JAMES SCOTT.....APPELLANT; 1878

AND Jan. 26.
April 25.

THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA—(APPEAL SIDE).

Larceny—Unstamped Promissory Note—Valuable Security—32 & 33 *Vic.*, ch. 21 D.

S. was indicted, tried and convicted for stealing a note for the payment and value of $258.33, the property of A. McC. and another. The evidence showed that the promissory note in question was drawn by A. McC. and C. R., and made payable to *S's* order. The said note was given by mistake to *S.*, it being supposed that the sum of $258.33 was due him by the drawers, instead of a less sum of $175.00. The mistake being immediately discovered, *S.* gave back the note to the drawers, *unstamped* and *unindorsed*, in exchange for another note of $175.00. An opportunity occurring, *S.* afterwards, on the same day, stole the note; he caused it to be stamped, indorsed it, and tried to collect it.

*PRESENT.—Sir William Buell Richards, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

1878

JAMES SCOTT
v.
THE QUEEN.

Held,—On appeal reversing the judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), that *S.* was not guilty of larceny of "a note" or of "a valuable security" within the meaning of the Statute, and that the offence of which he was guilty was not correctly described in the indictment.

The prisoner, *James Scott*, was tried and convicted on a charge of stealing "a note for the payment of and of the value of $258.33, the property of *Archibald McCallum* and *Charles Read*," at the March Term, 1877, of the Court of Queen's Bench (Crown Side) sitting at *Montreal*.

Mr. Justice *Ramsay*, holding that Court, reserved the following case for the Court of Queen's Bench sitting in Appeal and Error.

"PROVINCE OF QUEBEC, "District of Montreal. } IN THE COURT OF QUEEN'S BENCH. (*Crown Side*). March Term, 1877.

"No. 90. "THE QUEEN "*vs.* "JAMES SCOTT. } On Conviction of Stealing a Valuable Security.

"Case reserved for the Court of Queen's Bench sitting "in Appeal and Error.

"Prisoner was indicted for stealing a note for the "payment and value of ($258.33) two hundred and "fifty-eight dollars and thirty-three cents, the property "of *Archibald McCallum* and another. The evidence "showed that the promissory note in question was "drawn by *Archibald McCallum* and *Charles Read*, and "made payable to the prisoner's order. The said note "was given by mistake to prisoner, it being supposed "that the sum of ($258.33) two hundred and fifty-eight "dollars and thirty-three cents was due him by the "drawers, instead of a less sum of ($175.00) one hundred "and seventy-five dollars. The mistake being immedi- "tely discovered, prisoner gave back the note to the

1878

JAMES SCOTT v. THE QUEEN.

"drawers, unstamped and unindorsed, in exchange for "another note of ($175.00) one hundred and seventy- "five dollars. An opportunity occurring, prisoner after- "wards, on the same day, stole the note; he caused "it to be stamped, indorsed it, and tried to collect it. He "was convicted, and I reserved the following questions "for the consideration of the Court:—

"First: Whether an unstamped promise to pay is a "promissory note or a valuable security?

"Second: Whether in the hands of the drawers it was "such property as to be the subject of larceny?

"And I postponed the judgment until such questions "are decided, and recommitted the prisoner to prison.

"(Signed) T. K. RAMSAY, J.

"*Montreal*, 11th June, 1877."

The reserved case was heard in the full Court and the conviction sustained, Chief Justice *Dorion* and the late Mr. Justice *Sanborn* dissenting.

Due notice to appeal to the Supreme Court of *Canada* was given to the Attorney-General of the Province of *Quebec*, within fifteen days from the rendering of the above judgment, as required by sec. 49 of the Act.

The prisoner, being poor, was unable to make any deposit to appeal, but fyled in the office of the Clerk of the Court of Appeals a petition *in forma pauperis* to be allowed to obtain the papers from that office.

Mr. *Frank Keller*, for Appellant:—

The indictment contains but one count: that of "feloniously stealing one note for the payment of and of the value of $258.33, the property of *A. McC.* and another." This note, payable to appellant's order, was unstamped and unindorsed when stolen. In order to obtain a conviction under 32 and 33 *Vic.*, c. 21, it was the duty of the Crown prosecutor to have evidence that the Appellant had stolen "money or a valuable secur-

1878

JAMES SCOTT v. THE QUEEN.

ity." Now, all the English authorities go to prove that an ordinary unstamped note cannot be "a valuable security in the hands of the owner." The Canadian Statute which allows a *bonâ fide* holder of a promissory note to cure the defect by affixing double stamps, does not alter the case. A note, considered as a valuable security, is only deemed equal in value to the unsatisfied amount of money, for the securing or for the payment of which it is applicable. There was no amount due upon this note and it cannot have been of any value to the owner, as it was stolen before it was negotiated. See *Rex* v. *Phipoe* (1); *R.* v. *Mead* (2); *R.* v. *Bingley* (3); *R.* v. *Perry* (4); *Russell* on Crimes (5); *Caverly* v. *Caverly* (6); *Rex* v. *Walsh* (7); *Reg.* v. *Yates* (8); The case of *R.* v. *West* (9); was relied upon by the Court below, but it does not apply.

The case of *West* was an indictment against *Frederick West* for stealing £95 in money, and against *Elizabeth West*, his wife, for receiving £5 in money, part of said £95, knowing them to have been stolen. The money stolen consisted in bank notes, and the only question raised, was whether bank notes not in actual circulation could be the subject of larceny as money, under section 18 of 14 and 15 *Vict.*, ch. 100, similar to section 25 of 32 and 33, ch. 29, of the Dominion Acts, which declare it sufficient to describe bank notes in an indictment as money.

It cannot be seriously argued that there is any similarity between taking a bank note and a promissory note made by the drawer, especially when the Statute declares that stealing bank notes is equivalent to stealing money.

(1) 2 Leach 673.
(2) 4 C. & P. 535.
(3) 5 C. & P. 602.
(4) 1 Denn, 69.
(5) Greaves' Ed., vol. 2, p. 344.
(6) 3 U. C. Q. B. (O.S.) 338.
(7) R. & R. 215.
(8) 1 Mood. C. C. 170.
(9) 7 Cox C. C. 185.

1878

JAMES SCOTT v. THE QUEEN.

The honorable Judges who delivered the judgment of the full Court acknowledged the decision was contrary to English precedents. This judgment, if sustained by the Supreme Court of the Dominion of *Canada*, would over-rule the former decisions existing on this point.

Our criminal law being based on the English criminal law should follow the English precedents. The reasoning of the honorable the Chief Justice, and the grounds urged by the different authorities cited, prisoner's counsel respectfully submits are clear and ought to be sustained.

Mr. *C. P. Davidson*, Q. C., for the Crown:

The prisoner was convicted for stealing a *note*. In Art. 2344 C. C. L. C., we have the definition of a promissory note. Under this section the moment the note got into the possession of the Appellant it was a legal instrument. The English cases cited by Appellant's Counsel do not apply, for the law was not the same when these decisions were rendered as ours is now. In the Canadian Statute the following words have been added "evidencing title to any chattel or money." The importance of these words has not been taken into consideration by the learned Judges who differed in the Court below. It is argued that the note was unstamped and unindorsed, but the endorsation by *Scott* is not of the essence of the note, neither is the stamp, for the note can be legalized here by affixing double stamps.

The case of *R.* v. *Walsh* (1), relied on by the Appellant, has been twice overruled: 1st. by *R.* v. *Metcalfe* (2); and 2nd. By *R.* v. *Heath* (3). The case of *Reg.* v. *West* (4), where it was held that bank notes in the hands of a bank, and not in circulation, could be the subject of larceny, is a case in point.

(1) R. & R. 215.
(2) 1 Mood, C. C. 433.
(3) 2 Mood, 57.
(4) 7 Cox, C. C. 185.

1878

JAMES SCOTT v. THE QUEEN.

Mr. *F. Keller*, in reply :—

There is no difference between a promissory note here and a promissory note in *England*. In the case of *R.* v. *Heath* (1) there, the cheque was taken, not from the hands of the drawer, but from the servant. It became a valuable security because it was taken from a third party. In no case whatever is the case of *R.* v. *Heath* referred to as overruling *R.* v. *Walsh* (2).

RITCHIE, J. :—

A note was made payable by the prosecutors to the prisoner's order and given to him. It having been discovered that a mistake had been made in the amount for which the note was drawn, the prisoner returned it to the drawers, unstamped and unindorsed. On the same day prisoner stole the note, caused it to be stamped, indorsed, and tried to collect it. He was indicted "for stealing a note for the payment and value of $258.33, the property of *Archibald McCallum* and another, the drawers." He was convicted, and the learned Judge reserved for the consideration of the Court the following questions:—

First. Whether an unstamped promise to pay is a promissory note or a valuable security ?

Second. Whether, in the hands of the drawers, it was such property as to be the subject of larceny ?

The conviction was sustained by a majority of the full Court, the Chief Justice and Mr. Justice *Sanborn* dissenting.

The Statute under which the prisoner was indicted and convicted is the 32 and 33 *Vic.*, ch. 21, and the sections bearing on this case are sections 1 and 15. Section 1 provides :—

(1) 2 Mood, 57. (2) R. & R. 215.

That in the interpretation of this Act the term "valuable security" shall include, *inter alia*, any debenture, deed, bond, bill, *note*, warrant, order, *or other security* whatsoever, for money or for payment of money, whether of *Canada* or of any Province therein, or of the United Kingdom, or of any British Colony, or possession, or of any foreign State, or any document of title to lands or goods as hereinbefore defined, and any stamp or writing which secures or evidences title to, or interest in, any chattel, personal, or any release, receipt, discharged or other instrument evidencing payment of money or the delivery of any chattel personal; *and every such valuable security shall, where value is material be deemed to be of value equal to that of such unsatisfied money*, chattel personal, share, interest or deposit for the securing or payment of which, or delivery, or transfer, or sale of which, or for the entitling or evidencing title to which such valuable security is applicable or *to that of such money* or chattel personal, *the payment* or delivery of which is evidenced by such valuable security.

And section 15 declares that:—

Whosoever steals or for any fraudulent purpose destroys, cancels, obliterates or conceals the whole or any part of *any valuable* security other than a document of title to lands is guilty of felony of the same nature and in the same degree; and punishable in the same manner as if he had stolen any chattel of like value with the share, interest or deposit, to which the security so stolen relates, *or with the money due on the security so stolen or secured thereby and remaining unsatisfied*, or with the value of the goods or other valuable thing represented, mentioned or referred to in or by the security.

I think it capable of easy demonstration that at the time this document was stolen it was neither a "note," nor a valuable security within the meaning of the Statute. If it was of any appreciable value to the owner as a mere piece of paper, the prisoner was not indicted for stealing it as such, and therefore on this indictment for stealing a note could not be convicted.

The document was not at the time it was stolen, as against the makers, valid and obligatory, so that in whosesoever hands it might come for valuable consideration it would be productive and available against the makers.

The note was not stamped when stolen. The 11th

1878

JAMES SCOTT v. THE QUEEN.

section of the Stamp Act then in force declared that if any person in *Canada* makes, &c., "any promissory note" chargeable with duty under 31 *Vic.*, ch. 9, before the duty or double duty has been paid, such person shall thereby incur a penalty of $100, and save only in case of payment of double duty as in 12th section provided, such instrument shall be invalid and of no effect in law or equity. The 12th section provides:—

> No party to or holder of any promissory note, draft or bill of exchange, shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the other party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays the double duty or additional duty as soon as he acquires such knowledge,—and any holder of such instrument may pay the duty thereon and give it validity, under section eleven of this Act, without becoming a party thereto. In this section the word "duty" includes any double or additional duty payable under the said section eleven.

It is therefore clear, that the alleged note, not having been stamped by the makers, and, indeed, never properly stamped, was, under the Stamp Acts, of no effect in law or equity.

At the time this paper was taken it was not then a valid or binding undertaking to pay or secure any sum of money, nor yet intended so to be, and if the maker did not stamp it, and never intended it should be stamped, surely the law never contemplated that in the event of such a paper being stolen, it could be legally stamped by the thief, and so, by the act of the thief, vitality and effect should be given to that which otherwise would be wholly void and of no effect, either at law or in equity. I can find no provision in the law for making the stamping by such a party effective.

But, independent of this, the Statute only declares that the party stealing a valuable security shall be

1878

JAMES SCOTT v. THE QUEEN.

guilty of felony of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of the like value with the same, &c., "*or with the money due on the security so stolen or secured thereby and remaining unsatisfied*"; so if there is no money due on the security so stolen nor secured thereby and remaining unsatisfied, what is the nature of the felony and degree and punishment to which he is liable? And thus we find in *Archibold* (1) the form of the indictment for stealing a bill or note contains the averment, that the sum "payable and secured by and upon the said Bill, being then due and unsatisfied," and in the text it is stated; "so that to show that the stealing of a bill, or note, or cheque is punishable within the 7 & 8 *Geo.* 4 C. 29, s. 5 (which is couched in the same language as section 15 of the Dominion Act), it is necessary to show that some amount of money is due upon it or secured by it and remaining unsatisfied, and that is not done by merely stating it to be a bond, bill of exchange, promissory note or order for money or payment of money, for it may have been paid;" and in the case of the *Queen* v. *Lowrie* (2), in which the indictment was in a similar form, and where it was determined, that an indictment, under the 24 and 25 *Vic.*, cap. 96 Sec. 27, (which uses similar language to our own Statute,) for stealing a valuable security must particularize the kind of valuable security stolen. *Bovill*, C.J., delivering the judgment of the Court, speaking of the document proved, says: "It was not by itself a document entitling *Cairns* (the Prosecutor) to receive the money from *Stafford*. *Moreover, the money was not due and unsatisfied at the time the prisoner took the agreement.*"

How can it be said there was any money due on this paper or secured thereby? It could not have been used by the drawer, the owner, for any available purpose

(1) 1 Pr. & P. 464. (2) (3) L. R. 1 C. C. 61.

1878

JAMES SCOTT v. THE QUEEN.

whatever, either as a promissory note or a valuable security; nor, as regards others, could what prisoner stole, have been sued on, or made available by any one at the time he took it, in the unindorsed and unstamped state in which it then was, and certainly not by the prisoner himself, because, if he sued on it, it would be quite open to the maker to show that nothing was due or owing on it, and that the claimant had stolen the paper, which it is obvious would be a clear answer to his action, and so conclusively establish that the instrument, in lieu of being a valuable security, was simply a piece of paper, on, or by which, there was no money due or secured, and no unsatisfied money for securing or payment of which the paper was applicable. If then it was valueless as a security to the maker and payee, and, at the time it was taken, to all others, it not being then indorsed or stamped, had the prisoner been apprehended and indicted and tried while the paper continued in that condition, is it not self-evident that he could not have been convicted of stealing a promissory note or a valuable security, the paper then being in fact and in law neither the one nor the other. If this be so, on what principle can it be successfully contended, that the act of the prisoner in either stamping or indorsing, or both, subsequent to the taking, and wholly unconnected with the act of taking, and while still retaining the paper in his own possession, or under his own control, could make that taking larceny, which was not larceny when the act of taking was committed; for when he took the note from the prosecutor, he certainly neither stole a stamped nor an indorsed note. If such was the effect of his dealing with the paper, it would necessarily follow, that it was not the taking which constituted the larceny, but the subsequent stamping and indorsing, and we were not to look at the condition of the paper when the larceny was actually

committed. But it is clear that neither the stamping nor the indorsing would give the paper any value in the possession of the prisoner; because the mere fact of his stamping and indorsing the paper and retaining it in his own hands could in no way make the paper a good note, or a valuable security, nor in my opinion in any way change the relative position of the parties in respect to the paper, or their relative rights or obligations.

1878

JAMES SCOTT v. THE QUEEN.

It is not necessary to discuss or express any opinion as to what might have been the possible effect of prisoner's acts had he stamped and indorsed the paper and transferred it to a *bonâ-fide* innocent indorsee for value, whereby it might, or might not, have become available as against the drawer as a promissory note, the payment of which he could or in view of the stamp Acts or otherwise he could not resist.

It is sufficient for us to say that on the present indictment, we think the prisoner should not have been convicted of stealing a note for the payment and value of $258.33; but there need have been no failure of justice in this case, for had the Prisoner been indicted for the common law offence of simply stealing a piece of paper, and had there been a second count in the indictment of that character, he might have been tried for that crime and convicted as in *Reg.* v. *Perry* (1); *Reg.* v. *Walls* (2); *Reg.* v. *Yates* (3); *Reg.* v. *Clark* (4); *Reg.* v. *Frampton* (5); *Reg.* v. *Rodway* (6); *Reg.* v. *Vyse* (7); and other cases.

Strong, J., I am of the same opinion.

HENRY, J.:—

The prisoner was indicted for stealing "a valuable

(1) 1 C. & K. 725.
(2) 1 Eng. L. & Eq. 558.
(3) 1 Mood. C. C. 170.
(4) R. & R. C. C. 181.
(5) 2 C. & K. 47.
(6) 9 C. & P. 784.
(7) 1 Mood. C. C. 218.

1878

JAMES SCOTT v. THE QUEEN.

security," in the shape of a promissory note, for the payment and of the value of $258.33, the property of *Archibald McCallum* and another. The note was made by *Archibald McCallum* and *Charles Read*, payable to prisoner's order. The note was delivered unstamped to the prisoner, but it was immediately given back by him in the same state and unindorsed, as it was discovered that the amount was too large, and he received a note in lieu thereof for the correct amount ($175). The prisoner afterwards, on the same day, stole the note first mentioned. He was convicted, and the learned Judge on the trial reserved two points:

"First. Whether an unstamped promise to pay is a promissory note or a valuable security?

"Second. Whether, in the hands of the drawers, it was such property as to be the subject of larceny?"

The reserved case was heard in the full Court, and the conviction sustained by three out of the five Judges who heard it, and it has come to this Court by appeal from that decision.

I am of opinion the conviction was wrong on many grounds.

In the first place the indictment charges the larceny of "a note," being the note in question. I am of opinion it was not a note at all. It was drawn by mistake, and, although delivered, it was unstamped, and, therefore, then imperfect *as a note;* and the re-delivery when the mistake was discovered made it precisely as if never made or delivered. It is then an incomplete instrument in the hands of the drawers, with no intention or idea of ever completing the execution or delivery of it, or of making any use whatever of it *as a note.* It has been argued that the payee, after a larceny of it, might *double stamp it*, and indorse it for a valuable consideration to a third party without notice of the larceny, and that the indorsee would thereby acquire a right of action to re-

1878

JAMES SCOTT v. THE QUEEN.

cover the amount from the parties whose names appeared as the makers. I can find no law to sustain this proposition. If, indeed, a note be fully executed, and passes by delivery out of the hands of the drawer, is endorsed and subsequently stolen, and gets into the hands of an innocent holder for a valuable consideration, he can recover it from the drawer, but it must first have the character of a note. If I draw a note to the order of a party, and lock it up in my desk to be stamped and delivered when I receive a consideration for it, and my desk is opened and the note stolen, I know of no law to oblige me to pay it. When I execute and deliver a note, I am presumed to have received a consideration for it, and am therefore bound to pay the legal holder or indorsee, but it would be contrary to every equitable, and I may say legal, principle to make me pay in the other case, where I received no value or did no act from which such might be presumed. There is no doubt of the law in the first case, but I can find none to sustain the other proposition. Many decisions, however, run in the opposite direction.

The authorities as to the necessity of a *delivery* before liability attaches are abundant.

It must be by the drawer or by some one authorized by him. An executor cannot complete his testator's indorsement by delivering the instrument which has been already signed by the testator. *Bromage* v. *Lloyd* (1). Neither indorsement nor acceptance are complete before delivery of the bill. *Cox* v. *Tray* (2); *Chapman* v. *Cottrell* (3). Where *A.* specially indorsed certain bills to *B.*, sealed them in a parcel and left it with his servant to be given to the postman, it was held that the special indorsement did not transfer the property in the bill still delivery, and that delivery to the servant was not suf-

(1) I Exch. 32. (2) 5 B. & Ad. 474.
(3) 34 L. J. Exch. 186.

1878

JAMES SCOTT v. THE QUEEN.

ficient, although it would have been otherwise if delivery had been made to the postman. *Reg.* v. *Lampton* (1); see also *Adams* v. *Jones* (2); *Brind* v. *Hampshire* (3); *Côté* v. *Deveze* (4).

The liability of the acceptor, though irrevocable when complete, *Thornton* v. *Dick* (5); *Trimmer* v. *Oddie* (6), does not attach by merely writing his name, but upon the subsequent delivery of the bill—or upon communication to some person in the bill, that it has been so accepted. Hence it follows that if the drawee has written his name on the bill, with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or, at least, before the fact of the acceptance is communicated to the holder, *Cox* v. *Tray* (7); and the other cases cited in *Byles* on bills (8);

A distinction, and a wide one, exists on this point between a note or bill payable *to order* and those payable to *bearer*. In the case of the latter an unauthorized delivery may, and often does, give to a *bonâ fide* holder a claim on the other parties, but the rule is not so in respect to those payable to *order*.

There is no doubt that, in general, the circumstance of a bill or note having been obtained without adequate consideration, or by duress or fraud, or feloniously, or having been put into circulation contrary to agreement, affords no defence when the instrument has come into the possession of a *bonâ fide* holder for value (9); but that doctrine does not apply to what was never a bill or note. If a note be fully executed, as I have before said, the maker is answerable if the instrument be stolen from a holder and gets afterwards into the hands of another *bonâ-fide* holder for value.

(1) 5 *Price* 428.
(2) 4 P. & D. 174; 12 A. & E. 455.
(3) 1. M. & W. 369.
(4) L. R. 9 Chan. App. 27.
(5) 4 Esp. 270.
(6) 5 B. & Ald. 474.
(7) Bayley 6th Ed. 204.
(8) Note G. page 196.
(9) Chitty on Bills, 10th Ed. 50.

1878

JAMES SCOTT v. THE QUEEN.

The cases cited by *Chitty* in support of the doctrine quoted as to stolen notes refer to bank notes or cheques, or crossed cheques, all of which pass by delivery after issue, but do not, in the slightest degree, refer to promissory notes never delivered.

Having shewn that on principle it would be inequitable to enforce payment of an inchoate instrument stolen from the party to it, and for which he never received any value, and in the absence of any legal authority, I feel bound to declare that no action on the note in question would lie, even at the instance of a *bonâ fide* holder for value, and must conclude that it was not a note at all and therefore *as such* not the subject of larceny.

The provision for double stamping, if carried out in regard to this note, does not, I take it, help the case, for if it wanted other essentials the mere stamping could not change the character of the instrument.

I am also of opinion, from a careful study of all the authorities, that in no case could a mere promissory note, payable by a party to some other, and not fully executed and delivered, be in any circumstances "a valuable security." It could not be one to the intended payee for he had never acquired any right to it, and a man's own note could not be a security to *him*. It is laid down in *Archibold's* Criminal pleading (1), that it must be of value to the *prosecutor*, and be proved that something remains due and unsatisfied *to him*. How could it be said that a man's own note was due and unsatisfied to himself? Common sense forbids it.

I also am of opinion, that it must be a valuable security *to some one at the time of the larceny*, and that no subsequent act of double stamping which might make the note otherwise a good one would be sufficient to sustain a charge of larceny. On the points stated by my learn-

(1) P. 392.

1878

JAMES SCOTT v. THE QUEEN.

ed brother *Ritchie*, I fully agree and am therefore of opinion that the indictment has not been sustained by proof.

THE CHIEF JUSTICE, TASCHEREAU AND FOURNIER, J. J., concurred.

Appeal allowed.

Solicitor for the Prisoner : *Frank Keller.*