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THE COMMISSIONER OF INCOME-TAX, BURMA v. THE KYAUKTAGA GRANT, LTD.

LEACH, J.

entitled to a refund of the Rs. 100 paid in connection with the reference.

ROBERTS, C.J.—I agree.

MACKNEY, J.—I agree.

APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Leach.

WILLIAM MOSES EZEKIEL

v.

MRS. SAUL SOFAER.*

Cancellation of instrument—Instrument prima facie duly stamped, executed and cancelled—Averment of subsequent cancellation—Burden of proof—Test of admissibility of instrument—Promissory note—Signature admitted—Line of cancellation in different ink—Other promissory notes not cancelled—Discharge of burden of proof—Stamp Act (I of 1899), ss. 12, 35, 69.

Where an instrument *prima facie* appears to be duly stamped and cancelled by the drawer at the date of execution the burden of proof lies upon the party who avers that the cancellation was not effected at the time of execution. In the absence of evidence to the contrary, it may be inferred that the stamp was duly affixed and cancelled

Bradlaugh v. *De Rin*, 18 L.T.R. 904; *Doe d. Fryer* v. *Coombs*, (1842) 3 Q.B. 687; *Jethibai* v. *Narottam*, I.L.R. 13 Bom. 484; *Raman Chetty* v. *Mahomed Ghouse*, I.L.R. 16 Cal. 432; *Wilson* v. *Smith*, 12 M & W. 401, referred to.

The test of admissibility of an instrument is whether the instrument appears when tendered in evidence to be sufficiently stamped.

Bull v. *Sullivan*, 6 Q.B. 209; *Chandrakant Mookerjee* v. *Kartichcran*, 5 Ben. L.R. 103; *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B. 715 referred to.

Dayaram v. *Chandulal*, 27 Bom. L.R. 1118, distinguished.

The execution of the promissory note in suit by a deceased person was admitted by his executrix, but she denied the cancellation of the two lower stamps by the deceased by a line whose ink was admittedly different from the

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* Civil First Appeal No. 154 of 1936 from the judgment of this Court on the Original Side in Civil Regular Suit No. 264 of 1934.

one used for the signature. It was proved that on occasions the deceased did not cancel all the stamps on promissory notes executed by him. *Held*, that these two factors were not sufficient to discharge the burden of proof placed on the executrix that the line was added subsequently.

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Lambert for the appellant. The ink used in making the line of cancellation is admittedly different from the ink of the signature. The plaintiff and his father have given a reasonable explanation as to the cause of the difference. The evidence has not been shaken in cross-examination, and has not been contradicted otherwise. Section 12 (*2*) of the Stamp Act is not of a penal character. As regards execution and cancellation, see *Krishna Kumar Chatterjee* v. *Jagpati Kuer* (1) ; *Surij Mull* v. *Hudson* (2) ; *Bhawanji* v. *Devji* (3) ; *Dayaram* v. *Chandulal* (4) ; and Mulla and Pratt's Indian Stamp Act, 3rd Ed. p. 80.

Aiyangar for the respondent. The defendant has admitted the signature on the promissory note, but has denied the cancellation of the stamps at the time of execution. The burden of proof is therefore on the plaintiff. *Hoe Moh* v. *Seedat* (5).

[ROBERTS, C.J. You say the promissory note was not duly cancelled ; have you not to show that ?]

The ink is different and the burden of proof is on the plaintiff. It takes only a fraction of a second to draw the line after signing and Mr. Sofaer could have completed that act quite easily. Where was the urgency to get up and speak to a customer ? He must either know that cancellation was necessary or else he did not know. There is evidence to show that Mr. Sofaer did not know that all the stamps were

(1) A.I.R. (1937) Pat. 73.
(2) I.L.R. 24 Mad. 259.
(3) I.L.R. 19 Bom. 635.
(4) 27 Bom. L.R. 1118.
(5) I.L.R. 5 Ran 527.

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required to be cancelled. He learnt that long after and hence the subsequent cancellation in a different ink.

ROBERTS, C.J.—This is an appeal brought by the plaintiff after failure of his action to recover the sum of Rs. 6,000 with interest at 9 per cent per annum, Rs. 386-2-0, in respect of a promissory note alleged to have been executed in his favour by Mr. Saul Sofaer on the 7th July 1932. The claim was brought against his executrix and widow. In the action upon the Original Side there were claims in respect of two sums of Rs. 6,000, but we are only now concerned with the promissory note which I have just mentioned.

The learned trial Judge framed the following issues :

"1. Is the promissory note dated 7th July 1932 inadmissible in evidence?

(*a*) Because the line on the two lower stamps was not affixed at the time of execution.

(*b*) Does that line amount to cancellation of stamps according to law?"

In the plaint as amended the plaintiff set up the promissory note and averred that interest was paid up to 15th August 1933, Mr. Sofaer having died in April of that year. The defendant in her written statement admitted the signature of the deceased but said that the lower two adhesive stamps were not on the note, but were affixed shortly before the institution of the suit : there was also a denial of payment of interest either by deceased or defendant. It being apparent that the stamps affixed were in a block of four the inner perforation of which remained intact, the former allegation was altered in an amended written statement to a denial that the lower stamps were cancelled at the time of execution, and it was pleaded that the plaintiff dishonestly cancelled them later. The

evidence for the plaintiff was heard first and the learned trial Judge in his judgment says :

"I must say I was not impressed with the manner in which the plaintiff and his father gave their evidence in this case. * * * I am not satisfied that the promissory note dated 7th July, 1932, had the line across the lower stamps when it was executed by Saul E. Sofaer."

He referred to section 12 (*1*) (*a*) of the Stamp Act, and remarked that as he held there was no line drawn across the stamps at the time of execution, then by section 35 of the Stamp Act the alleged promissory note was inadmissible and the suit accordingly failed.

Now, there was evidence by Mr. Charles Hardless, an expert in handwriting called for the defendant, who declared that he had tested the ink on the disputed instrument and had arrived at the conclusion that the ink of the admitted signature was different from the ink used in making the line across the two lower stamps : he was unable to state the age of the ink lines on the two lower stamps, but the learned Judge attached weight to his evidence and drew from it the conclusion that the signature was made at one time and the lower line added on a subsequent occasion. The plaintiff had said in his evidence that at the time of execution of the instrument Mr. Sofaer signed it in his presence and that of his father Mr. N. S. Ezekiel and Mr. E. S. Mordecai. The latter gentleman is now bedridden and was not called as a witness by either side nor was he examined on commission. After Mr. Sofaer signed his name a customer interrupted him. He spoke to the customer and after about a minute, seeing the plaintiff waiting, he took a pen and drew the line through the lower stamps of his own accord. Plaintiff was not sure if

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he used the same pen, but there were pens and an ink-pot on the table. Mr. Sofaer had a fountain pen but plaintiff cannot say if he used it on that occasion. Mr. N. S. Ezekiel corroborated this evidence but made no reference to a fountain pen. The learned Judge points out that at the stage at which the witnesses were called the evidence of Mr. Hardless taken on commission had been returned and they must have seen it, and he thought that this explanation was not to be believed and was only forthcoming when it was established that two different inks had been used.

In *Doe d. Fryer* v. *Coombs* (1) Lord Denman C.J. said :

"The onus lies upon the party attacking a deed which appears to have been properly executed. The Stamp Acts superadd the necessity of something beyond execution ; but the party impeaching the deed ought to shew the want of that requisite. And, if the appearance of the deed, combined with the probability that parties would take care of their own interest, gave reason to infer that a stamp had been affixed, the Judge was entitled to say that the instrument had been properly completed, and to receive it in evidence."

In *Wilson* v. *Smith* (2) Baron Parke said :

"In *Rex* v. *Enderby* (2 B. & Ad. 205) it was held that the onus of impeaching an instrument for want of stamp, or of shewing that a higher stamp was necessary, lies on the party who objects to its being received in evidence. That rule applies here."

In British India the same law applies. Thus in *Ramen Chetty* v. *Mahomed Ghouse* (3) Wilson J. said :

"It is clear that the present Stamp Act in India ought to be construed according to the same principles of construction as the Stamp Act in England and the earlier Stamp Acts in this country."

(1) (1842) 3 Q.B. 687, 688. (2) 12 M. & W. 401.
(3) (1889) I.L.R. 16 Cal. 432.

In that case there was a cheque which the evidence showed to have been post-dated and to be a bill of exchange payable 17 days after date. Section 67 of the Stamp Act, 1879 (section 68 of the present Act) imposes a penalty for postdating bills of exchange or promissory notes with intent to defraud the revenue. It was contended that persons making and dealing with the cheque were subject to the penalty and the cheque itself was inadmissible by reason of section 34 (now section 35) of the Stamp Act. But it was held that in order to determine whether a document is sufficiently stamped for the purpose of deciding on its admissibility in evidence, the document itself must be looked at as it stands, and not any collateral circumstances which may be shown in the evidence. See also *Bull* v. *Sullivan* (1) and *Chandrakant Mookerjee* v. *Kartcharan Chaile* (2) (Judgment of Sir Barnes Peacock). The test of admissibility is whether the instrument appears when tendered in evidence to be insufficiently stamped. See *Royal Bank of Scotland* v. *Tottenham* (3).

We have had cited to us the case of *Dayaram Surajmal* v. *Chandulal Dayabhai* (4) in support of the contention that where an adhesive stamp is not cancelled at the *time of execution* so that it cannot be used again it shall so far as such stamp is concerned be deemed to be unstamped by reason of section 12 (*2*) of the Indian Stamp Act. That is to say that a subsequent stamping cannot give it validity. What the section aims at is clearly the prevention of imperfect cancellation and consequent loss to the revenue. Section 12 (*1*) (*b*) says that whoever executes any instrument on any paper bearing an adhesive stamp shall at the time of execution cancel the same so that it cannot be used again, and a penalty is imposed by section 63. Section 12 (*2*) makes

(1) (1871) 6 Q.B. 209.
(2) 5 Beng. L.R. 103.
(3) (1894) 2 Q B. 715.
(4) 27 Bom. L.R. 1118.

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it clear that documents which are deemed to be unstamped are those on which a stamp is not cancelled so that it cannot be used again ; no other documents are deemed to be unstamped by this sub-section.

In the Bombay case cited to us one Dayaram was the intermediate holder of a Shah Jog hundi drawn on Joraji Deoraj on February 10, 1922, by one Jagannath and he posted it to his bank : it was stolen in transit and reached the hands of Chandulal who presented it for acceptance, wrote the date February 12, 1922, across the face of the stamp and received the money. This being so it was clear that at the time the hundi came into Chandulal's possession it bore an uncancelled stamp. This hundi might have had the stamp affixed and cancelled by Joraji Deoraj, the drawee, when it was presented for payment and would then have been a good and valid document by reason of the saving provisions of section 47 of the Act (since the stamp required in this case was a one anna stamp). But it was cancelled by Chandulal : it could not upon the face of it have been cancelled by the drawer Jagannath at the time of affixing the stamp because the date of cancellation was the date not of execution but of presentation. The case is therefore authority for holding that where it appears on the face of the stamp that cancellation was by an intermediate holder and not by drawer this is no cancellation at all, and the saving provisions of section 47 are not applicable (see Mulla's Indian Stamp Act, page 157). In the Bombay case the instrument was not *prima facie* stamped for it was dated February 10th at Poona and cancelled by Chandulal who wrote 12-2-22 across the stamp on the date of presentation at Bombay.

The facts in that case, therefore, are very different from those which we have to consider here. The instrument in this case was in my opinion *prima facie*

stamped and cancelled by the drawer at the date of execution. In the absence of evidence to the contrary it may be inferred that the stamp was duly affixed and cancelled. [*Bradlaugh* v. *De Rin* (1) *per* Bovill C.J. in granting the rule *nisi*.] But such evidence if available ought to be admitted. [*Jethibai* v. *Ramchandra Narottam* (2).] The provisions of section 35 of the Stamp Act impose upon the Court a duty to see whether an instrument presented to it is duly stamped, that is to say, stamped in accordance with the law in force when such instrument was executed, and that again means stamped before or at the time of execution (see section 17). The burden of proof lay, in my opinion, upon the defendant to show that the instrument here had not had its adhesive stamp cancelled before or at the time of execution; but the learned Judge appears to have held that it was for the plaintiff to satisfy him that it had.

The evidence produced on behalf of the defendant showed, as I have stated, that two different inks were used but the handwriting expert could not say that the cancellation was made at a date later than that of execution. The defendant never applied for a commission to take the evidence of Mr. E. S. Mordecai who knew whether Mr. Sofaer was in the habit of cancelling stamps beneath his signature. Mrs. Sofaer was informed by her brothers that her husband did not cancel stamps by drawing lines : but this was after the inspection of the two notes in Mr. Lambert's office : those who might have known what Mr. Sofaer's habit was, never suggested that he used not to cancel stamps till they saw the promissory note in question. A number of documents signed by Mr. Sofaer in which he did not cancel the stamps were certainly produced : it is not

(1) 18 L.T.R. 904. (2) (1889) I.L.R. 13 Bom. 484.

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contended that they were more than a selection, and I do not regard their production as in any way conclusive. They are a mere step in the direction of discharging the onus of proof but no more.

Now, it so happens that in 1930 Mrs. Sofaer filed a suit against the plaintiff's father in the Subdivisional Court of Insein on a promissory note : the two lower stamps on this note were not cancelled and she lost her suit : the inspection of the promissory note in the present suit took place after the decree dismissing her claim was passed by the Insein Court, and the inference is sought to be drawn that Mrs. Sofaer, unsuccessful in that suit, is trying to impeach the validity of the promissory note here by saying that the cancellation of the stamps was not before or at the time of execution, because of the successful defence raised by the plaintiff's father in the earlier suit. In a letter before action (Exhibit M) written on Mrs. Sofaer's instructions and dated 12th May, 1934, the defence set up after the inspection of the promissory note was merely that there was no consideration for it. Nothing is said about the deceased not having duly cancelled the stamps though the letter was written only two days after inspection of the document.

The only evidence to impeach the validity of the note which can be regarded without suspicion apart from the non-cancelled documents is that of the handwriting expert to the effect that different inks were used in the signature and cancellation : it does not go so far as to say they were used on different occasions. I think that one is entitled to assume that normally in the due execution of a promissory note the maker does not use two different kinds of ink on the same occasion, but if as here an explanation is given as to why two different kinds of ink might have been used, I think the burden of proof is still upon the party

impeaching the document to prove that the explanation is false. The learned Judge appears to have been dissatisfied with the evidence for the plaintiff and to have thought the burden of proof was on him: it is impossible to say he would have reached the same conclusion if he had viewed the whole matter from the standpoint of whether the defendant had proved affirmatively that the cancellation was not made by the deceased at the time of execution. If there was a doubt about the matter he ought in my opinion to have declared that the onus of proof had not been discharged by those who desired to impeach the instrument, and consequently to have admitted it in evidence and to have given judgment for the plaintiff. That there must be a doubt about the matter is evident from the conflicting testimony of what actually happened and the omission by the defendant to secure evidence from Mr. E. S. Mordecai.

The story told by the plaintiff and his father explains the interruption of Mr. Sofaer's execution of the note but it does not expressly say that he used a fountain pen for the signature or a different pen for the line. A story which was entirely false would probably be far more explicit. In my view the defendant failed to prove that the promissory note dated the 7th July, 1932, was not duly stamped and cancelled before or at the time of execution by Mr. Sofaer, and accordingly I would allow this appeal with costs, fifteen gold mohurs on the appeal as special advocates' costs. And we fix special costs in the Court below at ten gold mohurs daily after the first day.

LEACH, J.—I agree that the learned trial Judge wrongly placed the burden of proof on the plaintiff. The only question at issue was whether the two lower stamps of the four appearing on the promissory note

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had been cancelled at the time of the execution of the instrument. When the instrument was put in evidence it was *prima facie* in order. The signature was not in dispute, and the only defect alleged was with regard to the line in ink drawn across the lower stamps. Unless it was proved that this line was made after the note had left the hands of the maker the Court was bound to find for the plaintiff. The burden of proving the alleged defect was therefore on the defendant.

The learned advocate for the appellant frankly conceded that he was not in a position to challenge the evidence of the expert in handwriting with regard to the different inks. That the ink used for the cancellation of the stamp is different from the ink used by Saul E. Sofaer when he executed the promissory note is, therefore, not in dispute. I am not impressed by any of the other oral testimony, whether for or against the plaintiff. It has, however, been shown that on occasions Saul E. Sofaer omitted to cancel stamps on promissory notes executed by him, as eight such promissory notes were put in evidence.

The position, therefore, in my opinion is this. The defendant has proved that a different ink was used for the cancellation of the two lower stamps from the ink used by Saul E. Sofaer when signing the document, and it has been shown that on occasions he omitted to run his pen through some of the stamps. Are these two factors sufficient to justify the Court in holding that the defendant has discharged the burden of proof placed upon him? I cannot regard them as sufficient. They do not prove that the stamps were cancelled after the instrument had passed out of the hands of the maker and this must be proved to entitle the defendant to succeed.

This being the only point involved in the appeal, I agree that the decision of the learned trial Judge

should be set aside, and the suit decreed with costs in both Courts. I concur in the order of the learned Chief Justice with regard to the special costs.

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FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Leach, and Mr. Justice Spargo.

YEIK LEE *v.* AIHOOR BIBI.*

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Apl. 27.

Appeal—Ex parte *decree against defendant set aside—Rehearing of suit—Plaintiff's suit dismissed—Appeal against decree—Ground of appeal against order setting aside* ex parte *decree—Error "affecting the decision of the case"—Order must affect the decision of the case on its merits—Civil Procedure Code (Act V of 1908), ss. 104, 105, O. 43, r. 1.*

Where on the application of the defendant the trial Court sets aside an *ex parte* decree because it was satisfied that the defendant was prevented by sufficient cause from appearing, no appeal lies against such order. On the re-hearing of the suit if the defendant succeeds and the suit is dismissed the plaintiff in his appeal against the decree cannot question the propriety of the order setting aside the *ex parte* decree. The words in s. 105 of the Civil Procedure Code "affecting the decision of the case" mean affecting the decision of the case on its merits. An order setting aside an *ex parte* decree does not constitute an order affecting the decision of the case.

Athamsa Rowther v. *Ganesan*, 47 M.L.J. 641 ; *Bhola Ram* v. *Arjan Das* I.L.R. 14 Lah. 361 ; *Chintamony* v. *Raghoonath*, I.L.R. 22 Cal. 981 ; *Dhondu* v. *Patwardhan*, I.L.R. 51 Bom. 495 ; *Gulab Kunwar* v. *Thakur Das*, I.L.R. 24 All. 464 ; *Krishna Chandra* v. *Mohesh Chandra*, 9 C.W.N. 584 ; *Radha Mohan* v. *Abbas Ali*, I.L.R. 53 All. 612 ; *Tasadduk Husain* v. *Hayat-un-nissa*, I.L.R. 25 All. 280, referred to.

M. S. Mahomed v. *The Collector of Toungoo*, I.L.R. 5 Ran. 80, overruled *pro tanto*.

Gopala Chetti v. *Subbier*, I.L.R. 26 Mad. 604, distinguished.

Hay for the applicant. Once a Court sets aside an *ex-parte* decree and restores the suit for hearing, no other Court can question the order. Order 43, r. 1 (*d*) of the Code allows an appeal from an order refusing to set aside an *ex-parte* decree, but not from an order

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* Civil Revision No. 299 of 1936 from the judgment of the District Court of Myaungmya in Civil Misc. Appeal No 17 of 1936.