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evidence. Reading s. 132 of the Evidence Act as a whole I can come to no other conclusion than that the Legislature has by it made a clear distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and has given him a protection in the latter of those cases only. If protection was to be allowed in every case in which a witness gives an answer, the words "be compelled to" in the proviso are quite superfluous. The insertion of those words clearly shows, to my mind, that protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give: (see Field's Law of Evidence, p. 646, 4th ed.). In the [443] present case both the accused were examined in the Court of the Subordinate Judge on behalf of Sarasvati and Kesu, and they freely and voluntarily there gave evidence to the effect that they had attested the deed on which Sarasvati and Kesu relied. This deed was held to be a forgery. Sarasvati and Kesu were prosecuted and convicted of the forgery; and the accused were tried along with them and convicted on a charge of abetment of that forgery, and their answers in the Court of the Subordinate Judge were admitted in evidence against them. I am of opinion that these answers being purely voluntary answers, and not answers which they were in any way compelled to give, can be proved against them in the present trial. And as they are proved, I would dismiss these appeals.

The case was accordingly referred to the Acting Chief Justice Mr. Bayley, who gave the following judgment:—

"For the reasons given by Sir Charles Turner, C. J., in the case of *The Queen* v. *Gopal Doss* (1) I think that the evidence is admissible, and I concur with Mr. Justice Parsons in dismissing the appeals."

Appeals dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Nanabhai Haridas, Mr. Justice Birdwood and Mr. Justice Jardine.

DAMODAR JAGANNATH, (*Plaintiff*) *v.* ATMARAM BABAJI (*Defendant*).* [6th February, 1888.]

Stamp Act, I of 1879, *s.* 34, *Prov.* I—*Suit on an unstamped promissory note—Evidence Act, I of* 1872, *ss.* 65, *cl.* (*b*), *and* 91.

The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. The plaintiff contended that the note was a bond, and could be admitted on payment of the [444] stamp duty and the penalty, under s. 34 of the Stamp Act I of 1879, which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but that the defendant's admission of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court,

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* Civil Reference No. 41 of 1887.

(1) 3 M. 271.

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Held, per JARDINE, J., that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp.

Held, per BIRDWOOD, J., that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under s. 65, cl. (*b*) of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected.

[F. 12 Ind. Cas. 246=49 P.W.R. 1911 ; 16 Ind. Cas. 33 ; U.B.R. (1907), 3rd Qr., Evidence, 5 ; R., 18 B. 369 (371); 24 B. 360 (366) ; 4 Bom. L.R. 912 (914).]

THIS was a reference by Rav Saheb V. V. Wagle, Subordinate Judge of Chiplun, under s. 49 of the Stamp Act I of 1879. The reference was as follows:—

"The plaintiff in this case sued to recover Rs. 15 as balance due on a note passed by the defendant on the 22nd December, 1886, for Rs. 38 borrowed by him on that date. The defendant admitted having passed the note sued on, but alleged that he received only Rs. 37 worth of paddy from the plaintiff, and that this amount was paid off. He also objected to the admissibility of the note, the same being unstamped. The plaintiff then applied to the Court to receive the note in evidence on payment of the necessary stamp duty and penalty, under s. 34 of the Stamp Act, I of 1879. The defendant's *vakil* opposed this application, relying on Proviso I to the said section, and contended that the note being a promissory note was not liable to be admitted in evidence on payment of the duty and penalty. The plaintiff's *vakil*, on the other hand, argued that the document was not a promissory note, but either a bond or an ordinary agreement, and that in any case the defendant having admitted receipt of the consideration, so far as the amount claimed is concerned, he, the [445] plaintiff, was entitled to a decree, unless the defendant proved his alleged satisfaction."

The following is a translation of the document sued on :—

"Private memorandum:—To Damodar Jagannath Thate, by Atmaram Set bin Babaji Set Potkar, inhabitant of Parashram. (I) have received from you Rs. 38. Interest therefor is agreed to be at the rate of one *per cent. (per mensem)*. The time (for the repayment) thereof is (as follows) :—After a month and a half (I will pay) a moiety (of the amount), and after (another) month and a half, the other moiety: thus, after three months from this day I will pay (the amount) in full. This is duly given in writing. Lunar date *Margashirsh, Vadya* 12th, the day of the week Wednesday, in Shake 1808 (22nd December 1886), in the *Samvatsar* cyclical year) named *Vijaya*. Handwriting my own.

(Signature)."

The Subordinate Judge referred the following questions to the High Court for decision :—

(1) Whether the document sued on (Ex. 3) was a promissory note, a bond, or an agreement ?

(2) Whether the admission made by the defendant of the consideration of the document would entitle the plaintiff to maintain his suit notwithstanding the inadmissibility of the document ?

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The Subordinate Judge's opinion on the first point was that the document was a promissory note, and on the second in the affirmative.

There was no appearance for the parties.

OPINION.

JARDINE, J.—I am of opinion that the document sued on is a promissory note.

The plaint shows that the suit it brought on the promissory note as the original cause of action. The admission of the contents of this document made by the defendant in his written statement does not avail the plaintiff, the document being itself inadmissible in evidence from want of stamp—*Ankur Chunder Roy* v. *Madhub Chunder Ghose* (1). My reasons for this opinion are those stated in *Sheikh Akbar* v. *Sheikh Khan*(2), which case [446] as well as that of *Radhakant Shaha* v. *Abhoychurn Mitter* (3) the present case resembles,—the facts of *Golab Chand* v. *Thakurani Mohokoom Kooaree* (4) and *Hiralal* v. *Datadin* (5) coming under a different principle.

BIRDWOOD, J.—The Subordinate Judge has adopted an unusual course in mixing up a reference under s. 49 of the Stamp Act with one under s. 617 of the Code of Civil Procedure. A reference under the former Act must be disposed of by three Judges of this Court, whereas one under the Code can be dealt with by one of the Division Benches ordinarily sitting. However, as the two references now made arise out of the same case, it will not be inconvenient to dispose of them together.

On the question referred under the Stamp Act, I concur with Mr. Justice Jardine that the document sued on is a promissory note. It is chargeable with a duty of two annas.

On the question referred under s. 617 of the Code, I am of opinion that the plaintiff cannot, in this case, recover irrespectively of the promissory note, because he does not seek to prove the consideration otherwise than by the note, which is inadmissible in evidence, and because the admissions contained in the written statement do not amount to an admission of the claim as for money lent.

The case is not one in which secondary evidence would be admissible for the purpose of proving the contents of the unstamped promissory note; for primary evidence, *i. e.*, the document itself, is forthcoming. To such a case, s. 65, cl. (*b*) of the Evidence Act would not apply. The admission of secondary evidence would, moreover, be an evasion of s. 34 of the Stamp Act of 1879, under which the note cannot "be acted on," being unstamped. See *Muttukaruppa Kaundan* v. *Rama Pillai* (6). To prove it by secondary evidence, and so make it the basis of a decree, would clearly be to act on it. The note cannot, therefore, be looked at in dealing with the claim.

The document itself and secondary evidence of its contents being inadmissible, no other evidence can, under s. 91 of [447] the Evidence Act, be given to prove the terms of the contract between the parties, of which the note was intended to be the evidence—*Ankur Chunder Roy* v. *Madhab Chunder Ghose* (1). If the plaintiff had sought to prove the consideration by other evidence, as for instance, by evidence as to an admission of the debt by the defendant, such evidence would have been admissible. But he rests his claim on the note; and that being inadmissible, he must fall back and recover, if at all, on admissions, if any, in the written statement.

(1) 21 W. R.C. R. 1. (2) 7 C. 256. (3) 8 C. 721.
(4) 3 C. 314. (5) 4 A. 135. (6) 3 M.H.C.R. 158 (160).

In *Farr* v. *Price* (1), the verdict for the plaintiff was set aside on the ground that the promissory note sued on bore a nine penny instead of an eight-penny stamp, as required by the Stat. 37 Geo. III, c. 90; but Lord Kenyan, C. J., observed that "as there were other general counts in the declaration, if the plaintiff could give other evidence of consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant's having given this imperfect promissory note for it;" and in *Tyte* v. *Jones*, quoted in the note to that case, Lord Kenyon "permitted the plaintiff," who had obtained an unstamped promissory note from the defendant, "to recover on a common count for money lent, by proving that when the money for which the note had been given was demanded of the defendant, he acknowledged the debt."

In *Golap Chand* v. *Thakurani Mohokoom Kooaree* (2), the case of *Farr* v. *Price* is cited as an authority for the rule that the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration if the pleadings are properly framed for that purpose; and the Judges who decided *Golap Chand's Case*(2) remark further that, in this country, the great power given of raising the true issues between the parties prevents the question of pleading having much importance; and they held that Lord Kenyon's decision in *Farr* v. *Price* (1) precisely governed the case, in which the plaintiff, who sued on an unstamped promissory note, sought to give evidence of the advance, the form of pleading being, as the Judges said, not material. In the present case, it is not necessary to **[448]** decide whether the plaintiff may be allowed to give independent evidence of the advance,—evidence, that is, apart from the defendant's admissions in the written statement;—for what the plaintiff relies on, as I understand from the terms of the reference, after the rejection of the promissory note, are the admissions in the written statement only. So that the case is similar to that of *Ankur Chunder* v. *Madhub* (3), rather than to that of *Golap Chand* v. *Thakurani Mohokoom Kooaree* (2). And the only question is whether the written statement of the defendant amounts to such an admission of the claim as to dispense with the production of the promissory note in evidence. If it does not, and if the production of the note itself is necessary, the suit must fail. In *Ankur Chunder'i Case* (3), the plaintiffs did not set out the document sued on in the plaint, nor did the defendant admit it in such a way as to make it unnecessary for the plaintiff to produce it; and Couch, C. J., observed: "It seems to me that, when the plaintiff made it a part of his case that he should produce and prove the document, it cannot be said that his case was so admitted by the defendant that he need not produce it." In that case, the defendant admitted that he wrote the '*amanati rokha*' filed by the plaintiff, but denied that he had received the money covered by it. The plaintiff's appeal was accordingly dismissed.

This decision seems to govern the present case. And I think the Subordinate Judge ought to reject the claim, as the plaintiff does not offer any independent evidence of the advance alleged by him, and the defendant does not in his written statement admit that any money was lent to him, as alleged by the plaintiff, but sets up an entirely different transaction, in respect of which he admits no remaining liability.

NANABHAI HARIDAS, J.—I concur.

(1) 1 East. 55 (59). (2) 3 C. 314. (3) 21 W.R. C. R. 1.