Her Majesty, and to form part of the Consolidated Revenue Fund" creates a debt for which an action lies; the general rule being that, where a Statute gives a right to a sum of money and provides no means of recovering it, the remedy is by action (see *Richardson* v. *Willis* (1).

The appellants' argument in reply to this is, virtually, that the tax granted by Parliament is a stamp duty only, to be charged, levied, collected and paid by stamping the specified instruments in the specified way, and that no other method of charging or collecting it is permissible. The principle relied on for this purpose may be taken to be that stated by Lord *Tenterden* C.J. in *Doe d. Murray* v. *Bridges* (2) in these words:—"Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." This was affirmed by the House of Lords in *Pasmore* v. *Oswaldtwistle Urban Council* (3). The Crown in turn answers this by saying that the rule does not apply because there are no prohibitory words excluding an action, and the reasonable and necessary implication from the words quoted from sec. 4 is that taxes granted by Parliament and required to be "paid" must be enforceable by action.

The terms of the Act itself, when that document is construed, must determine the matter; but before looking at its provisions, there is one recognized rule of construction that is all important in

(1) L.R. 8 Ex., 69, at p. 71.
(2) 1 B. & Ad., 847, at p. 859.
(3) (1898) A.C., 387, at p. 394.

the present case. It is that laid down by Lord *Cairns* in *Partington* v. *Attorney-General* (1). His Lordship says "I understand the principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any Statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing Statute, where you can simply adhere to the words of the Statute." Adverting to this passage Lord *Collins* (then *Collins* M.R.) said in *Attorney-General* v. *Earl of Selborne* (2):—"Therefore the Crown fails if the case is not brought within the words of the Statute, interpreted according to their natural meaning; and if there is a case which is not covered by the Statute so interpreted, that can only be cured by legislation, and not by an attempt to construe the Statute benevolently in favour of the Crown."

With that rule of construction as a guide I turn to the words of the Act. First of all the duties are stamp duties, that is, duties which by sec. 4 itself are to be "denoted in stamps upon the material upon which any such instrument or matter is written or expressed." That is the way in which, *primâ facie* at all events, the duties are to be paid. This is confirmed by sec. 7.

Part 2 deals with duties on deeds and instruments, and Division 1 of that Part consists of general regulations.

Reference to secs. 9 to 13 inclusive will show that the legislature was consistently speaking of the liability of an *instrument* to duty, and nowhere in those sections is any personal liability indicated. The expressions are "Every instrument, subject under this Act to be stamped" (sec. 9); "the liability of any instrument to duty" and "the duty with which any instrument is chargeable" (sec. 10); "an instrument chargeable under this Act with duty" (sec. 11); and similarly in secs. 12 and 13.

So too in sec. 19, which speaks of "the liability of the instru-

(1) L.R. 4 H.L., 100, at p. 122. (2) (1902) 1 K.B., 388, at p. 396.

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ment." Sec. 22 makes special provision for recovering duty, but that is in the case of fraudulent removal, or second use of stamps, or fraudulent act of evasion, and besides the duty a penalty is inflicted.

But not only is there a *primâ facie* mode of paying the duty provided in the very section which imposes it, and a complete absence of any express personal liability such as is created by sec. 56 in respect of deceased persons' estates (as to the effect of which see *Bell* v. *Master in Equity*) (1), but there is a series of legislative sanctions in the shape of practical compulsions which Parliament devised for the plain purpose of enforcing the new statutory obligation it was creating. First of all, it cannot be denied that the duty is chargeable at the instant the instrument is completed. That is inevitable from the nature of the case—no other time is mentioned, and sec. 14 assumes it. Further, secs. 11 and 12 make express reference to "the day of the date of the instrument." Consequently, if there be a personal liability, it ought be discharged the instant an instrument is created, as a promissory note though it is never handed to the payee, a bill of lading though it can never be stamped if unstamped then, and can never be enforced afterwards, or a conveyance though it be destroyed the next minute, a receipt though it never be given or sent to the person who paid. These instances may seem impossible to comprehend, but they necessarily arise if there is at the instant of creating a specific instrument a personal liability to the Crown for the duty imposed, for no provision appears in the Act of 1898 for relieving a person of his liability—if it exists—in case the instrument is not used, or issued, or remains inoperative. Destruction, or cancellation would apparently work no avoidance of the obligation to pay the tax imposed by sec. 4 as construed by the Crown.

It is not until we come to the later legislation in 1904 that we find any notion of relief. It is in relation to mining property (sec. 14). But that is only a provision that, *after* any person has paid the duty on an agreement, the *ad valorem* duty, less the fixed duty of £1, shall be returned, in case the agreement is not substantially performed or carried into effect. That

(1) 2 App. Cas., 560, at pp. 564, 565.

would, of course, be unnecessary except, as to the £1, if mere rescission were sufficient to obviate the necessity for payment. So that the Crown is driven into the extraordinary position I have pointed out, that the mere signing of a document answering the specified description irrevocably fixes any person participating in its creation with an individual liability not dischargeable except by payment, unless expressly limited by the Act.

The common law remedy of action to recover duties under the Act of 1898 seems, as a matter of practical working, altogether inapplicable.

The Act however applies its own remedy, namely, invalidation of the instrument (as secs. 15, 23, 33, 34) unless and until afterwards stamped where it may be stamped after execution, with additional fine (as secs. 14, 15), or absolutely (as sec. 33). A penalty in certain circumstances is another mode of sanction (as secs. 21, 27, 33). Therefore a very substantial and a very serious consequence is created as the statutory method of enforcing the direction to stamp a document.

The Act of 1904 is by sec. 1 construed with the Act of 1898, and by sec. 5 repeats in respect of certain instruments the provisions of sec. 4 of the earlier Act.

Again there is an absence of express enactment of personal liability for duty except as to estates of deceased persons: sec. 22 (*d*). But there is a provision that has been insisted upon as sufficiently indicating legislative intention to create personal liability. That provision is sec. 17, which imposes a fine upon specified persons in case certain instruments are not properly stamped. Still no word appears of liability to pay the duty, or of power to recover it as a debt to His Majesty, though these latter words are used in the very next section in relation to expenses of valuation, and although a personal liability to pay duty on deceased persons' estates is expressly enacted in sec. 22.

Therefore I do not regard the imposition of the penalty as also an imposition of a personal obligation to pay the duty. If it were, sec. 15 would create a Crown debt in respect of an unstamped draft, as would also sec. 30, an ordinary bill of exchange or promissory note, upon many persons, as the person who issues it, the person who endorses it, the person who

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transfers it, the person who uses it, and the person who presents it for payment, and even, in the case of a bill of exchange or promissory note, the banker who pays it. Each and every one of these possibly separate, and some of them necessarily separate, individuals would be a debtor to the Crown for the whole duty, in addition to the penalty expressly provided, and not only so, but debtors as to debts arising at totally different times, in different circumstances and independently, though for the same sum. The position is inconceivable. So far as precedent goes, admittedly there is none, and seeing that English stamp duties were introduced in 1694, and the New South Wales Act is modelled on English Statutes, this is an important feature. One instance, indeed, I found of an information for stamp duties: *Attorney-General* v. *Bradbury* (1), where the defendant succeeded, but on another point. The Statute in that case (6 & 7 Will. IV. c. 76) by sec. 16 expressly enacted that a person in the position of the defendant should be deemed and taken to owe the tax to the Crown. So that the one exceptional instance, disclosing the one exceptional statutory provision, adds materially to the presumption arising from the general dearth of precedent.

I therefore apply the rule laid down by Lord *Cairns* and the comments of Lord *Collins*. I give the fullest effect to the words actually used in sec. 4 of the Principal Act and sec. 5 of the amending Act in their natural meaning, but I cannot extend them so as to include other words not found in the Act, namely, words creating a personal liability to pay, or any obligation to pay otherwise than in the manner and circumstances designated by the Act itself.

And finding specific modes of enforcement expressly provided by the Statute in respect to the newly created statutory obligations, there comes into play the rule laid down by Lord *Tenterden* already quoted, and consequently I am not at liberty to apply the common law rule *ubi jus ibi remedium* as a necessary instrument to give some effect to an obligation, and so call into operation the ordinary common law remedy as if there were a gap left by the legislature, and assumed to be met by the common law. There is no gap, and a Court is not justified in creating one,

(1) 7 Ex., 97.

and then filling it with a remedy which might or might not be convenient. Such a step as Lord *Collins* says must be left to the legislature. As to the effect of assessment I agree with the learned Chief Justice that it creates no personal liability that would not otherwise exist. An application to assess is only a precautionary measure to ensure that the document shall never be held invalid for want of a proper stamp, and that no penalty shall be incurred. Once made and acceded to it binds both sides as to the proper amount of duty for that instrument, but nothing more. I therefore agree that the first ground taken by the appellants is sustained.

The next question is as to that portion of the case which deals with the penalty. This stands on quite a different footing. Suing for penalties is, as I have said, one of the statutory methods of enforcing the payment of duty. It is a matter in debate in the present case whether the £25 claimed by way of penalty under sec. 17 of the 1904 Act is a penalty within the meaning of sec. 69 of the Act of 1898, or a fine consisting of additional duty. If the latter, the claim for the accessory must share the fate of that for the principal, and be determined by the considerations already addressed to the first part of the case. But assuming, without deciding, that it is a penalty within sec. 69, then there is a specific method prescribed for recovering it, namely, "in a summary way before any two justices of the peace or by action of debt in the Supreme Court in the name of the Attorney-General."

The point has arisen whether the present proceedings fall within the authority of sec. 69 as being an "action of debt in the Supreme Court." It is of course in one sense in the Supreme Court and it is in the name of the Attorney-General. Learned counsel for the respondent have contended that the King may bring his action of debt by information. No doubt he can unless there be some statutory provision to the contrary. *Chitty on Prerogatives of the Crown* (p. 335) says:—"The information of debt is in effect and substance the King's action of debt, and is usually brought in the case of forfeitures to the Crown, upon the breach of a penal Statute, enacted for the support of the revenue." *Bacon's Abridgment, Prerogative* (E.), vol. 6,

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pp. 472, 473, says:—"Now an information for the duties is nothing more than the King's action of debt." See also *Manning's Practice of the Exchequer*, p. 201. And *Comyn's Digest Action upon Statute* (E) "Actions upon Statute, are, at the suit of the King only, viz., an indictment or information." There is not, so far as I am aware, any enactment altering the common law in this respect, and if the only question were whether an information is a correct mode of instituting the action for penalties, I should answer that it is. Sec. 7 of the *Crown Suits Act* 1897, read with the aid of the common law, is not in my opinion opposed to this. (See also *Comyn's Digest*, Action (10) "Action popular and information"; *Manning's Practice of the Exchequer*, p. 171; *Attorney-General* v. *Sewell* (1); and *Lord Halsbury's Laws of England*, vol. 6, par. 625).

And I further think, on reading the information, and particularly p. 12, which claims payment of the penalty, and that the whole sum claimed is "payable in priority to all other *debts* due by the defendant corporation," that it ought to be taken to be in substance an information for debt. But that does not end the matter. The essential question is whether the proceeding as instituted is "an action of debt in the Supreme Court" within the meaning of the section, and it is not, unless it is brought as an "action of debt" as that term is known to the law, and as such an action must be brought in New South Wales. It certainly purports to be brought in the Supreme Court, so that no question as to the right of the Sovereign to choose his *Court* arises; nor in the view I take is it material to consider the further question whether he could choose the Chancery side in England for a purely common law demand. But it becomes a question whether, in face of the legislation of this State, the learned Chief Judge in Equity exercising the jurisdiction of the Supreme Court in Equity matters can entertain or determine such a demand. In *Maiden* v. *Maiden* (2) it was held that, the Supreme Court is one Court having every kind of jurisdiction, but I pointed out that Parliament may regulate the exercise of that jurisdiction, and that case does not touch the present.

And where there is a provision that the jurisdiction of a Court

(1) 4 M. & W., 77. (2) 7 C.L.R., 727.

shall be exercised in a prescribed manner—whether in the Charter that creates the Court (see *Larios* v. *Gurety* (1)) or in a subsequent Act of Parliament competently passed—it may appear that on a true construction of the provision it is an essential condition of jurisdiction. As was said by the Privy Council in *The Queen* v. *Hughes* (2): "the question of the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. And that, however convenient or necessary a mode of proceeding for the redress of certain wrongs might be, that consideration alone would not confer jurisdiction on the Court to sanction its introduction."

Is there an information, such as was filed in the present case, within the jurisdiction of the Chief Judge in Equity under the provisions of the *Equity Act* 1901, and "an action for debt" in the Supreme Court within the meaning of sec. 69 of the Act of 1898?

Unless the proceeding is one in respect of which the Chief Judge in Equity is by law authorized to exercise the jurisdiction of the Supreme Court empowered to receive the complaint, and thereupon to command the appearance and answer of the defendants, and afterwards to hear and determine the cause and to give final judgment, the proceeding is not such as is described in the enactment.

An action of debt is a form of proceeding well known to the law. It is a personal action, a common law action, and includes a claim for a penalty such as the one sued for (see *Barns* v. *Hughs* (3), and *Anonymous* (4). Is the jurisdiction of the Court exerciseable in such an action by the Chief Judge in Equity, and under the procedure provided by the *Equity Act* 1901? That Act contains no reference to any such action, the authority of the Judge, as the representative of the Court, being limited to matters in Equity (sec. 4), except so far as co-ordinate jurisdiction with common law Courts is expressly given by Division 1 of Part III. The procedure sections provide (sec. 22) that all suits in equity shall be commenced except as otherwise mentioned

(1) L.R. 5 P.C., 346.
(2) L.R. 1 P.C., 81, at p. 91.
(3) 1 Lev., 249.
(4) 5 Mod., 425.

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(and nothing material to this case is mentioned) by filing a statement of claim, (sec. 29) that a copy of the statement of claim endorsed is to be served. By sec. 31 the endorsement is to be made in the form in the Third Schedule, which contains a command to enter an appearance in the Equity Office of the Supreme Court, and specify whether the claim is disputed or admitted, and the command is vested in the name of the Chief Judge in Equity, and sec. 37 requires the defence to be on oath. Now the scheme of these provisions are foreign to the idea of an action of debt. On the other hand the *Common Law Procedure Act* 1899 does make express provisions for actions of debt (see secs. 10, 18, 24, 92).

Again in the *Supreme Court Procedure Act* 1890, under the heading "Common Law Procedure," the word "action" is used in secs. 7 and 8; while a separate heading of Equity "Procedure," contains no such reference.

The conclusion I arrive at may be thus stated:—Assuming the King may choose his own Court in England, including the Chancery Court (see the authorities collected in the speech of Lord *Selborne* L.C. in *Bradlaugh* v. *Clarke* (1)), and now the Chancery Division (see *per Vaughan Williams* L.J. in *Attorney-General* v. *Wilson* (2)), still the question remains whether an action of debt has been brought in the Supreme Court when the information has been instituted before a single Judge with limited authority to exercise the jurisdiction of the Court, that authority not extending to a case of this description.

I do not think that such an action has been brought. There has been an information which, if it had been an equitable claim, would have been within the authority conferred, and in that case it would in law be brought in the Supreme Court; or if the information, being of the nature of an action of debt, had been launched and proceeded with under the authority of the *Common Law Procedure Act* as amended by the Act of 1900, it would have been lawfully placed within the jurisdictional powers of the Supreme Court, because those enactments have prescribed how and by what Judges and in what manner those powers may in such a case be exercised. But neither of these conditions has

(1) 8 App. Cas., 354, at p. 360.

(2) 83 L.T., 647.

been satisfied in the present instance, and, therefore, though the learned Judge from whom this appeal comes is a Judge of the Supreme Court, he is not, *qua* such an action as is referred to in sec. 69 of the *Stamp Act* 1898, invested with the powers of the Court, nor does the Act of Parliament under which the proceedings were begun apply to them. The result is the whole proceeding is misconceived, and devoid of any legal effect, and should have been dismissed. The appeal should therefore be allowed, and although this objection was not taken on the trial, this Court ought to make the order which the learned Chief Judge in Equity should have made. (See *Jones* v. *Owen* (1); *Norwich Corporation* v. *Norwich Electric Tramways Co. Ltd.* (2)). In these circumstances, the Court has no right to pronounce upon the questions sought to be raised by the nugatory proceeding.

Appeal allowed. Decree appealed from discharged. Suit dismissed with costs and costs of the injunction. Respondent to pay the costs of the appeal.

Solicitor for the appellants, *W. G. Parish.*

Solicitor, for the respondent, *J. V. Tillett,* Crown Solicitor for New South Wales.

C. A. W.

(1) 5 D. & L., 669.

(2) (1906) 2 K.B., 119.