AUSTIN J. ROBERTS (Defendant).....APPELLANT; 1884

AND

*Feb'y. 25.
*June 23.

LORENZO H. VAUGHAN, THOMAS A. VAUGHAN, ROBERT M. VAUGHAN (Plaintiffs)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Bill of exchange—Not stamped by drawer—Affixed by drawee before being discounted—Double duty affixed at trial—Knowledge of law relating to stamps—42 Vic. ch. 17—Plea that defendant did not make draft—Cons. Stats. N. B. ch. 37 sec. 83 sub-secs. 4 & 5—Evidence of want of stamp under—Special plea.

R. remitted by mail to *V.* a draft on Bay of Fundy Quarrying Co., Boston Mass., in payment of an account of the Co. of which *R.* was Superintendent. The draft, when received by *V.*, was unstamped, and *V.* affixed stamps required by the amount of the draft, and initialed them as of the date the draft was drawn, which was at least two days prior to the date on which they were actually affixed. The draft was not paid, and an action was brought against *R.*, who pleaded, according to provisions of Cons. Stats. New Brunswick ch. 37 sec. 83 sub-sec. 4, "that he did not make the draft." On the trial the draft was offered in evidence and objected to on the ground that it was not sufficiently stamped, the plaintiff having previously testified as to the manner in which the stamps were put on, and having also sworn that he knew the law relating to stamps at the time. The draft was admitted, subject to leave reserved to defendant to move for a non-suit, and at a later stage of the trial it was again offered with the double duty affixed.

The trial resulted in counsel agreeing that a non-suit should be entered with leave reserved to plaintiffs to move for verdict, Court to have power to draw inferences of fact.

On motion, pursuant to such leave reserved, the Supreme Court of New Brunswick set aside the non-suit and ordered a verdict to

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

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be entered for the plaintiffs on the ground that the defect in the draft of want of stamp should have been specially pleaded.

On appeal to the Supreme Court of Canada:—

Held, Strong and Gwynne JJ. dissenting, that double duty should have been placed on the note as soon as it came into the hands of the drawee unstamped, and that it was too late at the trial to affix such double duty, the plaintiff having sworn that he knew the law relating to stamps, which precludes the possibility of holding that it was a mere error or mistake.

Held also, that under the plea that defendant did not make the draft, he was entitled to take advantage of the defect for want of stamps.

Per Strong J.—That the note was sufficiently stamped and plaintiffs were entitled to recover.

Per Gwynne J.—That if the note was not sufficiently stamped the defence should have been specially pleaded.

APPEAL from a judgment of the Supreme Court of New Brunswick making absolute a rule to set aside a non-suit and enter a verdict for the plaintiffs, according to leave reserved.

The facts of the case are sufficiently set out in the judgments of Ritchie C.J. and Gwynne J.

Weldon Q.C. for the appellant.

Straton for the respondents.

Sir W. J. RITCHIE C.J.—The bill of exchange sued upon in this case is dated 25th July, 1881, and payable four months after date to L. H. Vaughan & Bros., at Pacific National Bank, Boston Mass., for $577.30. At the trial Mr. Weldon proposed to call witnesses to show that the draft was not properly stamped, and this was objected to.

The defendant was then called and examined, and says:—

I never put these stamps on or authorized any one to do so. I sent this paper to Mr. Vaughan to pay an account of the Bay of Fundy Quarrying Company. I was then at Mary's Point. Account was not due by myself.

L. H. Vaughan, one of the plaintiffs, says:

Received this draft in latter end of July, 1881. No stamps then on it. Stamped it myself. Cancelled them myself by figures 25-7-'81 on 25th July, 1881. Cannot give exact date of receipt; will not swear I got it on 25th July. A letter from Mary's Point ought to come in a day. Got it in a letter. Have not letter here.

Cross-examined :—

I stamped draft before using it at bank. May have stamped it at time or not before using it at bank. General course of business is to stamp note—sometimes immediately on receipt—other times when used. I think this was stamped on day received.

Re-cross examined :—

Can't tell without referring to books when it was used. Will not undertake to swear when this was stamped. Mary's Point is, by one road, six miles, by another, eight or ten miles from Harvey, Don't known when mail comes down. (I admit draft subject to leave to defendant to move to enter a non-suit, Mr. Palmer to be at liberty to supply further evidence bearing on the point).

Mr. Palmer offers protest, proving presentation.

Other witnesses are called, but no further evidence relating to the stamping was offered.

It is clear, from plaintiff's letters to W. J. Roberts, that draft was not received by them on the 25th July. The letter of 26th July to defendant so says,—and on the next morning they wrote again—"Since writing you last evening have received a letter from A. J. Roberts (defendant), enclosing the draft;" and L. H. Vaughan, in his evidence after close of plaintiff's case, says, "Will swear they were put on between 27th and 29th."

The following are the sections bearing on the question: 42 Vic. ch. 17 s. 10 :—

The stamps shall be cancelled by writing thereon the signature or part of the signature or the initials of maker or drawer, or of the witness attesting signature of maker or drawer, or if drawn out of Canada, &c., &c., to identify each stamp with the instrument, to show it has not before been used, and to prevent it being again used.

Persons or witness affixing stamp shall write or stamp thereon the

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date at which it was affixed, and stamp shall be held *primâ facie* to have been affixed at that date.

If no signature or initials, nor any date stamped or written; "or if date do not agree with that of the instrument, such stamp shall be of no avail; and any person wilfully writing a false date shall incur a penalty of $100."

Section 11:

Stamp shall be affixed by maker or drawer. Such maker or drawer failing to affix stamp at the time of making, or affixing insufficient stamps, "shall thereby incur a penalty hereinafter imposed;" and the duty payable on such instrument, or the duty by which the stamps affixed fall short of the proper amount, shall be doubled.

Section 12:

Penalty for drawing bill without affixing proper stamps to be $100, and save only in the case of double duty, as in the next section provided, instrument so drawn shall be invalid and of no effect in law or equity.

No party shall incur any penalty, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double or additional duty, as in the next section provided, as soon as he acquires such knowledge.

Section 13:

Any holder may pay double duty by affixing stamps to amount of double the sum the stamps affixed fall short of the proper duty, and by writing his initials on such stamps, and the date on which they were affixed; and where, in any suit or proceeding in law or equity, the validity of any such instrument is questioned by reason of proper duty not having been paid at all, or not paid by proper party, or at the proper time, or 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 appears that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge, even though such knowledge shall have been acquired only during such suit or proceeding; and if it shall appear in such suit or proceeding, to the satisfaction of the court or judge, as the case may be, that it was through mere error or mis-

take, 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 shall be held legal and valid if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake, but no party who ought to have paid duty shall be released from penalty.

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The facts in this case are undisputed. The bill was transmitted by drawer to drawees unstamped. Bill was stamped by drawees and cancelled, as of the day of the date (obviously not on day of date, but between the 27th and 29th), with full knowledge of the law relating to stamps, for L. H. Vaughan says in his evidence: "I know the law relating to stamps."

These were not only not the proper stamps to be put on by the drawees after neglect by a drawer, and after bill came to their hands, but they should have been for double the amount, and they were not dated the day they were affixed, but on the day of the date of the bill. They were received in evidence without double stamps, and it was only after being so received, and on the day after, that the bill is produced in court, with the double stamps on, and nothing whatever to show that it was proved to the satisfaction of the judge, &c., as provided in the Act.

The plaintiff's statement, when re-called, that he "believed he had authority to affix the stamps on behalf of the drawer," amounts to nothing whatever. In the first place, there is not the slightest evidence of any such authority, but if he had any such authority, affixing the stamps as he did, supposing he claimed to do so under such authority, would be clearly contrary to the Act. The drawer having issued the bill without stamps, he could not, on a subsequent day, affix the original amount of stamps and initial them as of the day of the date of the bill, and the day of issuing, and if he could not do so, *a fortiori* nobody could do it for him. The Act was clearly violated by the drawer issuing the bill to

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the drawees without stamps; and it was violated by the drawees, after receiving the bill, in affixing the amount of stamps which ought to have been affixed by the drawer, instead of double the amount.

It was likewise violated by writing a false date as to the time of affixing, viz., the date of the draft, and not the date of the actual affixing, and all this, as plaintiff proves, with a knowledge of the law relating to stamps.

And yet he says, when re-called at the close of defendant's case: "Yesterday afternoon, in court, was the first I heard that draft was insufficiently stamped." It may be the first he heard of it, but not the first he knew of it.

There was no evidence offered to show any mere error or mistake, or no intention to violate the law; and no finding of the judge, that any such fact was made to appear to his satisfaction; then as to the double stamping, it was entirely too late.

Then as to the point not noticed in the judgments of the court below: If the address was insufficient on the notice of dishonor, who is to blame? The drawer of the bill must be taken to know that the statute permits notices to be addressed in accordance with the bill or note, unless he stipulates for a more particular address. What had the holder to do with there being or not being a post office at St. Mary's Point? The drawer chose, in fact, to say (having reference to the statute) "put in the post office a notice addressed as I have headed this bill, and I will take the responsibility of its reaching me. "No doubt, the drawer knew full well that if a notice was addressed to St. Mary's Point he would find the letter in the Harvey post office; but whether so or not, he named the place to which the notice was to be mailed, and cannot now complain of this direction being followed.

The note not being properly stamped, the judge

should not have received it in evidence, the statute declaring that this instrument, not being properly stamped, should be invalid and of no effect in law or equity. There was no necessity for a special plea.

I think the appeal should be allowed and a non-suit entered, agreeably to leave reserved.

STRONG J. was of opinion that, as a matter of fact, the note was sufficiently stamped, and agreed with the court below that the plaintiff was entitled to recover.

FOURNIER J.—The appellant disputes the validity of the draft on account of its not being stamped when it was drawn.

L. H. Vaughan (one of the respondents and the person who received and stamped the draft) says he knew the law in regard to stamps, yet he insufficiently stamped this draft when it came into his hands, by affixing single, where he should have affixed double, duty.

Judgment has been given against the defendant, who was only an agent for the Quarrying Company, and known to be such by the respondents. If he should have pleaded that the note was not properly stamped, and he asks to be allowed to add this to his plea, I am of opinion that such leave should be granted and the appeal allowed.

HENRY J.—This action was brought by the respondents to recover from the appellant the amount of the draft made by him in their favor, hereinafter set out.

The appellant pleaded that he did not make the draft.

The respondents were merchants dealing in iron at St. John N. B. The Bay of Fundy Quarrying Company was a company incorporated in Massachusetts, having their principal office in Boston, and operating in quarries at St. Mary's Point, Albert County, in New Brunswick.

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The appellant was their superintendent at St. Mary's Point, having no interest in the quarries or the company. The respondents sent up goods to the quarries for the company, charging the same to the company, and it appears that the mode of payment was by appellant giving his drafts on the company to respondents, which drafts were accepted and paid, with the exception of the one upon which this action was brought.

To pay for goods furnished to the company in July, 1881, the appellant drew a bill, as he had several times before done for other goods furnished to the company by the respondents on the company, as follows:—

$577.30. St. Mary's Point, July 25th, 1881.

Four months after date, pay to order of L. H. Vaughan & Bros., five hundred and seventy-seven dollars and thirty cents, Pacific National Bank, Boston Mass., value received, and charge to account of

Austin J. Roberts,
Superintendent.

To The Bay of Fundy Quarrying Company,
119 Devonshire street, Boston Mass.

On back of note are the following Canada bill stamps, with dates and initials cancelling: 3ct, *L. H. V.*, 19-1-'83; 7ct., *L. H. V.*, 19-1-'83; 8ct., *L H. V.*, 19-1-'83; 9ct., *L. H. V.*, 19-1-'83; 9ct., *L. H. V.*, 19-1-'83.

The draft was discounted by the bank of New Brunswick on the 29th July, and L. H. Vaughan, one of the respondents, proved that when the draft was received by the respondents, it was not stamped, but that between the 27th and the day it was so discounted he stamped it and cancelled the stamps by figures 25-7-'81, *i.e.*, the 25th July, 1881. It is shown that the stamps so affixed amounted to but a single rate. It is suggested that he had authority from the appellant so to place and obliterate such stamps, but I can find no evidence to sustain that suggestion. It is true that in the bill of goods for which the draft was given there is a charge of fifteen cents, which is explained, but it

having been shown that the charge was for stamps used on a previous draft, that fact is no evidence of authority to obliterate stamps for the appellant on the draft now in question.

The evidence shows that, during the trial, the stamps above mentioned as appearing on the back of the draft were affixed by L. H. Vaughan, one of the respondents.

The questions that arise under such circumstances are—

1st. Was the appellant bound to plead specially the fact that the draft was not stamped as required by the provisions of the statutes relating thereto?

2nd. Was the affixing of the stamps by L. H. Vaughan, before the draft was discounted, sufficient? and

3rd. If not, was the affixing of the stamps subsequently during the trial sufficient?

The appellant pleaded, as before stated, that he did not make the draft declared on. If the draft, as it passed from his hands, was, in contemplation of law, a binding draft, then the decision should be against him. Sec. 12 of ch. 17 of 42 Vic. provides that—

> If any person in Canada makes, draws, accepts, indorses, signs, becomes a party to or pays any promissory note, draft or bill of exchange chargeable with duty under this Act, before the duty (or double duty, as the case may be) has been paid, by affixing thereto the proper stamp or stamps (or by making it on stamped paper, or both), such person shall thereby incur a penalty of one hundred dollars, and save only in case of the payment of double duty, as in the next section provided, such instrument shall be invalid, and of no effect in law or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect.

Section 13 provides that:—

> Any holder of such instrument, including banks and brokers, 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

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date on which they were affixed; and where, in 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; 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 indorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty thereon as 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.

By sec. 12, just partly quoted, it will be seen that unless the prescribed duty be paid either by the maker or drawer, or by double duty paid by the holder, as prescribed by sec. 13, the instrument is declared to be "invalid and of no effect in law or in equity." To constitute an instrument not invalid it is a necessary part of its due execution that it should be properly stamped, and the stamp or stamps obliterated as prescribed. The penalty in this case attached as soon as the bill or draft was made and sent to the payees without being stamped; and by the same section the same is declared "invalid and of no effect in law or in equity." It was therefore, in law, no draft as such, and being so, the plea that the appellant did not make the draft declared on, puts in issue the making of a legally binding draft. If it never was a draft by legal intendment, the plea raises the proper issue. A valid and binding instrument is what the declaration sets out, and if,

for any reason, it was *ab initio* void, then, under the plea in question, the alleged drawer can show the necessary facts to have it so adjudged. Delivery is necessary to the validity of an instrument in all other respects duly executed. The possession of the document by the payee, or others through him, is *primâ facie* evidence of delivery, but under a plea that the defendant did not make the instrument, he could show that he never delivered it. It, in legal acceptation, was not his instrument, and was therefore void as against him. The statute makes the draft in this case void, as wanting in one of the essentials to a valid instrument. To make a valid instrument, the proper stamping of it by the maker or drawer is as necessary as the delivery of it, and when it is shown not to have been stamped it stands in the same position as if it had been shown not to have been delivered.

When, then, the draft in this case came to the hands of the respondents, it was a void instrument. It remained so when negotiated with the bank, when accepted by the company, when protested for non-payment, and when notice of such protest was sent to the respondent, as I shall hereafter show. All this time the draft was void by law, and, it appears to me, not a document to be negotiated, accepted or protested.

Sec. 11 requires the stamp or stamps to be affixed by the maker or drawer of the instrument, and not by any one else, even with his authority, at a time subsequent to the delivery of the instrument out of his possession. It is said that ruling would create inconvenience, but it is not the less the plain prescription of the law, and it cannot be disregarded from any suggestion of inconvenience. Besides, provision is made to remedy the defect by the holder paying double duty. This latter mode of supplying the deficiency or defect

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is the only one provided by law, and unless adopted, the instrument continues to be invalid and of no effect.

The first stamps affixed to the draft in question were not so affixed before the 27th of July—two days after it was drawn—although they were marked as having been affixed on the 25th—the date it was drawn. The fifth clause of sec. 10, however, requires that the person affixing the same should "write or stamp thereon the date at which it was affixed." The respondents, to make the draft good, were bound, when it came to their hands, as it did, without any stamp, to have paid double duty by adhesive stamps, and to have cancelled them, by causing to be written the initials of the party affixing them, "and the date on which they were affixed." The stamps affixed on the draft in July, 1881, in my judgment, were wholly useless. They were so affixed as the act of the drawer, without, as he swears, any authority from him (which is not contradicted), and two days after the draft was made—when the law requires such to be done at the time.

Having considered two of the three questions referred to, I will deal with the third and only remaining one, which refers to the stamping during the trial. Stamping instruments at the trial is provided for on the part of holders under the circumstances referred to in the 13th section. The first provision for the double stamping, however, is based upon the want of knowledge of defects when he became the holder, but he is required to pay the double duty "as soon as he acquired such knowledge." The respondents in this case acquired such knowledge as soon as the draft came into their hands. They were bound, then, immediately to have paid double duty, and to have affixed and properly marked the necessary stamps, which they did not do. Not having done so, they cannot claim the benefit of a provision they did not comply with. The concluding provision of

the 13th section goes further, and it is necessary to consider its bearing upon and applicability to the circumstances of this case. It provides that:

> 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 indorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake, &c.

The learned judge who presided at the trial was not called upon or requested by the counsel of the respondents to, and did not, find whether there was any error or mistake on their part or on the part of any of them, in regard to the stamping of the draft. Without taking that position, it was:

> Agreed that a non-suit be entered, plaintiffs to have leave reserved to move to have a verdict entered for them by the court for any amount that court may think plaintiffs entitled to. Court to have power to draw such inferences of fact as a jury might draw, or as I might draw in reference to facts respecting the stamping.

In the reasons for judgment given by the learned Chief Justice, in which Weldon, Wetmore and Fraser JJ. concurred, the matter of error or mistake is not considered, and such is not found directly in the reasons given by Mr. Justice Palmer. If found at all, it must be by this court.

I have examined carefully the evidence of the respondent who affixed both sets of stamps, and he does not particularise any error or mistake he made. He says he did not discover, before the time of the trial, the insufficiency of the stamps, but he did not explain what the mistake or error was that he made. He says he knew the law as to stamps, and so knowing he affixed only a single duty in July 1881, when the law required double the amount. To obtain the benefit of

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the provision in question, I think the party desiring to do so should show on the trial wherein the error or mistake consisted, and satisfy the presiding judge or court on the point; and not having done so, I think this court should not be expected to consider the matter. There is, besides, another objection to the legality of the stamping during the trial in this case. The trial took place in November 1882, and the Stamp Act then in force (the 42nd Vic.) was repealed on the 4th of the preceding month of March (1). The repealing Act, however, contained a provision that—

All things lawfully done, and all rights acquired under the said Act, or any Act repealed by it, shall remain valid, and all penalties incurred under them, or any of them, may be enforced and recovered; and all proceedings commenced under them, or any of them, may be continued and completed, as if this Act had not been passed.

The operation of the provision was to continue all rights as then existing, but not to acquire any new ones. It preserved and continued all penalties then incurred, and provided for enforcing them, but created no new ones, and for the continuance of proceedings then previously commenced. When that statute was passed the draft in question was incapable of being recovered. It was, in the words of the statute, invalid and of no effect. The statutory provisions in regard to payment of double duty by a holder were repealed, and the process of the stamping, during the trial, was without legal authority, and therefore ineffectual. I have fully considered the matter of pleading suggested by the learned judges in the court below, and the references made by them to the 4th and 5th sub-sections of sec. 83, of ch. 37, of the Consolidated Statutes of New Brunswick, but cannot reach the same conclusions as they appear to have done. The 4th, as to bills of exchange and promissory notes, abolishes the pleas of

(1) 45 Vic. ch. 1.

non assumpsit and never indebted, and requires a special traverse of some matters of fact, "for example, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note." The plea in this case is a denial of the making of the draft, and surely is, as to that provision, a good plea.

The 5th is expressly confined to matters in confession and avoidance, and does not apply to cases where the party confesses nothing. Here the appellant is charged as the maker of a legal draft and one capable of enforcement. His answer is, substantially, "I did not make such legal draft." The principles of pleading applicable to such a case are wholly different from those in confession and avoidance, the examples of which are given in that sub-section.

I think, for the reasons given, the law is in favor of the appellant, and that the equities are also with him. The respondents gave the credit to the company, of which the appellant was the mere servant to the full knowledge of the respondents. He would, no doubt, have been answerable for the amount of the draft but for the imperfect stamping of it; but he evidently did not contemplate such responsibility, nor did, I assume, the respondents either when giving credit to the company.

I think the appeal should be allowed and judgment given for the appellant with costs.

GWYNNE J.—I am of opinion that this appeal must be dismissed, and that the plaintiffs are entitled to recover. The bill upon which the action is brought against the defendant as drawer, was, to all appearances, sufficiently stamped, having affixed to it stamps to the amount required for single duty, and I know of no mode by which the defendant can call in question the sufficiency of such stamping but by plea stating the facts relied

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upon by him as establishing the contention, that what to all appearance is good, valid and sufficient, is, in truth, invalid and insufficient. For the reasons given by me in *Chapman* v. *Tufts* (1), I am clearly of opinion that the defendant's plea, that he did not draw the bill, does not raise any question as to the invalidity of the bill on the ground of its not being sufficiently stamped, whether the defect intended to be relied upon by him consisted in the stamps, although affixed at the proper time and by the proper person, and to the proper amount, not having been properly erased, or not having been affixed by the proper person, or at the proper time, or for the proper amount, which latter varies according to the time when, and the person by whom, and the circumstances under which, the stamps upon the bill were affixed.

The onus lies upon the defendant to state specifically which of the above grounds is that which he relies upon as invalidating a commercial instrument of such importance as a negotiable bill of exchange, which, to all appearances, is good and valid ; and the only mode of stating these facts in an action at law, is by a special plea, averring the particular fact intended to be relied upon. But upon the other point also, assuming that the question had been sufficiently raised upon the record by a special plea, I am of opinion that the plaintiffs are entitled to recover, for, by the agreement entered into at the trial, the whole case, both upon the facts and the law, was submitted to the judgment of the court, with power to draw inferences of fact as a jury, and the court to which the case was so submitted has unanimously found, as matter of fact, that the plaintiffs affixed stamps to the amount of double duty as soon as they became aware of the previous defect in the stamping. As a court of appeal we cannot interfere with such

(1) 8 Can. S. C. R. 543.

a finding on pure matter of fact, consistently with the principle upon which this court has, upon different occasions, announced that it proceeds in such a case.

I confess I am unable to preceive any distinction in principle between this case and that of *Chapman* v. *Tufts*, or anything which justifies a different judgment in this case from the judgment which was rendered in that case in favor of the plaintiff. There, the learned judge who tried the case being of opinion that double stamps were affixed by the party whose duty it was to affix them as soon as he became aware that double stamps were necessary, this court held that the plaintiff was entitled to recover. Upon the same principle the plaintiffs here are entitled to recover, as the whole of the members of the Supreme Court of New Brunswick, which court was, by agreement at the trial, substituted for court and jury, have unanimously found a like fact in favor of the plaintiffs here. The distinction appears to me to be one without a difference. I am of opinion also, that by reason of the provisions of the Dominion Statute, 45 Vic. ch. 1, the validity of the bill of exchange sued upon is not, in this action, open to any such objection as that suggested, this action having been commenced after that Act came into operation. The Act enacts that—

> The 42nd Vic. ch. 17, intituled "An Act to amend and consolidate the laws respecting duties imposed on Promissory Notes and Bills of Exchange," shall be repealed from and after the 4th day of March 1882, the day after the passing of the Act: Provided always, that all Acts repealed by the said Act, shall remain repealed, and that all things lawfully done and all rights acquired under the said Act, or any Act repealed by it, shall remain valid, and all penalties incurred under them or any of them, may be enforced and recovered, and all proceedings commenced under them, or any of them, may be continued and completed as if this Act had not been passed.

It is not, in my opinion, necessary for the determination of this case, but if it be, I am prepared to

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hold that the privilege of a defendant in any action to be commenced after the time fixed for the Act to come into operation, to dispute the validity of his own note, draft or acceptance, by reason of his own default in not having stamped the note, draft or acceptance at the proper time or in the proper manner, or with the proper amount, as directed by 42 Vic. ch. 17, was not, at the time of the passing of 45 Vic. ch 1, a right acquired under 42 Vic. ch. 17, within the meaning of the proviso contained in 45 Vic. ch. 1.

The defendant's liability to pay the penalties imposed by 42 Vic. may be, and perhaps is, preserved in force by the express words of the proviso, but there is nothing in the Act which, in my opinion, is sufficient to maintain in force, or indicates the intention of the legislature to maintain in force, the provisions of 42 Vic. ch. 17 for calling in question the validity of any promissory note, draft or acceptance in any action which should be commenced after the coming into operation of 45 Vic. ch. 1, whatever may be the date of the draft, note or acceptance. For all of the above reasons, I am of opinion that the unanimous judgment of the Supreme Court of New Brunswick should be sustained, and that this appeal therefrom should be dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *Weldon, McLean & Devlin.*

Solicitor for respondent: *C. A. Palmer.*