anticipation of the difficulties which the defendant will have the ability to throw in his way, if para. 2 of s. 7 be interpreted in the manner above suggested, will never consent to any Second Class Subordinate Judge trying his case under the provisions of Chap. II of Act XVII of 1879, and thus the object of the said Act would, to a great extent, be frustrated.

"In conclusion, I would respectfully submit that the examination of the defendant, contemplated in para. 2 of s. 7 of Act XVII of 1879, is not an answer to the suit, and unless therefore the defendant satisfies the requirements of s. 101 of the Code of Civil Procedure, his position as a witness will not be changed to that of the defendant appearing and answering to the suit. It, therefore, follows that in the present case, he is not entitled to produce evidence in support of his allegation of part-payment."

The parties did not appear in the High Court.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C. J.—The view stated is very technical, and certainly opposed to the spirit of the Dekkhan Ryots Act.

By s. 74, the Civil Procedure Code is only to be applied so far as it is consistent with the Act. By s. 12, the Court is **[188]** bound to inquire into the merits of the case whenever the amount of the claim is disputed. In the present case it is disputed, and the Subordinate Judge cannot ascertain the merits of the case, unless he examines the persons who are acquainted with them. It seems, therefore, to be his duty to summon the witnesses named by the defendant.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill Mr. Justice E. D. Melvill and Mr. Justice Nanabhai Haridas.

DOWLATRAM HARJI AND ANOTHER (*Plaintiffs*) *v.* VITHO RADHOJI AND ANOTHER (*Defendants*).*

[30th November, 1880.]

The Indian Stamp Act, No I of 1879, ss. 7, 12, 13 and 14—Stamp—Contract by principal and surety on same stamp paper, but separately written—Writing on the reverse of a stamp paper—Whether Government Notifications under the Stamp Act are not ultra vires *when more stringent than the Act itself.*

In a bond engrossed on a stamp paper of sufficient value, and dated the 19th April 1879, the contract of the principal was written first, and after his signature followed the contract of the surety, signed by the latter. The document commenced on the side other than that on which the stamp was impressed and terminated on the side impressed with the stamp. The stamp was not in any way defaced, nor was the paper so written as to admit of the stamp being used again. *Held*, that the bond constituted only one instrument, and was properly stamped, not being open to objection under ss. 7, 12, 13 and 14 of the Indian Stamp Act, No. I of 1879.

The construction of the words "on the face of the instrument," used in s. 12 of Act I of 1879, considered.

Quære, whether certain Government Notifications—to the effect that an instrument, commenced on the side of the paper other than that on which the stamp

* Civil Reference No. 23 of 1880.

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is impressed and completed on the side on which the stamp is impressed is, under s. 12 of Act I of 1879, to be treated as unstamped; and prohibiting, writing on the reverse of an impressed stamped paper—are *ultra vires* as being more stringent than and, therefore, inconsistent with that Act?

[R., 13 A. 66 (75); 13 C.W.N. 815 (821)=1 Ind. Cas. 670; 5 Ind. Cas. 812 (813)=15 P.R. 1910=4 P.L.R. 1910=16 P.W.R. 1910.]

THIS case was referred for the opinion of the High Court by Rao Saheb V. V. Wagle, Subordinate Judge of Shevgaon, in the district of Ahmednagar, under s. 617 of Act X of 1877, and s. 43 of Act I of 1879. He stated the case as follows:—

[189] "The plaintiffs in this suit claim to recover the amount, being principal and interest due on a bond executed in their (plaintiffs') favour by defendant No. 1 with the security of defendant No. 2 on the 19th April 1879.

"The bond in question, together with the guarantee, is written on one stamp paper. It begins on the side other than that on which the stamp (2 annas) is impressed, and closes on the other.

"The points for decision are:—

"1st.—Whether the agreement made by the principal debtor and the guarantee given by the surety at one and the same time form one instrument or two for the purposes of the Stamp Act?

"2nd.—Whether the bond is duly stamped according to Act I of 1879?

"My opinion on the first point is that both the agreements form one instrument for the purposes of the Stamp Act, and on the second that the bond in question is duly stamped according to Act I of 1879.

"As to the first point, though the two agreements in question are separately written on one and the same stamp paper, the bond is to be given effect to as if it were executed by two persons with joint and several liability. Therefore, if in the latter case one stamp duty is sufficient, there is no reason why it should not be so in the former. There is the same community of interests in one case as in the other. I can see no substantial difference between the two cases. The practice of the Civil Courts, so far as I know, is to consider the two agreements as one instrument, and to admit such bonds as duly stamped. Moreover, in the new as well as in the old Stamp Act no express provision seems to be made for such agreements of guarantee. But, on the other hand, such agreements do not appear in the list of exempted documents. I, therefore, entertain a doubt on this point, and submit it for an authoritative decision of the High Court one way or the other. As such bonds are of common occurrence, a definite opinion of the High Court on the subject is desirable.

"As to the second point, Act I of 1879, which came in force on the 1st April 1879, applies to the bond in question, which is dated the 19th April 1879. Section 12 of this Act provides that every [190] instrument written upon an impressed stamp paper should be so written that the stamp may appear on the face of the instrument and cannot be used for, or applied to, any other instrument; and s. 14 provides that every instrument written in contravention of s. 12 or 13 shall be deemed to be unstamped. Now, this point hinges upon the construction to be put on the phrase 'on the face of the instrument' used in the aforesaid s. 12. By this expression I understand the Legislature to have meant that an instrument shall be so written that the stamp thereof may appear at once without any difficulty,—that is to say, nothing should be written on the stamp itself so as to render the

impression unintelligible. But the Government of Bombay in their Resolution No. 4242 of 15th August 1879, Revenue Department, issued for the guidance of the Registrars, seem to have put a different construction on the same expression, namely, that every instrument should be commenced on that side of the paper on which the stamp is impressed; whereas the bond in question is commenced, as I have stated above, on the other side. If this construction be correct, the bond will have to be considered as unstamped according to s. 14 of the Stamp Act. As it is the general practice in this district to write the instruments in the manner in which the bond in question is written, it is very important that the point be once for all decided by the High Court.

"I therefore humbly and respectfully beg to submit, of my own accord, the above points for the decision of Her Majesty's High Court, under s. 617 of Act X of 1877, and s. 49 of Act I of 1879,—the decree that I have to pass in the suit in question being unappealable under Chap. II of the Dekkhan Agriculturists Relief Act."

There was no appearance of parties.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C. J.—This is a suit instituted in the Court of the Subordinate Judge of Shevgaon, in the district of Ahmednagar, on a bond of the 19th April 1879, given by a principal and his surety. The bond is written upon one piece of stamped paper, but, in the manner common in this Presidency, the contract of the principal comes first and is signed by him, and next after that signature **[191]** follows the contract of the surety, signed by the latter. The first question, referred to us, is whether this paper is to be regarded as one or two instruments in relation to the present Stamp Act I of 1879, which came into force on the 1st of April in that year. The uniform practice of the Civil Courts of this Presidency has been, we believe, to treat such a document as one instrument, and we see nothing in the new Act to lead us to depart from that practice. The word "bond" is defined by s. 4 to mean (*inter alia*) "any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void, if a specified act is performed or is not performed, as the case may be." The word "person" in the singular includes "persons" in the plural (Act I of 1868, s. 2), and we consider that the definition of 'bond,' just mentioned, may be regarded as including such a document as that now submitted for our opinion, executed by a principal and surety, notwithstanding the apparent separation of the clauses respectively relating to the principal's contract and that of the surety; the contract of the surety being incidental and accessory to that of the principal and in respect of one and the same sum or consideration—the leading object or character of the document being the securing of that sum.

In *Price* v. *Thomas* (1), by an instrument, in the form and containing the usual covenants of a lease, A demised premises to B., and B. and C. covenanted to pay the rent, but C. was not otherwise referred to in the instrument. In an action against C. on the covenant to pay rent, it was held that the instrument was available against him, though stamped as a lease only and that a deed stamp was unnecessary. Lord Tenterden, C. J., said: "If this covenant had introduced matter no way connected with

(1) 2 B. & Ad. 218.

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the demise, but wholly distinct and independent, it might then have been said that the plaintiff could not benefit by such a stamp as was affixed to this indenture. But that was not the case; the objection, therefore, cannot prevail." Littledale, J., said: "The lease was the principal, to which this covenant was an accessory." And Park, J., said: "This covenant was part of the consideration for granting the lease." A similar ruling had been previously made by Patteson, J., at *nisi prius*, on the [192] same document, *Pratt* v. *Thomas* (1). He said: "I think this stamp is sufficient. This deed is a lease, and this covenant is only ancillary to it. The question is, what is the leading character of the instrument?"

Annandale v. *Pattison* (2) was a stronger case than *Price* v. *Thomas*, or than the present case. A., as principal, and B., as surety, were jointly and severally, by bond, bound to pay to the creditors of C. fourteen shillings in the pound on the amount of their debts, and, by the same bond A. was bound to indemnify B. against all loss by reason of his becoming surety. It was held, by the King's Bench, that a stamp of £ 1-15 was sufficient in amount for that instrument, and that it did not require a second stamp on account of A.'s obligation to indemnify B.—the whole appearing to have been one transaction—and A.'s agreement to indemnify B. being, "no doubt, the consideration which induced the latter to become surety for A.'s performance of the agreement with the creditors of C." That decision has been questioned by Mr. Tilsley (Assistant Solicitor of Inland Revenue) in his treatise on the Law of Stamps (3) on the ground that the contract by A. to indemnify B. amounted to a counterbond, and was, therefore, liable to a specific duty. He also argued that it would be a contradiction in terms to say that the counter-obligation of the principal was the leading object of the instrument. On the other hand, it should be remembered that even if that document had been completely silent as to the recouping, by the principal, of the surety to the extent of any loss to which the latter might be liable in respect of his suretyship, a contract by the principal to indemnify the surety against any such loss would, both at law and equity, be implied (4). It, therefore, seems difficult to maintain that the counter-obligation was not incidental and ancillary to the contract of suretyship. We have not found that, in subsequent cases, the decision of the King's Bench in that case has been [193] unfavourably criticized by the Courts. However, whether it be right or wrong, it goes a step further than it is necessary for us to go in the present case.

Stead v. *Liddard* (5) shows that the fact that the contract of the principal appears separately on the instrument from the contract of the surety does not render two stamps necessary. In that case a letter was written proposing certain terms of agreement, and the person, to whom it was sent, wrote, at the foot of it, a memorandum consenting to those terms. On the back of the letter, the father of the latter wrote a guarantee of the performance of the agreement by his son. It was held by the Court of Common Pleas that one stamp was sufficient, and that the letter, the memorandum accepting its terms and the guarantee—all formed but one transaction. In that case, as well as in the present case, the guarantee expressly refers to the agreement by the principal—a circumstance which

(1) 4 C. & P. 554. (2) 9 B. & C. 919. (3) 1st ed., p. 348; 3rd ed., p. 291.
(4) 2 T. R. 104 *per* Ashurst, J.; 8 T. R. 310, *per* Lord Kenyon, C.J.; *Warington* v. *Furbor*, 8 East 242; *Alexander* v. *Vane*, 1 M. & W. 511; 1 Spence Eq. Jur., p. 639; 1 Story Eq. Jur., pl. 499 *et seq.* and pl. 730; Theobald on P. and S., 226 *et seq.*, Ind. Contract Act (IX of 1872), s. 145.
(5) 8 J. B. Moore, 2.

distinguishes those cases from *Richards* v. *Franco* (1). The limitation of the guarantee in *Wharton* v. *Walton* (2) to a sum less than that which might become payable under the agreement of the principal, and the circumstance that the guarantee applied not only to the principal covenant, but also to the payment of penalties to which the covenantor might, under the agreement, become liable, sufficiently distinguish that case from the present case and from *Price* v. *Thomas* and *Stead* v. *Liddard* above cited.

For these reasons we think that the bond and guarantee, submitted for our opinion, form but one transaction, and do not fall within s. 7 or s. 13 of the Stamp Act I of 1879. This view is, we believe, consistent with that which has heretofore prevailed in our Courts on the point, and we do not, in that enactment, perceive any indication of an intention on the part of the Legislature to lay down a new rule in that respect. The reluctance of Courts of Justice to break through an established practice on such a point to the disadvantage of the subject, and to the advantage of the Crown, is illustrated by the decision of Lord Mansfield [194] and his observations in an anonymous case on stamps reported in Lofft, p. 155.

We now come to the second question. In amount the stamp is sufficient, but the document commences on the side other than that on which the stamp is impressed, and is continued and terminates upon the side on which the stamp is impressed. The stamp is not in anywise defaced, nor is the writing so placed upon the paper as to admit of the stamp being used again. The point referred to us is whether, under such circumstances, the instrument is duly stamped—having regard to s. 12 of Act I of 1879, which enacts that "every instrument written upon paper, stamped with an impressed stamp, shall be written in such a manner that the stamp may appear on the face of the instrument, and cannot be used for, or applied to, any other instrument." That section (which is substantially similar to s. 7, clause I of the Statute 33 and 34 Vic., c. 97), seems, like s. 11, to contemplate two objects—1, that the stamp should not be defaced or made illegible; 2, that the writing should not be so distant from the stamp as to admit of its being used again for another instrument—for instance, by cutting off the part of the paper previously written upon, and writing a fresh instrument upon the portion left blank. The case of *Rex* v. *Reeks*, as reported by Strange (3) and viewed by Mr. Tilsley (4), perhaps partly illustrates what the Legislature may have intended to guard against by enacting that the instrument shall be written in such a manner that the stamp may appear on the face of the instrument. As reported in Strange, and described by Mr. Tilsley, that case was as follows:—"Upon a trial at bar in the nature of a *quo warranto* for the Office of Burgess (of the Corporation) of Christ Church, the admission of the defendant was produced, and it appeared to be a parchment that had only one stamp, and yet had five admissions entered upon it. And in order to make it good, they had annexed four other parchments, each of which was stamped. And the Court held that would not make it good, and that the proper way would have been to have paid the four penalties, and had four new stamps *on the first parchment*, as was done in the Bishop of Chester's case (5). And,

(1) Mentioned in Tilsley on Stamps, 3rd ed., p. 302, and Chitty on Stamps, 2nd ed. p. 28.
(2) 7 Q. B. 474, S. C. 9 Jur. 638.
(3) 2 Stra. 716.
(4) Tilsley (1st ed.) 337; (3rd ed.) 275.
(5) 1 Stra. 624.

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[195] for want of this, there was a verdict against this and the other four defendants. The next day they moved for a new trial. And the Court would not hear anything of the motion, unless they produced the admission and showed that they had paid the penalty. And the defendants not caring to be at that certain expense for the uncertainty of gaining a new trial afterwards, they submitted to judgment of ouster." The aspect of the same case, as presented in Lord Raymond's Reports(1), is somewhat different. Thence it would appear that the admission of the defendant stood third in order upon the original stamped parchment, which contained the admissions of four other persons as burgesses also, and was dated 19th December 1721. The four additional stamped parchments bore the same date, and upon them were respectively entered the four latter in order (including the admission of the defendant) of the five admissions. Those four admissions had not, in fact, been entered upon the four parchments, nor had the latter been stamped until two months after the 19th December 1721, whereas the Statute 9 and 10 William III, c. 25, ss. 27 and 59, applicable to the case, required that the admission should appear on paper stamped at the time, otherwise it could not be given in evidence until the penalty had been paid and a certificate thereof produced. The same case is, *nomine The King* v. *Rich* reported in Barnardiston's Reports (2), more curtly than by Lord Raymond, but nearly to the same effect.

[In ordinary legal parlance, when the face of a deed or document is mentioned, no particular side or sheet of the parchment or paper, on which the deed or document is written, is thereby indicated.] The last line on the second side, or, if the deed or document consist of more sheets than one, the last line on the last side or sheet, if part of the text or body of the instrument, is deemed to be as much upon the face of it as the first line on the first side or sheet. [Ordinarily, if the instrument be of sufficient length, both sides of the paper are written upon. [The 12th section of Act I of 1879 does not say that the instrument must commence on the side on which the stamp is impressed, or that only one side may be written upon]. [The imposition of such excessive and minute details would be pitfalls to the unwary, and [196] would, by frequently invalidating documents, press harshly upon the illiterate classes, and overthrow thousands of honest transactions without producing any such advantageous result in the form of revenue to the State as would compensate it for the discontent which would be occasioned. The Legislature has avoided such stringent details, and seems to us to have satisfied itself by legislating against defacement of the impressed stamp, and against such a mode of penning the document as would admit of that stamp being used for, or applied to, any other instrument. Although the similar provision in Statute 33 and 34 Vic., c. 97, s. 7, has been in force in England for the last ten years, we have not been able to discover any decision of the English Courts to the effect that the expression "face of the instrument" is to be interpreted as requiring that the document should commence on the side on which the stamp is impressed, or that both sides of the paper or parchment may not be written upon, or as having any different meaning than it was previously understood to have. Where such a state of facts, as that suggested by the above-mentioned case of *Rex* v. *Reeks* as reported by Strange only, exists, *viz.*, where five distinct instruments are written on one parchment, stamped sufficiently for only one of those instruments,

(1) Vol. 2, 1445. (2) Vol. 1, p. 8.

and several other stamped parchments are annexed to the first parchment sufficient to cover the other four instruments, but no part of them is engrossed upon the additional parchments, the stamps on the latter could not be said, in ordinary legal parlance, to appear on the face of any of the four instruments, and those stamps could, with facility, be used for other instruments, and in fraud of the revenue.

The Subordinate Judge has referred to a Resolution of the Government of Bombay, No. 4242 (dated 15th August 1879, in the Revenue Department) in relation to a practice at Nasik of writing on the side of the paper other than the side on which the stamp is impressed, which Resolution contains an opinion of the Remembrancer of Legal Affairs to the effect that "if a stamp appears on the back of an instrument it cannot be said to be on its face, and that every instrument written, since the 1st of April last, upon paper stamped with an impressed stamp, is therefore liable to be impounded if the stamp does not appear on the face of it." In connection with that opinion and the Nasik practice, [197] the Under-Secretary of the Government of India, in his letter No. 1857 to the Government of Bombay, dated 26th July 1879, says (*inter alia*): "You inquire 'whether an instrument begun on the back of the paper and completed on the front is to be treated as unstamped under s. 12.' It is clearly laid down in s. 12 that the instrument must be so written that the stamp shall appear on the face of it, and this condition would not be fulfilled in the case described." The same letter directed that such cases should be dealt with under s. 12 of Act I of 1879. We, as will be seen from what has already been said, do not concur in the opinion that the mere circumstance, that the instrument has been commenced on the side of the paper other than that on which the stamp is impressed, and is continued on the side on which the stamp is impressed, would warrant either the Courts of Justice or the officers of Government in treating the instrument as unstamped.

The Registrar (Mr. Hosking) has also directed our attention to a notification, dated from Bombay Castle, 23rd November 1880, and published in the *Bombay Government Gazette* of the 24th November 1880, which is as follows:—"No. 6197. It is hereby notified for general information that, under the stamp rules, writing on the reverse of an impressed stamp paper is prohibited." Although this may be intended to signify that a general rule has been made by the Governor-General in Council under s. 56 of Act I of 1879 to the effect that writing on the reverse of an impressed stamp paper is prohibited, the notification does not expressly say that such a rule has been made by the Governor-General in Council. Under s. 55, the Local Government could not make such a rule. Assuming, however, that it has been made under s. 56 by the Governor-General in Council, it does not appear to have been notified until the 23rd November 1880, *i.e.*, long subsequently to the 19th of April 1879, the date of the bond under our consideration, and, therefore, cannot affect that document. Had the bond been of a date subsequent to the notification of the 23rd of November 1880, it would have been necessary for us to consider whether such a rule is, as required by s. 56, consistent with the Act (1)—that Act being fiscal in character, [198] and the rule having the tendency to add to s, 12 a more stringent provision than the construction of that section seems to warrant. It not being absolutely necessary in this case to express any positive opinion whether

(1) See as to rules or bye-laws, *Reg.* v. *Yenku Bapuji*, 8 B.H.C.R.Cr. Cas. 39 (47) *et seq.*

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or not the rule is *ultra vires*, we defer doing so until the question directly arises in some other case.

We reply to the Subordinate Judge that we regard the bond as constituting but one instrument, and as properly stamped, and not open to objection under ss. 7, 12, 13 or 14 of the Indian Stamp Act I of 1879.

5 B. 198.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

KRISHNASHANKAR (*Decree-holder*) *v.* CHANDRASHANKAR (*Judgment-debtor*).* [23rd November, 1880.]

Decree—Execution—Rateable distribution of assets—Civil Procedure Code (Act X of 1877), s. 295.

The salary of a karkun, who was employed in the Second Class Subordinate Judge's Court of Anklesvar, was attached, in execution of a decree of the First Class Subordinate Judge's Court of Surat, by an order issued by the Surat Court, directing the Anklesvar Court to stop and remit, every month, a moiety of the said karkun's salary to itself (the Surat Court), until satisfaction of the decree. While the decree of the Surat Court was thus in course of execution, another judgment-creditor of the karkun, who had obtained a decree in the Anklesvar Court, applied to it for a rateable distribution of the moiety between himself and the Surat decree-holder, under s. 295 of the Civil Procedure Code, Act X of 1877.

Held that the application was not sustainable, inasmuch as the decree of the Surat Court was being executed by itself and not by the Anklesvar Court to which the order of attachment was sent as the head of a department or as "the officer whose duty it was to disburse the salary," and not as a Court executing the decree of another Court.

Jetha Madhavji v. *Nujarali Abramji* (1) followed.

[F., 18 B. 456; 6 M. 357 (359); R., L.B.R. (1893—1900), 161 (167).]

THIS case was referred for the opinion of the High Court by Rao Saheb Ranchorlal Desai, Second Class Subordinate Judge of Anklesvar, under s. 617 of Act X of 1877. He stated the case as follows:—

[199] "A decree in suit No. 664 of 1861 was passed in the Court of the First Class Subordinate Judge of Surat against one Chandrashankar Sudashankar, who is now a karkun on the establishment of this Court. The decree-holder, Maneklal Jeychand, having applied for execution in the Court of the First Class Subordinate Judge against one half of the salary of the judgment-debtor, an order, dated 10th February 1880, has been sent to this Court, directing that one-half of the salary of the said karkun be withheld every month until the sum of Rs. 181-4-3, *i.e.*, the amount of the decree with costs, is paid up. Accordingly, one-half of the said karkun's salary for the months of February, March and April was withheld and remitted to the First Class Subordinate Judge; but before the pay of the said karkun for the months of May and June was received from the treasury, *i.e.*, on the 24th June 1880, the *darkhast* now under consideration was filed in this Court, wherein the decree-holder has prayed that his decree should be executed against the salary of the said karkun. Hence the question arises whether a decree-holder, who has

* Civil Reference No. 24 of 1880.

(1) 4 B. 472.