corroboration of their evidence to be found on the record. In my opinion, the appellant was rightly held to be guilty of the offence with which he was charged. Accordingly, I agree that the appeal should be dismissed and the sentence of death confirmed.

1937
AUNG PE
v.
KING-EMPEROR.
LEACH, J.

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## ORIGINAL CIVIL.

*Before Mr. Justice Dunkley.*

## J. N. EZEKIEL

*v.*

## E. MORDECAI AND OTHERS.*

1936
*July 7.*

*Stamp on on demand promissory note—Effective cancellation—Prevention of re-use—Cancellation, how effected—Crossing by line—Ineffective line—Cancellation of each stamp—Failure of suit on promissory note—Use of note as an acknowledgment—Collateral matter and collateral purpose—Limitation Act (IX of 1908), s. 19—Stamp Act (I of 1879), ss. 12, 35.*

The question whether a particular adhesive stamp on an instrument has or has not been cancelled in a sufficiently effectual manner so that it cannot be used again, in accordance with the requirements of s. 12 of the Stamp Act, is one which must be considered with reference to the facts of each particular case. The cancellation must be such as will prevent the stamp being lawfully or conscientiously used again.

A stamp can be as effectually cancelled by a line drawn across it with the object of cancelling it, as by writing a name or a date across it.

*Mahadeo Kori* v. *Sheoraj*, I.L.R. 41 All. 169; *Ralli* v. *Caramalli*, I.L.R. 14 Bom. 102; *Virbhadrapabin* v. *Bhimaji*, I.L.R. 28 Bom. 432, referred to.

The promissory note in suit was stamped with four stamps of the value of one anna each in the form of a square. The signature of the defendant firm covered and extended beyond the upper two stamps. Underneath the name was an irregular line that crossed the whole of the left lower stamp, and ended in the top left corner, a quarter of an inch, of the right lower stamp.

*Held*, that the last stamp was not effectually cancelled as the line on it, if the stamp was taken out, could be thought to have been made by accident. As each and every stamp on the promissory note must be cancelled, no suit could be brought on the promissory note.

*Held further*, that the promissory note could not be used as an acknowledgment of debt under s. 19 of the Limitation Act so as to bring within time a suit based upon the original contract of loan. The promissory note is admissible in evidence for proof of a collateral matter, such as endorsement

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* Civil Regular Suit No. 77 of 1936.

1936

EZEKIEL
v.
MORDECAI.

as proof of payments, but it cannot be used for a collateral purpose. An acknowledgment is a collateral purpose, for the proof of an acknowledgment depends upon proof of the transaction which has to be acknowledged.

*Ashling* v. *Boon*, (1891) 1 Ch. Div. 568; *Mulji Lala* v. *Makaj*, I.L.R. 21 Bom. 201 ; *Natarajulu* v. *Subramoniam*, I.L.R. 45 Mad. 778; *Thaji Beebi* v. *Pillai*, I.L.R. 30 Mad. 386, referred to.

*Bhattacharyya* for the plaintiffs.

*P. K. Basu* for the defendants.

DUNKLEY, J.—This is a suit for the recovery of the principal and interest due on a promissory note. For a suit of so simple a nature the pleadings are long and complicated. Three preliminary issues have been framed and the arguments of learned counsel have been heard on two of these issues and, in my opinion, the decision of these issues must be such as to dispose of the suit against the plaintiffs. The issues in question are as follows :

"1. Is the promissory note in suit stamped in accordance with law ?

2. If the promissory note is invalid are the plaintiffs entitled to sue upon the alleged original consideration ?"

The point taken by the defendants out of which the first issue arises is that the stamps affixed to the promissory note in suit have not been cancelled as required by section 12 of the Indian Stamp Act, and that, therefore, the promissory note must be deemed to be unstamped under the provisions of sub-section (*2*) of that section ; consequently, under the provisions of section 35 of the Stamp Act, no suit can be brought upon it. Section 12 of the Stamp Act is as follows :

"(1) (*a*) Whoever affixes any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again ; and

(b) whoever executes any instrument on any paper bearing an adhesive stamp shall, at the time of execution, unless such stamp has been already cancelled in manner aforesaid, cancel the same so that it cannot be used again.

(2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped.

(3) The person required by sub-section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner."

The promissory note in suit is stamped with four stamps each of the value of one anna. They are affixed so as to form a square. It is conceded on behalf of the plaintiffs that, unless each one of these stamps was cancelled as required by the provisions of section 12 of the Stamp Act, the instrument must be deemed to be unstamped under sub-section (2). It is common ground that the cancellation, so far as it has been done, was done under clause (b) of sub-section (1) by writing the name of the firm to which the defendants are alleged to belong across the stamps. This signature begins on the paper to the left of the upper two stamps and continues right across these two stamps on to the paper on the right of the stamps. Underneath the name is drawn an irregular line which begins on the paper to the left of the two lower stamps, tends upwards, crosses the whole of the left lower stamp, and ends in the top left corner of the right lower stamp. There is about a quarter of an inch only of this line on the right lower stamp. It has been urged in argument on behalf of the plaintiffs that this line forms part of the ordinary signature of the firm, and I have no doubt that the member of the firm who wrote the firm name on

1936

EZEKIEL
v.
MORDECAI.

DUNKLEY, J.

this document does ordinarily, in signing that name, add such a line underneath it, for the manner in which this has been written shows that it was written as a whole, and that the line underneath forms part of the ordinary method of making the signature ; but I do not myself understand the relevancy of this argument. The sole point for consideration is whether all four stamps have been cancelled as required by the provisions of section 12. Under sub-section (*3*) the stamps may be cancelled

> " by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing, or in any other effectual manner."

And under sub-sections (*1*) and (*2*) each stamp must be " cancelled so that it cannot be used again." The effectiveness of the cancellation of each stamp has therefore to be determined by reference to the question whether, if it be removed from this document, it could be used again. The two upper stamps are effectively cancelled by the writing of the name across them. On behalf of the plaintiffs it is urged that the lower stamps are cancelled by the line which has been drawn across them. For the defendants I have been referred to two cases of the Bombay High Court, *S. A. Ralli and others* v. *Caramalli Fazal* (1), and *Virbhadrapabin Adrashapa Javli* v. *Bhimaji Balaji Saraff* (2), as authorities for the proposition that a stamp cannot be effectively cancelled by drawing a line or lines across it, and for the plaintiffs *Mahadeo Kori* v. *Sheoraj Ram Teli* (3), is cited as authority for the opposite proposition, namely, that the writing of a line across a stamp may amount to an effective cancellation. In my opinion, these, at first sight, conflicting authorities are easily reconcilable, and

(1) (1890) I.L.R. 14 Bom. 102. (2) (1904) I.L.R. 28 Bom. 432.
(3) (1918) I.L.R. 41 All. 169.

1936

EZEKIEL
*v.*
MORDECAI.

DUNKLEY, J.

in all three cases the judgments merely lay down the evident proposition that an effective cancellation of a stamp must render the stamp "so that it cannot be used again", and as Piggot J. observed in *Mahadeo Kori's* case (1), (at page 179),

"the question whether a particular adhesive stamp has or has not been cancelled in a sufficiently effectual manner, so that it cannot be used again, is one which must obviously be considered with reference to the facts of each particular case."

And Walsh J. (at page 182 of the same case), observed :

"* * * Whether the requirement of the law as to the cancellation of the stamp has or has not been sufficiently met is a question to be determined upon examination of the document in each particular case."

I am in entire agreement with the observations of these learned Judges to the effect that the words "so that it cannot be used again" do not imply such a degree of cancellation as would make it physically impossible for any dishonest person to make hereafter a fraudulent use of the stamp. In my opinion, the expression means merely such cancellation as will prevent the stamp being lawfully or conscientiously used again. The question, to my mind, resolves itself into this; if the stamp became detached from the document to which it has been affixed and came into the possession of a person of ordinary honesty and prudence could he conscientiously use that stamp again? If that is the correct criterion, then plainly a stamp can be as effectually cancelled by a line deliberately drawn across it with the object of cancelling it, as by writing a name or a date across it. Applying this test to the promissory note in the present case, I am prepared to

(1) (1918) I.L.R. 41 All. 169.

1936
EZEKIEL
v.
MORDECAI.
DUNKLEY, J.

hold that the lower left stamp has been duly cancelled, but not so the lower right stamp. The circumstances pertaining to this stamp are very similar to those appearing in *S. A. Ralli*'s case (1), where the only mark of cancellation upon one stamp was a small part of the first letter of a signature, consisting of a slightly curved line. On the right lower stamp of this promissory note there is an ink line about a quarter of an inch long near the left top corner. Such a line might easily be made by accident on the stamp, and no one seeing this stamp separately from the other three would for one moment think that it had ever been used for any purpose. It has been urged that as these four stamps have apparently not been separated along their perforated margins, the question of the cancellation of each stamp should be considered in reference to the same question of cancellation of the others. This is clearly not a tenable contention, for section 12 of the Stamp Act plainly requires that each and every stamp should be separately cancelled. The question for consideration is not whether all these four stamps, looked at together, do each and all of them show marks which would prevent their being used again, but whether, when each stamp is considered separately, that particular stamp shows marks which would prevent its being used again. It cannot possibly be held that the right lower stamp has been, in the terms of the section, "cancelled so that it cannot be used again." Consequently, the promissory note must, under sub-section (2) of section 12 of the Stamp Act, be deemed to be unstamped and, therefore, no suit can be brought upon it.

In view of my decision on this issue, the plaintiffs desire to fall back upon the alleged original consideration for this promissory note and to base their cause of action thereon. But according to the plaint the original

(1) (1890) I.L.R. 14 Bom. 102.

1936

EZEKIEL
*v.*
MORDECAI.

DUNKLEY, J.

consideration was a loan in cash made on the 18th March 1926, and, therefore, the cause of action based upon the original contract of loan has long been barred by efflux of time. The argument for the plaintiffs is, however, that, although the promissory note in suit has been held to be invalid and cannot be sued upon, it can be used as an acknowledgment of liability within the terms of section 19 of the Limitation Act. It is correctly pointed out that section 19 of the Limitation Act prescribes no particular form for an acknowledgment of debt. It is further urged that, as three of the stamps on this promissory note have been duly cancelled, looked upon as an acknowledgment of debt it is correctly stamped under Article 1 of the First Schedule to the Stamp Act. This contention is not correct because, even if treated as an acknowledgment, the invalid promissory note contains a promise to pay the debt ; but however that may be, I am clearly of opinion that the argument advanced on behalf of the plaintiffs is directly contrary to the plain provisions of section 35 of the Stamp Act, which enacts that

"no instrument chargeable with duty shall be admitted in evidence for any purpose * * * * , or shall be acted upon, * * * * , unless such instrument is duly stamped."

It seems to me that the argument advanced on behalf of the plaintiffs, that this promissory note can be used as an acknowledgment of indebtedness so as to bring within time a suit based upon the original contract of loan, if accepted would in effect amount to allowing a suit to be brought upon the promissory note itself. It is not a question of allowing the promissory note to be admitted in evidence merely to prove some collateral matter, but it is a question of using the promissory note for the very basis of the action, as without it the action obviously could not be brought, and therefore it would be "acting upon" the promissory note in the strictest

1936

EZEKIEL v. MORDECAI.

DUNKLEY, J.

sense of that expression. In *Ashling* v. *Boon* (1), Kekewich J. observed :

"* * * , I think that the receipt of money acknowledged by a promissory note is of the very essence of the promissory note itself. It is impossible to read this document partly as a receipt and partly as a promissory note. It is a promissory note given for £40 value received, and if I were to admit it as evidence of the receipt of that sum, I should be giving a right to sue for this £40 by virtue of this instrument which is a promissory note, notwithstanding that the statute says that it shall not be available for any purpose whatever."

With these observations I entirely agree. For the plaintiffs the case of *Fatechand Harchand* v. *Kisan* (2) has been cited as authority for the proposition that although an unstamped document cannot be acted upon, it can be used for the collateral purpose of showing an acknowledgment of liability. This case was dissented from by a Full Bench of the same Court in *Mulji Lala and others* v. *Lingu Makaji and another* (3), where the Full Bench held that an acknowledgment of a debt cannot, if unstamped, be given in evidence for any purpose including the purpose of saving limitation. I have been referred to a number of unreported cases, mainly of the Madras High Court, in which it has been held that a promissory note which cannot be acted upon because it is insufficiently stamped may be admissible in evidence so as to save limitation. With all due respect to the learned Judges who decided these cases, I must dissent from these decisions so far as they purport to decide that, in spite of the provisions of section 35 of the Stamp Act, an unstamped promissory note may be admitted in evidence as an acknowledgment of debt under section 19 of the Limitation Act. But these cases are all judgments of a single Judge

(1) (1891) 1 Ch. Div. 568, 574. (2) (1893) I.L.R. 18 Bom. 614.
(3) (1896) I.L.R. 21 Bom. 201.

sitting in appeal or revision, and it appears that the learned Judges considered that, in consequence of the provisions of section 36 of the Stamp Act, they had no authority to question the admissibility in evidence of the promissory note, which had already been admitted by the trial Court, and that as the document had been admitted in evidence and was on the record they were compelled to take it into consideration for what it was worth, and the decisions appear to have turned on the meaning of the provisions of section 36 rather than on the provisions of section 35. However that may be, there are two reported decisions of the Madras High Court, in *Thaji Beebi and others* v. *Tirumalaiappa Pillai and others* (1), and *Natarajulu Naicker* v. *Subramoniam Chettiar and others* (2), in which the contrary proposition has been held by a Bench of the Court. In my opinion, the correct rule has been stated by Sir Dinshah Mulla in his work on the Indian Stamp Act (2nd Edition, page 113), where he has stated that the admissibility of such an unstamped document for the proof of any fact turns upon the distinction between a collateral purpose and a collateral matter. A collateral matter is any matter the proof of which does not depend upon proof of the transaction, *e.g.* proof of payments which have been made and which are endorsed on the promissory note. For this purpose the endorsements would be receivable in evidence, as the proof of the payments does not depend upon proof of the transaction for which the promissory note was given. A collateral purpose is any matter the proof of which depends upon proof of the transaction, and an acknowledgment of liability is plainly such a collateral purpose, because the proof of an acknowledgment must depend upon proof of the transaction which has to be

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(1) (1907) I.L.R. 30 Mad. 386. (2) (1922) I.L.R. 45 Mad. 778, 784.

1936

EZEKIEL
*v.*
MORDECAI.

DUNKLEY, J.

acknowledged. The ground upon which the plaintiffs desire to introduce the invalid promissory note in suit in evidence, namely, as an admission by the defendants of their liability, depends upon proof of the original transaction which is evidenced by the invalid promissory note. It is consequently a collateral purpose, and section 35 of the Stamp Act bars the admission of the promissory note in evidence for any such purpose.

Hence my findings on the two issues are as follows:

First, that the promissory note is unstamped and, therefore, cannot be sued upon, and, secondly, that a suit based upon the cause of action of the original contract of loan cannot be brought by the plaintiffs because this cause of action is barred by limitation.

The suit of the plaintiffs must therefore fail and is dismissed with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Baguley.*

1936

*July 10.*

### MA SEIK AND ANOTHER
*v.*
### MAUNG SAN PE AND OTHERS.*

Res Judicata—*Person in possession of land—Title to land claimed against auction-purchaser of land at Court sale—Land alleged to belong to mortgagor—Predecessor's declaratory suit against mortgagee—Dismissal of declaratory suit—Matters decided in declaratory suit—Discretionary relief—Effect as to* res judicata—*Specific Relief Act (I of 1877), s. 42—Civil Procedure Code (Act V of 1908), s. 11.*

A person in possession of land and claiming it through her predecessor in title who had acquired it by purchase from its former owner has the right to set up the title in defence to a suit by an auction-purchaser at a Court sale held at the instance of a mortgagee who claims the land to belong to a mortgagor, his judgment-debtor. She can do so notwithstanding the fact that her predecessor in title had filed a declaratory suit against the mortgagee claiming

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* Special Civil Second Appeals Nos. 46 to 51 of 1936 from the judgments of the District Court of Pyinmana in Civil Appeals Nos. 70—85 of 1935.