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STAMPS.

THE questions arising under the United States Stamp Acts may be grouped as follows: 1st. Whether the provisions of those acts are binding only upon courts of the United States, and inoperative in the state courts? 2d. Whether the penalty prescribed by the acts attaches only upon proof that the omission to affix the stamp was with intent to evade the law, or whether the mere failure to stamp is itself evidence of such intent? 3d. Whether a note not stamped is invalid and inadmissible in evidence? and, 4th. Whether any party in interest may affix the stamp, and when? The decisions under all of these heads are conflicting and not easily reconciled.

I. Upon the first question raised, viz., that these acts are binding only upon United States courts, the leading authority is the case of *Carpenter* v. *Snelling*, 97 Mass. 452, decided in 1867. The court there say: "The provision of the statute of the United States" (Act of 1866, ch. 184, § 9) "does not, in terms, apply to the courts of the several states. The language of the enactment is only, 'That hereafter no deed, instrument, document, writing, or paper, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court, until a legal stamp, or stamps, denoting the amount of tax, shall have

been affixed thereto, as prescribed by law.' This provision can have full operation and effect if construed as intended to apply to those courts only which have been established under the Constitution of the United States and by Acts of Congress, over which the Federal legislature can legally exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. * * * * We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states, which shall be obligatory upon them."

The same doctrine was affirmed even more emphatically in *Latham* v. *Smith*, 45 Ills. 29, decided at June Term 1867. BREESE, C. J., says: "The note was made for a good and valuable consideration and recognised by the laws of this state as a valid instrument, and competent evidence in the courts of this state to charge the party making it with the debt specified in it. * * * We deny the power of Congress to go into the states, and, under the pretence of laying taxes, take away from the states legitimate and long-established rights. The power of Congress to tax these instruments can be effectually carried out by the imposition of a fine upon the negligent party, if wilfully so, and the innocent payee fully protected, without any encroachment upon the right of the states to make the instrument valid as evidence in their own courts." See also to the same effect, *Griffin* v. *Ranney*, 35 Conn. 239; *Craig* v. *Dimock*, 47 Ills. 308; *Bunker* v. *Green*, 48 Id. 243; and *Green* v. *Holway*, 101 Mass. 243. The doctrine laid down in these cases has, however, been distinctly repudiated by the courts of New York, Iowa, and Mississippi. In *Howe* v. *Carpenter*, 53 Barb. 382, PARKER, J., referring to the case of *Carpenter* v. *Snelling*, says: "In this state it has been repeatedly held otherwise, and effect has been given in this court to those provisions;" and in support thereof he cites the cases of *Cole* v. *Bell*, 48 Barb. 194; *Myers* v. *Smith*, Id. 614; *Hoppock* v. *Stone*, 49 Id. 524; and *Beebe* v. *Hutton*, 47 Id. 187.

In *The City of Muscatine* v. *Sterneman*, 30 Iowa 526, decided at December Term 1870, the court say: "That the act does apply to and govern the state courts, with respect to the admissibility and inadmissibility of documentary evidence, has been so frequently recognised by this court, that it cannot be regarded as an open question."

So in *Davy* v. *Morgan*, 56 Barb. 218, "The power of raising revenue by means of stamp duties, similar to the case in question (Acts of June 30th 1864 and March 3d 1865), has been exercised by Congress from time to time since 1797. I have not been able to find any adjudged case declaring any of such acts to be void. This being so, it is too late for this court, after such usage of the power has so long continued, to question it now."

Referring to the case of *Latham* v. *Smith*, TARBELL, J., in *Morris* v. *McMorris*, 44 Miss. 441, after deciding that a note not stamped at the date of execution may, in the absence of fraud, be stamped at the trial and given in evidence, says: "This solution at the same time sustains the law of Congress, and preserves the rights of the states and the independence of the state courts. The early impression that this law would have to be resisted as an encroachment on the integrity of the states has passed away, and the rules adopted and followed herein seem to obviate every possible shadow of seeming conflict."

The weight of reason and authority seems clearly to rest with the latter cases. It is difficult to find in the Revenue Acts any ground for the assertion made in *Carpenter* v. *Snelling*, that their provisions can only be properly construed as applying to courts established under the Constitution of the United States and Acts of Congress. The words of the acts, as amended in 1866, are, that "no instrument required by law to be stamped, shall be used as evidence in *any court*, until a legal stamp shall have been affixed thereto." Language broader or clearer than this could scarcely have been used. To restrict the phrase *any court* to mean only any *United States court*, it is necessary to hold that Congress has no power to declare as forfeited any instrument which may, by possibility, come within the cognisance of a state court. But Congress has clearly power to raise a revenue by the imposition of stamp duties. It has as clearly the power to effectuate this purpose by forfeiting instruments executed with intent to evade those duties. But its power in this respect will be gone if the state courts can disregard such forfeiture. To forfeit such instruments, or to declare them inoperative until duly stamped, is in no just sense to interfere with the right of the state courts to establish their own rules of evidence. It is simply to impose a tax, the effect of which, when paid, is to leave the instruments which are the subject of such tax open to all the rules of evidence

which may have been adopted by the various state courts. If this reasoning is incorrect, and the acts in question shall be restricted in their operation to the courts of the United States, we shall have the curious anomaly, in cases where the state and Federal courts have concurrent jurisdiction, of an instrument, which is null and void in the Federal courts, held to be binding and operative in the state courts.

The right of Congress to prescribe in certain cases, rules which shall be binding upon the state courts, seems to be implied in the Constitution, which after enumerating the general powers of Congress, confers upon it the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Article I. Section 8.

If Congress has the right, which is nowhere denied, to impose stamp duties, it has the power under this section, to carry that right into exercise. And by section 1st of Article 4th of the same instrument which gives to the public acts, records, and judicial proceedings of the courts in the several states, full faith and credit in all other states, Congress is expressly empowered by general laws to prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

II. Under the 2d head, viz., Whether the penalty prescribed by the acts attaches only upon proof that the failure to affix the stamp was with intent to evade the law; a number of authorities hold that the omission to stamp is itself evidence of such intent. In *Howe* v. *Carpenter*, 53 Barb. 382, it is said "that the invalidity of an instrument not stamped, as well as the forfeiture imposed, is made to depend upon the existence of the intent to evade the act. The parties to an agreement are presumed to be aware of the requirement of the statute; and their omission to obey it must, in the absence of any explanation, be deemed wilful and with intent to evade its requirements." "The act of omitting the stamp was unlawful and injurious to the government, and must be deemed presumptively so intended. It comes within the class of cases in which the proof of justification or excuse lies with the party transgressing; and on failure thereof the law implies a criminal intent."

In *The City of Muscatine* v. *Sterneman*, 30 Iowa 526, decided in 1870, it was held that the penalties of the Act of 30th June 1864, § 158, apply as well to instruments issued without intent to evade the provisions of that act as to those issued with such intent, and that the question of intent is immaterial. In that case, MILLER, J., says: "Whatever doubts might exist as to the correctness of this ruling, were the question an open one, we must regard it as settled in this state. We are aware that a contrary rule has been laid down by the courts of several states." And see *Miller* v. *Larmon*, 38 How. Pr. 417; *Beebe* v. *Hutton*, 47 Barb. 187; *Harper* v. *Clark*, 17 Ohio 190; *Maynard* v. *Johnson*, 2 Nev. 16, 25; *Wayman* v. *Torreson*, 4 Id. 124; *Hujus* v. *Stickler*, 19 Iowa 413.

On the other hand, the doctrine that the intent to evade the statute must be affirmatively proved, and cannot be presumed, is maintained by the courts of Pennsylvania, Maine, Vermont, Massachusetts, New York, Maryland, West Virginia, Indiana, Mississippi, and California; and it would seem with the better reason. The penalty prescribed by the Act of 1864 for omitting to stamp the instruments named in the act, is based expressly upon the intent to evade the provisions of the statute. The act is in the nature of a penal statute, and should therefore be strictly construed. It names an offence, and prescribes a penalty for that offence. Following all legal analogies, it would seem that the commission of that offence should be affirmatively proved before the penalty could attach. It is true that the impossibility, in very many cases, of proving fraudulent intent in the omission to affix the proper stamps to instruments, may result in loss to the government. This was doubtless in the mind of the Federal Legislature when they framed the act, yet they chose to limit the penalty to fraudulent omissions to stamp. But omissions to stamp may be accidental and innocent. The presumption, therefore, that an unexplained omission to affix the stamp is fraudulent, is a presumption against the expressed meaning of the legislature.

III. The discussion of this point is blended, in the cases, with that of the 3d question, viz., Whether a note not stamped is invalid, and inadmissible in evidence? The reasoning which requires the fraudulent intent to be shown, before the penalty can attach, holds good with regard to the forfeiture or invalidation of the instrument. The penalty is founded expressly upon the intent to evade

the provisions of the act, and immediately following in the same clause are the words, "such instruments, &c., not being stamped according to law, shall be deemed invalid and of no effect." Both the penalty and the forfeiture of the instrument are here made to depend upon the fact that the omission to stamp was with intent to evade the act. To construe the statute otherwise, would be to maintain that, while the penalty of $50 named in the Act of 1864 is incurred only upon a fraudulent evasion of its provisions, the invalidating of the instrument, which may involve a far more serious loss than the amount of the penalty, must follow upon any accidental and innocent omission to stamp.

The following authorities will illustrate the law upon this point in the states just named: *Ritter* v. *Brendlinger*, 8 P. F. Smith 68; *Tripp* v. *Bishop*, 6 Id. 424; *McGovern & Fisher* v. *Hoesback*, 3 Id. 176; *Sawyer* v. *Parker*, 57 Me. 39; *Dudley* v. *Wells*, 55 Id. 145; *Hitchcock* v. *Sawyer*, 39 Vt. 412; *Tobey* v. *Chipman*, 13 Allen 123; *Holyoke Machine Co.* v. *Franklin Paper Co.*, 97 Mass. 150; *Vaughan* v. *O'Brien*, 57 Barb. 491; *Vorebeck* v. *Roe*, 50 Id. 302; *Schermerhorn* v. *Burgess*, 55 Id. 422; *Cook* v. *England*, 27 Md. 14; *Welchner* v. *Reeds*, 3 W. Va. 445; *Adams* v. *Dale*, 29 Ind. 273; *Morris* v. *McMorris*, 44 Miss. 441; *Hallock* v. *Jaudin*, 34 Cal. 167.

Upon these points, the law, after carefully weighing the authorities, may briefly be stated as follows: The Act of 1864, § 158 (as amended July 13th 1866, and July 14th 1870), provides a penalty of $50 for the making, &c., of any instrument, not duly stamped, with intent to evade the act, and declares such instrument invalid. The mere omission to stamp is neither conclusive nor presumptive evidence of an intent to evade the act; and such intent must be affirmatively proved before either the fine or the forfeiture of the instrument attaches.

The same act provides a *locus penitentiæ* for those who may have sought to evade the act, by permitting them to appear before the collector of revenue of the district and declaring that, upon payment to him of the value of the stamp and the penalty named in the act, the instrument shall be deemed valid as if stamped when made.

It also directs the collector, in cases where it shall be made to appear to his satisfaction, that the omission to stamp was without any fraudulent intent, to remit the penalty upon payment of the price of the stamp.

Section 163 enlarges the operation of the act by providing that no instrument required by law to be stamped, which has been signed or issued without being duly stamped, shall be recorded or admitted in evidence in any court until a legal stamp or stamps shall have been affixed thereto. The payment of the tax is thus sought to be secured upon all instruments, 1st. By forfeiting those which have been left unstamped, with intent to evade the law, and subjecting their makers and issuers to a penalty; and, 2d. By excluding, as evidence, all instruments which may have been innocently left unstamped, or which have not been shown to have issued with intent to evade the act, until the proper stamp should be affixed. These provisions apply to state courts as fully as to the Federal courts.

4. The cases are not agreed upon the question as to the party who must affix the stamp. In *Myers* v. *Smith*, 48 Barb. 614, it was held that the maker of the instrument is the only person who can appear before the collector to procure the cancelling and stamping, and that without his knowledge and assent it cannot be done. And in *Maynard* v. *Johnson*, 2 Nev. 17, it was held that a defendant may plead the want of a stamp, although the effect of his evidence is to avoid his own contract.

JOHNSON, J., however, in *Schermerhorn* v. *Burgess*, 55 Barb. 422, referring to this case, says: "I do not so read the act. The maker might not be desirous of having the stamp affixed. He might prefer to subject himself to the penalty rather than have the instrument validated by the proper stamp. Hence it was highly proper to provide that any party interested in having the obligation rendered *primâ facie* valid as well as valid in fact and law, might appear and procure such stamp to be affixed." And in *McGovern & Fisher* v. *Hoesback*, 3 P. F. Smith 176, WOODWARD, J., says: "It will not lie either in the mouth of the obligor or that of his sureties, to allege his own neglect in avoidance of his own instrument." See also to the same effect, *Adams* v. *Dale*, 29 Ind. 273, where it is held that it is wholly immaterial which party affixes the stamp.

Where the note or other instrument is invalid for want of a stamp, the innocent payee may recover upon the original consideration: *Wilson* v. *Carey*, 40 Vt. 179; *McAfferty* v. *Hale*, 24 Iowa 355.

W. N. ASHMAN.