

J. H. CHAPMAN ..... APPELLANT ;

1882

AND

\*Oct. 25.

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FRANCIS AND JAMES A. TUFTS.....RESPONDENTS.

\*Jan. 12.

*Unstamped bill of exchange—42 Vic., ch. 17, sec. 13—Knowledge—  
Question for Judge.*

The action was brought by *T. et al* against *C.* to recover the amount of a bill of exchange. It appeared that the draft when made, and when received by *T. et al*, had no stamps ; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and they immediately put on double stamps.

The bill was received in evidence, leave being reserved to the defend-

\*PRESENT—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, JJ.

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ant to move for a non-suit; the learned judge stating his opinion that though as a fact the plaintiffs knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880.

- Held*, 1. That the question as to whether the holder of a bill or draft has affixed double stamps upon an unstamped bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 *Vic.*, ch. 12, sec. 13, is a question for the judge at the trial and not for the jury. (*Gwynne, J.*, dissenting.)
2. That the "knowledge" referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case showed that *T.* acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880.
3. That the want of proper stamps or proper stamping in due time is not a defence which need be pleaded (*Gwynne, J.*, dissenting).

**A**PPEAL from the decision of the Supreme Court of *New Brunswick*, refusing a motion that the verdict in this cause be set aside, and a non-suit entered (1).

This was an action brought by the respondents as payees against the appellant as acceptor of a bill of exchange.

The first count of the declaration is on the acceptance, by the defendant, of the draft of one *David S. Howard*, dated 26th December, 1880, for \$500, in favor of the plaintiffs. The declaration also contained the usual common counts. The only plea material to the case is the first, which traverses the acceptance of the draft. The cause was tried on the 10th August, 1881, at the *St. John* Circuit Court, before his honor Mr. Justice *Duff*. The only question involved in the case was as to the sufficiency of the stamping.

The evidence on the point was, that the plaintiffs received the draft about a fortnight or a month after it

was drawn ; that the plaintiff, *James A. Tufts*, who was the witness, knew then that notes and bills required stamps, but never gave it a thought ; that he did not put stamps on it until it was being sued ; that his first knowledge that it was not stamped was when his attorney called attention to it on 26th February, 1880 ; that he then immediately put on double stamps and cancelled them ; that he had the management of this, his brother and co-plaintiff having been away, and having had nothing to do with it.

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The counsel for the defendant claimed on the trial that it was not competent for the person who had the bill in his possession, with the knowledge that bills of that kind required stamps, to make the bill good by acts such as those of Mr. *James Tufts*, as above detailed. He did not claim that there was any evidence of the plaintiffs having had any knowledge, in fact, that the draft was not stamped, any sooner than the time stated by the only witness who was called in the case, viz. : on the 26th February, 1880, at which time the double stamps were put on and duly cancelled.

The counsel for the plaintiffs claimed that double stamps having been put on by the holder, and duly cancelled as soon as he acquired knowledge of the defect, ("plaintiff put double stamps as soon as he becomes aware of the defect ;") the acceptance was rendered legal and valid under 42 *Vic. ch. 17*.

Mr. Justice *Duff* received the draft in evidence, reserving leave to enter a non-suit if the draft was improperly received in evidence.

The motion of counsel for the defendant was, "That the verdict in the above cause be set aside, and a non-suit entered ;" and the court, having taken time to consider, ordered—"That the said motion be refused."

Mr. *Davies*, Q.C., appeared for appellants, and Mr. *Travis* for respondents.

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RITCHIE, C.J. :

This was an action on a bill of exchange by the drawees against the acceptor, tried at the *St. John* Circuit Court before Mr. Justice *Duff*.

The only question involved is as to the sufficiency of the stamping. It was, in my opinion, the duty of the learned judge, under the statute 42 *Vic.*, ch. 17, to determine whether the bill, on its face, was properly stamped or not properly stamped, and as I think the evidence shows that the respondent paid the double duty so soon as he acquired the actual knowledge that the bill was not properly stamped, the bill was properly received in evidence, and the judgment in the plaintiff's favor should be affirmed.

STRONG, J. :

The question, whether the plaintiffs affixed double stamps so soon as the unstamped state of the bill was brought to their knowledge, within the terms of sec. 13 and 20, ch. 17, was, as it appears to me, by the express provisions of that section, a question for the determination of the judge at the trial, and not one to be tried by the jury. It was a question of fact, upon the decision of which the admissibility or rejection of a document tendered in evidence was made to depend, and like all such issues, was one to be tried not by the jury but by the judge. And this being so, I am of opinion that the want of proper stamps or proper stamping in due time is not a defence which ought to be pleaded, inasmuch as the rules of pleading only require such defences founded upon facts as the jury might be called upon to try to be placed upon the record. In my view, therefore, Mr. Justice *Duff* took the proper course at the trial in dealing with the question himself, instead of treating it as one for the jury.

This view is warranted by the express words of the

section, "to the satisfaction of the court or a judge," which I construe according to their primary meaning as excluding a jury. These words "to the satisfaction" have relation as well to the payment of double duty by the holder as soon as he acquired knowledge as to the other condition that the omission should be through error and mistake, and without any intention to violate the law; both questions are clearly made triable by the judge alone. Then, this being so, it was quite competent for the court in banc to reverse the finding of the learned judge at the trial on this preliminary issue.

The learned judge finds substantially that it was through error and mistake and unintentionally that stamps were not affixed as soon as the bill came to the plaintiffs' hands, but he also finds that the plaintiffs knew when they received the bill that it was unstamped. The latter part of the finding the majority of the court below have thought unwarranted by the evidence—a conclusion in which I entirely agree. I can find nothing in the evidence to warrant us in holding that the plaintiff, *James A. Tufts*, had any knowledge of the unstamped state of the instrument at any earlier date than that at which he swears he first became aware of it. He says his first knowledge that the bill was unstamped was when Mr. *Travis*, his solicitor, called his attention to it on 26th February, 1880, when he immediately put on double stamps and cancelled them. There is no evidence in any way to vary or neutralize this in the slightest degree. And unless we are bound to say that because the bill had been for some time preceding the date of the stamping in the plaintiffs' possession, they must be presumed to know it was not stamped, it will be impossible for us to come to any conclusion different from that arrived at by the Supreme Court of *New Brunswick*. The object of the enactment of which the plaintiff claims the benefit was

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clearly to relieve persons from loss through innocent inadvertence to pay the duty, and if we were to hold that imputed or constructive, and not actual knowledge was meant, we should be going far to do away with the efficacy of the section, as affording a means of relief against innocent error and mistake, and that without anything in the language of the statute requiring such a construction. I am, therefore, of opinion that "knowledge" means actual and not imputed or presumed knowledge; and this the evidence shows the plaintiff acquired for the first time on the day he affixed stamps for the amount of the double duty.

The appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J. :—

The question was raised here whether a plea of the absence of proper stamps was necessary to be filed before the defendant could obtain the benefit of the evidence of the want of them. In the statute which provides that a bill or note not properly stamped shall not be sufficient, we have mentioned what kind of a bill would be sufficient to enable a party to recover. The statute settles that, and provides that, where the maker did not put on the stamp corresponding with the date and obliterate it when it is made, the party to whom the note is given, as soon as he discovers it is not stamped or is not sufficiently stamped, by putting on double the number deficient, with the date of his doing so, is enabled to make that which was useless before a good and available document. When a note or bill is produced and bears the stamping by the party who makes it, it is on view before the judge a sufficient document, and it would be for the other party to show that there was some reason, either that it was not stamped at the time, or give

some other reason, why the stamp as affixed should not be considered sufficient. When a party denies the acceptance of a bill or the making of a note, he virtually denies the making of a legal and available document, and I think it is not necessary for the party to plead the want of stamps. It refers to a bill that the other party could recover on at law. The denial of the acceptance throws upon the other party the onus of proving a valuable document upon which he is entitled to bring the action. In this case the party in whose favor the bill was drawn received it without any stamps, and the evidence goes to show that, as soon as he became aware of the fact, he put on the legal number of stamps. It was a question then that might or might not be tried by the judge. The judge, in the first place, would be bound to receive the document on the trial, and it might be a question for him afterwards to decide whether there was any evidence on the other side which would do away with the testimony of the plaintiff. If there were contradictory evidence, it would, I take it, be left to the jury, but the judge was bound to decide whether on the face of it it was a good and available document. Under these circumstances, then, I think the judge did right so far as he gave effect to the bill, but I must say that I think his judgment was a little contradictory, and I think that, the only evidence being the evidence of one of the plaintiffs in regard to the fact of his own knowledge of the stamping of the bill, and that not being in any way attacked by counter evidence, I can only say that I for one, sitting as a judge, would have no hesitation in saying that the evidence was sufficient under the law. So that, although the judge decided in that way, it is more a legal decision than it is a decision on the evidence. Under these circumstances, I think the plaintiff is entitled to recover. He proved, I think, that he was not

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aware that the bill was not stamped, and I agree with my learned brother *Strong* in stating that, under the statute, it is actual knowledge that is required. If a party knows the bill is not stamped, and does not act upon that knowledge and put on the stamps, then, of course, he is liable to the consequences, but, if a man without knowing it puts a bill into his drawer or his safe, keeps it two or three months, takes it out again, and discovers it is not stamped or not sufficiently stamped, I think the statute provides for that. I therefore think the appeal should be dismissed, and the judgment below confirmed.

GWYNNE, J. :—

In my judgment the learned judge who presided at the trial of this case would have erred if he had ruled upon the case as presented at the trial, that there was no case to go to the jury and that the plaintiffs should be non-suited. As the plaintiffs could not be non-suited against their will, what was contended for is, in effect, that unless they should be willing to accept a non-suit the learned judge should have told the jury that there was no case to go to them, and that therefore their duty was to render their verdict for the defendant. The question depends upon the proper construction to be put upon the 2nd section of 37 *Vic.* ch. 47.

The action was brought by the plaintiffs as payees against the defendant as acceptor of a bill of exchange. To this action the defendant pleaded *non accepit*, upon which plea issue was joined, and the issue was brought down for trial by a jury. On the bill being produced, it appeared to bear date the 26th December, 1879, to be for the sum of \$500, and to have on it bill stamps to the amount of 30c. marked "cancelled *F. T. & Co.*, Feb. 16, '80." There was no plea upon the record that the bill was not properly stamped. The stamps appearing upon

it were consistent with the fact of the bill having been stamped at a time and in a manner authorized by law ; but whether there existed any fact or circumstance which would render the stamps so put on insufficient in point of law was a point which, it must be admitted, was not raised by the plea of *non accepit*. Our act is quite different in this respect from the English act, which prohibits a bill not stamped being received in evidence, and therefore in *England* under a plea of *non accepit* an objection of want of a stamp does necessarily arise, because a bill not stamped being inadmissible in evidence, a defendant upon issue joined to a plea of *non accepit* must prevail, no bill being produced. He succeeds simply by reason of the plaintiff being unable to produce a bill, the existence of which the plea denies. It was assumed, however, by all parties at the trial, that the plea did put in issue all such questions as might be raised by the evidence, by reason of the stamps not having been, if they should appear not to have been, put upon the bill and cancelled at a time and in a manner authorized by law ; the most favorable light therefore for the defendant in which we can entertain the point argued on this appeal is to treat the question, as it should be treated, upon an issue joined on pleadings in express terms raising the question. The plea in such a case would be to the effect that the bill had no stamps put upon it when it was drawn or accepted, and that the plaintiffs when they became holders of the bill acquired the knowledge that the bill was defective for want of stamps, and did not as soon as they acquired the knowledge that the bill was so defective by reason of the stamp duty not having been paid thereon, pay double duty thereon by affixing stamps to the amount of such double duty, and cancelling them as required by law in that behalf, but wilfully neglected so to do, and afterwards, to wit, a long time after they had acquired such

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knowledge that the bill was so defective as aforesaid, to wit, on the 26th February, 1880, put on and cancelled the stamps appearing on the said bill; by reason whereof and by force of the statute in that behalf, the said bill hath become and is invalid in law and equity. To this plea the plaintiffs, as appears by the evidence given at the trial, might have replied in substance to the effect that they first became holders of the bill some time after, to wit, a fortnight after it was drawn and accepted, and that they did not, when they first became such holders, nor until the 26th day of February, 1880, acquire knowledge that the said bill was defective for the reasons in the said plea alleged, and immediately upon their acquiring such knowledge they did upon the same 26th day of February affix stamps to the said bill to the amount of double the duty payable at the time of the drawing of the bill, and did cancel such stamps in the manner required by law; issue being joined on this replication would have effectually raised the point of fact to be tried, and the jury sworn to try that issue would have been the sole constitutional tribunal to render a verdict upon it. Now, the only evidence given at the trial upon the point was that given by *James A. Tufts*, one of the plaintiffs, whose evidence, as I read it, upon the case submitted to us, is, in substance, that although he knew that bills and notes require stamps, yet that the first knowledge he had that the bill in question was not stamped, was when *Mr. Travis*, his attorney, called his attention to it, Feb. 26th, 1880, and that he then immediately put on double stamps and cancelled them. He added, that he had the management of the matter; that his brother, the other plaintiff, had nothing to do with it. It was not objected or suggested at the trial that the other plaintiff should have been called; the naked contention of the defendant's counsel was that upon the evidence of

*James A. Tufts*, as above, there was no case to go to the jury, and that of plaintiff's counsel was, that by the provisions of 37th *Vic.*, ch. 47, sec. 2, the double stamping on the 26th Feb., 1880, was sufficient in law.

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This section enacts that any holder of a bill of exchange or promissory note may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his initials on such stamp or stamps, and the date on which they were affixed; and wherein any suit or proceeding in law or equity the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party, or at the proper time, or of any formality as to the date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof when he became such holder had no knowledge of such defects, such instrument shall be held to be legal and valid, if it shall appear that the holder thereof paid double duty as in this section mentioned so soon as he acquired such knowledge, even although such knowledge shall have been acquired only during such suit or proceeding.

Now, it is obvious that, whether the double stamps were affixed so soon as the plaintiffs acquired knowledge that the bill had not had affixed to it stamps to cover the single duty, was a question of fact which, assuming the point to have been properly in issue, it was the duty and province of the jury alone to solve. It was exclusively the province of the jury to determine what weight should be attached to the evidence of *James A. Tufts*, and what was the proper conclusion to arrive at in respect of the matter testified to by him. In arriving at this conclusion, it would have been quite

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proper for the jury to consider the fact admitted by him, that he knew that bills and notes required stamps, and also to take into consideration the means he had of acquiring knowledge, that a bill received by him in the course of his business had no stamps affixed to it when he received it; but as means of knowledge is not actual knowledge, all these considerations were but aids in enabling the jury to determine whether in point of fact they should find by their verdict that the plaintiff first acquired the knowledge, as testified by him, on the 26th February, 1880. It was the exclusive province of the jury to weigh evidence, to draw inferences of fact—to find the fact, and accordingly as they should find that single material fact, to render their verdict for or against the plaintiffs.

There is nothing in the Act of Parliament to justify a contention that the Legislature contemplated so to neutralize—and in fact to revolutionize—trial by jury, as to authorize a judge presiding at a trial of an action the issues of fact in which the parties have put themselves upon a jury to try, to take from the jury the sole material question of fact it had been sworn to try and to substitute himself for the jury. When a judge tries questions of fact without a jury, he is by law substituted for a jury, and his duty is to find facts as a jury should, and his verdict is open to review if it should be arrived at by improper inferences drawn by him, or if it should be plainly at variance with the evidence; but where the parties have put themselves upon a jury, called and sworn to try issues of fact joined, and a true verdict to render according to the evidence, there is no law which authorizes a judge to withhold from the jury the evidence bearing upon those issues of fact and to substitute himself for the jury, and this was what in effect the judge in this case was asked by the defend-

ant's counsel to do, and what he would have done if he had ruled that there was no evidence to go to the jury, and that the plaintiffs should be non-suited. Even in a case where a question of reasonable and probable cause arises (which is held to be a legal question for a judge to determine) if the existence or non-existence of the reasonable and probable cause depends upon the existence or non-existence of certain facts, the jury must pass upon the facts before the judge can apply the law. The proper charge in the case before us would be that it was for the jury to say whether, all things considered, they believed the witness, *James A. Tufts*, when he swore that his first knowledge of the bill not having been stamped was acquired on the 26th February, 1880, and to render their verdict for the plaintiffs or defendant accordingly, as they should find upon that fact; but, as no question is raised here as to whether the point for the jury to determine was or not left to them with a proper direction, but simply whether there was any evidence to go to the jury, all that we have to do is to express our opinion upon that point, and, in my judgment, there can be no doubt that there was, and to have ruled otherwise would have been erroneous. It is, however, contended that a paragraph in the second section of 37 *Vic.*, ch. 47, not quoted above, but which comes immediately after that which I have quoted, has the effect of substituting the opinion of the judge for the finding of the jury upon the material question of fact in dispute, and that as he intimated his opinion to be that Mr. *Tufts* (although, as a fact, he knew the bill had no stamps on it when he received it, and that stamps were necessary) accidentally, and not intentionally, omitted to affix them until his attention was called to the omission by Mr. *Travis* in February, 1880, the effect of such intimation of opinion was to require the case to be withdrawn from the jury, and to entitle the

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defendant to have a judgment of non-suit entered. This contention appears to me to be based upon a misconception of the paragraph referred to. If the defendant's contention be correct, then it is apparent that the effect of the section referred to would be, not by express language, but by implication, to neutralize, and, in fact, to revolutionize trial by jury, a construction which would require the most express and unequivocal language to justify. The paragraph is :

And if it shall appear in any such suit or proceeding to the satisfaction of the court or judge, as the case may be, that it was through mere error or mistake and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument,—then such instrument or any endorsement or transfer thereof shall be held legal and valid, if the holder shall pay the double duty thereon, so soon as he is aware of such error or mistake, but no party who ought to have paid duty thereon shall be released from the penalty by him incurred as aforesaid.

Now, what is meant by the words “if it shall appear, &c., to the satisfaction of the court or judge, as the case may be,” especially of the words “as the case may be.” The section, it is to be observed, is providing in respect of a question arising in a suit or proceeding in law or equity. Such questions in the ordinary course of the practice of courts of equity arise there sometimes before a single judge, sometimes before the full court, and in such cases the court or judge is judge of facts as well as of law. In law the question might arise before a single judge trying the case without a jury, in which case the judge discharges the functions of a jury, but more usually it arises before a Court of Assize and *nisi prius*, of which court a jury is a constituent part, having exclusive jurisdiction over all questions of fact. The words then “as the case may be,” plainly, as it appears to me, apply to the case of the question arising either in a court of which a jury is a constituent part, or before a single judge or a court

consisting of more judges than one acting as a jury ; before whatever tribunal, as the case may be, that the question arises in the suit or proceeding in law or equity, it is still the tribunal for determining facts in such case, to whose satisfaction the point of fact referred to must be made to appear. The tribunals referred to in the second paragraph are precisely the same as those referred to in the prior one, under the words :

Whenever in any suit or proceeding in law or equity the validity of any instrument is questioned by reason of the proper duty not having been paid, &c., it appears that the holder thereof, &c.

To hold that a judge presiding at a jury trial may, under this language, withhold from the jury sworn to try the issues joined all consideration of the material matter of fact involved in such issues and assume to find the fact himself, would be, in my judgment, to put a forced and most unnatural construction upon the language used. The object of the first part of the section is to enable every holder (subject always to the liability to pay the pecuniary penalty imposed by the Act) to affix stamps for double duty to, and so to rehabilitate, a bill or note which had not a sufficient number of, or any, stamps to cover single duty when he received it, provided he can satisfy the constitutional tribunal in the given case, before which a question as to the validity of the instrument is raised in any suit or proceeding in law or equity, that he affixed such double stamps so soon as he acquired knowledge of the existence of the defect complained of ; and this, whether his previous ignorance was ignorance of law or of fact ; and the object of the second paragraph is to provide, that if he can satisfy such tribunal that the defect complained of was attributable to mere error or mistake, and not to any intention upon the part of the holder to violate the law, that shall be sufficient to enable him to put on double stamps and to recover in the suit or proceeding upon the

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instrument provided he shall put on such double stamps when he becomes aware of such error or mistake, even though that should be during the trial; but as questions of ignorance—whether of law or fact, and of error or mistake, and of intention—are all questions to be tried by the proper tribunal for trying facts in each case, whenever the question arises in a suit upon an issue found which a jury is sworn to try, the jury is that tribunal.

In the case before us, I am clearly of opinion that the question, assuming it to have been properly raised, was one for the jury and not for the judge to determine, and that the evidence could not have been withheld from them, and that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for appellant: *James Straton.*

Solicitor for respondents: *J. Travis.*

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