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TROY v. WRIGGLESWORTH.

sec. 39 (2) (*d*) *of the Judiciary Act* 1903-1915. *Respondent to pay costs in this Court and in the Court of Petty Sessions.*

Solicitors for the appellant, *Strongman & Crouch.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

Foll/Cons *Ash Street Properties Pty Ltd v Pollnow* (1987) 9 NSWLR 80

Discd *Conpers (No664) Pty Ltd v NZI Securities Aust Ltd* 20 ATR 1084

Appl *Exbea Pty Ltd, Re; Ex parte M & W Holdings Pty Ltd* (1989) 1 WAR 287

Foll/Discd *Connell v Zuks* (1995) 17 ACSR 539

Appl *Richlaw Pty Ltd v Blackburne* (1998) 19 WAR 164

Appl *Hoggett v O'Rourke* [2002] 1 QdR 490

Appl *Proficient Building Co Pty Ltd v Daimaru Pty Ltd* 21 ATR 965

Foll *Ash St Properties Pty Ltd v Pollnow* 18 ATR 935

[HIGH COURT OF AUSTRALIA.]

DENT . . . . . APPELLANT;
DEFENDANT,

AND

MOORE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 16, 17, 23, 30.

Barton, Isaacs and Rich JJ.

Stamp Duties—Unstamped instruments—Contract of sale of land—Evidence of contract—Admission by party to contract—Action for commission on sale—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *sec.* 15.

Sec. 15 of the *Stamp Duties Act* 1898 (N.S.W.) provides that no unstamped instrument shall, except in criminal proceedings, be admissible in evidence, or available or effectual for any purpose whatsoever in law or equity.

Held, that where a contract is reduced to writing in an instrument which is intended by the parties to be the binding record of the contract and that instrument is required by the *Stamp Duties Act* 1898 to be stamped, a person who wishes to rely on that contract cannot do so unless the instrument is stamped.

Held, therefore, in an action to recover commission for procuring a sale of the defendant's land, the instrument recording the contract of sale being insufficiently stamped, that the plaintiff was not entitled to prove the contract

by an admission of the defendant that he had made it, and consequently that a subsequent deed executed by the defendant which recited the contract of sale was not admissible in evidence to prove it.

Slatterie v. *Pooley*, 6 M. & W., 664; *King* v. *Cole*, 2 Ex., 628, and *Birchall* v. *Bullough*, (1896) 1 Q.B., 325, distinguished.

Decision of the Supreme Court of New South Wales: *Moore* v. *Dent*, 18 S.R. (N.S.W.), 455, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Brian Ludlow Moore against John Irwin Dent in which the plaintiff claimed £1,294 14s. 6d., being the amount of commission alleged to be due on the sale of the defendant's station, Ooma, to Mutual Investments Ltd. in accordance with an account which had been rendered by the plaintiff to the defendant and in which it was stated that the station contained 26,538 acres, that the price for which it was sold was £4 2s. 6d. per acre and that the amount of commission claimed was 2½ per cent. on the first £10,000, 1½ per cent. on the next £10,000 and 1 per cent. on the balance. The defendant's plea was never indebted. The action was heard before *Sly* J. and a jury. In addition to oral evidence in support of the plaintiff's claim (the nature of which appears in the judgments hereunder) three documents were tendered in evidence on behalf of the plaintiff, and after objection were admitted. The first of these documents (Exhibit J) was an indenture of surrender dated 28th March 1917 of the lands comprising Ooma Station by the defendant, by the direction of a company called Mutual Investments Ltd., to the Crown, which was executed by the defendant. This indenture recited (*inter alia*) that the title to the lands in question was in the defendant; that both Houses of Parliament had approved of the purchase of those lands by the Crown at a specified price; and that by a memorandum of agreement dated 23rd February 1916 made between the defendant and the company it was agreed that the defendant should sell and the company should purchase those lands at the price mentioned therein. The second of the documents (Exhibit K) was a memorandum of transfer dated 28th March 1917 of the lands by the defendant, by the direction of the company, to the Crown, which was executed by the defendant. And the third

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of the documents (Exhibit L) was an agreement dated 14th March 1917 between the company, the Governor of New South Wales and the Secretary for Lands of New South Wales, for the sale of the lands by the company to the Crown. The jury found a verdict for the plaintiff for £971 0s. 10d., being three-quarters of the amount claimed, evidence having been given that the plaintiff had agreed that one Weaver should receive one-quarter of the commission.

The defendant subsequently moved before the Full Court that the verdict should be set aside, and that a new trial be directed or a verdict be ordered to be entered for the defendant or that a nonsuit be directed. That motion was dismissed : *Moore* v. *Dent* (1).

From that decision the defendant now appealed to the High Court.

Knox K.C. (with him *Watt*), for the appellant. It was necessary for the respondent to prove that the appellant had entered into a contract to sell his land to Mutual Investments Ltd. As that agreement was contained in an instrument which was required by the *Stamp Duties Act* 1898 (N.S.W.) to be stamped and was admitted to be insufficiently stamped, the respondent was prevented by sec. 15 of that Act from giving evidence of the agreement, and therefore the surrender was not admissible in evidence.

[ISAACS J. referred to *Fengl* v. *Fengl* (2).]

Under sec. 7 (2) of the *Stamp Duties (Amendment) Act* 1914 (N.S.W.), which enables secondary evidence of an unstamped instrument to be given on payment of the duty and a fine, secondary evidence of an unstamped instrument which had been lost cannot be given (*Louis* v. *Grigg* (3)). In *Slatterie* v. *Pooley* (4), which was relied on as supporting the admissibility of these documents, it seems that it must have been discovered before the case came to the higher Court, that the document there in question did not require to be stamped. *R.* v. *Inhabitants of Holy Trinity, Kingston-upon-Hull* (5) and *King* v. *Cole* (6), which were also relied upon, have nothing to do with the admissibility of unstamped instruments. Looking at the recital of the sale in the surrender as an admission, it must be treated

(1) 18 S.R. (N.S.W.), 455.
(2) (1914) P., 274.
(3) 14 S.R. (N.S.W.), 78.
(4) 6 M. & W., 664.
(5) 7 B. & C., 611.
(6) 2 Ex., 628.

as an admission only that the appellant had sold the land by an agreement in writing which was not properly stamped. Under the English law, which is practically the same as that under the *Stamp Duties Act*, an unstamped instrument cannot be used for any purpose whatever, even if it be only a collateral purpose (*Keane* v. *Janes* (1); *Sweeting* v. *Halse* (2); *Williams* v. *Gerry* (3); *Interleaf Publishing Co.* v. *Phillips* (4); *Baker* v. *Dale* (5); *Ashling* v. *Boon* (6); *Matheson* v. *Ross* (7); *Baker* v. *Nixon* (8); *Turner* v. *Power* (9); *Yorke* v. *Smith* (10)).

[RICH J. referred to *Birchall* v. *Bullough* (11).]

If the proof of a transaction which an unstamped instrument represents or embodies is material to the case of a party attempting to prove it, then the instrument cannot be put in evidence. "Material" is there used as meaning relevant for the purpose of proving the issue.

[ISAACS J. referred to *Hughes* v. *Budd* (12); *Rani Chandra Kunwar* v. *Chaudhri Narpat Singh* (13).]

The respondent had to prove that the company became a ready and willing purchaser. There is no evidence of that except the written agreement which was entered into, because any prior negotiations were merged in that agreement. An admission of an agreement contained in an unstamped instrument is in a position analogous to secondary evidence of such an agreement; otherwise it would leave it in the power of parties to defeat the revenue.

Shand K.C. and *Curtis*, for the respondent. The documents tendered were properly received in evidence as an admission by the appellant of the sale. The duty under the *Stamp Duties Act* is upon the instrument, and not upon the transaction (*Cobar Corporation Ltd.* v. *Attorney-General for New South Wales* (14)).

[ISAACS J. referred to *Minister of Stamps* v. *Townend* (15).]

There are no cases in England which decide that an admission

(1) 2 Car. & K., 725.
(2) 9 B. & C., 365.
(3) 10 M. & W., 296.
(4) 1 Cab. & El., 315.
(5) 1 F. & F., 271.
(6) (1891) 1 Ch., 568.
(7) 2 H.L.C., 286.
(8) 7 S.C.R. (N.S.W.), 15.
(9) 7 B. & C., 625.
(10) 21 L.J. Q.B., 53.
(11) (1896) 1 Q.B., 325.
(12) 8 Dowl. P.R., 478.
(13) L.R. 34 Ind. App., 27, at p. 35.
(14) 9 C.L.R., 378, at p. 387.
(15) (1909) A.C., 633.

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may not be made of a transaction which is evidenced by an unstamped instrument. *Slatterie* v. *Pooley* (1) and *King* v. *Cole* (2) are inexplicable unless that is so.

[ISAACS J. referred to *Brown* v. *Watts* (3); *Magnay* v. *Knight* (4); *Fielder* v. *Ray* (5).]

The particular documents which were admitted, not requiring to be stamped, were properly admissible, and if the statements in the recitals were objected to the proper course was to ask the Judge to cover them up. But that course was not taken, and as the documents have been properly admitted the recitals are evidence of the fact of the sale. Sec. 15 of the *Stamp Duties Act* does not apply, for the word "effectual" in the section means effectual between the parties. A person not a party to a document who seeks to put it in evidence to prove the transaction which it represents does not make that document "effectual" (*Fengl* v. *Fengl* (6); *Birchall* v. *Bullough* (7)). The three cases last referred to by *Isaacs* J. turn on the rule of evidence that where a cause of action arises on a document the best evidence of the document must be given. This case is not within that rule, because there are no degrees of primary evidence. The English cases relied on are all cases in which the instrument tendered in evidence itself required to be stamped. Assuming that the recitals in the documents were not admissible, there is evidence in the documents that the company, which at the time the respondent introduced it to the appellant had no interest in the land, were at the date of those documents in a position to direct the appellant to transfer the land to the Government. That is some evidence that the relation of buyer and seller had arisen between the company and the appellant. Even if these documents were wrongly admitted, a new trial should not be granted, because without them there was sufficient evidence to support the verdict (*Cross* v. *Goode* (8); *Gordon* v. *Bank of New South Wales* (9)).

Knox K.C., in reply, referred to *Knight* v. *Barber* (10).

(1) 6 M. & W., 664.
(2) 2 Ex., 628.
(3) 1 Taunt., 353.
(4) 1 Man. & G., 944.
(5) 6 Bing., 332.
(6) (1914) P., 274.
(7) (1896) 1 Q.B., 325.
(8) 8 N.S.W.L.R., 255
(9) 7 N.S.W.L.R., 122.
(10) 16 M. & W., 66, at p. 69.

[ISAACS J. referred to *Gordon* v. *Macgregor* (1).]

Cur. adv. vult.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

This case raises questions of great public importance. They relate both to the protection of the public finances of every part of Australia and to the general administration of justice, particularly the admission of evidence and the enforcement of contracts in writing.

The respondent, Moore, is a stock and station agent at Cowra. The appellant, Dent, is a grazier in the Forbes district, and owned a station, called "Ooma," consisting of 26,538 acres. Moore sued Dent in the Supreme Court for £1,294 14s. 6d. for commission on the sale of Ooma by Dent to a company called Mutual Investments Ltd. The particulars of claim are these :—"To amount of commission due on sale of Ooma Station, Grenfell, to Mutual Investments Ltd., 2½ per cent. on the first £10,000, 1½ per cent. on the next £10,000 and 1 per cent. on the balance : 26,538 acres at £4 2s. 6d.—£1,294 14s. 6d." The evidence showed that Moore had agreed to let an agent named Weaver have one-fourth of the commission, and the jury gave Moore a verdict for £971 0s. 11d.

It is evident that Moore, in order to succeed, is bound to establish not only that there was an actual *sale* by Dent to the company—for the evidence shows that that was the event on which commission was payable—but also the *price* for which the property was sold, otherwise the quantum is not ascertainable. The actual written contract was not tendered in evidence because it was not duly stamped : it was either wholly unstamped or insufficiently stamped. The deficiency must have been great, if not total, or else it would have been paid rather than this risk be run. As Dent would naturally not pay it, and the company had no means of paying it before the surrender, the deficiency is probably total. And as secondary evidence (allowable under the Act of 1914, No. 3, sec. 7 (2)) would have cost the same, it was equally out of question. It is not

(1) 8 C.L.R., 316, at p. 322.

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unimportant to remember that it was not Dent's duty to stamp the contract. That obligation is placed by law on the purchaser, the company (Act No. 24 of 1904, Schedule II.).

The plaintiff staked all on the doctrine, or supposed doctrine, of *Slatterie* v. *Pooley* (1) and *King* v. *Cole* (2), relying on those cases to escape the requirements and provisions of the Stamp Acts. He contends, to begin with, that all he needs to do is to prove the fact of a sale, and that those cases decide that an admission will do that without drawing in the instrument by which the sale was evidenced. His argument on this point, which was acceded to by the Supreme Court, is, at root, that the written contract is only evidence, and admission is equally evidence, but independent evidence, of the same fact.

The defendant undoubtedly in the surrender to the Crown (Exhibit J) and in Exhibits K and L, and in his conversation with Moore, which the jury believed, admitted the existence, and sufficient of the contents, of the written agreement between himself and the company to satisfy the ordinary formal requirements of *primâ facie* proof of the respondent's claim. But, in saying this, two things must be borne in mind as essentials of that claim.

The first is that since it appears that the agreement was embodied in a written document (see *Alcock* v. *Delay* (3)) the contents of that document must be proved *as such*. That is not because it is a mere rule of evidence that the best way to prove the contents of a document is production of the document itself, nor because secondary evidence of a document always purports to state its contents; but it is because of the rule of positive law that when parties have agreed that before they are bound the result of their negotiations shall be embodied in a written instrument even where the law does not require writing—and, if possible, still more where it does (see per *Maule* J. in *Harnor* v. *Groves* (4))—then their agreement to have the contract in writing is as much a necessary term of their bargain as any other. There are many cases which show that, in such a case, until the bargain is reduced to writing and signed there is no contract at all (*Winn* v. *Bull* (5) ; *Rossiter* v. *Miller* (6)).

(1) 6 M. & W., 664.
(2) 2 Ex., 628.
(3) 4 El. & Bl., 660, at p. 664.
(4) 15 C.B., 667, at p. 674.
(5) 7 Ch. D., 29.
(6) 3 App. Cas., 1124, at p. 1152.

In *Knight* v. *Barber* (1) *Pollock* C.B. says: "I think it is a conclusion of law, that where parties are making an agreement by parol, and subsequently reduce it into writing, the writing constitutes the contract." So per *Parke* B. in the same case. So also per *Abbott* C.J. in *Kain* v. *Old* (2). This is subject to the one qualification above mentioned, which is adverted to by *Bramwell* B. in *Wake* v. *Harrop* (3), viz., that the parties have made the document the binding record of their bargain. So too per *Blackburn* J. in *Angell* v. *Duke* (4). The document may be called the evidence of the contract, if you please, but it supersedes all previous communings (*Inglis* v. *Buttery* (5)) and all antecedent parol agreements (*Henderson* v. *Arthur* (6)); and where it is part of their agreement that the bargain shall be contained in writing, and it is in fact reduced to writing, you would be departing from the bargain itself if those terms of agreement were sought for elsewhere. They do not exist elsewhere; the assent of the parties is given only by their signatures. Consequently, any evidence whatever of their contract must be evidence of the contents of that document. Whatever, therefore, sec. 15 of the *Stamp Duties Act* enacts as to the "instrument" may vitally affect the respondent's right to succeed.

In the present case the respondent's evidence shows that the bargain between Dent and the company was reduced to writing, that the written agreement was treated as the binding record of their bargain, and the oral evidence refers to no other agreement. If anything could be required to conclude the plaintiff as to the written agreement of 23rd February 1916 being the only agreement of sale, it is the final covenant of the vendor in the deed of surrender. There, under date 28th March 1917, it covenants that it has not impaired its rights under that agreement of 23rd February 1916, and no other is mentioned. The respondent, then, is bound to rely on the written agreement of sale of 23rd February as *the sale* by Dent to the company, for which he claims commission.

The other point essential to his case is that the terms of that

(1) 16 M. & W., at p. 69.
(2) 2 B. & C., 627, at p. 634.
(3) 6 H. & N., 768, at p. 774.
(4) 32 L.T. (N.S.), 320.
(5) 3 App. Cas., 552.
(6) (1907) 1 K.B., 10, at pp. 12-13.

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agreement must be proved. The written evidence, Exhibits J, K and L, prove the acreage, and the verbal evidence proves the identity and the price. There are several objections taken by Dent, but there is one which stands at the threshold: it is that the *Stamp Duties Act* 1898, sec. 15, is a bar. Apart from authority, the words of the section are quite plain. It says of an "unstamped instrument"—that is, such a document as the written agreement of 23rd February 1916, on which the respondent's case depends—that, except as to criminal proceedings, it is (1) inadmissible in evidence and (2) not to be available or effectual for any purpose whatsoever at law or in equity. As to its inadmissibility in evidence, no question whatever arises here. The respondent does not contend that it is admissible. It clearly is not. But he contends that so long as he avoids putting the actual document in evidence, and avoids the ordinary course of giving secondary evidence, the law does not impair the validity of the sale.

The meaning of the second branch of the enactment, unless controlled by authority, is not open to reasonable doubt. The Legislature by way of securing the payment of the impost for public purposes, which is placed on the instrument, provides in effect that the sanction of law shall be withheld from the acts of the parties until the revenue law is obeyed. It lies at the root of all contractual obligation that the mere convention of the parties creates no binding tie between them. It is the law operating on their compact—either the common law or some Statute—which creates the obligatory relation that one can enforce against the other. But here, acting impersonally on the bargain finally embodied in an "instrument," and therefore contained nowhere else, it strikes that instrument with sterility (to borrow an expression from another branch of the law) unless and until the public requirement of taxation has been complied with. Until that has happened, the instrument (except in criminal proceedings) is not "available" and not "effectual"—that is, it has no effect—for any purpose whatsoever at law or in equity: in other words, it cannot be considered as an instrument giving title, or as one which could be made the means of compelling anyone to give title. It is in the eye of the law a nullity, except for criminal proceedings and, of

course, for the purpose of being stamped. That being the natural effect of the enactment, what authority is there against this view?

It is said that *Slatterie* v. *Pooley* (1) and *King* v. *Cole* (2) are opposed to it, and it is said that they show that the disqualification, so to speak, of the instrument is limited to the case where a person is attempting to put it into force, or, in other words, to compel another to perform it, or pay damages for breach of it, or in some way conform to its stipulations. It is also said that where you can prove your case by an admission, instead of proceeding by the ordinary course of putting in the document or giving secondary evidence of its contents, you are outside the section; in other words, that the section is directed only to a special mode of evidence, this being connected with the proposition that the writing is only evidence of a contract. It has already been shown that according to the primary meaning of the words that is not the true construction of the enactment. But it is argued that the two cases cited necessarily mean that.

It is perhaps convenient to deal first with the question of admissions. There is no doubt that, after running the gauntlet of various criticisms, *Slatterie* v. *Pooley* (1) is at last definitely established as sound law. It has not merely the warrant of the distinguished lawyers who decided it, but it has at last the direct approval of the Judicial Committee of the Privy Council in the case of *Rani Chandra Kunwar* v. *Chaudhri Narpat Singh* (3) in 1906, where Lord *Atkinson* states the law in the clearest possible terms. But the learned Lord adds what it is very material to remember, though *Slatterie* v. *Pooley* (1) says nothing about it, namely, that, where the admission is not made in such a way as to create an estoppel, the party making the admission may give evidence to rebut the presumption that his admission is true; and adds "but unless and until this is satisfactorily done, the fact admitted must be taken to be established."

Now, it is not to be assumed that any estoppel of the parties could defeat the operation of the Stamp Acts, which are for the protection of the public revenue and not of private interests (see *Owen* v. *Thomas* (4)). But, apart from estoppel, the matter would stand

(1) 6 M. & W., 664.
(2) 2 Ex., 628.
(3) L.R. 34 Ind. App., at p. 35.
(4) 3 Myl. & K., 353.

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thus. A bare admission of the written agreement would include a presumption not merely of its existence (*supra*) but also of its being duly stamped (*Marine Investment Co.* v. *Haviside* (1)). But if the contrary is proved, and none the less if, as in the present case, the plaintiff himself shows it, the admission goes for nothing, because the presumption is shown to be wrong. Here the presumption of the existence of the agreement is not displaced, but the presumption as to stamping is admitted to be wrong. And that that is allowable stands on the authority of the Privy Council. But the point to be remembered in this connection is that an admission, though primary evidence, must be taken as given ; and an admission not of simple liability, or of a sale consistent with an oral sale, but of the contents of a written document, though as good in law as if the document were itself produced (*Taylor on Evidence*, secs. 410-411, and see per *Maule* J. in *Boulter* v. *Peplow* (2)), is still only primary proof of the document itself, and not of something outside the document. It is just as if the document were produced. Proof of the contents of a written document by admission is simply an alternative method of reaching the same end as by the ordinary method of production or secondary evidence. See *Stephen's Digest of the Law of Evidence*, art. 64.

" Instrument " means (sec. 3) " any written or printed deed or document." But a deed or document means primarily not the piece of material but what is written upon it, the existence of the material itself being an essential of the document. A written contract is a " written document," and therefore an " instrument " within the meaning of the Act. Exclude the " contract," and you have no " instrument " ; give evidence of *that* " contract "—and here there is no other—and you give evidence of the " instrument." When it is said, as in *Minister of Stamps* v. *Townend* (3), that the Statute taxes instruments and does not tax transactions, it is not meant to sever the piece of material on which the transaction is inscribed from the transaction itself, but to distinguish between transactions which are not constituted by instruments from transactions which are. If they can be and are effected by other means than an instrument,

(1) L.R. 5 H.L., 624.
(2) 9 C.B., 493, at p. 501.
(3) (1909) A.C., at p. 639.

they are outside the Act; but if by means of an instrument, then the whole matter is within the Act. This connotation of "instrument" is well illustrated by the judgment of *Parke* B. in *Hunter* v. *Parke* (1). The primary importance in the connotation of the word "instrument," as used in this section of the matter written upon the material, is shown by the words "available" and "effectual," and by the amending Act (1914, No. 3, sec. 7 (2)). See also *Alcock* v. *Delay* (2), and *R.* v. *Watts* (3) there cited.

It follows from what has been said, that once it appears that the document the contents of which are admitted is an "unstamped instrument," the admission cannot be received at all, because if it is, the "instrument," in the sense of the recorded transaction, is admitted in evidence. The Legislature obviously contemplates that secondary evidence admits the "instrument" by proving the contents, although the piece of material is not present. If that is so, what distinction can be drawn where primary evidence serves the same purpose? But, in any case, the admission of the fact of its contents does not make it one iota more or less valid than if it were physically in Court. If by that means the fact of an instrument is brought within the knowledge of the Court, and at the same time the Court is made aware that it is what the Act calls an "unstamped instrument" which is sought to be made "available" or "effectual," it is the duty of the Court to withhold the judicial power, which it only exerts by authority of the State, and which in this instance the Legislature has directed shall not be exerted.

The respondent meets this by saying that it is not sought to make the instrument here "available" or "effectual," because it is not sued on or sought to be enforced. That is a fundamental error, not only according to the primary meaning of the words themselves, but according to the authorities on similar but less stringently worded enactments for over a century.

Until 1891 the English Stamp Acts had used the language "admitted to be good, useful, or available in law or equity." On these Acts a principle was laid down by authority of the House of Lords in 1849, in *Matheson* v. *Ross* (4). It was there held that

(1) 7 M. & W., 322, at pp. 343-344.
(2) 4 El. & Bl., 660.
(3) 1 Dears. C.C., 326.
(4) 2 H.L.C., 286.

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an unstamped instrument could not be given in evidence to prove any issue, if the fact to be proved by production of the instrument were a fact giving it its taxable character, even although the purpose of proof were indirect and collateral to the direct purpose of the instrument; but if the fact proved by the instrument were one which, even if it were stamped, would be foreign to its taxable character, the document could be used for that purpose. *Rutty* v. *Benthall* (1), in 1867, followed and applied *Matheson* v. *Ross*. The principle was again recognized by *Cotton* L.J. in *Whiting to Loomes* (2). The principle had not been uniformly recognized previously, but there had been cases of great authority in which it had been recognized and applied. Instances in which the Courts applied the principle elucidate the position here.

In 1795 the case of *R.* v. *Inhabitants of St. Paul's Bedford* (3) was decided. A pauper named Page was removed from the parish of St. Paul's Bedford. In 1777 he was bound apprentice to A, and on the death of his master in October 1783 was resident in another parish. On 24th November 1783 the executrix of the master assigned the apprentice to B for the residue of the term, that is, until 1784. The question arose in 1795, between the pauper and the defendant parish, whether he had a settlement in that parish. The indenture of assignment was proved, but it was not stamped, and was rejected by the Court of Sessions. Parol evidence was tendered and rejected, and the Court decided against the pauper. The Court of Queen's Bench (Lord *Kenyon* and *Grose* J.) confirmed that order. It will be observed (1) that the indenture had expired many years, so that there could be no question of enforcing it, and (2) that the question at issue was between one of the parties and a third party who was only indirectly and collaterally affected by it. *Grose* J. made express reference to the argument that the agreement had expired, and therefore was *functus officio*; but he still considered that the party tendering it wished " to avail himself " of it.

In *Roderick* v. *Hovil* (4), in 1811, Lord *Ellenborough* in effect held that an unstamped policy of insurance was a nullity. (See *Arnould*

(1) L.R. 2 C.P., 488.
(2) 17 Ch. D., 10, at p. 12.
(3) 6 T.R., 452.
(4) 3 Camp., 103.

on Insurance, 3rd ed., p. 237). In *Stevens* v. *Pinney* (1), in 1818, *Dallas* C.J. and *Park* J. held an unstamped agreement to be no agreement in law. (See also *Jones* v. *Jones* (2).) *R.* v. *Inhabitants of Castle Moreton* (3), decided in 1820, is similar to the *Bedford Case*, the parish being a stranger to the agreement of letting. *Abbott* C.J. referred to the value of the tenement mentioned in the agreement as of "the very essence of the case." In *Turner* v. *Power* (4), in 1828, a parol agreement of letting was made between plaintiff and defendant upon terms and conditions contained in a written lease previously made between plaintiff and West. The lease when produced was unstamped, and was rejected. Of course, it was not sought to enforce the lease; and its terms were only orally made part of the agreement sued on. In *Williams* v. *Gerry* (5), in 1842, a cancelled bill of sale was rejected, it being tendered of course not to be enforced but only to show that a later bill of sale was *bonâ fide*. *In arguendo*, Lord *Abinger* C.B. said (6), "Here you are setting up this instrument in order to give effect to it"; and *Alderson* B. (7) drew the distinction between putting in a document to show it is "a valid instrument" and putting it in to show it is not. In the judgment Lord *Abinger* said (8): "The Stamp Act, for the sake of the revenue, was intended to exclude the reception in evidence of such instruments as this, unless stamped, whenever they are introduced for the purpose of making them available; that is to say, of *setting them up* and *giving effect to them*." Again he says (9): "In my opinion, an unstamped instrument cannot be received in evidence, wherever the party tenders it with a view to give any legal effect to it whatever." *Alderson* B. says, with much appositeness to the present case (10), "it was propounded as an instrument *valid and effectual* for the purpose of conveying the property mentioned in it at the time it was executed, and as having a capacity to be made available in law. I think, therefore, it was properly rejected." *Rolfe* B. was of the same opinion, and his reference to the connection of the two branches

(1) 8 Taunt., 327.
(2) 1 C. & M., 721.
(3) 3 B. & Ald., 588.
(4) 7 B. & C., 625.
(5) 10 M. & W., 296.
(6) 10 M. & W., at p. 301.
(7) 10 M. & W., at p. 302.
(8) 10 M. & W., at p. 304.
(9) 10 M. & W., at p. 306.
(10) 10 M. & W., at p. 307.

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of the enactment is not to be taken as conceding validity, apart from evidence. Such a result would be anomalous and insufficient. The judicial use of the word "effectual," even where it was not expressed in the Statute, should be noticed.

R. v. *Gompertz* (1), decided in 1846, was a criminal case upon indictment for conspiracy. The parties therefore were not the same, and *ex necessitate* there was no question of enforcing the instrument as to which the question arose. An unstamped acceptance was admitted in evidence. Objection was taken, and on a rule *nisi* for a new trial or arrest of judgment Lord *Denman* C.J. stated the law in these terms (2):—"Where the object of the evidence is not to enforce or set up the instrument as a valid instrument, but merely to show that it was part of a scheme of fraud, and so to use it for a purpose collateral to the object apparent upon the face of it, there are many cases in which it has been held that a written instrument, requiring a stamp but unstamped, is admissible. On the other hand, if there be any allegation to the proof of which an *instrument available in law is necessary*, or *if it be tendered as such instrument*, unless, as in forgery, it be itself the subject matter of the charge, then it cannot be received unstamped, if of a nature requiring a stamp." In 1849, as already mentioned, came *Matheson* v. *Ross* (3), and it was evident that in criminal matters the law as to the admissibility of unstamped documents might easily lead to a failure of justice. In 1854, by 17 & 18 Vict. c. 83, sec. 27, documents, though unstamped, were made generally admissible in criminal cases. This principle of preferring public justice to revenue has been generally followed. But private advantage still stands subordinate to public revenue, and an "unstamped instrument" cannot be set up as ever being valid and operative for any civil purpose.

In 1869 there came before the Court of Appeal a question of a policy of insurance in which *Roderick* v. *Hovil* (4) was not cited, but the same result was reached:—In *Smith's Case* (5) the question was whether Smith was a contributory in the winding-up of a marine insurance company. He had paid his entrance fees as

(1) 9 Q.B., 824.
(2) 9 Q.B., at pp. 839-840.
(3) 2 H.L.C., 286.
(4) 3 Camp., 103.
(5) L.R. 4 Ch., 611.

member; he had ordered a policy on his ship; it had been issued; he had renewed his membership; he paid calls; his ship was injured, and he made a claim under his policy. Before it was finally settled the company was wound up. It happened, however, that his policy was not stamped. For this reason *James* V.C. removed his name from the list. On appeal *Selwyn* L.J. and *Giffard* L.J. upheld that decision. They held that, though the contract was made and acted on for some time, the Act left it without legal effect. Two observations of *Selwyn* L.J. should be noticed. The first is at p. 614: "I agree with the Vice-Chancellor, that it is not the duty of a Court of law or of equity to be astute to find out ways in which the object of an Act of the Legislature may be defeated." That observation may be placed alongside the opening words of Lord *Brougham* in *Matheson* v. *Ross* (1). The second observation of *Selwyn* L.J. is at p. 615, viz.: "In the present case, therefore, the contract entirely failed, for by the Act we are precluded from taking notice of it as having any effect whatever at law or in equity." Again the word "effect" is used, though not in the Statute.

In 1870 the English stamp law was consolidated in Act 33 & 34 Vict. c. 97, and by sec. 17 the old words were repeated. In 1872 *In re Teignmouth and General Mutual Shipping Association—Martin's Claim* was decided by *Bacon* V.C. (2). There also a policy of insurance was unstamped, and the widow of an insured person claimed in the winding-up as a creditor, although the policy was not stamped. *In re London Marine Insurance Association—Smith's Case* (3) was cited against the claim. But as it appeared that the company before winding up had admitted the claim, had entered the sum claimed in their books as a debt owing to the estate, the Vice-Chancellor, rightly or wrongly, perhaps rightly in view of sec. 154 of the *Companies Act* of 1862, making entries in the books *primâ facie* evidence in winding up, held in favour of the argument that there was an account stated. He said the relation of debtor and creditor had been created, and the amount admitted in the books was due subject to an inquiry as to the claim. It is quite clear the Vice-Chancellor rested his decision on a specific

(1) 2 H.L.C., 286.
(2) L.R. 14 Eq., 148.
(3) L.R. 4 Ch., 611.

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ground of liability other than the policy. In *Maynard* v. *Consolidated Kent Collieries Corporation Ltd.* (1) the Court of Appeal applied the section to an insufficiently stamped transfer of shares in a company. The Court held that the directors were entitled to refuse registration, because, if the matter were ever questioned, the transfer would be inadmissible and would afford the company no justification for registering it. But that assumes the document was ineffectual *ab initio*.

It remains to consider how the two cases of *Slatterie* v. *Pooley* (2) and *King* v. *Cole* (3), and a third case, *Birchall* v. *Bullough* (4), stand, having regard to the decisions quoted. The first was decided in 1840, the second in 1848, and the third, as above appears, in 1896. The second may easily be disposed of. A guaranty was relied on as an admission that the plaintiff had executed the indenture as averred in the declaration. The Court construed the guaranty as not containing that admission. The question as to the effect of the *Stamp Act* on such an admission, if made, therefore did not come into question. *Slatterie* v. *Pooley* (2) was cited in that case, but *Pring* J. correctly says that it is no authority on the *Stamp Duties Act*. The only point argued in it was whether an admission could be admitted as the contents of a written document, no reference whatever being made to the Stamp Acts. In the report in *Meeson and Welsby* (5) the words "which was itself inadmissible for want of a proper stamp" appear in the statement of counsel's objection, and then there is added: "and the learned Judge being of that opinion, the plaintiff was nonsuited." It is difficult to understand the objection so framed when the argument and judgments are read. But the matter is made clear by reference to two contemporary reports. One is in *Hurlstone and Walmsley* (6). At p. 19 this passage occurs:—"It was then proposed to give in evidence an admission of the defendant, that the debt sued for by Thomas was the same debt that was inserted in the schedule; but the learned Judge rejected the evidence on the ground that, though an admission might be used to show the existence of

(1) (1903) 2 K.B., 121.
(2) 6 M. & W., 664.
(3) 2 Ex., 628.
(4) (1896) 1 Q.B., 325.
(5) 6 M. & W., at p. 665.
(6) H. & W., 18.

a deed, when that fact was established, it could not be allowed that the contents of that deed should be so proved. The plaintiff was in consequence nonsuited." In 10 *Law Journal, Exchequer*, at p. 8, this passage occurs :—"The defendant's counsel objected to this evidence, on the ground, that no question could be asked as to an admission by a party to the suit, of the contents of a written instrument, without the instrument being produced, or some account given of its non-production. The learned Judge was of this opinion, and nonsuited the plaintiff, reserving the point for the consideration of the Court." At p. 668 of the report in *Meeson and Welsby*, learned counsel, arguing against the rule, say : "This is no doubt a point of great importance and it is desirable that it should be settled by a distinct decision of the Court." The point of that observation is that Lord *Tenterden's* opinion was opposed to *Park* J. and other Judges, and to *Phillips on Evidence*. The decision is nowhere referred to as affording a means of escape from the Stamp Acts, and it is impossible to find a sound reason for thinking that proof of a written document by an admission instead of production can elude the specific direction of the Legislature that the instrument is not to be given effect to. Sir *C. J. Selwyn's* first quoted observation in *Smith's Case* (1) here becomes important. If conjecture be permissible why the point was persisted in and decided as it was, the probability is that the learned counsel who represented the defendant feared that if once the fact were established that Thomas's debt was included in the schedule, the Stamp Acts would not stand in the plaintiff's way. But conjecture would also suggest the reason for that fear. The deed of composition had been rejected as a whole, and that seems to have been acquiesced in. But the single fact of the inclusion of Thomas's debt, since Thomas was not an assenting creditor, stood for nothing in the composition deed. It had no effect there ; it did not create in whole or in part any taxable character : if all the creditors had been in Thomas's position, there would have been no stamp wanted at all. Sir *Frederick Pollock*, who was of counsel in the case, may have felt that on the principle followed in some of the cases up to that time, though *Matheson* v. *Ross* (2) had not yet been decided, that

(1) L.R. 4 Ch., 611.

(2) 2 H.L.C., 286.

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single fact might have been provable by admission, though not by proving the whole deed. His view of the decision in *Slatterie* v. *Pooley* (1) sixteen years afterwards is seen in *Darby* v. *Ouseley* (2), and is in accord with the opinion above expressed.

In the case of *Stowe* v. *Querner* (3), where *Slatterie* v. *Pooley* (1) was cited, learned counsel for the plaintiff and *Pigott* B. took the view that, assuming the evidence there was primary evidence, the contract was still within the Stamp Acts, and the question was whether those Acts were complied with.

In 1891 the language was altered in 54 & 55 Vict. c. 39, sec. 14 (4), to "for any purpose whatever." Whether these words exclude collateral purposes within the meaning of *Matheson* v. *Ross* (4), it is unnecessary to determine.

The third case, *Birchall* v. *Bullough* (5), was an action, not on the promissory note but for money lent. It is true the interrogatory asked as to the promissory note and perhaps wrongly, but there was a clear admission of receiving the money, and that of itself supported the claim.

In the result, the plaintiff fails, because his claim is founded on a promise, one essential condition of which is a sale, and the only evidence of the sale is inadmissible by reason of the Stamp Acts.

The only remaining question is: What should be the judgment of the Court? Mr. *Shand* was asked whether his client was prepared to pay the duty on the agreement, and he replied that his client was not prepared to do so. He has since qualified that by informing the Court that the solicitor for the respondent would undertake to pay the duty in the event of a new trial being ordered without costs, and in the further event of the respondent electing to proceed further. But no other undertaking was given. Mr. *Shand* added that if costs were ordered it would not be worth the respondent's while to pay the duty. A new trial, except upon the respondent's terms, therefore, would leave matters precisely where they are, if the truth were allowed to appear. But it would not be just to order a new trial without making the respondent pay the costs of the proceedings he had deliberately taken and conducted with full

(1) 6 M. & W., 664.
(2) 1 H. & N., 1, at pp. 5-6.
(3) L.R. 5 Ex., 155
(4) 2 H.L.C., 286.
(5) (1896) 1 Q.B., 325.

knowledge of the risks. That being so, the proper order, on the principles stated in *Banbury* v. *Bank of Montreal* (1), is to direct a verdict. This is quite competent to the Court under sec. 7 of the *Supreme Court Procedure Act* 1900 (No. 49).

As to costs, there are some cases where a stamp objection would be such as to merit no costs. But here, Dent, finding that the company was utterly without capital, may have regarded it as an intermediary, and the real intermediary, in effect disposing of his property to the Government and receiving for its trouble £7,500 cash. Without in the least impeaching the jury's finding as to what passed between Dent and Moore, that aspect would relieve him from any charge of dishonesty. The position is, then, that the plaintiff fails on a point he saw before him, and persistently endeavoured unsuccessfully to overcome. The usual result as to costs should therefore follow.

Appeal allowed. Order appealed from discharged with costs. Verdict entered for the defendant. Respondent to pay costs of this appeal.

Solicitors for the appellant, *Crommelin & Moore*, Grenfell, by *L. G. B. Cadden.*

Solicitor for the respondent, *H. S. Bland.*

B. L.

(1) (1918) A.C., 626, at pp. 670 *et seqq.*