LAW COMMISSION OF INDIA

SIXTY- SEVENTH REPORT

ON

THE INDIAN STAMP ACT, 1899

February, 1977

P. B. Gajendragadkar

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA
12, TUGHLAK ROAD,
NEW DELHI-11
March 1, 1977

My Dear Minister

I have great pleasure in forwarding herewith the sixty-seventh Report of the Commission on the Indian Stamp Act, 1899.

As the first Chapter indicates, the Law Commission, soon after its initial constitution, had announced that it would revise the Stamp Act. However, since the Commission was then occupied with other subjects of an urgent nature, it could not take up the work of revising the Stamp Act, as announced. Thereafter, that announced plan has remained unimplemented so far.

After the present Commission submitted its Reports on topics, which it thought were more urgent, it felt that the earlier announcement made by the first Commission should be carried out and a thorough study of the Stamp Act made with a view to make suitable recommendations for amendment in regard to its provisions.

Accordingly, the whole Act was carefully examined and the question pertaining to its amendment in material particulars was considered and the pros and cons of every recommendation thoroughly discussed.

In order to facilitate the formulation of its final recommendations, the Commission sent a Questionnaire to persons and institutions interested in the problem, and the replies received by it in response to its Questionnaire have been carefully examined. Besides, some suggestions for making amendments in the Act had already been received ; these also have received careful consideration by the Commission.

After discussion of the entire problem in its broad perspective, examining its provisions one by one, the Commission has decided to make the recommendations indicated in the Report. The Report, I hope, will speak for itself. But, I would like to mention some important amendments which the Commission has recommended in order to simplify and rationalise the law with a view to improving its working.

In its examination of the Act, the Commission found that the definitions of 'bills of exchange', 'promissory notes' and 'policies of insurance' presented certain problems and the Commission has attempted to solve them by suitable redrafting of the said definitions.

It is obvious, that in an Act, like the Stamp Act, provisions relating to the mode of denoting payable duty are of considerable relevance in their proper collection. Bearing this principle in mind, the Commission has made suitable recommendations to provide for consolidation of duties on certain instruments not covered at present and also for the use of the franking machines. These amendments, it is hoped, will simplify the machinery of collection and pave the way for its modernisation.

In regard to the meaning of the expression 'bond', the Commission found considerable uncertainty which appeared to cause inconvenience not only to the tax-payers, but also, in some cases loss to the revenue and in many cases unnecessary waste of valuable judicial time. The Commission believes that the recommendations, which it has made for the amendment of this part of the Act, will, to a large extent, rationalise the position in that behalf.

It is plain that in the Stamp Act where the important and indeed vital matter pertains to the person who is liable to bear burden of duty *vis-a-vis* Government. The present provisions in sections 3, 29, 40 and 48 are somewhat sketchy and incomplete and the diversity of judicial opinion in respect of the import of these provisions appeared to the Commission to weaken the very foundation of the authority of the State to recover the deficiency in stamp duties because the person, on whom the liability is imposed, remains substantially undefined and therefore unidentified. After careful study of the true juristic position in this matter and the views expressed by several judicial decisions, the Commission has recommended a solution which attempts to state the position in a clear, compact and easily intelligible manner.

It is clear that if the proper duty prescribed by the Act is not paid, the Act must provide for a suitable penalty. To some extent, however, the penalty provision prescribed by section 35 has, by reason of its drastic character, proved to be unrealistic in its working. The Commission's recommendation for amending this provision, in one sense, liberalises the section to some extent but would, according to the Commission, ultimately facilitate better enforcement of the Act.

The Commission noticed that, by virtue of the power conferred on the appropriate Governments to grant concessions and reductions of stamp duty, a virtual plethora of notifications has emerged. Some of these notifications are of great importance. In an area of such importance, according to the Commission, the Act itself should incorporate exemptions rather than relate it to the rules and orders which, as is well-known, are not easily available to the public. The Commission has recommended a few amendments which proceed on this assumption. The recommendations relating to the remission granted in regard to bills of exchange and promissory notes can be cited as instances in point.

I have deliberately mentioned some of the significant recommendations made by the Commission in the hope that Government will appreciate the magnitude and urgency of the problem and will soon undertake legislation on the lines recommended by the Commission in the present Report.

Let me add that in making these recommendations we have avoided to affect the rates in any substantial manner because we thought that the question about the fixation of rates constitutes a question of policy on which the Commission would not like to make any recommendations.

Having regard to the many problems which we faced in revising the present Act, it is not surprising that the Report extends over 900 pages in type and comprises fifty Chapters.

Before concluding, I would like to add that after the Commission was constituted in September 1971, it has forwarded twenty-three reports (numbering forty-five to sixty-seven) including the present one ; and after the present Commission was re-constituted in September 1974, it has forwarded seven Reports including the present one.

In the end, let me repeat the suggestion which I have already made on two or three previous occasions that, after the Report of the Commission is printed, copies of the report should be circulated to the relevant academic and professional institutions so that it may stimulate a debate on the questions considered by the Commission and that, in turn, may assist Government in coming to its own conclusions on the relevant recommendations made by the Commission.

With warm personal regards,

Yours sincerely,
Sd/-
(P. B. GAJENDRAGADKAR)

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REPORT ON THE INDIAN STAMP ACT, 1899

CHAPTER I

GENESIS OF THE REPORT

Importance of the Act.

1.1. This Report relates to the Indian Stamp Act, 1899 which is a fiscal enactment of daily importance to the citizens. A proposal for taking up the Act for revision was announced by the Law Commission soon after its initial constitution[1]; but, somehow, this work was not taken up because the Commission was busy with other subjects. When the Commission was reconstituted in 1971, its terms of reference were widened, and revision of laws in the light of directive principles was included within those terms.

Having dealt with several laws which were of importance from the point of view of directive principles, the Commission took up the Stamp Act. Meanwhile, on several occasions, suggestions have been received by the Commission from various sources, for considering amendments in specific sections of the Act. Those suggestions have been duly taken into account, as also the replies received to our Questionnaire, in making the recommendations contained in the succeeding Chapters.

Nature of Stamp laws.

1.2. Of the corresponding English Act, it has been stated by one reviewer[2]—

> "Of all the branches of revenue law, none, in the experience of your reviewer, is one-half so dull as stamp duties ; and there is none on which it is more difficult to express an opinion with any degree of certainty. The reason in each case is that this subject has no underlying principles ; it springs basically from the Schedule to the Stamp Act, 1891, which was accurately described by Lord Reid in *Inland Revenue Commissioners* v. *Henry Ansbacher and Co.*, (1963) A.C. 191, 204, as 'a mere conglomeration of unco-ordinated provisions.' "

This aspect shows the difficulty of revising the Act.

Preliminary aspects.

1.3. Before we proceed to mention the broad lines on which revision of the Act could be usefully considered, we think it necessary to deal with certain preliminary questions, not only by way of introduction but also in order to draw attention to the constitutional position concerning legislation in respect of stamp duties, and other aspects of importance[3].

Nature of Stamp Duties.

1.3A. Stamp duties, as is evident from the Act, are paid by affixing a stamp, either impressed, or, in some cases, adhesive, to the instrument required to be stamped. Under section 3, it is the instrument which is chargeable with duty. It follows, therefore, that if a legal transaction can be effected orally, no stamp is required, because there is nothing to which the stamp can be affixed, and because the charging section levies a duty on an instrument only. In general, therefore, it would be correct to say that "the thing which is made liable to duty is an instrument",—as was observed with deference to the English law by Lord EsherMJSR[4]. A similar view was expressed by Rowlatt, J.—a distinguished authority in taxation law[5] and has been reiterated in the House of Lord[6].

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1. F. 2(9)/56/L.C. II (Notes) (Note dated 14th May,1957); F. 3(57)/L.C. II, S. No. 1.
2. Book review of Farrand, Stamp duties for the Conveyancer (1963),107 Solicitors' Journal, 849.
3. See discussion as to 'lines of revision', *infra*.
4. *Internal Revenue Commissioner* v. *Angus*, (1889) 23 Q. B. Div. 579, 589.
5. *Murex Ltd.*, v. *I.R.C.*, (1933) 1 K.B. 173, 179; 148 L.T. 164, 166.
6. *Oughtred* v. *I.R.C.* (1960) A.C. 206, 227, 231, 238; 1959 3 W.L.R.898, 899, 904, 910; affirming (1958) 2 All E.R. 443.

This is what Rowlatt J. observed :—

> "The Stamp Act deals not with the commercial effect of the transaction, but deals with the vehicles ; and you look at the vehicle to see what it does."

In the House of Lords, it was stated :—

> "Yet the law with regard to liability to stamp duty is clear enough. The duty is charged upon instruments, if they exist and come within any of the categories prescribed by the Act."

> "It is not charged upon transactions. Thus, property such as chattels, which by law pass on delivery, can be transferred from one owner to another without attracting duty. Again, though an agreement for sale may be chargeable *ad valorem*, since the Act has so required, an oral agreement for the sale of property involves no charge to duty because no instrument is brought into existence to effect or to record it.[1]".

Charging provision—Interpretation of.

1.4. It is also well-established that if the charging provision does not, on a proper construction, apply to the particular instrument, then duty is not leviable[2]. At the same time, if the charging provision applies, then duty is leviable unless, of course, the citizen can bring himself within a specific exception. About hundred and forty years ago, Taunton J., pointed out[3] that "the law upon the subject of stamp is altogether a matter *positivi juris*. It involves nothing of principle or reason, but depends altogether upon the language of the Legislature."

Sanction for the charging provision—Its relationship to judicial procedure.

1.4A. One of the major sanctions for ensuring that instruments are duly stamped, is the provision[4] that an unstamped document is not to be admissible except in certain cases. It is well established also that if a document is not admitted for want of stamp duty. Secondary evidence of its contents—even where otherwise permissible under the law of evidence—cannot be given, and this shows the importance of the Stamp Act, not only as a measure of fiscal legislation but also in relation to judicial proceedings.

Charging and machinery provisions.

1.5. Usually, legislation relating to stamp duties has to provide for several matters of detail as well as of substance. It is not necessary at this stage to enumerate all those matters, or even to analyse them. But it would be useful to point out here that such legislation—as, indeed, any taxing statute—usually comprises two broad categories of provisions, namely, charging provisions and machinery provisions. The charging provisions lay down the charge of tax, while the machinery provisions create the machinery and lay down the procedure for the assessment, collection and refund of the tax. This distinction has not merely been of academic interest, because, under the Constitution[5], the legislative power is demarcated in terms of (a) rates of stamp duty, and (b) stamp duties. In the ensuing discussion, provisions relevant to stamp duties other than the rates of stamp duty will be referred to as machinery provisions, for the sake of convenience.

Interpretation.

1.6. Principles for the interpretation of stamp laws are broadly the same as those for the interpretation of other taxing statutes, namely, an ambiguity in a charging provision is ordinarily resolved in favour of the citizens, but where the citizen claims the benefit of an exemption, he has to bring himself within it. The major difficulty which the courts experience in construing the Stamp Act—apart from those attributable to defective drafting—can be said to arise out of the fact that often there is no rational principle forming the basis of the levy of a duty on a particular document or the levy of a higher rate of duty on a particular document in contrast with smaller duties levied on other analogous documents.

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1. (1957) 3 W.L.R. 898, 901 (H.L.) per Lord Radcliffe.
2. *Gurr* v. *Scuddy*, 11 Ex 190, 191 (Lord Chief Baron Polloch).
3. *Morley* v. *Hall*, (1834)2 Dowl. 494, 499, 497.
4. Section 35.
5. See *infra*.

History of stamp duties.

1.7. The idea of raising revenue for the State from the transactions of its citizens originated in Holland[1]. The first stamp law was passed in Holland in 1624. In England, it was first adopted under Charles II but, under the reign of William and Mary, it assumed a definite shape and thereafter various statutes were passed requiring stamps on various instruments among the English people[2].

Stamp Duties in India—The Regulations.

1.8. In India, the first stamp law was Regulation 6 of 1797, which was limited in its extent to Bengal, Bihar, Orissa and Benaras. Various stamp Regulations were subsequently introduced in the sister provinces of Bombay and Madras.

By sections 16 and 21 of the Bengal Regulation 6 of 1797, all written obligations, except Bills of Exchange above Rs. 50 in value, were made chargeable with *ad valorem* duty, ranging from four annas to one rupee. With a few exceptions, all other instruments as well as all copies were made chargeable according to the quantity of matter engrossed on the stamp paper (the stamp paper varied in size and value, from two annas to one rupee). The immediate occasion for this Regulation was the abolition of the tax for the maintenance of police establishments, leviable on "Indian Merchants and Traders."

1.9. Although the stamp duties under this Regulation were primarily intended to compensate for the deficiency in the public revenue occasioned by the abolition of the tax on merchants etc., this Regulation paved the way for a series of later enactments relating to stamp duties. Regulation 7 of 1800 introduced a fresh set of provisions as to stamp duties, and it may be of interest to note, that for the first time, a specific provision was introduced for stamping an acknowledgement for the receipt of money at the same rate as the rate prescribed for an instrument creating an obligation. The stamp duty on many other deeds was doubled, and a provision was also introduced to enable the holder of an unstamped document to get the omission to stamp rectified, by presenting it to the Collector. To check the practice of forging of stamps, Regulation 13 of 1806, Regulation 7 of 1809 and Regulation 12 of 1810 made further additions or modifications regarding the sale and authentication of stamp papers. Certain changes were made by Regulation 12 of 1812, Regulation 16 of 1813 and various other Regulations, passed from 1814 to 1829.

In Madras, Regulation 8 of 1818 (sections 9, 10 and 11), mainly modelled on Bengal Regulation 7 of 1800, contained the principal provisions as to stamp duties, followed by Regulation 2 of 1813 and Regulation 13 of 1816 as modified by Regulation 2 of 1825.

In Bombay, the first enactment relating to stamp duty was Regulation 14 of 1815, followed by Regulations passed in 1827 and 1831.

Stamp Acts in India.

1.10. So much as regards the Regulations. In 1860, the first Act relating to stamp duties (Act 10 of 1860) was enacted in India. It repealed all the existing Regulations. Prior to this Act, there had been some amending Acts[3], adding to the law contained in the Regulations. The Stamp Act of 1860 was amended the same year, and repealed and replaced by Act 10 of 1862. The Stamp Act of 1862 was amended in 1865 and 1867, and was finally repealed (as regards stamp duties) by Act 18 of 1869. The last mentioned Act was replaced by the Stamp Act of 1879 (Act I of 1879), which was the immediate predecessor of the present Stamp Act.

The Stamp Act of 1879, during its short life, underwent numerous alterations (it was amended 9 times),[4], and was ultimately repealed by the Stamp Act, 1899, which contains the present law on the subject.

Amendments.

1.11. During the period that has elapsed since 1899, the Stamp Act has been amended several times. The most important amendments were made in 1904, 1906, 1910, 1923, 1927 and 1955. The last mentioned amendment is the most important from the point of view of the territorial application of the Act.

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1. M.N. Basu, Indian Stamp Act (1954), page (vii).
2. Position in England in detail is dealt with, *infra*.
3. Act 14 of 1840; Act 9 of 1842; Act 15 of 1859.
4. Act 9 of 1881; Act 1 of 1888; Act 5 of 1888; Act 18 of 1889; Act 6 of 1889; Act 20 of 1890; Act 12 of 1891; Act 96 of 184; Act 13 of 1897.

The introduction of decimal coinage in 1958 necessitated extensive amendments in the Act[1].

No comprehensive revision of the Act has, however, been attempted so far.

Stamp Duties in England.

1.12. In England, stamp duties were first imposed at the end of the 17th century[2]; they are now governed primarily by two Acts of Parliament, one imposing the duties[3], and the other making numerous administrative provisions[4]. But it should be noticed that the Stamp Acts in England have been repeatedly amended by subsequent Finance Acts and Revenue Acts, and some of these amending Acts expressly direct that the relevant sections shall be read "together with" or as "one with" the Stamp Act, 1891[5].

The fundamental principle on which the English Acts are based is the same as in India, namely, "the thing which is made liable to duty is an instrument[6]." Exemptions from duty in England are not given by notification, but are contained in the relevant Act. And, of course, it need not be stated that if a document does not fall under any of the enumerated categories, it is not liable to stamp duty. Examples of such documents in England are—affidavits, awards, bills of lading, coupons for interest, proxy for one meeting only, receipt for an amount less than two pounds, share certificates and statutory declarations[7].

1.13. It is well-known that one of the causes of the American revolution was the Stamp Act of 1765, introduced by George Grenville. The Act levied a duty on every "skin or piece of vellum or parchment or sheet or paper", used for legal documents, commercial transactions, etc.[8] Opposition to this legislative measure in the American colonies was so strong, that the expenses of collection of the duty exceeded the revenue realised.

History of relevant constitutional provisions.

1.14. We may now turn to the constitutional position in India. At the time when the Indian Stamp Act, 1899 (a Central enactment) was enacted, the duties levied under each of the several articles in its Schedule became part of central revenues, no part of it being specifically allocated to the provinces. A change was, however, introduced into this system by the Montford Reforms of 1919. Section 45-A of the Government of India Act, 1919, enacted :

> "45-A. (1). Provision may be made by rules under this Act :
>
> . . . . . .
>
> (b) for the devolution of authority in respect of provincial subjects to local Governments and for the *allocation of revenues* or other moneys to those Governments."

Devolution Rules were framed under this provision and rule 14(1) read :

> "14(1). The following sources of revenue shall, in the case of Governors' provinces, be allocated to the local Government *as sources of provincial revenue*, namely :—
>
> . . . . . .
>
> "(b) receipts accruing in respect of provincial subjects.
>
> . . . . . .
>
> (f) the proceeds of any taxes which may be lawfully imposed for provincial purposes."

Schedule 1 to these rules classified subjects of Legislative power into two heads, Central and Provincial—Part I and Part II respectively. Item 20 of Part II—List of Provincial subjects—ran in these terms :

> "20. *Non-judicial stamps*, subject to Legislation by the Indian legislature. . . . . ."

1. The Indian Stamp (Amendment) Act, 1958 (19 of 1958).
2. In 1964.
3. Stamp Act, 1891 (England).
4. Stamp Duties Management Act, 1891 (England).
5. *Internal Revenue Commissioners* v. *Angus*, 23 Queens Bench Division 579, 589 (Lord Esher, M.R.).
6. *C. f.* section 1, Stamp Act, 1891 (England).
7. The list is not exhaustive.
8. Encyclopaedia Britannica, Vol. 21, page 306.

Section 80-A(3) laid down the formal requirements with which the Provincial Legislatures should comply before enacting these laws :

> "80-A(3). The local Legislature of any province may not, without the previous sanction of the Governor-General, make or take into consideration any law (a) imposing or authorising the imposition of any tax unless the tax is a tax scheduled as exempted from this provision by rules made under this Act ; or....."

In pursuance thereof, the Scheduled Taxes Rules were framed which specified the taxes which might be imposed by the provinces either for their purposes or for the purposes of local authorities within them without the previous sanction of the Governor-General. In regard to stamp duties, item 8 of Schedule I to these rules enabled provincial legislation without previous sanction only in regard to—

> "8. A stamp duty other than duties of which the amount is fixed by Indian legislature."

The result of this Scheme was that by virtue of the main provisions in section 80-A(3)(a), the local legislature could legislate for the levy of stamp duties on the instruments included in the Stamp Act, 1899, only after obtaining the previous sanction of the Governor-General. Several Provinces took advantage of these provisions and enacted legislation on the subject of stamps after obtaining the previous sanction of the Governor-General under section 80-A(3), making the proceeds part of Provincial revenues and amending the rates of duties imposed by Schedule I of the Indian Stamp Act, 1899.

Act of 1935.

1.15. The Government of India Act, 1935, effected a substantial change in the law in relation to stamp duties, carrying to its logical result the provision of the Devolution Rules and the practice that prevailed thereunder. It also introduced a dichortomy, so far as the provinces were concerned, between the substantive law relating to the levy and collection of the duties including the machinery therefor on the one hand, and the rate of levy on the other hand. The White Paper proposals started this cleavage by listing "Stamp duties which are the subject of legislation by the Indian Legislature at the date of the Federation" in the exclusively Federal List I, and "stamp duties other than those provided for in List I" as a source of Provincial Revenue. This rather vague form received clarification in the report of the Joint Parliamentary Committee. In their revised lists, "Fixation of rates of stamp duty in respect of bills of exchange, bills of lading, cheques, letters of credit, promissory notes, policies of insurance, proxies and receipts", was made exclusively Federal (Item 53 of List I), while "fixing of rates of stamp duty in respect of instruments other than those mentioned in item 53 of List I" was put in as item 32 in List II--the exclusively Provincial List. The legislative power to enact Stamp Laws in general, as distinguished from the "fixation of rates of duty", was assigned to the Concurrent List (Item 10), which read "Law of non-judicial stamps, but not including the fixation of rates of duty." These recommendations of the Joint Parliamentary Committee were adopted by the framers of the Government of India Act, 1935. The instruments mentioned in item 53 of List I, set out above, were allocated to the exclusively Federal List I (item 57)--but instead of the words "fixing of rates of stamp duty", the expression "rates of stamp duty" was used.

Legislative Entries.

1.16. The Constitution of India followed, in this respect, the pattern of the Government of India Act, 1935. Entry 91 of the Union List reads : "rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts", while Entry 63 of the State List provides for legislation in regard to "rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty". Entry 44 of the Concurrent List deals with the power to make a law in relation to stamp duties as distinguished from the rates of stamp duty in these terms. "Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty."

Present constitutional position.

1.17. The Constitution has a number of other provisions relevant to stamp duties. Of these, article 246 and the Seventh Schedule are relevant in regard to the legislative power to levy stamp duties. Articles 265, 268 and 269(e) are relevant mainly as regards the distribution of the revenues. The former is more important, for the purposes of a consideration of the Stamp Act.

1.18. Briefly, the scheme provided for in the Constitution is as follows :

(a) Under article 246, such stamp duties as are mentioned in the Union List[1] are levied by the Union, but, under article 268, each State in which they are levied, collects and retains the proceeds (except in the case of Union Territories).

The documents are specified in Entry 91, Union List :

"91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of leading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts."

(b) Other Stamp duties are levied and collected by the States, by virtue of the legislative entry in the State List, already quoted below[2] :—

"63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty."

(c) And the Concurrent List[3] contains the following entry :—

"44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty."

This entry deals with the general subject of stamps. Provisions other than[4] those relating to rates of duty are, thus, within the legislative power of both the Union and the States.

(d) Broadly speaking, therefore, except as regards Union Territories, Parliament's legislative power extends to :—

(i) rates of stamp duty on the specified documents ;

(ii) machinery provisions, *in respect of all documents.*

1.19. The position can be stated in the form of a Chart as follows :

THE CONSTITUTIONAL PROVISIONS
CONCERNING STAMP DUTIES

Union list Entry 91.	State List Entry 63.	Concurrent List Entry 44.
Rates of Stamp duty in respect of bill of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.	*Rates of Stamp duty* in respect of document other than those specified in the provisions of list I with regard to rates of stamp duty.	*Stamp duties* other than duties or fees collected by means of judicial stamps, *but not including rates of stamp duty.*

1. Schedule 7, List 1, entry 91.
2. Schedule 7, List 2, entry 63.
3. Schedule 7, List 3, entry 44.
4. For convenience, provisions not relating to rates may be referred to as "machinery provisions".

1.20. Thus, the power of the Union extends to the whole field of stamp duties, except that as regards *rates of stamp duty in the States*, it is confined to the specified documents. It is plenary as regards machinery provisions.

Full use, however, has not so far been made of Parliament's legislative power in relation to machinery provisions.

Lines of revision.

1.21. Having dealt with the important preliminary aspects, we now proceed to state briefly the lines on which revision of the Act would be desirable.

1.22. The defects which were described in the Act of 1879 at the time of introduction of the Bill in Council, and the improvements which were suggested to remedy those defects, can be said to provide the justification for revising the present Act also. First, there are cases in which, for want of clarity, the law has failed in its intention. The Stamp Act is left very largely to a sort of "automatic operation", inasmuch as it is applied to citizens themselves to their own transactions as evidenced by the instruments; and the burden of its interpretation rests, not only upon the lawyer, but also upon the layman. It is all the more necessary, therefore, that the Act should, in its expression, be as clear as possible, so that people who desire to pay proper duty on their documents and who have no intention of evading the duty in any way, may clearly understand the obligations which rest upon them.

Then, there are cases where the provisions of the law, though clear, can be, and have been, evaded by carrying out the transactions in a fraudulent manner.

Thirdly, there are cases where greater facility could be given to the public to avoid petty hardships, without making any serious inroads on the revenue.

Fourthly, there is need to introduce uniformity where divergence has arisen owing to conflict of decisions.

Finally, notice has to be taken of statutory and other developments which have a bearing on stamp duties.

Scope for revision of the Stamp Act.

1.23. The Stamp Act is a taxing statute. It is not purely a "lawyer's law"; and a revision of the tax structure raises important matters of policy. Moreover, even if revision of the rates of duty were to be embarked upon, constitutional competence of the Union in that respect is limited to the documents mentioned in entry 91 of the Union List, (except as regards Union territories).

There is, however, (as already stated), considerable scope for revision of the Act in other respects, without materially affecting the rates of tax. Without claiming to be exhaustive, it may be said that even after keeping the above limitation in mind, revision is possible in respect of—

(a) the structure and arrangement of the Act;

(b) the legal labels employed in the Act, to denote the various kinds of documents;

(c) rectification of the unsatisfactory position, arising from conflicting decisions or otherwise, in regard to the charging section and connected provisions;

(d) improvement of the machinery provisions;

(e) reducing the multifarious variety of rates of stamp duty,—of course to the minimum extent, so as not to affect the States' revenues; and

(f) incorporating, in the Act itself, many of the remissions granted by notifications[1] under section 9.

We are satisfied that revision on the above lines would considerably simplify the Act, and bring it up-to-date from the legal point of view, and would also contribute to the removal of practical difficulties felt by reason of some of the drastic provisions of the Act[2].

Considerations kept in mind.

1.24. At this stage, therefore, it would be proper to mention that in our consideration of the Act, we have kept before ourselves certain broad guidelines which it may be convenient to set out.

1. *E. g.*, see discussion as to section 2(4)—bill of lading and article 14.
2. *E. g.*, section 35.

In the first place, we have considered it legitimate to recommend such changes as were necessary to rationalise the law or to simplify its working, and generally to avoid difficulties in its implementation.

Our general approach in this regard is based on our firm belief that the smoother the working of the law, the better will it be for all concerned. We do not, in this context, postulate a conflict, between the interests of the revenue and the convenience of tax payers.

Secondly, in the interests of easy accessibility of the law, we have, where the circumstances so justified, suggested amendments to incorporate in the section exemptions of long standing.

Thirdly, where we found that the provisions of the Act—in particular, what can be conveniently described as the machinery provisions—have led to serious inconveniences or to unnecessary controversies in the courts or official circles or to avoidable delay, we have not shrunk from recommending suitable amendments. We believe that even though it may, at the first sight, appear that a particular amendment proposed by us with this object liberalises the law in favour of the citizens, yet, ultimately, the revenue will also benefit, inasmuch as ignorance or misunderstanding of the law as well as the temptation to evade the law will be minimised. Moreover, it is legitimate to point out that ordinarily speaking, a taxation law ought not to be so formulated as to encourage the raising of dishonest defences by litigants, particularly where the interests of the revenue can be safeguarded by other provisions.

We are making this observation particularly with reference to the changes which we are recommending in the law relating to instruments not duly stamped and in the provisions as to the levy of penalty. Sections 13 to 15 and section 35 are instances in point. These amendments no doubt make the law more liberal than at present; but they are not, in our view, likely to lead to a serious increase in the evasion of stamp duties—if at all they are likely to lead to any increase in the scope for evasion.

Fourthly, apart from the convenience of citizens, there are situations where wider considerations of public interest may have to override a very rigid enforcement of the revenue law. For example, the importance of detection of crime in an efficient manner and without delay justifies the legislature in making a relaxation of the ordinary rule that an unstamped document shall not be acted upon by a public officer. Acting on this principle, we have considered it proper to recommend certain amendments to section 33(1). The section imposes an obligation to impound documents not duly stamped but there is an exception. Our amendment seeks to widen the exception to this obligation—an exception which is, at present, confined to police officers[1].

Fifthly, we have not undertaken a review, as such, of the rates of stamp duty. Incidentally, we note that as regards most of the documents to which the Act applies, the rates of stamps duty are within the State Legislative List. But even as regards other documents, our amendments are not based on any need for increase or decrease in the rates. This general approach is, of course, subject to what we have stated above.

Finally, it is our view that, as far as possible, the provisions of a statute should be so framed as to maintain logic and consistency with basic juristic principles. It may not always be easy to discover or to maintain a logical structure in every provision of the revenue laws. But that certainly should be the ideal,—at least in regard to machinery provisions; these provisions do not affect the rate of tax, and are intended to deal with details of its implementation. Lest this should sound to be too abstract a statement, let us illustrate it by stating that where the liability to pay stamp duty rests with a particular person who thus carries the primary duty, we do not consider it proper that the law should, overlooking this primary duty, impose a secondary sanction on some other person[2]. We have borne this consideration in mind in dealing with the vexed question of the person on whom stamp duty can be compulsorily levied under section 48 read with section 40.

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1. See section 33(2), *infra*.
2. Section 40, *infra*.

CHAPTER 2

SECTION 1 : TERRITORIAL APPLICATION

Introductory.

2.1. We propose to deal in this chapter with the territorial application of the Act—first, the intra-territorial application, and next, the extra-territorial application.

Section 1—Intra-territorial application

By virtue of the proviso to section 1(2), the Act, as it stands at present, does not apply to areas which were previously comprised in Part B States, except in respect of rates of stamp duties on documents mentioned in the Constitution, Seventh Schedule, Union List, entry 91. This is the position emerging by reason of the narrow lines on which the Amendment Act of 1955, which extended the Act to areas of the erstwhile Part B States, was drawn. In this connection history of the Act is of interest.

History of section 1(2)

2.2. Section 1, sub-section (2), as originally enacted, ran thus :

> "It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas and the Pargana of Spiti. The term "British India" was held to include the Agency Tracts included in the Scheduled Districts.[1]"

Certain later amendments extended the Act to Scheduled districts and scheduled areas ; but they are not material for the present purpose.

Adaptations

2.2A. By the India (Adaptation of Existing Indian Laws) Order, 1947, the expression "the whole of British India" in section 1(2) was replaced by the expression "all the Provinces of India". Expressions like "British Baluchistan" etc. were dropped by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

By the Adaptation Order, 1948, the words "all the Provinces" were substituted for the words "British India". The Adaptation Order of 1950 also made certain verbal changes in this part of section 1(2). The clause as substituted by the Adaptation of Laws Order, 1950, read as follows : "It extends to the whole of India except Part B States." Paragraph 8 of the Adaptation of Laws Order, 1950 enacted that notwithstanding the amendment about the extent of law, the law should not be deemed to have been extended to any area to which it did not extend immediately before the appointed day (26th January, 1950).

By the Merged States (Laws) Act, 1949 (59 of 1949), the Act was extended to certain merged areas ; but that extension is not material for the present purpose. By the Part C States (Laws) Act, 1950, the Act was extended to Manipur, Tripura and Vindhya Pradesh. To the erstwhile territory of Cooch-Bihar, the Act was extended by the Cooch-Bihar (Assimilation of Laws) Act, 1950.

Amendment of 1955—Part B States.

2.2B. The Amendment Act of 1955 extended the Act to Part B States to the very limited extent indicated by the section as it now stands.

2.3 In 1956, on the reorganisation of States, the proviso was adapted. The expression "Part B States" in that proviso was replaced by the words "the territories which immediately before the 1st November, 1956, were comprised in Part B States", by the Adaptation of Indian Laws No. (2) Order, 1956.

The proviso now reads as follows :

> "Provided that it shall not apply to the territories which, immediately before the 1st November, 1956, were comprised in Part B States excluding the State of Jammu and Kashmir except to the extent to which the provisions of this Act relate to rates of stamp duty in respect of the documents specified in entry 91 of List I in the Seventh Schedule to the Constitution."

1. *Collector of Vizagapatnam* v. *K.C.K. Patnaik*, I.L.R. 52 Mad. 1; A.I.R. 1928 Mad. 1181 (F.B.).

The territories which were comprised in Part B States before the 1st November, 1956 were :—

(1) Hyderabad, now forming parts of Andhra Pradesh State, Mysore State and Maharashtra State ;

(2) Madhya Bharat, now forming parts of the Madhya Pradesh State and the Rajasthan State ;

(3) Mysore, forming part of the bigger State of Mysore as reorganised now re-designated as Karnataka ;

(4) Patiala and East Punjab States Union, now forming part of the Punjab State ;

(5) Rajasthan, now forming part of the Rajasthan State as reorganised and Madhya Pradesh State ;

(6) Saurashtra, now forming part of the Gujarat State ;

(7) Travancore-Cochin, now forming parts of the Tamil Nadu State and the Kerala State ;

Part B States

2.4. Thus, to areas formerly comprised in Part B States, the Act applies only to the extent to which its provisions relate to rates of stamp-duty on documents specified in the Union List, entry 91, i.e., promissory notes, bills of exchange, proxies etc. The Part B States' areas are, so far as machinery provisions of the Act are concerned, left to be dealt by the laws for the time being in force in the particular areas. It is assumed by the Legislature that some law or other will always be in force containing the machinery provisions to govern stamps: (i) on documents mentioned in the Union List, as well as (ii) on other documents.

Statewise position analysed

2.5. Now, it should be stated here, that under the Constitution[1], Parliament, when it dealt with the territorial extent of the Act in 1955, (i.e. when the Act was extended to Part B States), could have extended the machinery provisions of the Act to stamps on—

(i) documents mentioned in the Union List ; and

(ii) other documents.

But this has not been done.

The present position as to the application of the Act to various local areas, as deducible from section 1(2) of the Act, is, therefore, as follows :—

(1) In the whole of India except the State of Jammu and Kashmir, the Act extends so far as it deals with rates of stamp duties on documents in the Union List, entry 91.

(2) In the whole of India except the State of Jammu & Kashmir and except the areas in former Part B States, the Act, subject to what is stated below, extends so far as it deals with—
   (a) rates of stamp duty on other documents ; and
   (b) machinery provisions in respect of all documents.

(3) But proposition (2) above is subject to important qualifications :
   (a) In some States, there have been extensive local amendments in respect of the rates of stamp duty on other documents, the usual procedure being to insert a separate Schedule in lieu of the entries in the existing Schedule[2], or to increase the duties in the existing Schedule[3]; and

1. See discussion under "Constitutional position"—Para. 1.17 *supra*.
2. (a) Andhra Pradesh;
   (b) Bihar;
   (c) Haryana and Punjab;
   (d) Madhya Pradesh;
   (e) Orissa;
   (f) Rajasthan;
   (g) U.P.; and
   (h) West Bengal
3. (a) Assam; and
   (b) Tamil Nadu.

(b) Some States have enacted a self-contained Stamp Act of their own, to deal with the rates of stamp-duty on documents in the State List and also with the machinery provisions as to documents in the State List[1].

(c) Some States have, while enacting a self-contained law of their own governing the rates and machinery provisions for documents in the State List, applied the Indian Stamp Act as regards machinery provisions in respect of documents in the Union List. Thus, Kerala, which comprises mostly areas of the former Part B State of Travancore, Cochin and the Malabar district of the former Madras State, has, enacted a Stamp Act[2] of its own, but as regards documents in the Union List, the machinery provisions of the Indian Stamp Act are made applicable. The gap has, thus, been closed.

2.6. The Amendment Act of 1955 could have gone further, and extended the provisions of the Act even to the areas previously comprised in Part B States, in so far as the provisions relate to matters mentioned in the Constitution, seventh Schedule, Concurrent List, entry 44 (stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty[3]), that is to say, machinery provisions. However, that has not been done, so that "rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts[4]." constitute the only subject in respect of which the Indian Stamp Act applies by virtue of its own force to the areas of what were previously Part B States[5].

As regards the areas of former Part A States, the Indian Stamp Act, 1899, applies to those areas, except where, by separate laws or amendments introduced by a particular State, its application has been modified or abrogated. At this stage[6], it is not proposed to enter into details of the State laws.

Union Territories.

2.7. In the Union territories, of course, there is no restriction on the competence of Parliament.

It is not necessary for the purposes of the present discussion to notice the position in detail in regard to Union territories. To areas in Union territories which were part of British India, the Indian Stamp Act, 1899 extended of its own force and this position continued except where it was altered by legislative developments after independence relevant to the particular Union territory.

To the Union territory of Goa, Daman and Diu, the Act was extended by Regulation 11 of 1963, and further amended in 1968.

As regards Pondicherry, section 3 read with Part II of Schedule of the Pondicherry (Extension of Laws) Act, 1968 (XXVI of 1968) extended the Indian Stamp Act, 1899 as in force in the erstwhile State of Madras to the Union Territory of Pondicherry, subject to certain modifications. The Act came into force[7] in the Union Territory of Pondicherry on 9th January, 1969.

In relation to Manipur and Tripura, which were previously Union territories (now States), the Union Territories Stamp & Court Fees Laws Act, 1961 (33 of 1961), section 5, dealt with the matter.

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1. *E.G.* (a) Bombay Stamp Act,1958—sections 74 and 75 and Schedule 2 (for Maharashtra and Gujarat);
   (b) Mysore Stamp Act, 1957—section 72.
2. Kerala Stamp Act, 1959—sections 72 and 73.
3. See also discussion as to section 1(2), *infra*.
4. Constitution, Seventh Schedule, Union List, entry 91.
5. Section 1.
6. See *infra*.
7. Notification of the Administrator, Pondicherry published in Pondicherry Gazette Extraordinary No. 4, dated 9th January, 1969.

Parliamentary legislation relevant to Stamp duties in some Union territories was passed[1] in 1971. It introduced what is known as the surcharge for "Refugee relief". It was repealed[2] in 1973, in so far as it applied to the Union territories of—

(i) Andaman and Nicobar Islands.

(ii) Chandigarh :

(iii) Dadra and Nagar Haveli.

(iv) Delhi.

(v) Goa, Daman and Diu.

(vi) Laccadive Minicoy and Amindivi Islands.

(vii) Pondicherry.

Observations regarding intra-territorial application of the Act

2.8. To revert to section 1(2), the provision in section 1(2) regarding the extent of the Act creates a somewhat confusing picture. The matter may be re-stated as follows[3]:

(a) In some cases[4], the Cental Act is the governing Act, not only for rates of stamp duties for documents in the Union List, but also for rates of duty for the documents mentioned in the State List (there having been no local variations in the stamp duties), as well as for machinery provisions for all documents.

(b) In some cases[5], the Central Act applies for the purposes of determining the rates of stamp duty in respect of documents mentioned in the Union List, entry 91, and as regards the machinery provisions in respect of all documents. But it does not apply for rates for documents in the State List, these having been dealt with by a separate Schedule—usually, Schedule 1A inserted locally.

(c) In some States which have enacted their own separate Stamp Acts[6]=[7], the utility of the Central Act is more limited, and is confined to the rates of duty and machinery provisions for the documents mentioned in the Union List, entry 91. The self-contained Stamp Acts of the States concerned apply in regard to documents mentioned in the State List, both for determing the rate of stamp duty and for ascertaining the machinery provisions applicable to those documents.

It should be mentioned that in States which comprise Part B areas (i.e., areas previously comprised in Part B States), the Indian Stamp Act, 1899, has been extended, for matters excluded by section 1(2), by *State amendment* in relation to those areas.

(d) Theoratically, States could even apply their own machinery provisions even to documents in the Union List.

Recommendation as to intra-territorial application under section 1(2), Proviso

2.9. In our opinion, this position is very unsatisfactory. We are unable to see any justification for continuing the present state of the law under which the machinery provisions differ from document to document[8] (within a State) and from State to State[9]. In respect of an Act like the present, uniformity of machinery provisions is, in our opinion, of considerable importance. Since we attach importance to the introduction of uniform procedure in regard to machinery provisions, we have thought it appropriate to deal with the problem.

Accordingly, we recommend to the Union Government that it should take early steps towards achieving uniformity in regard to machinery provisions. Of course, this implies

1. Act 73 of 1771.
2. Act 14 of 1973.
3. Also see para. 2.5, *supra*.
4. This discussion is confined to "States" proper.
5. *E. g.*, Andhra Pradesh, Bihar, Madhya Pradesh.
6. See below, "State Acts".
7. *E.g.*, the erstwhile State of Bombay. Also Kerala and Mysore.
8. Category (c), *supra*.
9. Categories (a) to (d), *supra*.

(i) repeal of State Stamp Acts, i.e. portions of those Acts which relate to machinery provisions, and (ii) Parliamentary action adopting uniform machinery provisions applicable to the whole of India. In making this recommendation, we do not wish to dispute the fact that State laws can and should properly deal with the rates of duties.

As is evident, States are at liberty to pass their own Stamp Act, by exercising the power cumulatively conferred by State List, Entry 63, and Concurrent List, entry 44. This has already been done in some States[1]. (Of Course, those Acts cannot deal with the rate of Stamp duty for documents mentioned in the Union List). But uniformity in respect of machinery provisions would be a better course, and there does not appear to be any constitutional hindrance in that regard.

We may mention that the point was raised in our Questionnaire, and by and large opinion is favourable to what we have recommended above[2].

Extra-territorial application of the Stamp Act.

2.10. So much as regards the intra-territorial application of the Act. Extra-territorial application of the Act is a matter on which the position now seems to be fairly certain, in view of the precise wording ofthe charging section[3]. The scheme of the Act is that, subject to certain special provisions (to be presently noticed), only an instrument executed in India[4] is chargeable with duty. The special provisions relate to (i) bills of exchange[5] payable otherwise than on demand or promissory notes which, though drawn or made out of India, are accepted or paid or presented or endorsed or negotiated in India[6], and (ii) other instruments[7] executed out of India which relate to any property situate or to any matter or thing done or to be done in India and which are received in India, for various matters, arising out of or concerning these special provisions (e.g., the time of stamping etc.), the Act has provided a detailed scheme[8].

Position in England

2.11. It would appear that in this respect, the position is not so clear in England, and it is nowhere stated in the (English) Stamp Act, 1891, in the *charging provision* that foreign document do not require to be stamped. It is only when one comes to the section providing the sanction[9] that the English Act speaks of an instrument executed in the United Kingdom etc. Of course judicial decisions in England do take the view that the Act is so confined. This view has been taken in deference to the "comity of nations". In the case of *Nestle & Co.*[10] Danckwerts J. observed :—

"The comity of nations requires that a government must tax only those people who are under the control of its own laws."

Hence, an agreement entered into between persons living abroad with regard to property abroad doe not require an English stamp if it does not relate to a matter or thing to be done in the United Kingdom[11].

It would also appear that, in England, a contract for the sale of immovable property situate *outside the U. K.* is not chargeable with duty[12].

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1. (a) The Bombay Stamp Act, 1958 (in force in the States of Maharashtra and Gujarat, subject to amendments subsequently made in those States);
   (b) The Kerala Stamp Act, 1958.
   (c) The Mysore Stamp Act, 1957.
   (The list is not necessarily exhaustive).
2. Question 1 of the Questionnaire.
3. Section 3, clauses (a), (b) and (c).
4. Section 3(a).
5. Section 3(b). See also section 32(3)(b) and section 11(b).
6. This is the rough gist of the provision.
7. Section 3(c).
8. Section 17 to 20.
9. Section 14(4), Stamp Act, 1891 (Eng.).
10. *Nestle & Co. Ltd.* v. *Internal Revenue Commissioners,* (1952) 1 All E.R. 1388, 1392 (Danckwerts J.), on appeal (1953) Chancery 395.
11. *Glickrist* v. *Herbert,* (1872) 26 Law Times 381, cited in Halsbury, 3rd ed., Vol. 33, page 269, footnote (c).
12. Section 59(1), Stamp Act, 1891 (Eng.).

CHAPTER 3

DEFINITIONS—SECTION 2(1) to 2(4)

Introductory

3.1. Section 2 of the Act contains, in all, 28 definitions, of which the definitions in sub-sections (13A), (16A) and (19A) were inserted by later amendments. The expressions defined in the section—which need not be enumerated at the present stage—fall into the following broad categories.

In the first place, there are definitions which define particular kinds of instruments for the purposes of the Act *in a self-contained manner*. The definitions of "bond", "conveyance", "instrument of partition", "lease", "mortgage deed", "policy of insurance", "power of attorney", "receipt" and "settlement" fall in this category.

Secondly, there are definitions which, while also relating to certain kinds of instrument, *adopt*, with or without additions, the definitions given in other Acts. They are, thus, not self-contained. The definitions of "bill of exchange", and "bill of exchange payable on demand" and "cheque" fall in this category, because the basic concept of bill of exchange relies heavily on the Negotiable Instruments Act, 1881, though some of the definitions do include certain other documents also.

Thirdly, there are definitions of expressions which do not relate to classes of *instruments*, but are, at the same time, of importance for the purposes of the Act, since the expressions defined occur frequently in the Act; (that is to say, in the body of the Act as distinguished from the Schedule). The definitions of the expressions "chargeable", "duly stamped", "executed", "execution", "impressed stamp" and "instrument" fall in this category.

Finally, there are other definitions which are of a minor importance.

The definitions in the first category are of the highest importance, and are those which have led to the largest volume of case-law. With these introductory observations, we proceed to deal with each definition.

Section 2(1), "Banker"

3.2. Section 2(1) defines "banker", as including a bank and any person acting as a banker. The expression "banker" is used in the following sections[1] of the Act :—

(a) Section 2, clause (7), "cheque" ;

(b) Section 51, allowance in case of printed forms no longer used by a banker.

The importance of the definition of "banker" has diminished, in view of the decrease in the importance of the definition of "cheque"[2]. The latter has lost its importance after the removal of the stamp duty on cheques in 1927.

It should be pointed out that the definition of 'banker' tells us nothing about the attributes of a banker.

In England, bankers are given special exemption from stamp duty when giving drafts or orders for payment from one banker to another. The definition given of a "banker" in the English Stamp Act, says that it means "any person carrying on the business of banking in the United Kingdom[3]".

Inaccuracy and defect.

3.3. Strictly speaking, the mention of bank as including a "banker" would not be accurate, because a bank is really a place where money is deposited for certain purposes. In defence

1. See article 13, as amended in 1927.
2. Section 2(7).
3. Section 29, and Schedule 1—Exemption 2, "Bill of Exchange", Stamp Act, 1891 (Eng.).

of the present definiton, it could be said that it is useful as covering cases *where an impersonal* banker is involved (such as, a corporation). On this reasoning, a distinction could be made between a bank and a banker, so that the former is confined to impersonal bankers and the latter to individual bankers. A bank could then be regarded as an establishment for the custody of money received from or on behalf of its customers, a banker as a person who is in charge of an establishment. Whether any such subtle distinction forms the basis of the present definition is, however, extremely doubtful. Apart from this, however, the major defect in the present definition is that it begs the question, as it does not tell us what the concept of "banking" implies. Not much help can be derived in this respect from the Negotiable Instruments Act[1]. A banker, as defined in that Act, includes also persons or a corporation or company acting as bankers. Under the General Clauses Act[2], the expression "person" includes any company or association or body of individuals, whether incorporated or not. Obviously, these definitions are not helpful for the present purpose.

3.4. There are several characteristics usually found in bankers today[3]: (i) They accept money from, and collect cheques for, their customers and place them to their credit; (ii) They honour cheques or orders drawn on them by their customers accordingly. These two characteristics carry with them also a third, namely : (iii) They keep current accounts or something of that nature, in their books in which the credits and debits are entered.

These three characteristics are much the same as those stated in Paget's Law of Banking[4] :

> "No. one and nobody, corporate or otherwise, can be a 'banker' who does not (i) take current accounts; (ii) pay cheques drawn on himself; (iii) collect cheques for his customers."

Definition of "banking"

3.5. It has been stated[5] that it is notoriously difficult to define the business of banking, and no statute has attempted it. Perhaps, a very good definition is that stated in by the Privy Council in *Bank of Chattinad Ltd. of Colombo* v. *Commissioner of Income Tax, Colombo*[6]. The definition is as follows :

> "A company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order."

It may also be stated that the concept of banking has changed[7] in the course of history. In the eighteenth century, before cheques came into common use, the principal characteristics were that the banker accepted the money of others on the terms that the persons who deposited it could have it back again from the banker when they asked for it, sometimes on demand, at other times on notice, according to the stipulation made at the time of deposit; and meanwhile the banker was at liberty to make use of the money by lending it out at interest or investing it on mortgage or otherwise. Thus, Dr. Johnson[8] in 1755 in his dictionary defined a "bank" as a "place where money is laid up to be called for occasionally" and a "banker" as "one that traffics in money, one that keeps or manages a bank."

Case-Law

3.6. Some controversy seems to have arisen with reference to the question whether the word "bank" in the Negotiable Instruments Act connotes the business of utilising money for *purposes of profit*, and whether the business must have a commercial side to it. The Madras High Court answered this question in the affirmative[9], and held that the mere fact that the Government Treasury received money from the District Board and respected orders issued to

1. Section 3, Negotiable Instruments Act, 1881.
2. Section 3(39), General Clauses Act, 1897.
3. See *U.D. Trust Ltd.* v. *Kirkwood*, (1966) 2 W.L.R. 108.
4. Paget, (H.L.) Law of Banking (1961), page 8.
5. *U.D. Trust Ltd.* v. *Kirkwood*, (1966) 2 W.L.R. 1083, 1090.
6. *Bank of Chettinad Ltd. of Colombo* v. *Commissioners of Income Tax, Colombo*, (1948) A.C. 378, 383 (P.C.).
7. *United Dominion Trust Ltd.* v. *Kirkwood*, (1966) 2 W.L.R. 1083, 1090.
8. *United Dominion Trust Ltd.* v. *Kirkwood*, (1966) 2 W.L.R. 1083.
9. *Rangaswami* v. *Sankaralingam*, A.I.R. 1920 Madras 1011.

it for payment would not constitute the Treasury into a bank. This controversy, however, has not much practical importance now, because the stamp duty on cheques[1] was abolished in 1927.

Recommendation to delete the definition of 'banker'

3.7. The above discussion shows that the definition of 'banker' in the Stamp Act is not very expressive in itself, and serves no useful purpose, as it affords no guidance whatever.

We may note that under the Banking Regulation Act[2], "banking" means the accepting for the purposes of lending or investment of deposits of money from the public repayable on demand or otherwise, and withdrawable by cheques, draft or order or otherwise.

We are of the view that for the purposes of the Stamp Act, it would be convenient to adopt the definition in the Banking Regulation Act, 1949. We may add that on this point[3] a specific question was included in our Questionnaire, and opinion generally supports this course.

Recommendation

3.8. Accordingly, we recommend that section 2(1) should be revised as follows :

> "banker" means a person who accepts, for the purposes of lending or investment, deposits of money from the public repayable on demand or otherwise, and withdrawable by cheque, draft or order or otherwise.

Section 2(2), Bill of Exchange

3.9. The second definition relates to "Bill of Exchange" defined as follows[4] :—

> "Bill of Exchange" means a bill of exchange as defined by the Negotiable Instruments Act, 1881, and includes also a hundi, and (i) any other document, (ii) entitling or purporting to entitle, (iii) any person, whether named therein or not, to payment by (iv) any other person of, or to be drawn upon any other person for, (v) any sum of money.

The definition of "Bill of Exchange" in the Negotiable Instruments Act[5] is as follows[6] :

> "5. A 'bill of exchange' is an instrument in writing containing (i) an *unconditional* order, (ii) *signed by the maker*, directing (iii) *a certain person* to pay (iv) *a certain sum of money* only to, or to the order of, (v) *a certain person or to* the bearer of the instrument."

"A promise or order to pay is not 'conditional' within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen although the time of its happening may be uncertain.

"The sum payable may be 'certain' within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

"The person to whom it is clear that the direction is given or that payment is to be made may be a 'certain person', within the meaning of this section and section 4, although he is misnamed or designated by description only".

In the Law Commission's Report[7] on the Negotiable Instruments Act, the following revised definition of 'bill of exchange' has been suggested :—

> "A 'bill of exchange' is an instrument in writing containing an unconditional order, signed by the drawer, directing a certain person to pay on *demand or at a*

1. Article 13.
2. Section 5(b), Banking Regulation Act, 1949.
3. Question 2 of the Questionnaire.
4. Numbers indicating items have been added.
5. Section 5, Negotiable Instruments Act.
6. Numbers indicating items have been added.
7. 11th Report (Negotiable Instruments Act), page 75, Clause 4(7)(ii).

fixed for determinable future time a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

3.10. The definition in the English Stamp Act[1] is in similar, though not identical, terms. It is quoted below :

"32. For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money ; and [.....] includes—

(a) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen ; and

(b) an order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof any sum of money, [.....]."

3.11. The judgment in a Calcutta case[2] does point out that the words "..... entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of any sum of money" (in the extended portion of the definition in the Stamp Act), cannot be taken literally, because the language is so wide that it might include all sorts of instruments not capable of being classed as a bill of exchange. Even a mortgage or lease may be a document "entitling any person to payment."

3.12. It may be stated that the wide and vague language of the English and Indian provision in the inclusive part of the definition of "Bill of Exchange", has created considerable difficulty.

'Section 2(2)—'Bill of Exchange"—Inclusive portion. Edit 15 to 17 Drop—Introductory

It has been held in some cases that even for the purposes of the extended definition, the document should possess the essential characteristics of a bill of exchange, and it must, in effect, be in the nature of an *order or direction* for the payment of money[3,4,5] which is the characteristic of a bill of exchange. But this amounts to adding to the section.

3.13 In England, it has also been held[6,7] that the document need not contain any express order for the payment of money. But, on this point, the Indian case law is to the contrary. It was held by the Punjab Chief Court[8] that whatever may be the private understanding between the banker and the customer, the court must be guided by what is expressly stated in the document.

Express order if required

3.14. It would appear, that sometimes, on one and the same document, conflicting views have been taken in the same court on the question whether the document did or did not fall within the extended part of the definition.

Conflicting views on one and the same document.

3.15. It is sometimes stated that the limitations to be read should be in the nature of confining the definition to documents *analogous to bills* of exchange and hundis. If so, it would be better to confine the section by suitably changing the wording in that manner.

Limitations—Vagueness of.

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1. Section 32, Stamp Duties etc. Act, 1891.
2. *In the matter of the Stamp Act*, A.I.R. 1928 Cal. 566 (F.B.).
3. *Buck* v. *Robson*, (1878) 3 Queens Bench Divn. 686, 691.
4. *Fisher* v. *Calvert*, (1879) 27 W.R. 804 (Eng.).
5. *Mead* v. *Young*, (1790) 100 English Reports 876, 878.
6. *Midland Bank Ltd.* v. *Inland Revenue Commissioners*, (1927) 2 King's Bench, 465, 474.
7. Also see *Rothschuld* v. *C.I.T.* (1894) 2 Q.B. 142.
8. *In Re Stamp Act*, (1912) 13 Indian Cases 330 (Full Bench) (Chief Court of Punjab).

Case law as to Shahajog Hundis as illustrative of vagueness.

3.16. By way of illustrating the vagueness of the present definition, it may be noted that the question whether attested hundis known as Shahajog hundis fall within the definition of "promissory note" or "bill of exchange", raised considerable controversy in the Calcutta High Court. In Asha Ram's case,[1] Fletcher J., held such a document to be an attested promissory note. In a later case[2] Mookerjee, J., held it to be a bond, and held that it did not fall within the wider definition of bill of exchange in the Stamp Act. However, in a later case,[3] Rankin, C.J., while criticising the language of the definition of "bill of exchange", pointed out that, taken literally the definition in the Stamp Act might cover the document in question.

Jessel M R 's view as to section 48, English Act of 1870.

3.17. In England, in reviewing the provisions of section 48 of the English Stamp Act of 1870, which were almost identical, Jessel, M.R., expressed the opinion[4] that the section could never have been intended to include every document coming literally within the meaning of the words used. If that were so, almost every kind of written document could be included as a bill of exchange, and great injustice and confusion would arise, as they could not be stamped subsequently and would be altogether void. It was quite plain, therefore, that the draftsman must have intended that the words used should be read with some limitation. The nature of the instrument must be looked at in each case, and its precise nature ascertained.

Criticism of definition of "promissory note".

3.17A. We may, however, point out that the precise nature of the limitations to be read has always caused difficulty. In this connection, we may refer to the criticism of the alteration introduced by the English Act of 1870, section 49, in the difinition of "Promissory note", by Pollock B. (This criticism applies to "Bill of Exchange" also) :—

> "It is unfortunate, I think, that in a statute dealing with revenue matters *natural terms have been enlarged* so as to create a sort of *legislative document*, other and different to the document which is commonly known by the term used . In the section we have to construe, here the legislature have taken a term of well-known meaning, and have then said it is to mean something else[5]".

It has been suggested, with reference to the corresponding provision in the earlier English Stamp Act of 1870, namely, section 48, that it will not apply to documents otherwise specifically provided for by the Act[6]. But, with respect, this does not remove the vagueness.

English cases.

3.18. A few English cases may be noted.

In *Rothschild and Sons* v. *Commissioners of Inland Revenue*[7] the Hungarian Government had issued certain bonds, in regard to certain loan transactions. Along with each bond were issued coupons for the payment of interest. These coupons *were payable to bearer* at the various places therein specified. It was held that the coupons were bills of exchange. It was pointed out that in considering the effect of a document, the Court need not confine itself to the words actually used in the document, but may go behind it and consider the purpose for which the document has been issued, *so that actual words of an order or mandate to pay are not indispensable*. Hence, though the interest coupons merely stated that interest would be paid at a certain time and place and were not bills of exchange within the legal definition of that phrase, nevertheless they came *within the more general language of the Stamp Act*. It may incidentally be noted that such coupons were exempted by later amendment.

In *Committee of London Clearing Bankers* v. *Commissioner of Inland Revenue*,[8] it was held that *an order to a bank* to transfer a sum of money from the customer's account to the account of another customer *of the bank* was bill of exchange. Such a document entitled

1. *Asha Ram* v. *Kesri Chand*, (1912) 33 Indian cases, 247 (Cal.).
2. *Kesri Chand* v. *Asha Ram*, (1915) 19 C.W.N. 1326.
3. *Re. Imperial Bank of India*, (1928) 32 C.W.N. 1015.
4. *Fisher* v. *Calvert*, 27 W.R. 301 (Eng.).
5. *Mortgage Insurance Corporation* v. *Commissioners L.R.*, 20 Q.B.D. page 651.
6. *Adams* v. *Morgan*, (1883) 14 L.R. Ir. 140.
7. *Rothschild & Sons* v. *Commissioners of Inland Revenue*, (1894) 2 Q.B. 142, 146, 147; 70 L.T. 667,
8. *Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue*, (1895) 65 L.J. Q.B. 372, 376; (1896) 1 Q.B. 542, 74 L.T. 209.

a person to *"draw on" the bank*. It was held in this case that the document was a bill of exchange payable on demand.

These cases do not furnish any detailed guidance as to the exact scope of the extended part.

Possible alternatives—first alternative—limitation of the extended part.

3.19. To make matters clearer, one alternative would be to amend the section by express words limiting the extended part to *orders for the payment of money which are regarded as negotiable otherwise than under the Negotiable Instruments Act.*

Any instrument containing a contract to pay money,[1] or any other negotiable security representing money which is in a form which renders it capable of being sued on by the holder of it *pro-tempore* in his own name and which is transferable, by custom of trade, by delivery like cash,[2] is a negotiable instrument.[3]

3.20. Thus, in England, dividend warrants,[4] and share warrants[5] have been held to be negotiable instruments,[6] as they involve the characteristics of a negotiable instrument.

The following are the characteristics of negotiable instruments :—

(1) Property passes by mere delivery ;

(2) The transferee can sue in his own name ;

(3) The transferee, if a holder in due course, is not affected by the defect in title of his transferor or his previous holder ; and

(4) The transfere is not affected by defences that may be available against previous holders[7].

3.21. Since a promissory note is an "undertaking", while a bill of exchange is an "order", documents which merely amount to an *undertaking* should be excluded even from the extended part of the definition of Bill of Exchange. There should be a tripartite transaction, namely, the person who signs the document, the person to whom it is addressed and the person in whose favour it is written. A bilateral document cannot be a bill of exchange under the Negotiable instruments Act[8], and should not be a bill of exchange for the purposes of the Stamp Act. This is because the theory on which an order is based is that the person to whom it is addressed has in his hands moneys of the person who draws it, on terms of 'paying' such money according to the direction of the drawer[9].

Second alternative—deletion of the extended part

3.22. The other alternative would be to delete the extended part of the definition. Its vagueness may be illustrated :

In an English case[10], a firm of bankers, having an account at the Bank of England for the purpose of enabling a customer to pay customs duties on goods otherwise than in cash, issued a document addressed to the cashiers of the Bank of England, directing them to transfer from the account of the bankers to the account of the Commissioners of Customs a sum named therein. When such a document was issued, the practice was to deal with it in one of the following two ways :

(1) It was handed by the bankers to their customer, in exchange for his cheque for the same amount, and given by him to the Commissioners of Custom, who handed it to the Bank of England ; or

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1. See *Dixon* v. *Boyil*, (1856) 3 Maco. 1.
2. *Cf. Crouch* v. *Credit Fancier*, (1873) L.R. 8 Q.B. 374, 381. *Miller* v. *Race*, (1758) 1 Smith L.C. (13th Ed.) 534; *Hazarimal* v. *Satish Chandra*, 46 Cal. 331, 337.
3. *London and County Banking Co.* v. *The London River Plate* Bank Ltd. affirmed in (1888) 21 Q.B.D. 536; (1887) 20 B.D. 232.
4. (a) *Goodwin* v. *Roberts*, (1875) L.R. 10 Ex. 337.
   (b) *Partridge* v. *Bank of England*, (1846) 9 Q.B. 396; *Slingsby* v. *westminster Bank*, (1931) 1 K.B. 173.
5. *Webb Hale & Co.* v. *Alexandria water Co.*, (1905) 93 L.T. 339. See also S. 114 of the Companies Ac, 1956.
6. Compare section 114.
7. *Simmons* v. *London Jt. Stock Bank*, (1891) 1 Ch. 270, 284. On appeal (1892) A.C. 201, 215.
8. As to the Negotiable Instruments Act, see *Hafiz Umaradas* v. *Akbar Khan*, A.I.R. 1934 Peshawar 1.
9. *Cf.* Cockburn C.J. in *Buck* v. *Robson*, (1878) 3 QB.D. 686, cited in *Nundubai* v. *Gaur*, (1903) I.L.R. 27 Bom. 150, 152.
10. *The Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue*, (1896) 1 Q.B. 542.

(2) It was handed direct by the bankers to a Custom Officer in exchange for that customer's cheque, and subsequently handed by the Commissioners of Customs to the Bank of England. It was held that the document was a bill of exchange payable on demand within the meaning of section 32 of the Stamp Act, 1891, and that it was not exempt from duty as being a "bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue" within the meaning of the 10th Exemption under the head "Bill of Exchange" in the First Schedule to the Act. The Courts were, moreover, of the opinion that, having regard to the history of the exemption clause, the word "remit" only applied to the placing to its proper account money *which was already public money.*[1]

Whether drawer and drawee should be same person.

3.22A. The wide scope is illustrated by the uncertainty as to whether the drawer and the drawee to a bill must be different persons in order that the bill may be a "bill of exchange" within the definition in the Stamp Act. In a Calcutta case,[2] it was held that a demand draft by one branch of a Bank on another branch of the same Bank payable on demand to a third party, is a bill of exchange within the Stamp Act. In this case, Rankin, C.J. expressed the view that even under the definition of a bill of exchange in section 5, Negotiable Instruments Act, different persons are not required. But, in any case, such a demand draft fell within the inclusive portion of the definition of bill of *exchange in the Stamp Act.*

As it was held to be a bill of exchange *payable on demand,* no duty was leviable under article 13, Stamp Act (as amended in 1927).

3.23. In a Patna case,[3] it was held that the drawer and the drawee need not necessarily be different persons.

This specific aspect will be dealt with later. But the more important defect is the uncertainty discussed in the judgment of Rankin, C.J.[4]. The present definition, if taken literally, is unduly wide. It was, therefore, suggested to us that the definition should be confined to a Bill of Exchange as defined in the Negotiable Instruments Act, as there is no great consideration of revenue necessitating a charge of tax on other documents. The law, it was stated, will gain in simplicity of form by the suggested amendment. Mention of 'hundi' should, no doubt, be retained. It was also suggested that it would be convenient if, as regards each of the ingredients of a bill of exchange, as defined in the Negotiable Instruments Act, a decision is taken as to which of them should be dispensed with in the Stamp Act.

Recommendation concerning section 35, Proviso (a) in regard to bills of exchange.

3.24. While we have carefully considered the suggestion, we have come to the conclusion that instead of amending the definition, it is better to mitigate the consequences of its vagueness by amending section 35. By narrowing down the definition, one might exclude documents intended to be covered by the extended part.

While we do not recommend any amendment in the definition of 'bill of exchange', we do recommend that in section 35, Proviso (a), the exception should be confined to bill of exchange or *promissory note as defined in the Negotiable Instruments Act* or 'hundi'[5]—even if the exemption is retained at all.

Ambiguous Instruments.

3.25. There is another question to be considered in connection with bills of exchange. A document can fall both under bill of exchange and under a promissory note, as defined in the Negotiable Instruments Act.[6].

1. See also *Buck* v. *Robson,* (1878) 3. Q.B.D 686; *Brice* v. *Bannister,* (1878) 3 Q.B.D. 569.
2. *In the matter of the Stamp Act,* A.I.R. 1928 Cal. 566. (S.B.) (Reference under section 57, Stamp Act). (Rankin C.J.).
3. *Bibi Kazmi Begum* v. *Lachman Lal Sao and Others,* A.I.R. 1930 Pat. 239.
4. *In the matter of the Stamp Act,* A.I.R. 1928 Cal. 566, *supra.*
5. For action under section 35, proviso(a).
6. Section 17, Negotiable Instruments Act.

Where an instrument may be construed, either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thence-forward treated accordingly.

The relevant section in the Negotiable Act reads—

"17. Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thence-forward treated accordingly." **Ambiguous instrument.**

3.26. This privilege is not taken away by section 6 of the Stamp Act; and if the holder treats the documents as a bill of exchange, then that election governs the position for the purposes of the Stamp Act also. This should be made clear, and we recommend accordingly. **Recommendation to clarify the position with reference to section 17, Negotiable Instruments Act.**

3.27. We may now discuss the question of demand drafts. It appears that with reference to the Negotiable Instruments Act (which defines the expression "cheque"), there is some controversy as to whether a demand draft drawn by a banker on his own branch is or is not a bill of exchange and a cheque. This controversy has arisen because, while sections 85A and 131A of that Act make limited provisions in regard to demand drafts for the protection of bankers, the Act does not contain any comprehensive provision as to drafts. **Demand drafts.**

This has led to a controversy. The High Court of Bombay[1] has, for example, taken the view that a demand draft issued by a bank on its branch or *vice versa* is not a cheque or a bill of exchange. Some other High Courts[2] have, however, held that it is a bill of exchange, and is very nearly allied to a cheque.

3.28. It would appear that, in England, the House of Lords[3] held, in 1903, that since the bank is both drawer and drawee, the draft drawn by a country branch of the Bank on the head office cannot be treated as a bill of exchange, as defined in section 3 of the Bills of Exchange Act, 1882, as it then stood. This judgment of the House of Lords dealt with other points also, and led to the enactment of the Bills of Exchange (Crossed Cheques) Act, 1906.[4] It is because of this aspect of the case that the Bombay High Court made a distinction between a bank draft on another bank and a bank draft on another branch of the same bank. **English case.**

In this connection, it would be of interest to note that in the English Stamp Act,[5] a bill of exchange is defined as including a *draft*, order, cheque and letter of credit and certain other documents. This suggests a useful improvement in the definition of "bill of exchange" in the stamp Act, namely, that it should include a draft. We recommend that the definition should include drafts.

3.29. In the light of the above discussion, we recommend that the definition of "bill of exchange" should be revised— **Recommendation to include drafts.**

(i) by including drafts, and

(ii) by adding the following Explanation.

"*Explanation* :

The provisions of section 17 of the Negotiable Instruments Act, 1881, apply for the purposes of this Act as they apply for the purposes of that Act."

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1. (a) *Sanyasalingam* v. *The Exchange Bank of India*, AIR 1948 Bom. 1 (Coyajee J.).
   (b) *Hasanoo* v. *Natesa Mudaliar*, A.I.R. 1959 Bom. 267 (Mudholkar, J.).
2. (a) *Suganchand* v. *Arahmayya*, A.I.R. 1951 Mad. 910 (D.B.).
   (b) *Sidha Nath* v. *Punjab National Bank*, A.I.R. 1960 All. 238.
   (c) *State Bank of India* v. *Mazumdar*, A.I.R. 1970 Cal. 503.
3. *Capital and Counties Bank* v. *Gordon*, (1900) All E.R. (Reprints) 1017, 1024 (H.L.).
4. See *Underwood Limited* v. *Bank of Liverpool*, (1904) All. E.R. (Reprints) 203, 241; 131 Law Times 271; 68 Solicitors Journal 716.
5. Section 32, Stamp Act, 1891.

We may add that these two changes have been mostly favoured[1] in the replies to the relevant question in our Questionnaire.

Recommendation regarding section 35, proviso (a).

3.30. We are further of the view, for reasons already stated,[2] that in section 35, proviso (a), the exception should be confined to bill of exchange or promissory note as defined in the Negotiable Instruments Act or a hundi,[3]—if at all the exception is retained.

This recommendation also bears the support of the majority of the replies to our Questionnaire.[4]

Section 2(3)—Bill of Exchange payable on demand.

3.31. While section 2(2) defines a bill of exchange, section 2(3) defines "a bill of exchange payable on demand". The first is generic; the second is specific. The distinction between a bill of exchange payable on demand and a bill of exchange not so payable is material for the purposes of stamp duty.[5] As from 1st July, 1927, bills of exchange payable on demand are not chargeable with any stamp duty, the relevant portion of article 13 having been deleted in 1927. Bill of exchange payable otherwise than on demand are chargeable with the duty specified in article 13.

Meaning of the expression "on demand" in the Negotiable Instruments Act.

3.32. The definition of "bill of exchange" in section 2(2) refers to the Negotiable Instruments Act. But section 2(3) does not refer to that Act. Under the Negotiable Instruments Act, a bill of exchange payable on demand is one[6] which is expressed to be so payable, or in which no time is fixed for payment. This is not provided in the definition section, but in section 19 of that Act. Further, the expressions "at sight" and "on presentment" in a bill of exchange mean "on demand".[7]

Need to insert reference to Negotiable Instruments Act, section 19, Recommendation.

3.33. It is to be borne in mind that section 2(3) does not expressly provide in what cases a bill of exchange, *as defined in sub-section* (2), becomes payable on demand. Apparently, in seeking the answer to this question, one has to draw up the concept of "on demand" in the Negotiable Instruments Act, mentioned above. This is because the definition in the Stamp Act, section 2(3), is merely intended to *include* certain other documents which may or may not fall under the generic concept of "bill of exchange" as defined in sub-section (2).

In a sense, this is a defect in the Stamp Act, inasmuch as one is driven to consulting the Negotiable Instruments Act without any express direction to that effect. This defect should be removed by suitably referring to section 19 of the Negotiable Instruments Act.

Definition in England.

3.33A. It may be stated that in England, the definition of bill of exchange[8] in the Stamp Act is a self-contained definition which, whatever its other peculiarities, does not suffer from the anomalous situation of the generic definition in the Stamp Act referring to the Negotiable Instruments Act and the specific definition in the Stamp Act not referring to the Negotiable Instruments Act.

Limited effect of section 2(3).

3.34. Section 2, sub-section (3), provides that "bill of exchange payable on demand" includes the documents specified in clauses (a), (b) and (c) of that sub-section. This does not, of course, mean that the enumerated documents fall within the *general definition* of bill of exchange. All hat sub-section (3) achieves is the limited result of bringing them within the definition of "bill of exchange payable on demand".

Section 2(3), clause (a)—conditional order for payment.

3.35. As regards the documents specifically mentioned in the section, it is to be noted that clause (a) extends the concept of "bill of exchange" "payable on demand" in respect of a document for the payment of a sum of money out of a particular fund *which may or may not be available or upon an uncertain condition or contingency*. The definition of "bill of exchange"

1. Question 3 of the Questionnaire.
2. See *supra*.
3. For action under section 35, proviso (a).
4. Question 3 of the Questionnaire.
5. See article 13.
6. Section 19, Negotiable Instruments Act, 1881.
7. Section 21, Negotiable Instruments Act, 1881.
8. Section 32, Stamp Act, 1891, as amended by the Finance Act, 1961.

in the Negotiable Instruments Act[1] is, on the other hand, confined to documents which are payable in all events,—see the words "unconditional order" used in that definition. This shows the contrast between section 2(3), clause (a), on the one hand, and the Negotiable Instruments Act on the other hand.

Section 2(3), clause (b)—payment period.

3.36. Then, section 2(3), clause (b), includes an order for the payment of a sum of money at weekly, monthly or any other stated period. The expression "bill of exchange", as defined in the Negotiable Instruments Act, may not cover such documents,—though that Act has been incorporated to cover an order for *payment in instalments.*[2]

Section 2(3), clause (c)—letters of credit.

3.37. Lastly, clause (c) of sub-section (3) includes a letter of credit,—"that is to say, any instrument by which one person authorises another to give credit to the person in whose favour it is drawn". As regards *stamp duty* on letters of credit of credit, the matter is governed not by the article prescribing the duty for a bill of exchange,[3] but by a separate and specific provision[4-5].

According to Story,[6] a letter of credit, "is a letter of request, whereby one person (usually a banker) requests some other person to advance moneys or give credit to a third person, named therein, for a certain amount and promises that he will repay such sum to the person advancing the same or accept bills drawn upon himself for the like amount. It is called a 'general (or open) letter of credit', when it is addressed to all merchants or other persons in general ; and it is called a 'special letter of credit' when addressed to a particular person, requesting him to make such advance to a third person".

Duty on letters of credit.

3.37A. For the purposes of stamp duty, letters of credit were, prior to Act 5 of 1927, governed by Article 13(a) which specified a charge of one anna on them. But there is now a separate and specific provision in Article 37, under which the duty payable on a letter of credit is one rupee.[7] The inclusion of such letters in the definition of "Bill of Exchange payable on demand" is, thus, of no effect *as regards the rate of stamp duty*. The higher duty under Article 37 is payable on such letters. In this connection, section 6 is quite clear.

Effect of section 35, proviso (a).

3.38. But a letter of credit has to be treated as a bill of exchange for the purposes of section 35, with the result that it is rendered inadmissible in evidence even on payment of penalty, because of the bar under that section.[8] Thus, the result of its being included in the definition of bill of exchange payable on demand—section 2, sub-section (3)—is that it attracts the prohibition, contained elsewhere in the Act, under which an instrument which is a bill of exchange cannot be admitted even on payment of penalty, if it is originally unstamped.

Recommendation as to letters of credit.

3.39. The present position as regards letters of credit is not satisfactory. It is likely to mislead, as it creates the impression that the duty thereon is the same as on a bill of exchange, unless one bears in mind a number of provisions referred to above. If at all the definition of "bill of exchange payable on demand" is to be retained, then—

(i) "letter of credit" should be excluded from that definition ; and

(ii) in section 35, Proviso (a), "letter of credit" should be expressly mentioned.[9]

This will simplify the law. The replies to our Questionnaire also generally favour it.[10]

It should be pointed out that our recommendation in relation to letters of credit is confined to the Stamp Act, and we do not express any opinion on the question whether, for the purposes of the Law of Negotiable Instruments or for the purposes of any other branch of the law, letters of credit should or should not be regarded as bills of exchange.

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1. Section 5, Negotiable Instruments Act, 1881.
2. *Lakshmi Dass* v. *Lekha Ram*, A.I.R. 1935 All. 410.
3. Article 13.
4. Article 37.
5. See *Infra*.
6. Story on Bills of Exchange, section 479.
7. Article 37 as amended by Act 36 of 1976.
8. Section 35, Proviso (a).
9. To be carried out under section 35, Proviso (a).
10. Question 4.

Recommendations.

3.39A. To sum up our recommendations concerning matters arising out of the definition of "bill of exchange payable on demand"—

(a) the definition[1] should refer to section 19. Negotiable Instruments Act, 1881, as to the meaning of "on demand" ;

(b) letters of credit[2] should be excluded from the definition, and should be included in section 35, proviso (a), Exception, if the Exception is to be retained.

Section 2(4)—"Bill of lading".

3.40. Section 3(4) defines a "bill of lading" as including a through bill of lading, but as not including a mate's receipt. A bill of lading is a document acknowledging the shipment of goods, signed by or on behalf of the carrier.[3] It serves three functions[4]—

(i) it is a receipt for goods delivered to the carrier ;

(ii) it normally embolies the terms of the contract of carriage ;

(iii) it acts as a document of title to the goods.

A through bill of lading denotes a bill of lading issued in cases where goods are to be carried for a portion of the journey by land, upon conveyance belonging to some person other than the ship-owner.

Subject to certain exceptions, a bill of lading is conclusive evidence of the shipment of goods as against the master.

A mate's receipt is a less formal document than a bill of lading. When the goods are shipped, the acknowledgement first[6] given is a less formal receipt, known as the mate's receipt. It is afterwards exchanged for a bill of lading. It is not a document of title, while a bill of lading is a document of title.[6]

Stamp duty.

3.41. In England, there is no stamp duty on a bill of lading.[7]

In India, under article 14, a bill of lading, including a through bill of lading, is charged with a duty of 25nP. There is, however, a remission granted by notification made under section 9, in respect of inland bills of lading,[8] and there are also two exemptions under artcle 14 itself.

A bill of lading need not be necessarily in respect of carriage by a sea-going vessel. It can be in respect of inland navigation also.[9] But, as already stated, the duty on an *inland bill of lading* has been remitted,[10] by a notification[11] issued under section 9.

Recommendation relating to article 14.

3.42. In view of the likely increase in inland water transport in the future, this remission granted by notification should be incorporated in article 14 of the Schedule (relating to the amount of duty on the bill of lading). The replies to our Questionnaire also favour it.[12]

But the wording of the notification[13] granting the remission is not accurate in one respect. The notification remits the duty in respect of "a receipt or bill of lading issued by a railway company or administration or an Inland Steamer Company *for the fare for the conveyance of passengers* or goods or both, or animals, or for any charges incidental to the conveyance thereof or given to such Company or Administration or Inland Steamer Company for the refund of an overcharge made in respect of such fare or charges."

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1. Para. 3.33, *supra.*
2. Para 3.39, *supra.*
3. *Gladwell* v. *Vall,* (1786) I.T.L. 216, cited in Stevens, Mercantile Law (1969), page 340.
4. Smith & Keenan, Mercantile Law (1965), page 284.
5. Stevens, Mercantile Law (1969), page 341.
6. Stevens, Mercantile Law (1969), page 344.
7. Monroe, Stamp Duties (1964), page 196.
8. See Below, for discussion about the notification granting remission.
9. *Reference under the Stamp Act,* (1903) I.L.R. 30 Cal. 563.
10. Government of India, Notification No. 6, dated 14-8-1937.
11. The relevant portion of the notification is quoted late.
12. Question 5 of the Questionnaire.
13. Government of India, Notification No. 6, dated 14-8-1937.

The emphasis on *fares* is not required, in relation to a bill of lading. A bill of lading is not concerned primarily with the fare. It records the contract of shipment, evidences the receipt of goods and is a document of title. Fare is merely an incident of the contract. Hence, while incorporating the substance of the notification as an exemption under article 14, the defect in the language should be attended to.

3.43. In the result, no changes are needed in the definition of "bill of lading". But a change is recommended in Article 14, as stated above.[1] **Recommendation.**

1. To be carried out under article 14.

CHAPTER 4

DEFINITIONS IN SECTION 2(5) TO 2(10)

Section 2(5)—"bond".

4.1. The definition of "bond" in section 2(5) is as follows :

"(5) "bond" includes—

(a) 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 ;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another ; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another."

Three parts of the definition.

4.2. This definition consists of three parts, which may appear somewhat heterogeneous. The common element in the three clauses of the definition appears to be that of an "obligation", because the word "obliges" appears in each of the clauses. It can also be said that the obligation should be either to pay money or to deliver grain or other agricultural produce. Clauses (b) and (c) also require attestation, which is not required in clause (a). At this stage, we are mentioning these salient features in order to bring out the general idea of the definition and such characteristics as can be usefully emphasised.

Bonds and agreements.

4.3. It can be stated that a bond is a kind of agreement, and but for the specific provision charging duty on a bond,[1] such instruments would have been chargeable under the generic article relating to agreements.[2] It is only because of the specific provision charging a higher duty on bonds that a bond has to be distinguished from an agreement, and it is from that point of view that the definition of "bond" assumes considerable practical importance.

It may be convenient to mention here that clause (a) of the definition refers to what are known in England as double or conditional bonds.

Clause (b) of the definition refers to simple money bonds. Clause (c) refers to simple commodity bonds.

So much by way of introduction. We shall now proceed to deal with specific points concerning each of the clauses.

Section 2(5)(a).

4.4. As regards clause (a) of the definition, questions arise as to in what circumstances agreements with penalty clause can be regarded as "bonds", particularly because of the provisions of section 74, Contract Act, which give relief against penalty. Some decisions[3] take the view that a covenant with a penal clause cannot be a "bond" under clause (a).

Against this view, it can be argued that Illustrations (d) and (g) to section 74 of the Indian Contract Act do use the word "bond", thus indicating that a "bond" in the general sense can have a penal clause. The true test under the Stamp Act, however, is, whether the obligation to pay money is the primary and immediate aim, or whether that is only a sanction to enforce another obligation which does not relate to the payment of money. Apart from cases which turn on their special facts,[4] this seems to be the general position. In any case, the practical im-

1. Article 15.
2. Article 5.
3. (a) *Gisborne & Co.* v. *Subal Bowri*, (1882) I.L.R. 8 Cal. 284, 286.
   (b) *Collector of Rangoon* v. *Haung Aung Ba*, A.I.R. 1916 L.B. 100, 101.
4. *E. g., Nand Lal* v. *Karam Chand*, A.I.R. 1920 Lah. 481.

portance of clause (a) is small, having regard to the comparatively infrequent use of such form of bonds in Indian conveyancing practice.

Whether attestation should be added in clause (a).

4.5. It has been suggested to us that in clause (a) also, attestation should be required as in clauses (b) and (c). The common elements of a bond, it was stated, would be (i) an obligation, and (ii) a formal element of attestation, and it was stated that there was no reason why, in clause (a) also, the formal element should not appear.

In this connection, reference was also made to a Lahore judgment[1] and the observations made therein while considering the question whether a certain document was a "bond" within the Limitation Act. The Limitation Act[2] defines a "bond" as follows :

> "(d) 'bond' includes 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."

Shadi Lal, C.J., examined the definition in the Stamp Act also, and made the following comments :—

> "From the foregoing, it is clear that the definition of the term "bond" even in the present Stamp Act is not exhaustive, and that the term in the course of years has been extended so as to include instruments which might not have fallen under the earlier definition. *Indeed, it is difficult to understand why in the instruments described in clauses (b) and (c), attestation should be regarded as essential and not so in the instruments described in clause (a).*"[3]

Change not suggested.

4.6. We have carefully considered the suggestion. But, as no practical difficulty has been caused by the present position, we do not think it necessary to accept the suggestion.

Section 2(5), clause (b).

4.7. This takes us to clause (b) of the definition of "bond". That clause includes "any instrument attested by a witness and not payable to order[4] or bearer, whereby a person obliges himself to pay money to another." This clause requires two positive conditions, and one negative condition. The positive conditions are that the instrument—

(i) must be one whereby a person obliges himself to pay money to another; and

(ii) must be attested.

The negative condition is that it must not be payable to order or bearer. We shall first discuss the positive conditions.

Importance of the word 'obligation'.

4.8. The crucial word in clause (b) of the definition is the word "obliges", and, therefore, no document can be a "bond" unless it is one which, by itself, creates the obligation to pay the money.

The obligation, it is generally held, should not, therefore, be a pre-existing one. Where the liability already exists, a subsequent document merely reproducing the nature of the obligation does not itself create a fresh obligation and therefore, for the purposes of the law of stamp, it remains an "agreement"; and does not come within the definition of "bond".[5]

4.9. On the same principle, that is to say, in the absence of words expressly creating an obligation, courts generally take the view that an entry in the books of account of the plaintiff, which acknowledges a debt and is signed by the debtor, is not necessarily a bond. If it is a mere balance struck, it is an acknowledgment; if it is followed by words like "baki dena", it

1. *Hdhawa Mal* v. *Karim Baksh*, A.I.R. 1925 Lahore 415 (Shadi Lal, C.J.).
2. Section 2(d), Limitation Act, 1963.
3. Emphasis added.
4. *Hiralal* v. *Queen Empress*, (1895) I.L.R. Calcutta 757.
5. (a) *Mal Dhan Gupta* v. *Board of Revenue*, (1969) Allahabad Law Journal 333;
   (b) *West Coast Electroplating Company Ltd.* v. *Sreedharan*, (1971) Kerala Law Times 383.

amounts to an agreement; and if it embodies a promise to pay, it is chargeable as a bond[1-2-3] if the other formalities required by the definition of bond are present. The other positive condition is of attestation—a solemn formality.

Comparison with promissory note.

4.10. So much as regards the two positive conditions in clause (b). The negative condition requires that the instrument should not be payable to order or bearer, the object of this requirement being that if the instrument is payable to order or bearer, it could fall under the definition of "promissory note", which is governed by special charging provisions and other special provisions.

A comparison with the definition of "promissory note" would be useful at this stage. Under the Stamp Act,[4] a promissory note means a promissory note as defined by the Negotiable Instruments Act, 1881. The definition also contains an inclusive portion, but that portion is not relevant for the present purpose. Under the Negotiable Instruments Act,[5] a promissory note is an instrument in writing, containing an unconditional undertaking to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. No doubt, there are some instruments which do not amount to bonds within the Stamp Act, because they are not attested as required by clause (b). There are, on the other hand, some documents which do not amount to 'promissory notes' under the Negotiable Instruments Act, because the sum is not certain or the undertaking not unconditional.

Points of difference and similarity.

4.11. There are differences as well as similarities between monds and promissory-notes. In the first place, a promissory-note, in its proper and legal form, could not well be confounded with a bond under clause (a), i.e., a bond with a condition, for such a promissory note must be "an unconditional undertaking"; nor could it be mistaken for a bond under clause (c) to deliver grain, as the subject of a promissory-note can be "money only".

As to simple bonds for money falling under clause (b), such bonds could not be mistaken for promissory-notes *executed in the ordinary form*, i.e., payable to 'order' or to 'bearer', which constitutes their negotiability, because instruments so worded are expressly excluded by clause (b).

4.12. A further distinction between a 'bond' as described in clause (b) and a promissory-note which is not expressed so as to indicate negotiability is sometimes thus stated. The language of a bond indicates an "obligation", while that of a note constitutes a "promise" or undertaking to pay. But this distinction, though easy to formulate in theory, proves difficult in practice. The distinction between these instruments when losely worded, is often difficult to trace. There are situations where a document can fall under boh. If there is, in an instrument, an unconditional undertaking to pay money to a specified person, and the instrument is attested, it will, *prima facie*, fall under both the definitions, i.e. the definitions of 'promissory note' and 'bond'.

Instruments not expressed.

4.13. An objection could be raised that since the instrument is not expressed to be payable to order or bearer, it falls within the definition of 'bond', because the negative requirement in that definition is not fulfilled. But, as to this objection, attention must be invited to section 13 of the Negotiable Instrument Act.[6] One of the Explanations to that section (as amended in 1919) provides (in effect), that a bill of Exchange, pronote or cheque payable to a specified person is to be regarded as payable to his order, unless there are provisions restricting its transferability. It is this provision which has caused some controversy. Is this provision in section 13 of the Negotiable Instruments Act to be read for the purposes of interpreting section 2(5)(b), Stamp Act, (i.e. the portion referring to 'not payable to order or bearer'), or is it to be disregarded for the purposes of the Stamp Act ?

1. *Daula* v. *Ganda*, 35 Punjab Records 1903 (Full Bench).
2. *Gulab Chand* v. *Bhama Naik*, (1972) Madhya Pradesh Law Journal 63.
3. *Dulabh* v. *Rahman*, I.L.R. 14 Bombay 511.
4. Section 2(22).
5. Section 4, Negotiable Instruments Act, 1881.
6. Section 13, Negotiable Instruments Act (as amended in 1919).

Thus, a pronote payable to X is, under the amendment, to be regarded as payable to 'X or order' (by virtue of the Explanation), if there are, in the instrument, no words prohibiting transfer or indicating an intention that it shall not be transferable.[1] A promissory not 'payable to A' was not negotiable before the amendment. But, after the amendment, by virtue of the Explanation, the words 'payable to A' mean 'payable to A', or order, and such a note is thus rendered negotiable, unless it is expressly made 'payable to A only', thereby prohibiting its transfer.

Section 13, Negotiable Instruments Act—History.

4.14. The history of section 13 of the Negotiable Instruments Act, referred to above, is of interest. To be negotiable, a promissory-note, a bill of exchange or a cheque must be made payable to order or bearer under the section. Even if it was not made expressly payable 'to order or bearer', the custom and usage of merchants in Bombay recognised a cheque from which the word 'bearer' was struck out, and the word 'order' was not substituted therefor, as an 'order' cheque and, as such, negotiable. In a Bombay case,[2] however, the High Court refused to recognise this custom as, if recognised, it would have the effect of overriding the express provisions of law in section 13 of the Negotiable Instruments Act, (as it then stood). This decision caused a great deal of hardship to the mercantile community, and to remove the hardship, an Explanation was added to section 13 of that Act, by an amending Act (Act 8 of 1919) to the following effect :—

> "*Explanation* 1.—A promissory-note, bill of exchange or cheque is payable to order which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable."

Question of applicability to Stamp Act of amended section 13—shades of view.

4.15. The question whether this provision (i.e., the amendment in section 13 of the Negotiable Instruments Act) is to be read for the purposes of the Stamp Act also, has caused a difference of opinion amongst the High Courts,[3] as also amongst the Judges in the same High Court.[4] The documents involved in the cases before the various High Courts did not contain the words 'or order'. The question arose whether the provision (that the instrument must not be payable to order or bearer), was satisfied. Answer to the question depended on whether the above provision of the Negotiable Instruments Act, as amended, was, or was not, to be taken into account for the purposes of the Stamp Act also.

Several shades of view seem to be current on the subject—

(1) Section 13, Negotiable Instruments Act (as amended in 1919), is to be read for the purposes of the Stamp Act also, and, therefore, an instrument containing an unconditional undertaking to pay to a specified person, if there is no express restriction on transfer, is to be excluded from the definition of 'bond', as it is to be treated as payable to order, though not so expressed.[5]

(2) Section 13, Negotiable Instruments Act is not to be so read, as the section is intended to define what is a 'negotiable instrument', and is not relevant to the definition of 'bond' for the purposes of the Stamp Act.[6]

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1. (a) *Bibi Kazmi Begum* v. *Lachman Lal Sao*, A.I.R. 1930 Pat. 239, 240.
   (b) *Gulabgir* v. *Nathmal*, A.I.R. 1932 Nag. 23, 25.
   (c) *Bankidas* v. *Tanabai*, A.I.R. 1929 Nag. 274, 275.
   (d) *Forbes, Forbes, Campbell and Co.* v. *Official Assignee, Bombay*, A.I.R. 1925 Bom 173.
2. *Desabhai* v. *Virchand*, A.I.R. 1919 Bom. 73.
3. See the case-law reviewed in—
   (a) *Kadorilal* v. *Sukhlal*, A.I.R. 1968 M.P. 4, 8, 9, paragraphs 10 to 12 (Golwalkar and Bhave JJ.).
   (b) *J. Sohab* v. *M.H. Gandly*, A.I.R. 1773 Bom. 27.
4. *E.G. Raja Rajeshwari Debi*, A.I.R. 1959 All. 583 (F.B.).
5. *Kadorilal* v. *Sukhlal*, A.I.R. 1968 M.P. 4 (D.B.).
6. (a) *Khetra Mohan* v. *Jamini Kanta Devan*, I.L.R. 54 Cal. 445; A.I.R. 1937 Cal. 472;
   (b) *Ram Narayan*, A.I.R. 1962 Pat. 325, 329 (Ramaswami, C.J. and Chaudhary, J.).
   (c) A.I.R. 1973 Bom. 27.

(3) The matter must be determined on a consideration of the intention of the parties. Did the parties intend the instrument to have the commercial character of a pronote, or was it the intention only to record the obligation by the party undertaking to pay ? In a case which went up to the Privy Council,[1] this test was applied, and, in his usual forceful way, Lord Atkin described the anomaly that would arise *if the net of negotiability were cast wide.*[2]

(4) Negotiability is not a pre-requisite of the document being regarded as a pronote, for the purposes of the Stamp Act.[3] Section 13 of the Negotiable Instruments Act (as amended) should be taken into account, for the purposes of the Stamp Act also.

From the discussion in a Gujarat case,[4] and in a Bombay case,[5] it would appear that this controversy is still subsisting. A clarification is, therefore, desirable.

Recommendation regarding section 2(5)(b).

4.16. In order to clarify the position, we recommend that the words "expressed to be", should be added in clause (b), before the words "payable to order or bearer". Though it could be argued that to treat such a document as a bond, would create disharmony between the Stamp Act and the Negotiable Instruments Act, we are deliberately making this recommendation, in view of the fact that if the document is regarded as a promissory note, then[6] the document cannot be admitted in evidence under the existing law, even on payment of the deficiency and penalty. We do not see any strong reason why the category of documents not admissible on payment of penalty should be enlarged.

Recommendation regarding clause (b).

4.17 We, therefore, recommend that clause (b) of the definition of "bond" should be revised so as to read as follows :—

> "(b) any instrument attested by a witness and not expressed to be payable to order or bearer, whereby a person obliges himself to pay money to another."

Section 2(5)(c)—Stipulation for delivery in pursuance of an agreement.

4.18. Clause (c) of the definition of "bond" includes any instrument attested by a witness "whereby a person obliges himself to deliver grain or other agricultural produce to another". There is a conflict of decisions on the question whether an attested instrument containing a stipulation for the delivery of grain or other agricultural produce *in pursuance of an agreement for the sale of such article* is a "bond" within this clause. The majority view is that such an instrument will be a "bond", and chargeable as such.[7] Thus, in a Bombay case,[8] it was held, following an earlier decision,[9] that an ordinary agreement for a sale of a crop or mortgage of a crop becomes a bond *if it is attested by witnesses.* The attestation is a necessary characteristic of the bond, but it is not an essential characteristic of a document incorporating mortgage of crop or sale of crop, as the validity of these transactions does not depend upon the attestation of the document, and they can be carried out by documents which are not attested. And the bond is the basis of transaction over which is superimposed a transaction of mortgage or sale and in such a case, the document shares and retains the character of a bond along with the characteristics of mortgage or sale respectively.

The other view is that the obligation to pay money and the obligation to deliver crops is incidental to and is a necessary part of the mortgage of crop or of the sale of crop respectively, and, in a transaction of mortgage of crop or of sale of crop, the element of bond, if there be any,

1. *Mohd. Akbar Khan* v. *Attar Singh*, A.I.R. 1936 P.C. 171 (Lord Atkin).
2. See also *Gaupaldas*, A.I.R. 1941 Nag. 1.
3. *Jagjivandas* v. *Gumanbhai*, A.I.R. 1968 Guj. 1, 5, 6, paragraph 5 (Bhagwati and Shah, JJ.).
4. *Parshottam* v. *Ishwar Bhai*, A.I.R. 1971 Gujarat 252 (A.D. Desai and D.P. Desai, JJ.).
5. A.I.R. 1973 Bom. 27.
6. Section 35, Proviso (a).
7. (a) *In re Balli Bros*, (1906) 8 Bom. L.R. 234, 238 (S.B.).
   (b) *Rupchand* v. *Barku*, (1884) Bom. P.J. 257;
   (c) *In re Gajraj Singh*, (1887) I.L.R. 9 All. 585, 589;
   (d) *L.H. Sugar Factory, Pilibhit* v. *Moti*, A.I.R. 1941 All. 243, 247, 257, 258 (Majority view—Bajpai and Verma JJ. contra.);
   (e) *Collector Nimar* v. *Lakshmichandra*, A.I.R. 1927 Nag. 72, 73, 74.
8. *In re Balli Brothers*, (1906) 8 Bom. L.R. 234.
9. *Rupchand* v. *Barku*, (1884) Bom. P.J. 257 (S.B.).

is entirely submerged in the transaction of sale or mortgage, and it is unnatural language to describe a transaction of a sale or mortgage of a crop as a bond, simply because there happens to be an attestation of the document, and in such a case attestation may well be regarded as surplusage. The obligation to pay money and to deliver crops are exclusively referable to sale and mortgage transactions, and they should not be treated as independent covenants furnishing the basis of a bond. There is high judicial authority in support of either of these contentions. In a Full Bench case of the Bombay High Court,[1] after expressing a doubt whether the real intention of the Legislature was being carried out by interpreting the transaction in the manner in which it did, it has been held that a document recording a sale of goods if attested becomes a bond, and ceases to be exempt from duty and becomes liable to pay duty as on a bond.

The judgment of the Court (which was delivered by Sir Lawrence Jankins) contains no discussion of law, and is based upon a previous authority of the Bombay High Court, to which the Court held itself bound.

The Full Benches of the Madras High Court[2] and Bombay High Court[3] have held that a document resembling a promissory note, *if attested*, becomes a bond.

4.19. It should, however, be noted that the Bombay High Court has, in a later decision, held that the agreement in order to come within the definition of bond, must *constitute a debt*, and must be capable of specific performance. That case related to an agreement to lend money to a partnership. It was held that such an agreement does not create an obligation to pay money within clause (b). The reasoning was that an agreement to lend money is not capable of specific performance, and it creates no debt though its breach may give rise to a claim for damages.

The matter has come up more than once before the Allahabad High Court. In a case[5] decided in 1936, the executant, who had received money from the other party, had mortgaged his sugarcane. There was another stipulation that the executant would supply the sugarcane exclusively to the sugar works of the mortgagee. The latter stipulation was regarded as a bond, being wholly apart and separate from the mortgage. In the same case, however, a stipulation to deliver in pursuance of sale, contained in another document—which was the third document in the case—was excluded from the definition of "bond".

4.20. In a case,[6] decided by the Allahabad High Court in 1941, the document in issue (being attested) was, on the facts, held by a mojority of the judges[7] to be a bond. The minority[8] dissented, on the ground that the obligation to deliver grain was only incidental. According to the majority, however, this test was irrelevant.[9]

The same view (holding such document to be a bond) has been taken in a later Full Bench case of the Allahabad High Court.[10]

In many of the cases cited above, the question whether the document would be exempt under article 5 by virtue of the exemption under that article in respect of an agreement for the sale of goods, has also been debated. That controversy was (no doubt, of importance for the actual decision in each case; but that controversy should be kept apart for the present purpose, because, even if the document is exempt under article 5, the main question to be first determined is about the scope of section 2(5)(c)—"bond".

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1. *In re Balli Bros.*, (1906) 8 Bom. L.R. 234.
2. *In re Reference under Stamp Act*, (1887) I.L.R. 10 Mad. 158 (F.B.).
3. *Venku Ranchandrashet* v. *Sitaram Pandurang*, (1905) I.L.R. 29 Bom. 82; 6 Bom. L.R. 841 (F.B.).
4. *Hitawardhak Cotton Mills* v. *Sorabji*, (1909 I.L.R. 33 Bom. 426 (Scott, C.J.), Batchelor and Heaton, J.)
5. *In re Board of Revenue*, A.I.R. 1936 All. 481, 482 (S.B. of 3 Judges) portion relating to first document.
6. *L.H. Sugar Factory* v. *Moti*, A.I.R. 1941 All. 243, 247, 258, 267, 272, 277.
7. Iqbal Ahmad, Ag. C.J., Mulla and Dar, JJ.
8. Verma and Bajpai, JJ.
9. See, particularly, Iqbal Ahmad, Ag. C.J.'s judgment, page 247.
10. *Revenue Board* v. *P.B. Singh*, A.I.R. 1957 All. 391, 393, para 22 (F.B.)

Recommendation relating to clause (c).

4.21. Here, one does find oneself in a dilemma. If an obligation to deliver grain etc. arising under an agreement on sale is excluded, then there is very little scope left for clause (c). An agreement to deliver grain under a hypothecation bond would, of course, still fall within clause (c) (if the document is attested), but an instrument containing such an obligation would be chargeable as a "mortgage of a crop",[1] and would not raise controversy in practice.

It is desirable that the legislative policy on the subject should be indicated more clearly. One alternative would be to modify clause (c) so as to exclude cases where the obligation is in pursuance of an agreement to sell the grain or produce. The opposite alternative would be to include such cases. Attestation will, of course, be required, as at present. Whichever alternative is preferred, the position regarding chargeability of the document would not be governed entirely by the definition of bond. Reference will also have to be made to article 15, and to the case law on article 5. The object in suggesting an amendment of section 2(5)(c) is only to clarify the position with reference to the definition of "bond".

Recommendation.

4.22. We are of the view that the first alternative should be preferred, since it is unrealistic to include such agreements within "bonds". An Explanation should, therefore, be added to clause (c), to the effect[2] that an agreement containing a stipulation for delivery of grain or other agricultural produce in pursuance of an agreement for the sale of such article does not amount to a bond *within the definition* in the Stamp Act.

Section 2(5) and attestation.

4.23. Section 2(5)(b) and 2(5)(c) use the expression "attested", but there is no definition of that expression in the Stamp Act. There is a definition of "attestation" in section 63(c), Indian Succession Act, 1925 (39 of 1925). This is a reproduction of the definition of the term as given in the earlier Succession Act.[3-4]

The definition of "attested" in the Indian Succession Act is as follows[5] :—

> "(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

4.24. In the Transfer of Property Act, there is a definition of "attestation". The definition in the Transfer of Property Act[6] is quoted below :—

> "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

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1. Article 41.
2. This is not a draft.
3. Indian Succession Act, 1865 (10 of 1865)—section 50(3).
4. See—(a) *D. Fernandez* v. *R. Alives*, (1878) I.L.R. 3 Bom. 382;
   (b) *Nitya Gopal* v. *Nagendra Nath*, (1885) I.L.R. 11 Cal. 429.
5. Section 63(c), Indian Succession Act, 1925.
6. Section 3, Transfer of Property Act, 1882.

4.25. It may be desirable to have definition adopting one of the two precedents referred to above. We prefer that contained in the Transfer of Property Act—of course, with the modification that one witness should do. We may add that the change recommended by us have generally found favour with most of the replies to our Questionnaire,[1] wherein we had included specific queries as to the points which we have discussed above concerning s. 2(b) and s. 2(c). **Recommendation.**

4.26. The following rough draft is recommended—

> "*Explanation.*—In this clause, "attested", in relation to an instrument, means attested by at least one witness who has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and has signed the instrument in the presence of the executant; but no particular form of attestation shall be necessary."

Section 2(6)—"chargeable".

4.27. Section 2(6) defines the expression "chargeable", and needs no change.

Section 2(7)—"Cheque".

4.28. Section 2(7) defines "cheque" as meaning a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. The definition of "cheque" in the Negotiable Instruments Act is identical.[2] In England,[3] the Bills of Exchange Act defines "cheque" as a bill of exchange drawn on a banker payable on demand. The English Stamp Act does not define a "cheque". The word 'specified" occurring in our Negotiable Instruments Act, is not to be found in the Bills of Exchange Act, and the requirement of demand is expressed in positive terms. It may be noted that the definition in the (English) Bills of Exchange Act, is itself based on a judicial decision.[4]

We are not, however, concerned with these minute differences between the Negotiable Instruments Act and the Bills of Exchange Act as regards the definition of "cheque". If, in future, the Negotiable Instruments Act is revised, the definition in the Stamp Act could be reconsidered if that is regarded as appropriate.

Stamp Duty on cheques in England.

4.29. In England, cheques are subject to Stamp Duty ;[5] but the person to whom the cheque is presented may, if it is unstamped,[6] affix thereto an adhesive stamp of the requisite amount.[7]

It may be noted that stamp duty is not leviable in India on cheques now, because article 13 which levies a duty on a bill of exchange was so amended in 1927 as to remove the duty. What, then, is the significance of the definition of "cheque" in the Indian Stamp Act ? So far as could be ascertained, and apart from the articles, there is one section of the Stamp Act[8]—section 30—which now uses the expression "cheque".—That section provides that any person receiving any money exceeding twenty rupees in amount, or any bill of exchange, *cheque* or promissory note for an amount exceeding twenty rupees—shall, on demand, give a duly stamped receipt for the same. The expression "cheque" appears in a few articles also. Thus, the definition has very limited utility. However, no changes appear to be necessary in this definition.

Section 2(9)—"Collector".

4.30. Section 2(9) defines the expression "Collector", and needs no change.

Section 2(10)—"Conveyance"

4.31. Section 2(10) defines a "conveyance" as follows :—

> "(10) 'Conveyance' includes a conveyance on sale and every instrument by which property whether movable or immovable is transferred *inter vivos*, and which is not otherwise specifically provided for by Schedule 1."

1. Question 6.
2. Section 6, Negotiable Instrument Act, 1882
3. Section 73, Bills of Exchange Act, 1882 (Eng.).
4. Hopkinson *vs.* Foster (1874) L. R. Eq. 74.
5. The Stamp Duty is a fixed one of 2 pence.
6. Section 38(2), Stamp Act, 1891.
7. As to drafts, see discussion relating to section 2(3)—"bill of exchange".
   Section 30.

The broad divisions of this inclusive definition are two :—

(a) Conveyance on sale; and

(b) Other instruments.

A "conveyance on sale" is not defined in the Act.

A conveyance on sale is defined[1] in England as including[2] "(1) every instrument, and every decree or order of any court or of any commissioners, (2) whereby any property, or any estate or interest in any property (3) on the sale thereof (4) is transferred to or vested in a purchaser or any other person on his behalf or by his direction."

Requirement.

4.32. Conveyances on sale present no problems. As regards "other instruments", three points must be noted :

(i) There must be transfer (*inter vivos*) ;

(ii) All property is covered—movable or immovable ;

(iii) But an instrument otherwise specifically provided for, is not a conveyance.

As regards the first requirement, it is to be noted that it is immaterial whether the transfer is for or without consideration except that gifts are specifically covered separately. Nor are the circumstances of transfer of any consequence. For example, a transfer on amalgamation of companies, would be covered[3].

4.33. As regards the second requirement, what is to be noted is that transfer of any "property" is covered. The property may be—

(a) a debt[4],

(b) good-will[5], which has been described by Lord Mecnaghten as the benefit and good advantage of the name, reputation and connection of a business, and "the attractive force which brings in custom[6] ;

(c) trade mark[7] ;

(d) patent[8] ;

(e) benefit of a contract[9] ;

(f) a share in a company[10] ;

(g) goods.

(Goods can be transferred by delivery. But, if the transfer takes the form of an instrument, duty is payable.).

Thus, under the present Act, all transfers of property movable or immovable on sale or otherwise and not otherwise specially provided for by the schedule, are chargeable as "conveyances". The transfers otherwise provided for in the Schedule are —

Agreement relating to deposit of title deeds etc. (Art. No. 6).

Composition Deed (No. 22);

Equitable Mortgage (No. 30) ;

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1. Stamp Act, 1891, section 54.
2. The numerals in brackets are not found in the English Act, but are added here for convenience.
3. There is, however, executive remission for transfer of assets on amalgamation etc.
4. As to assignment of debts, see—*Doraiswami Mudaliar*, A.I.R. 1925 Mad. 753 (Ramesam J.)
5. *Reference under the Stamp Act*, (1896) I.L.B. 23 Cal. 283.
6. *I.R.C.* v. *Muller*, (1901) A.C. 217; (1900-1903) All E.R. Rep. 413.
7. *Benjamin Brooke & Co.* v. *I.R.C.*, (1896) 2 Q.B. 356, 359 (C.A.).
8. *Smelting Co. of Australia*, (1897) 1 Q.B. 175, 180, 181 (C.A.).
9. *Nathu* v. *Hansraj*, (1907) 9 Bom. L.R. 119, 121 (Russell J.).
10. *Coats* v. *I.R.C.*, (1897) 2 Q.B. 423.

Exchange of property (No. 31) ;
Gift (No. 33) ;
Lease (No. 35) ;
Mortgage deed (No. 40) ;
Mortgage of Crop (Art. 41) ;
Partition[1] (Article 45) ;
Reconveyance (No. 54) ;
Release (No. 55) ;
Settlement (No. 58) ;
Transfer of share etc. (No. 62);
Transfer of lease (No. 63) ;
(Declaration of) Trust (No. 64).

Duty.

4.34. Duty on a conveyance is subject to the exemption under article 23. In determining the stamp duty, the substance of the transaction, as disclosed by the whole of the instrument, has to be looked to, and not merely the operative part of the instrument[2 3]. The use of any particular words like "release[4]", "relinquish", "assign" or "transfer" in any instrument does not conclusively determine the nature of the instrument.

Conveyance or release.

4.35. The question whether a document is a conveyance or a release often proves a difficult one to decide. This is so when the transferee has already a share, or a semblance of a share, in the property in which a share is transferred. The duty on a deed of release is lower than that on a conveyance for the same amount[5]. A few cases will illustrate the difficulty.

In a Bombay case[6], the executant of the document, purporting to be entitled to a share in a going pressing factory, transferred absolutely the whole of that share to the other person interested in the factory, in consideration of a certain sum. It was held that the document was a conveyance on sale of property.

In a Mysore case[7], by mutual agreement, one partner retired from business, and he executed a document whereby he gave up his share in favour of the other partner, in consideration of a certain sum of money. It was held that the deed could be classified as a conveyance, and hence it was unnecessary to consider whether the deed might also be regarded as a release. This Mysore case dissented from an earlier Madras Full Bench case[8], which itself had sought to distinguish the Bombay case[9]. The Madras case held that a document by which one co-owner purports to abandon or relinquish his claim to the share to which he would be entitled, is in the nature of a release. The Court had remarked that a document under which one Hindu co-parcener purported to give up right in the family property in favour of the remaining co-perceners would not be a deed of conveyance, but a deed of release. On this point, the Mysore High Court observed[10] :

> "I am unable to see any material distinction between the share of a co-owner in a particular immovable property and a co-owner's rights and interests in the assets of the partnership, for the purpose of determining whether the instrument is a conveyance or release. Nor have their Lordships (i.e. the Madras High Court) stated why the extinguishment of the interest of the releasing co-owner and the

1. On one view, partition is a transfer; on another view, it is not: See cases under section 10, 53 etc. Transfer of Property Act.
2. *Balkrishna Bihari* v. *Board of Revenue*, H.P., A.I.R. 1970 M.P. 74 (F.B.).
3. *Venkatachalapathi* v. *State of Mysore*, A.I.R. 1966 Mys. 323 (F.B.).
4. As to release, see *infra*.
5. Article 55.
6. *In the matter of Hiralal Navalram*, (1908) I.L.R. 32 Bom. 505 (F.B.).
7. *Venkatachalapathi* v. *State of Mysore*, A.I.R. 1966 Mys. 323 (FB.).
8. *Board of Revenue* v. *Murugesa Mudaliar*, A.I.R. 1955 Mad. 641.
9. *In the matter of Hiralal Navalram*, (1908) I.L.R. 30 Bom. 505.
10. *Venkatachalpathi* v. *State of Mysore*, A.I.R. 1966 Mys. 323, 330.

enlargement of the interest of the release co-owner, cannot amount to a conveyance of the undivided interest of the former to the latter."

In a Mysore case of 1970[1], it was observed :

"..... Whatever may be the name given to a document by the parties, the document will have to be examined in the light of the language employed in it and the objects sought to be achieved before any decision in regard to its effect can be arrived at. It is no doubt true that in ordinary circumstances or in a mojority of cases, a release deed is executed by one or more co-shares of a property in favour of the remaining co-sharer or co-sharers whereby the first-named release their interest of the second-named[2]. But, as pointed out by the Supreme Court[3], although a deed described as a release deed can be usefully employed as a form of conveyance by a person having some right or interest to another having a limited estate e.g. by a remainderman to a tenant for life, and the release then operates as an enlargement of a limited estate, it can also be made by using words of sufficient amplitude to transfer title to one having no title before the transfer."

In the Mysore case, the brothers who were members of a joint Hindu family transferred their interest in the joint family property to their father, but without consideration. This was interpreted by their Lordships as a gift, as the intention of the parties was to effect a transfer of title (and not a release).

Conflict.

4.36. A recent Madras case[4] shows that this conflict between the two High Courts still seems to persist. The facts were as follows : By a deed dated 15th June, 1959, the mother gave up her life interest in property in favour of her son and grandson, and in lieu thereof it was provided that she would be paid a monthly amount which was charged on some other property. The deed was described as a "partition-deed", and was stamped as such. On a reference to the High Court by the Revenue authority raising the question whether it was not a conveyance, it was held that the document, in so far as the mother gave up her life-interest, was not a conveyance, but operated only as a "release deed".

The fact that such a release was for consideration made no difference in its character as such. The Court reviewed its earlier cases, and observed :—

"The essential difference between a conveyance and a release lies in the fact that in the latter, there is no transfer of an interest or right to another who had no pre-existing right in it to any extent. A release of a right or of a claim can only be in favour of a person who had a pre-existing right or claim and by reason of the release the latter's right or claim is enlarged or is made fuller in its content."

4.37 This view of the Madras High Court is in direct conflict with that of the Mysore High Court in the case already referred to[5], where it was held that where the release is by a co-owner of his share in the common property which is legally capable of being transferred in favour of another co-owner, in a consideration of a sum of money coming from outside the common property, the transaction amounts to a sale of the undivided share.

It may also be pointed out that the decision of the Supreme Court[6] itself does not support the statement made by the Madras High Court in the 1970 case referred to above. The

1. *Rajanna* v. *Dhondusa*, A.I.R. 1970 Mys. 270, 276 (Pai, J.).
2. *Nanjunda Setty* v. *State of Mysore*, A.I.R. 1964 Mys. 124; *Board of Revenue* v. *Murugesa Mudaliar*, A.I.R. 1955 Mad. 641.
3. *Kuppuswami* v. *Arumugam*, A.I.R. 1967 S.C. 1395, 1397, paragraph 6.
4. *Board of Revenue* v. *Lakshmanan*, A.I.R. 1970 Mad. 348, 349, Para. 3 (*F.B.*).
5. *Venkatachalapathi* v. *The State*, A.I.R. 1966 Mys. 323, 327, *supra*.
6. *Kuppuswami* v. *Arumugam*, A.I.R. 1967 S.C. 1395, 1397; (1967) 1 S.C.R. 275.

Supreme Court refused to hold "that a deed *styled a deed of release* cannot in law, transfer to one who before the transfer had no interest in the property". On the facts of the case, therefore, it was held that though the deed was called a release deed, the words used were sufficiently clear to transfer title to one having no title before the transfer. There was no question of stamp duty in the Supreme Court case.

Madras case of 1955.

4.38. The Madras case[1] of 1955 was a case of one of the co-owners releasing his right in favour of the rest of the co-owners. The High Court held that the document relating to it was a release, and not a conveyance. In expressing that view, Rajamannar, C.J., who spoke for the Court, observed :—

> "In such a case there need be no conveyance as such by one of the co-owners in favour of the other co-owners. Each co-owner in theory is entitled to enjoy the entire property in part and in whole. It is not, therefore, necessary for one of the co-owners to convey his interest to the other co-owner. It is sufficient if he releases his interest. The result of such release would be the enlargement of the share of the other-co-owner. There can be no release by one person in favour of another, who is not already entitled to the property as a co-owner."

The Madras case[2] of 1968 took a similar view. Both these cases related to release of a co-owner's right in favour of the rest of the co-owners.

Scope of the words "and which is not otherwise specifically provided for by Schedule I."

4.39. So much as to release. Some difficulty is created also by the words "and which is not otherwise specifically provided for by Schedule I." Do these words qualify also the first category indicated by the words "conveyance on sale", or are they confined to the second category indicated by the words "every instrument by which property is transferred" etc.?

In the Mysore case, the latter view was taken. As a matter of interpretation, it is possible to take a different view and to regard the words "conveyance on sale" as unqualified by the words "and which is not otherwise specifically provided for". In fact, none of the other articles which tax a transfer of property would, in ordinary parlance, be described as a "conveyance on sale". So this question should be academic. But it is better to make it clear that only the latter half of the clause is qualified by the words "and not otherwise specifically provided for etc.".

4.40 History of the words does not throw much light on this point.

In a Calcutta case[3], where the Maharajah of Darbhanga, by a deed of family arrangement, conveyed a Pargana and a sum of two and a half lakhs of rupees to his younger borther on condition that the latter should release certain family properties on which he had claims, the High Court held that the deed was neither a conveyance nor a settlement nor an instrument of partition within the meaning of the Stamp Act of 1879. The deed, not having been made by way of sale, was in its nature a deed of arrangement, by which a sum of money was paid absolutely and a maintenance grant made by the Maharajah of Darbhanga to his younger brother, by way of discharge and satisfaction of all claims by way of maintenance or otherwise. It was considered that such documents should not thus escape the duty altogether, and hence the definition in the present Act has been altered so as to make it include all transfers *inter vivos* which were not specifically provided for in the Schedule[4]. The Select Committee on the Stamp Bill, 1898, observed thus :

> "We have altered this definition so as to make it include all conveyance *inter vivos* which are not specifically provided for in Schedule I and thus to meet the difficulty in I.L.R. 7 Cal. 21, where it was held that the instrument in question

1. *Board of Revenue* v. *Murugasa Mudaliar*, A.I.R. 1955 Mad. 641 (F.B.)
2. *Chief Controlling Authority* v. *Patel*, A.I.R. 1968 Mad. 159.
3. *In re Maharajah of Darbhanga*, (1880) I.L.R. 7 Cal. 21.
4. In England, also prior to the passing of the Finance Act, 1910, section 74, making chargeable all transfers *inter vivos*, it was held in Denn dem. *Manifold* v. *Diamon*, (4 B & C 243) (6 D. & R. 328) that a conveyance by father to son in consideration of natural love and affection, and the bond of the son to augment his sister's portions by £1,500, was a deed of family arrangement and not a conveyance on sale; see also *Massey* v. *Nanney*, 3 Bing. N.C. 478.

was neither a 'conveyance' nor a 'settlement', nor an 'instrument of partition' but an 'arrangement' for the transfer of property."

Recommendation.

4.41. It is desirable that the conflict of opinions between the Madras and Mysore High Courts on the question of release, as also the obscurity as to the words "what is not otherwise specifically provided for", should be clarified.

In particular, the fact situations of a co-owner transferring his share in the common property for a consideration to another co-owner, needs specific consideration.

Three classes of transactions may be considered in connection with release—

(1) *Sales which do not involve a release.*—For example, a sale between two persons who had no prior common interest in a property sold, does not involve a release, as a release pre-supposes the existence of common interest of the parties to the transaction.

(2) *Sale involving release.*—For example, if the seller and the purchaser have a prior common interest in the property, there is, in a sense, a release by the seller of his interest in the property. But the transaction is also a sale.

(3) *Release not resulting in sale.*—For example—

(a) a release relating to a settlement of a doubtful claim ;

(b) a release of a right which is not capable of being transferred in law, like the right to maintenance, or the mere right to sue ;

(c) a release of a debt by the creditor (here the debt is not transferred from the creditor to the debtor).

(d) a double or multiple release accompanied by the acquisition of the full right by each co-owner in the portion of the property allotted to him, which may amount to a partition between the co-owners.

As against this, where "release" is by a co-owner of his share in the common property which is legally capable of being transferred in favour of another co-owner, for a consideration in the shape of a sum of money coming from outside the common property, the transaction amounts to a sale of the undivided share.

Amendment.

4.42. In our view, it would be useful to add an Explanation in the definition of "conveyance", to cover an instrument whereby a co-owner transfers a share to another co-owner. The intention is that this should apply whether or not the transfer is for consideration. Many of the replies to our Questionnaire[1] have expressed agreement with such a view. The charging article on "Release" also lends some support to such an approach[2]. Some have raised the objection that this amounts to levying a tax for the first time, but we would point out that it is not so, as will be apparent from some of the reported cases referred to above.

Section 2(10)—Definition of "conveyance and family arrangement".

4.43. While on the subject of 'conveyance', we may also discuss the question of family arrangements.

There appear to be two senses in which the expression "family arrangement" is used. A family arrangement in the narrower sense is the bona fide settlement of a claim or dispute (i.e., a claim or dispute which has arisen or may arise), by the members of a family[3], for the benefit, peace or security of the family generally or for preserving its property or honour[4]. In the wider sense, it means any arrangement between members of the same family[5] for the benefit of the family.

1. Question 7 in the Questionnaire.
2. Article 55.
3. (a) *Bakhar Singh* v. *Dulari*, I.L.R. 52 All. 716;
   (b) *Ameer Hasan* v. *Md. Ejaz Khan*, A.I.R. 1929 Oudh 134;
   (c) *Sital Singh* v. *Kalka Singh*, A.I.R. 1937 Oudh 433, 434.
4. *Basant Kumar* v. *Lala Ram Sankar*, I.L.R. 59 Cal. 859.
5. See *infra*.

As Cheshire and Fifoot observe[1] :

Multitude of arrangements covered.

"The expression 'family arrangement' covers a multitude of agreements made between relatives and designed to preserve the harmony, to protect the property or to save the honour of the family[2]. It comprises such diverse transactions as the following : a resettlement of land made between the father as tenant for life and the son as tenant in tail in remainder ; an agreement to abide by the terms of a will that has not been properly executed, or to vary the terms of a valid will the release of devised property from a condition subsequently imposed by the testator ; or an agreement by a younger legitimate son to transfer family property to an illegitimate elder son."

Special rules of substantive law.

4.44. Family arrangements are specially favoured by the substantive law, in certain respects—e.g., no separate consideration is required[3] :

The courts view any such arrangement with favour and will uphold it unless there are strong reasons for doing otherwise[4].

Again, the Specific Relief Act, 1963[5], section 15(c), corresponding to section 23(c) of the Specific Relief Act, 1877, allows, in the case of a family arrangement, a suit by beneficiaries who are not parties to the arrangement.

We have referred to these rules relating to family arrangement by way of illustration. It is not necessary, for the present purpose, to enumerate all the rules of the substantive law applicable to family arrangements.

Assumption of antecedent title—hence no transfer.

4.45. We now revert to the two senses of the expression "family arrangement" mentioned above. It is stated that a deed in the nature of family settlement may be "based on the assumption that there was an *antecedent title of some kind in the parties*, and the agreement acknowledges and defines what that title is"[6]. Here, the narrower sense of the expression is intended.

In *Mt. Hiren Bibi* v. *Mt. Sohan Bibi*[7], the Privy Cuncil, approving its earlier decision in *Khuni Lal* v. *Gobind Krishna Narain*[8], held that a compromise by way of family settlement is in, no sense, an "alienation" by a limited owner of property. Here again, the narrower sense is intended. It would appear that this is so because no new title is created, and *the antecedent title is clarified by such compromise*. Hence, where a family arrangement is based upon an assumption that there was an antecedent title of some kind[9], it is not a transfer. In other words, if a family arrangement is for the settlement of disputes—existing or future[10],—it is not a "transfer".

Family arrangement in the wider sense.

4.46. In the wider sense, a family arrangement, as already stated, is a transaction between members of the family which is for the benefit of the family generally[11]. So viewed, it goes beyond a mere compromise.

It follows that a family arrangement in the wider sense can amount to a conveyance. Thus, where a document was executed in favour of a widow, whereby the executant, in pursuance of

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1. Cheshire and Fifoot, Law of Contract, 18th Ed. (1973) page 277.
2. Cheshire and Fifoot, Law of Contract, (8th Ed.) (1973) page 277.
3. (a) *Muhammad Raza* v. *Abbas Bandi*, (1932) 59 I.A. 236, 246 (P.C.);
   (b) *Chaudhry Ahmad Azim* v. *Chaudhry Safi Jan*, I.L.R. (1926) 2 Luch, 335.
   (c) *Lalif Jahan* v. *Mohammad Nabi*, (1932) 30 All. L.J. 9;
   (d) *Ghulam Mohammad* v. *Ghulam Hussain*, (1931) 59 I.A. 74, 87, 88 (P.C.).
4. Williams v. Williams, (1867) L.R. 2 Ch. 304.
5. Section 15(c), Specific Relief Act, 1963.
6. (a) *Rani Mewa Kunwar* v. *Rani Hules Kunwar*, (1874) 1 I.A. 157, 166 (P.C.).
   (b) *Khunni Lal* v. *Gobind Krishan*, (1911) 38 I.A. 87, 103; I.L.R. 33 All. 356 (P.C.).
7. *Mt. Hiren Bibi* v. *Sohan Bibi*, A.I.R. 1914 P.C. 44.
8. *Khunni Lal* v. *Gobind Krishna*, (1911) I.L.R. 33 All. 356 (P.C.).
9. *Bahadur* v. *Debi Sinha*, A.I.R. 1966 S.C. 292, 295.
10. *Ram Charan* v. *Girja Nandini*, A.I.R. 1966 S.C. 323, 329.
11. (a) *Madho Das* v. *Mukand Ram*, A.I.R. 1955 S.C. 481,1490, 1491; (1955) 2 S.C.R. 22;
    (b) *Kuppuswami* v. *Arumugam*, A.I.R. 1967 S.C. 1395.

a *rajinama* filed in a suit for maintenance brought by the widow, transferred to the widow a piece of land valued at a certain sum in satisfaction of her claim, it was held[1], to be a conveyance[2].

Determination of the question whether family arrangement should be stamped as a conveyance.

4.47. On the question whether a family arrangement does or does not amount to a "conveyance" for the purposes of the Stamp Act, the answer must, therefore, be sought in the nature of the instrument. What is called by the parties a family arrangement, may be a conveyance, or a partition, or a release[3-4], or some other category of instrument. If an instrument operates as a conveyance, it does not matter whether it is described as a memorandum or a release. It is in this context that one must distinguish between a family arrangement in the narrower sense (a compromise), and a family arrangement in the wider sense.

Amendment not necessary.

4.48. Broadly speaking, if a family arrangement merely renounces a claim or declares or confirms rights, it is not a conveyance. If it transfers rights, it is a conveyance[5].

We have discussed these aspects concerning family arrangements in order to bring out certain important elements. We do not, however, consider any amendment on the subject to be necessary.

Recommendation as to section 2(10).

4.49. In the light of the above, we recommend the following re-draft of sub-section (10):

"(10) 'Conveyance' includes—

(a) a conveyance on sale ;

(b) every instrument by which property whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I :

Explanation.—An instrument whereby a co-owner of a property transfers his interest to another co-owner of the property, is, for the purposes of this clause, an instrument by which property is transferred."

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1 *Reference under the Stamp Act* (1898) I.L.R. 21 Mad. 422, 425.

2. See also *Bhola Ram* v. *Emp.*, A.I.R. 1934 Lah. 530, 532.

3. *In Re Hira Lal*, (1908) I.L.R. 32 Bom. 505, 532.

4. *Khudmat Hubraji* v. *Deputy Commissioner*, A.I.R. 1943 Oudh 169, 172.

5. See, especially—

(a) *Marquess of Bristol* (1901) 2 K.B. 336;

(b) A.I.R. 1955 S.C. 481;

(c) A.I.R. 1966 S.C. 2920;

(d) A.I.R. 1966 S.C. 323.

(e) A.I.R. 1967 S.C. 1395.

CHAPTER 5

DEFINITIONS IN SECTION 2(11) to 2(18)

Section 2(11)—"duly stamped".

5.1. Section 2(11) defines the expression "duly stamped", as applied to an instrument. There are three broad requirements under the definition. First, the instrument must bear a stamp of not less than the proper amount; secondly, the stamp must be an adhesive or impressed stamp; and, thirdly, such stamp must have been affixed or used in accordance with "the law for the time being in force in India."

Though no change in this definition is needed, two observations are in order. First, the definition, like any other definition, should be taken as subject to the context, and construed in harmony with other provisions. For example, where duty has been remitted by notification under section 9 or a specific exemption is provided for under the relevant article, stamp need not be affixed. This aspect becomes material for the purposes, for example, of section 30, under which a person receiving money exceeding twenty rupees in amount etc. is bound to give a "duly stamped receipt" for the same. Obviously, where an exemption has been granted by or under the Act for a particular class of receipts, there can be no obligation to affix a stamp on the receipt, and the giving of an unstamped receipt should be regarded as sufficient compliance with section 30. Secondly, the definition of 'duly stamped' speaks of adhesive or impressed stamps[1] only. This is in conformity with sections 10 and 11; but it will be worthwhile considering the use of franking machines. This point will be considered at the appropriate place[2].

Position in England.

5.2. In England, it has been observed in one case[3] that an instrument—in that case, a security—is duly stamped "either if it has actually borne the correct amount of stamp duty that it attracts or if it is exempt for stamp duty."

The expression "duly stamped" would seem to mean not only bearing a stamp of the proper value[4], but also stamped at the right time[5], in the proper manner[6], with the proper description of stamp[7] under the Stamp Rules, and duly cancelled[8].

Thus, in the definition of the expression "duly stamped", a number of ingredients are implied, such as, provisions of the Act relating to description of the stamp, mode of affixing stamp and the like. A difficulty may arise where the amount of the stamp satisfies the law, but, in other respects, the instrument is not "duly stamped" as explained above. Under section 35, proviso, a deficiency in the amount of the duty can be rectified. But the situation where there is no deficiency in duty is not specifically covered by the proviso, though it would appear that the language of the proviso to section 35 is wide enough to cover such cases. Having regard to the fact that this is a recurring situation, it appears to be desirable to amend section 35, proviso (a), by a specific provision in this regard. This point will require consideration when section 35 is revised[9].

5.3 As regards the case of use of a stamp of improper description, it is covered separately[10] under section 37, which allows the defect to be rectified by applying to the Collector.

1. For definition of 'impressed stamp', see section 2(13).
2. See recommendation as to section 10A (proposed).
3. *I.R.C.* v. *Henry Enabacher & Co.*, (1963) A.C. 191, 209, 210 (1962) 3 W.L.R. 1292; (1962) 3 All E.R. 843, 848 (per Lord Morris of Borth-y-Gest).
4. Section 3, *et. seq.*
5. Section 3, 17, 48 and 19.
6. Sections 13 and 14.
7. Sections 10 and 11.
8. Sections 12 and 13.
9. To be considered under section 35.
10. Section 37.

Section 2(12)— "Executed" and "Execution".

5.4. Section 2(12) defines the expression "executed" and "execution", used with reference to instruments, as meaning 'signed' and 'signature'. The meaning of 'sign' is explained in the the General clauses Act[1].

Under section 3 of the Stamp Act, an instrument is chargeable with duty only if it is "executed". But, an acknowledgement is, under article 1, chargeable with duty, if it is "written" or "signed" by or on behalf of the debtor. A discrepancy, thus, arises between the definition of "execution" (read with section 3) on the one hand, and article 1 on the other hand. This will require[2] consideration, when we consider article 1.

Section 2(13)— "Impressed stamp".

5.5. The definition of "impressed stamp" in section 2(13) needs no comments.

Section 2(13A)— "India".

5.6. The expression "India" is defined in section 2(13A) as meaning "the territory of India excluding the State of Jammu and Kashmir". The object of the definition is to indicate that the sections concerned refer only to the territories to which the Act extends. To carry out this, it was suggested[3] that it should be revised as under :

"(13A) "India" means the *territory of India to which this Act extends*".

We, however, prefer an alternative course—deletion of the definition of "India". Though that would involve extensive consequential changes in numerous sections where the expression "India" occurs,[4] we are of the view that it is a preferable course. We shall presently indicate our reasons for this.

Section 2(13A) "India".

5.7. The word 'India' appears in the following sections :—

Section 2(6),
Section 2(11),
Section 2(13),
Section 2(16A),
Section 3(b), 3(c),
Section 17,
Section 18,
Section 19,
Section 20,
Section 32(3), proviso,
Section 33(2),
Section 50, proviso.

5.8. We are of the view that the definition of "India" should be deleted, since it is not appropriate that such an artificial definition should continue on the statute book. At present, the definition has been inserted as a technical device because several sections use the expression "India". We are recommending the substitution, in the substantive sections, of the expression "territory to which the Act extends" in all cases where the substantive provision, when speaking of "India", is intended to apply only to the territories now artificially defined as "India". We may mention that most of the replies[5] received to our Questionnaire have also agreed with the view that the definition should be deleted.

Let us now come to the consequential changes. In section 2(6)—"chargeable"—and section 2(11)—"duly stamped"—the expression "India" should be modified by substituting "territories to which this Act extends."

In section 2(16A), the expression "India" may be retained. The effect will be to cover "marketable security" sold in any stock market in the State of Jammu and Kashmir.

1. Section 3(56), General Clauses Act, 1897.
2. For consideration under article 1.
3. Minutes of 20th December, 1974.
4. Sections 2(6), 2(11), 2(13A), 2(16A), 3(b), 3(c), 19, 18, 17 , 20, 32(3) Proviso,33(2), and 50 Proviso.
5. Question 8 of the Questionnaire.

With reference to section 3(b) and section 3(c), which relate to certain negotiable instruments and certain other instruments executed outside "India" and brought into "India", the deletion of the definition in s. 2(13A) of "India" will mean that instruments executed outside India will not be required to be stamped, and "India" will, of course include the State of Jammu & Kashmir. This consequence is intended. Hence, "India" occurring for the first time in section 3(b) and 3(c) should be retained. But the word "India", where it occurs for the second time in sections 3(b) and 3(c), should be modified by substituting the expression "territories to which this Act extends", since that portion refers to things to be done within the territories to which the Act extends.

In section 17, in the phrase "instruments executed in India", the expression "India" may be modified by substituting "territories to which this Act extends".

In section 18(1) (time of stamping), the word "India" may be retained where it occurs for the first time. But it may be modified where it occurs for the second time. This section is the converse of section 17.

In section 19, (bills etc. made out of India), the expression "India" may be modified where it occurs for the first time, third time and fourth time, and retained where it occurs for the second time—"drawn or made out of India".

In section 20, the word "India" may be retained. The section relates to money expressed in any currency other than that of India.

In section 32(3), proviso (a), the word "India" may be modified, since it refers to instruments executed in the territories to which the Act extends. Documents executed in Jammu & Kashmir should fall outside section 32(3), proviso (a).

In section 32(3), proviso, clause (b), where the word "India" where it occurs for the second time, it may be modified. Where it occurs for the first time, it may be retained.

In section 33(2), the expression "India" may be modified.

In s. 50, proviso (a), it may be modified at both the places.

5.9. Section 2(14) gives a definition of "instrument" as including every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded. **Section 2(14)—'Instrument'.**

5.10. Attention should be drawn to the last word "recorded", which does not usually occur in provisions relating to instruments in other enactments.[1] The words "records" is obviously needed, in the Stamp Act, as otherwise the duty on "acknowledgement" and the duty on "memorandum of agreement"—to take only two examples—would not be a duty on an "instrument". And, since it is well-known that "the thing which is made liable to duty is the instrument",[2] this amplification in the definition is welcome. **"recorded".**

On the other hand, however, it is not to be overlooked that every document "recording" a transaction is not taxable. Apart from cases where an express provision exists,—as in the two examples of acknowledgement and memorandum of agreement referred to above—a document which does not itself deal with the right in the particular manner, but merely records a past "dealing with the right", would not, merely because it *records such dealing*, be regarded itself as an instrument containing a transaction of that type. This aspect becomes material in respect of a few instruments—*e.g.*, an instrument of partition.[3]

5.11. "Instrument of partition" is defined in section 2(15), as meaning any instrument, whereby co-owners of any property divide or agree to divide such property in severalty and as **Section 2(15)—'Instrument of partition".**

1. See, e.g., section 17, Registration Act.
2. *I.R.C.* v. *Angus*, (1889) 23 Q.B.D. 579, 589 (Lord Esher, M.R.).
3. Section 2(15)—"Instrument of partition".

including also a final order for effecting a partition passed by any revenue-authority or any Civil Court, and an award by an arbitrator directing a partition.

There are, thus, four types of instruments with which the definition concerns itself--

(a) any instrument whereby co-owners of any property *divide* such property in severalty ;

(b) any instrument whereby co-owners *agree to* divide the property in severalty ;

(c) a final order for *effecting* a partition, passed by any revenue authority or any civil court ; and

(d) an award by an arbitrator *directing* a partition.

(a) Instruments dividing property in severalty.

5.12. Instruments between *co-owners dividing* property in severalty, present few problems—

Memorandum of partition.

5.12A. The familiar question whether a particular document memely records a partition already orally effected, or itself divides the property,—so often arising under the Registration Act,—has arisen under the Stamp Act also. The question is one of construction of a particular document. The abstract rule is clear, namely, that a document recording a past partition is not chargeable with duty.[1]

The Legislature, no doubt, can levy duty on such documents also, and it appears that by a State amendment, Rajasthan[2] has added a provision[3] whereunder "instrument of partition" includes—

> "(iii) when any partition is effected without executing any such instrument, any instrument or instruments signed by the co-owners and recording, whether by way of declaration of such partition or otherwise, the terms of such partition amongst the co-owners."

There seems, however, some possibility of harshness resulting from such a wide amendment which might take in even incidental reference to past partitions.

(b) Agreement to divide.

5.13. It should be noted that under the general law, to constitute a "partition", there need not be an actual partition by metes and bounds. An agreement to divide in equal share is sufficient to constitute partition.[4] In fact, even an intimation is enough, if unequivocal. Whether the same principles apply for the Stamp Act, is not very clear. The words "agree to divide" in the clause seem to refer to an agreement to divide on some future date which does not operate to create any right in the property. Thus, it has been held[5] that a partition list, which does not itself effect division but is merely an agreement for effecting a future partition on terms agreed, is not an instrument of partition, and is liable to stamp duty only as an agreement.

(c) Final order for effecting a partition passed by a revenue authority or civil court.

5.14. The third category of instruments of partition comprises orders effecting a partition passed by a revenue authority or civil court. Some controversy seems to exist as to the consequences of non-stamping of a decree of a civil court for partition. The matter, however, pertains more appropriately to section 35, which deals with the consequences of failure to stamp.

(d) Awards by arbitrators directing partition.

5.15. Awards by arbitrators directing partition, constitute the fourth category of "instrument of partition". No changes are needed in this part of the definition.

5.16. In the definition, the words used in connection with an award of arbitrators are—"directing a partition", and not "effecting a partition",—which is the wording used in the definition in connection with a final order of a Revenue authority or Civil Court. The reason

1. *In re Tirathraj*, A.I.R. 1942 All. 220 (S.B.).
2. Rajasthan Stamp Amendment Act, 1966 (16 of 1966).
3. Only the relevant portion is quoted.
4. *Anantha Bhattacharya* v. *Damodar Mukund*, I.L.R. 13 Bom. 25.
5. *Gangaiya* v. *Chinna Lingaiyya*, A.I.R. 1933 Mad. 162.

is, that arbitrators have no power to do more than to direct a partition. Therefore, even if the arbitrators go further and define the manner in which the partition should be made, it has no more binding force,[1] and for the purposes of Stamp, it remains an instrument of partition.[2]

Section 2(16)—"Lease".

5.17. Section 2(16) provides that "lease" means a lease of immovable property and includes also—

(a) a patta ;

(b) a kabuliyat, or other undertaking in writing, not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for, immovable property ;

(c) any instrument by which tolls of any description are let ;

(d) any writing on an application for a lease intended to signify that the application is granted.

In the Transfer of Property Act,[3] a lease of immovable property is defined as a transfer of a right to enjoy such property, made for a certain time expressed or implied, or in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The English Act does not contain any definition of a "lease", and it is to be assumed that it has the same meaning as under the general law.[4]

Two parts.

5.18. The definition in the Indian Stamp Act can be divided into two parts. First, it says that "lease" means a lease of immovable property. While confining the scope of the expression to "immovable property", this part of the definition does not indicate what is intended by "lease". Secondly, certain instruments are, by the second part of the definition which is inclusive, brought within its scope.

Recommendation regarding first part of the definition.

5.19. As regards the first part, it is pertinent to point out that courts have, in deciding particular cases,[5] referred to the definition of "lease" in the Transfer of Property Act. A question to be considered is, whether we should now provide that "lease" means a lease as defined in the Transfer of Property Act. While that Act does not apply to the whole of India, and the provisions as to leases do not, in their entirety, apply to agricultural leases, it seems useful to adopt the definition in that Act by reference, so as to have precision. We recommend that it should be adopted. The replies to our Questionnaire[6] have also, in general, agreed with this.

"Immovable Property" not defined—Recommendation.

5.20. Both under the Stamp Act and under the Transfer of Property Act, the term "lease" is restricted to lease of immovable property ; but nowhere in either of these Acts is the expression "immovable property" defined. Section 3 of the Transfer of Property Act simply says that "immovable property does not include standing timber, growing crops, or grass. As the Stamp Act is silent about the expression "immovable property", the definition of that expression in the General Clauses Act can be used. That definition[7] includes "land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth"—"a definition large enough to include growing grass."[8]

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1. *Kalidas* v. *Tribhuwandas*, (1907) I.L.R. 31 Bom. 68, 71.
2. See also *Emperor* v. *Butto Lal*, 73 I.C. 336 (Oudh).
3. Section 105, Transfer of Proprty Act, 1882.
4. See *Jones* v. *I.R.C.*; *Sweetmeat Automatic Delivery Co.* v. *I.R.C.*, (1895)1 Q.B. 484, where an agreement licensing the installation of automatic machiners on railway platforms was held not to be a *lease* for stamp duty purposes.
5. *E.g.*, *Ag. Secy., Board of Railway* v. *South India Railway*, A.I.R. 1925 Mad. 434, 438 (F.B.). (Krishnan, J.).
6. Question 9 of the Questionnaire.
7. Section 2(26), General Clauses Act, 1897.
8. *In re Hormusji Irani*, (1886) I.L.R. 13 Bom. 87, 89.

The more restrictive provision in the Transfer of Property Act and the Registration Act, should not, it has been observed, be imported into the Stamp Act.[1] We are of the view that the definition of "immovable property" in the General Clauses Act should be adopted, by repeating it in the Stamp Act.

Second part of the definition considered.

5.21. The second part of the definition of "lease" in the Stamp Act has four clauses. These deal with particular classes of instruments. The main object of these is—(i) to check avoidance of duty by not executing a lease, and (ii) to extend the definition to the letting out of "tolls", which are not "immovable property" in the stricter sense.

Tolls.

5.22. The sub-clauses do not seem to have raised such controversy. But sub-clause (c), which relates to a toll, could be explained in some detail. A toll is an imposition for the privilege of using a bridge, road, ferry, or market, or for catching fish, cutting and appropriating trees for fuel etc.[2] A tax paid for some liberty, particularly for the privilege of passing over a bridge or on highway, the tax paid for the use of a ferry,[3] or the tax paid for selling in a market or fair,[4] or the tax paid for the right of fishing in a river, is a toll.[5]

Sub-clause (c) has, thus, extended the meaning of the term "lease"; for, the right to levy tolls, though concerning the user of land or water, is not regarded in law as an interest in immovable property. An ijardar of tolls does not acquire any interest in the land or water concerned.[6] Toll is distinguished from octroi which is a duty levied on good entering a certain area, town or territory.

There are several Central Acts relating to tolls—

(a) The Indian Tolls Act, 1851 (an Act for enabling Government to levy tolls on public roads and bridges) ;

(b) The Indian Tolls Act, 1864 ;

(c) The Indian Tolls Act, 1888 ; and

(d) The Indian Tolls (Army and Air Force) Act, 1901.

Agreement to lease.

5.23. It should, lastly, be noted that the entry in the Schedule to the Stamp Act[7] charges duty on an agreement of lease also. We shall deal with this at the appropriate place.

Lease and licence distinguished.

5.24. We may, at this stage, refer to the distinction between "lease" and "licence". A person may lawfully enter on land either in exercise of right as owner of an interest in land, or because the owner has given him permission. The owner might have granted him a lease—an interest conferring the right of exclusive possession,—or he might merely have given a licence,[8] permitting him to enter the land or use it for specified purposes.

Definition of licence.

5.25. The classic definition of a 'licence' was propounded by Vaughan, C. J. in the seventeenth century in *Thomas* v. *Sorrell*.[9] He said "a dispensation or licence properly *passeth no interest nor alters* or transfers *property in* any thing, but only makes an action lawful, which without it had been unlawful."

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1. *In re Hormusji Irani*, (1886) I.L.R. 13 Bom. 87, 89. Per Nanabhai Haridas , J. (The majority view in this case was, however, that the rent note in question, by which a person agreed to take certain pasture ground for grazing a number of she buffaloes at a certain rate per head, was not a lease, because possession had not been parted with).
2. (a) *Goodrich* v. *Venkanna*, (1878-81) I.L.R. 2 Mad. 104;
   (b) Financial Commissioner of the Punjab's Circular No. 35, dated 13th August, 1883; (1934) Punjab Stamp Manual, Part I-B, Chap. 3, para. 2.
   (c) *Ram Pritam* v. *Shoobulchunder*, (1888) I.L.R. 15 Cal. 259.
3. *Deputy Collector, Rohri* v. *Dennial*, (1883) Bom. P.J. 11, Madras Stamp Manual, (1958) 107-15.
4. *President of the Taluk Board* v. *Lakshmanarayana*, (1908) I.L.R. 31 Mad. 54.
5. *Midnapore Zamindary Co.* v. *Trailokya*, A.I.R. 1924 Cal. 562.
6. *Standard Coal Co.* v. *C.C.R.A. Bengal*, (1948) I.L.R. 2 Cal. 323.
7. Article 35, Stamp Act.
8. For history of licences, see Holdsworth H.E.C. Vol. 7, page 327, 328.
9. *Thomas* v. *Sorrell*, (1673) Vaughan 351.

The expression "licence" is not defined in the Stamp Act, or in the Transfer of Property Act. The Easements Act, defines it as follows :[1]

> "52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

5.26. In the law of property, lease and licence are distinguished by stating that a lease transfers an interest in land, which a licence does not. Where exclusive occupation is not given, the right is only of licence.[2] A licence is merely a personal right, and does not amount to an interest in property.[3]

Distinction between lease and licence.

5.27. As Denning, L.J. (as he then was) observed,[4] the difference between a tenancy and a licence is, therefore, that in a tenancy, an interest passes in the land, whereas, in a licence, it does not. He, however, added, "In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not". "If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will, whereas if he had not exclusive possession he was only a licencee. This test has, however, often given rise to misgivings because it may not correspond to realities..... The test of exclusive possession is by no means decisive."

Test of exclusive possession not conclusive.

In the context of the definition of 'lease' in the Stamp Act, the distinction between lease and licence becomes material, because, if the document is not a lease, the charge for leases under the first part of the definition of lease would not be attracted. At the same time, it should be noted that the inclusive part of the definition of 'lease' is not confined to leases proper, and may cover documents which are not leases as defined in the Transfer of Property Act. In particular, clause (b), which relates to "kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for immovable property" is somewhat widely worded. No doubt, a licence does not become a lease merely because a "rental" is reserved, the licences like exploring and prospecting licences (in respect of minerals) are not regarded as leases for the purposes of the definition in the Stamp Act. Here, the general test of *transfer of interest* as indicated by sole and exclusive occupation[5] could be utilised.

5.28. But it is to be noted that in clause (b), the words used are not *sole and exclusive* occupation, but an undertaking to *occupy* immovable property.[6] A case could, therefore arise where, even though the document specifically says that it should not be construed to create a tenancy, the rights conferred by the document on the party by the owners are of such a nature that it would fall under clause (b).

5.29. In the light of the above discussion, we recommend that the definition of lease should be revised as follows :—

Redraft.

> "(16) 'lease' means a lease of immovable property *as defined in section* 105 *of the Transfer of Property Act,* 1882, and includes also—
>
> (a) a patta ;
>
> (b) a kabuliyat, or other undertaking in writing, not being a counterpart of a "lease", to cultivate, occupy or pay or deliver rent, for, immovable property.
>
> (c) any instrument by which tolls of any description are let ;
>
> (d) any writing on an application for a lease intended to signify that the application is granted.

1. Section 52, Indian Easements Act, 1882.
2. A.I.R. 1959 S.C. 1262, 1269.
3. A.I.R. 1968 S.C. 175; (1968) 1 S.C.R. 23.
4. *Errington* v. *Errington,* (1952) 1 K.B. 290.
5. *Board of Revenue* v. *South Indian Railway Co.,* I.L.R. 48 Mad. 368; A.I.R. 1925 Mad. 434.
6. *Burmah Oil Co.,* I.L.R. 55 All. 874; A I.R. 1933 All. 735 (F.B.).

Explanation.—In this section, "immovable property" includes land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."[1]

Section 2(16A)—Marketable Security.

5.30. Under section 2(16A), "marketable security" means a security of such a description as to be capable of being sold in any stock market in India or in the United Kingdom. The definition was added in 1904, when this definition and section 23A were added and article 6 (agreement relating to deposit of title deed) etc. was amended. The object of the amendment was to save instruments of deposit of marketable securities from the *ad valorem* duty under article 6.

There are no Indian cases on this definition, though there are a number of English cases on the corresponding provision in the English Act.[2]

Recommendation.

5.31. We recommended that the mention of 'United Kingdom' in this definition should be omitted, having regard to changed political conditions. There have been suggestions[3] to omit "in India" also, but we do not think that the clause need be so widened.

Section 2(17)—"Mortgage deed"

5.32. Section 2(17) defines a "mortgage deed" as including every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of another, a right over or in respect of specified property. It may be noted that a mortgage of movable property is also covered by the definition.[4] Another point to be noted is that this definition includes charges also,[5] as the words "over or in respect" of property are wide.

The body of the Stamp Act makes no distinction between legal and equitable mortgages. But the charging provision[6] makes a distinction. The duty is different, if the mortgage is in the shape of an agreement by way of deposit of title deeds.[7]

A deed which contains all the provisions which one would normally find in a mortgage deed, would, however, be chargeable as a legal mortgage. The mere fact that the document also contains the bargain with regard to deposit of title deeds, will not make it an agreement for the deposit of title deeds,[8] within the meaning of article 6.

The above points do not indicate a need to change the definition.

Section 2(18)—"Paper".

5.33. In section 2(18), "paper" is defined as including vellum, parchment or any other material on which an instrument may be written.

It needs no change.

1. This is necessary in order to avoid any argument that the definition in the Transfer of Property Act be attracted.
2. Section 122, Stamp Act, 1891 (Eng.).
3. In reply to the Questionnaire issued by us—Question 10.
4. *Miran Baksh* v. *Emperor*, A.I.R. 1945 Lah. 69, 72 (F.B.).
5. As to charges, see section 100, Transfer of Property Act.
6. Article 6, as contrasted with article 40(b).
7. As to the position under the Registration Act, see A.I.R. 1939 P.C. 167.
8. *In re Indian Stamp Act*, A.I.R. 1954 Bom. 462, 463, paragraph 2 (F.B.).

CHAPTER 6

DEFINITIONS IN SECTION 2(19) AND 2(20)

Section 2(19)—"Policy of Insurance"—Introductory.

6.1. Section 2(19) defines "policy of insurance" as including—

"(a) any instrument by which one person, in consideration of a premium, engages to indemnify another against loss, damage or liability arising from an unknown or contingent event;

(b) a life-policy and policy insuring any person against accident or sickness, and any other personal insurance."

6.2. It may be pointed out that clause (a) of the definition is not confined to 'policies', and includes any instrument by which one person engages to indemnify another. If there is an indemnity undertaken in the document, then it is a policy for this purpose, even though, in business world, the document may be distinguished from a "policy".

6.3. In relation to one class of documents, namely, letters of cover or engagement to issue a policy of insurance, the position requires detailed examination. The need for discussion arises out of the charging article,—article 47.

Article 47 of the Act—Controversy created by the exemption.

6.4. The principal paragraph of article 47 levies duty on various policies. Considerable confusion is created by the "general exemption" under the article, quoted below[1] :—

"General Exemption".

"Letter of cover or engagement to issue a policy of insurance."

"Provided that, *unless such letter or engagement bears the stamp prescribed by this Act for such policy,* nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned."

This exemption is anomalous, because, as will be shown presently, there is considerable difference between a letter of cover etc. and a policy. In fact, the very language of the exemption makes a distinction between an 'engagement' and a 'policy'.

6.5. The exemption for letters of cover etc. would suggest that a letter of cover etc. would otherwise fall under the expression "policy of insurance". But, as stated by the Supreme Court in ***R. Ratilal and Co.***[2], while a letter of cover contains a contract of insurance, it is not a "policy of insurance" *in the common understanding of that word in the trade*[3].

Judgment of the Supreme Court as to fire insurance.

6.6. In the Supreme Court case (which related to fire insurance), the letter of cover was not stamped, but the plaintiff was prepared to pay the penalty under section 35, and had actually done so. The question to be decided was whether, even on payment of penalty, the letter could be admitted in evidence. This question arose because the contention of the insurance company was that since the exemption under article 47 uses the words *"bears the stamp prescribed by this Act for such policy"*, the stamp should have been affixed *at the time of the letter*, and the provision in section 35 for subsequent payment of penalty could not be involved in view of the special language of the exemption. This argument was negatived by the Supreme Court, by a majority judgement[4]. According to the minority view, however, in view of the express wording of the exemption to article 47, the letter could not be subsequently stamped under

1. This discussion applies to all policies, and is not confined to sea insurance policies.
2. *R. Ratilal & Co. v. National Security Assurance Co. Ltd.*, A.I.R. 1964 S.C. 1396, 1398, paragraphs 6—10 (Case of fire insurance).
3. Emphasis supplied.
4. Sarkar and Shah JJ.; Raghbar Dayal, J. dissented.

section 35. If the letter is intended by a person to be used for making a claim thereunder, and, therefore, to be treated as a policy, then, according to the minority view, it is incumbent on the person so intending to have the letter properly stamped for that policy from the very beginning. If it is not so stamped, it can only be used to compel the delivery of the policy, and not as a basis of the claim. If subsequent stamping of the document to convert the letter into a policy is allowed at the sweet-will of the party standing to gain, then, according to Raghbar Dayal, J. (who was in the minority), the law would lead to anomalies.

6.7. We are not so much concerned with the meaning of the expression "bears stamp", as with the question whether it is proper to equate a cover note with a policy. On this point, the majority as well as the minority took the same view.

The following is from the majority judgements[1]:

> "(16 The learned trial Judge held that the instrument was n't a letter of *cover but it was in reality a policy of insurance,* because it contained a contract of insurance. It is not in dispute that if this view is correct, then on payment of the duty and the penalty the instrument would be admissible in evidence, under section 35. *The Appellate Bench of the High Court, however, was unable to accept the view of the learned trial Judge and, we think, in this the Appellate Bench was right. The fact that a letter of cover contains a contract of insurance cannot make it a policy of insurance*[2]. As the learned Judge of the Appellate Bench rightly pointed out, the letter of cover was granted a general exemption from the liability to the duty specified in Article 47, that is to say, it was exempted from duty which would, but for such exemption, have been payable on it under that article."

"Now, under article 47, duty was payable on various policies of insurance. It would follow that a letter of cover would have been liable to duty as a policy of insurance if the exemption had not been granted[3]. The letter of cover had, therefore, to contain a contract of insurance, for it would not otherwise have been liable to duty under article 47. But *it did not thereby become a policy of insurance only for then the exemption and the article would have been in conflict with each other.*[4] We may also mention that the word 'cover' itself indicates that property is held insured or covered by it against certain risks.

' (7) What then is a letter of cover ? *How is it to be distinguished from a policy of insurance?* The Act contains no definition of it or of an 'engagement to issue a policy of insurance', but the terms are well known in trade. The Act is dealing with businessmen and with mercantile documents well known to them.

"It may be shortly stated that a letter of cover no doubt contains a contract of insurance, but *it is not a policy of insurance in the common understanding of that word in the trade.* It is well known that in order to obtain an insurance against the risk of fire the assured has first to send a proposal to the insurer and then the insurer takes a little time in making enquiries as to whether it would accept the proposal and undertake the obligation of covering the risk. He issues a policy only after he is satisfied that it would be a prudent business proposition to do so. Experience of trades people has, however, shown that some kind of protection for the interim period when the insurer is making the enquiries is necessary. This protection is given by what is called a letter of cover. *It is expressly a contract granting insurance for the period between its date and until a policy is prepared and delivered if one is eventually issued or otherwise upto a date mentioned in it,* just as a period of thirty days is mentioned in the Interim Protection Note issued in his case; see *Citizens Insurance Co. of Canada* v. *William Parson*[5]. We think that the present Interim Protection Note satisfied the conditions which would make it a letter of cover in this sense.

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1. *R. Ratilal & Co.*, A.I.R. 1964 S.C. 1396, 1398, 1399; Para. 6—10 (majority view).
2. Emphasis supplied.
3. This observation, with respect, is obscure.
4. Emphasis is supplied.
5. *Citizens Insurance Co. of Canada* v. *William Parsons,* (1891) 7 A.C. 96.

'It gives protection for a period of thirty days or the period upto *the date of the issue of the policy*. An engagement to issue a policy means, it seems to us, more or less the same thing as a letter of cover. A letter of cover, therefore, cannot be admitted in evidence under *section 35 as a policy of insurance.*"

The above passage shows that the Supreme Court made a clear distinction between the two concepts (cover note and policy). Some confusion was, no doubt, created by the general exemption, because the exemption itself is anomalous. We shall revert to this aspect later.

The minority agreed with the view. Raghbar Dayal, J., expressly stated in his dissenting judgment that it was agreed that a *cover note was not a policy*.

It may be mentioned that in the case before the Supreme Court, duty and penalty had already been paid in the court below, pending determination of the legal questions. The legal objection raised by the insurance company was that since the letter of cover did not "bear stamp", it could not be subsequently validated. The Supreme Court observed on this point :—

"(8) The next question is whether a letter of cover is itself an instrument chargeable with duty under the Act. It is not disputed that if it is not so chargeable, it cannot be admitted in evidence under section 35 by subsequent payment of duty and penalty. Now, section 3 specifies instruments which are chargeable with duty under the Act. It says, "subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor respectively, that is to say,—(a) every instrument mentioned in that Schedule which.....is executed in India on or after the first day of July 1899." July 1, 1899 is the date on which the Act came into force.

"(9) Now the contention of the respondent is that a letter of cover is not an instrument chargeable, with duty, because the General Exemption in Article 47 of the Schedule exempts it from such duty. This contention was accepted by the learned Judges of the Appellate Bench of the High Court who pointed out, "It is significant that the words used are not that such letter is chargeable with duty. The words used are "bears the stamp prescribed by the Act for such policy". On a proper interpretation this means that such letter of cover is not chargeable with duty as such under the Act but if it bears the stamp prescribed by the Act for a policy of insurance, then it will shed its inability and will become a competent document on which a claim for loss could be made." They further observed, "as no stamp is fixed for such a letter of cover being not a document chargeable with duty, the statute uses the significant words 'or bearing the stamp' and indicates the rate by saying that the stamp must be the same for such a letter of cover which is prescribed for a policy of insurance under the Act."

"In this Court Mr. Chatterjee for the respondent also advanced the same argument.

"(10) We are unable to accept the view which found favour with the Appellate Bench of the High Court. The matter was put in two ways. The first was that an instrument which is exempted from duty by Schedule I is not chargeable with duty under s. 3 and a letter of cover is so expressly exempted. No doubt, if an instrument is exempted by the Schedule from duty, then it cannot be chargeable. But we do not think that a letter of cover is for all purposes exempted from duty by the General Exemption. We think the proper construction of the General Exemption clause is that the exemption is to apply only if the *letter of cover is used for compelling the delivery of the policy mentioned in it*[1]. If it is used for any other purpose, then it is not exempted. That is why a proviso has been employed in the provision and the effect of that is to take the letter of cover out of the exemption in all other cases. If it is taken out of the exemption, then, of course, the present argument fails. We are unable to see how a letter of cover can be said to have been exempted for all purposes, if certain things cannot be claimed under it for the sole reason that it does not bear a stamp. If it were exempted for all purposes, it would be fully enforceable even without a stamp. When "a letter of cover is not stamped, then nothing is claimable under it except the delivery of a policy. If, however, it bears the stamp prescribed for the appropriate policy, a claim can be made under it. It seems to us that if an

1. Emphasis supplied.

instrument bears a stamp it has incurred the liability for the stamp duty. It has not then been exempted. Therefore, it cannot be said that a letter of cover is exempted from duty in all cases. When it is not exempted, it is an instrument chargeable to duty."

Other policies.

6.8. This judgement is confined to fire insurance. Before this judgement, generally on the question whether a "slip" for marine insurance is a policy for the purposes of the Stamp Law judicial decisions[1] did not help in creating certainty.

The importance of the above point does not survive[2] as regards marine insurance policies, because of specific statutory provisions governing them[3]. But, the point is of importance in regard to other insurance policies.

Anomaly.

6.9. In view of the above position, it was suggested to us that the present scheme of the Act is anomalous and the anomaly should be remedied. Really speaking, a letter of cover is not to be regarded as a "policy", though it may be evidence of a contract of insurance. This is clear from the relevant passage quoted from the judgement of the Supreme Court[4]. This being the basic nature of a cover note, a cover note, it was suggested, should not be regarded as a policy, and the definition of "policy of insurance" should be amended so as to exclude cover-notes. This would not lead to any loss of revenue, because, after the nationalisation of the general insurance business, the possibility of insurers not executing a formal policy in order to avoid stamp is almost nil.

Suggestion considered.

6.10. to 6.14. In concrete terms and in detail, the suggestion made to us was as follows:—

(a) A letter of cover etc. should be excluded from the definition of "policy of insurance", by an express provision amending that definition. The reasons have been given already in the above discussion. In brief, a policy and a letter of cover are different from each other.

(b) The general exemption to article 47, as at present worded, then becomes redundant and can be omitted.

(c) A provision to the effect that if, at the time of its execution, a letter of cover or engagement to issue a policy of insurance bears the stamp required by the Act for such policy, then, it shall not be necessary to stamp the policy again, should be inserted. The reasonableness of such a provision is obvious.

(d) Under article 5 (agreement), an exemption in respect of letter of cover etc. should be inserted. The intention is that such letters should be totally exempt from stamp duty under any article of the Act.

(e) These amendments would lead to no loss of revenue in the present circumstances.

We have, however, after carefully considering the suggestion, come to the conclusion that the matter may be left as it is, the provisions having stood for a long time.

6.15. to 6.18. The above discussion was concerned with a suggestion made during our discussions. We have not received any suggestion from the public for amendment[5] of the definition in response to our Questionnaire.

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1. (a) *Surajmal* v. *Triton Insurance Co.*, A.I.R. 1925 P.C. 83, 84.
   (b) *In re Marine Assurance Certificate*, (1895) I.L.R. 19 Bom. 130, 132 (Document which does not contemplate another formal document).
   (c) *Tricamji* v. *Birji*, A.I.R. 1923 Bom. 142, 143; 24 Bom. L.R. 820. (Distinction between cover note and policy)
   (d) *Ahmed Shah* v. *Grindlay & Co.*, A.I.R. 1944 Sind 98, 103. (Certificate of Insurance).
   (e) *Reference* (1903) I.L.R. 30 Cal. 565, 575. (Maclean, C.J.)—"A contract for sea insurance is one thing and a policy of sea insurance another."
2. See discussion as to section 2(20)—"Sea policies", *infra*.
3. Sections 24, 27(2) and 28, Marine Insurance Act, 1963.
4. Para. 6.7 *supra*.
5. Q. 11 of the Questionnaire.

Section 2(19-A)—"Policy of group insurance"

6.19. "Policy of group insurance" is defined in section 2(19A) as meaning any instrument covering not less than fifty or such smaller number as the Central Government may approve, either generally or with reference to any particular case, by which an insurer, in consideration of a premium paid by an employer or by an employer and his employee jointly, engages to cover, with or without medical examination and for the sole benefit of persons other than the employer, the lives of all the employees or of any class of them, determined by conditions pertaining to the employment, for amounts of insurance based upon a plan which precludes individual selection.

It needs no change.

Policy of sea insurance.

6.20. Under section 2(20), a policy of sea insurance or sea policy—

(a) means any insurance made upon any ship or vessel (whether for marine or inland navigation), or upon the machinery, tackle or furniture of any ship or vessel, or upon any goods, merchandise or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in, or relating to, any ship or vessel, and

(b) includes any insurance of goods, merchandise or property for any transit which includes, not only a sea risk within the meaning of clause (a), but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance ;

"Where any person, in consideration of any sum of money to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise or property from any risk, loss or damage, such agreement or engagement shall be deemed to be a contract for sea-insurance.

Stamp duty under article 47.

6.21. The stamp duty on such policies is chargeable under article 47. Questions exclusively concerning the rates of stamp duty will be dealt with under that article[1]. But, at this stage, it should be noted that the subject of marine insurance has been dealt with by legislation—The Marine Insurance Act, 1963. Its important provisions will be noticed in due course.

Marine insurance in England.

6.21A. In England, from 1605, legislative measures were passed from time to time relating to particular aspects of marine insurance. We need not mention all of them here, but it shoud be noted that since 1795, it has been obligatory in England to record the contract of marine insurance in a policy which is duly stamped. The effect of non-compliance with such a provision has been differently expressed from time to time, but, in substance, the position—so far as the statute law since 1795 is concerned,—has always been that if there is no written policy duly stamped, the contract cannot be admitted in evidence, and until 1959, the contract was not valid also.

6.22. It was maily due to the efforts of a Birmingham County Court Judge, (Sir) M. D. Chalmers, in collaboration with practising underwriter, (Sir) Douglas Owen, that in 1894, a Bill entitled the "Marine Insurance Codification Bill" was introduced by Lord Herschell in the House of Lords. Judge Chalmers had for a considerable time given his attention to marine cases in the Courts, and had interpreted the law, as it then was, in a careful and lucid manner. He drafted the Bill. He took the view that no code could provide for every case that might arise or always use absolutely accurate language. He accepted that the cases coming before lawyers were those in which a code was defective. Eventually, the measure was placed on the statute Book in 1906. The Act of 1906 does not set out to remodel the law relating to marine insurance, but merely to codify previous decisions and customary practice.

History of protection against marine perils.

6.23. The concept of protection against loss by maritime perils has been traced back to 215 B.C., when the Roman Government was required, by the suppliers of military stores, to accept "all the risk of loss, arising from the attacks of enemies or from storms," to the supplies

1. See article 47, *infra*.

2. Dover, A Handbook to Marine Insurance (1957), page 2.

which the supplier placed in the ships. Round about 50 A.D. Emperor Claudius issued guarantees to importers in respect of losses arising from storms. The practice of issuing bottomry bonds (on the security of a vessel) is supposed to have commenced even much earlier. Professor Trenerry[1] has traced its origin as early as 2250 B.C.

Rhodian law and Codex Justinian.

6.24. The "Rhodian" law has a lucid statement of the principle of "general average", which is one of the most important principles of marine insurance. In fact, the earliest enunciation of the principle of general average is itself known as the Rhodian Law, and is so designated in the Sententiae of Paulus, 200 A.D. the salient points of which state[2] :

> "Let that which has been jettisoned on behalf of all, be restored by the contribution of all."
>
> "A collection of the contributions for jettison shall be made when the ship is saved."

The principle of "general average" received further sanction in the Codex Justinian. The first relevant principle of this Codex is as follows :

> "The Rhodian Law decrees that, if goods are thrown overboard to lighten the ship, all shall make good by contribution that which has been given for all."

Lloyds in England, and 1906 Act.

6.25. Marine insurance was well known to traders in Venice, Genoa and Florence, and the history of marine insurance in Lombardy has become familiar to all those who have to deal with the subject in the West. The House of Lloyds in London, which, for about two centuries, has been associated with marine insurance, has contributed greatly to the development of the law on the subject. In England, the Marine Insurance Act, 1906, is the principal statute on the subject, but the principles were laid down long before that Act was passed. Continental codifications—official and others—are much earlier.

Meaning of "Policy".

6.26. The word 'policy' is, in modern times, used to indicate the formal instrument incorporating a contract of insurance. The word is derived[3] from Latin "pollicitatio", (a promise), through Italian "polizza" or French "police". Oddly enough, in an English policy of insurance, the promise to pay in case of loss is implied, not expressed. Continental policies, however, contain an express promise to pay, within so many days after notice of loss.

6.27. Marine insurance is, in its essence, a protection against the risks of marine adventure, though the concept can be extended to certain non-marine adventures also.

6.28. The contract of marine insurance is a contract of indemnity; and this brings in the doctrine of subrogation described as a doctrine in which lies the romance of marine insurance.

Position before 1963.

6.29. Before 1963, Indian courts usually followed principles of the English law as laid down in judicial decisions on the subject.

Sections 3 & 24, Marine Insurance Act, 1963.

6.30. In 1963, the Marine Insurance Act was passed in India. Section 3 of the Act[4] reads—

> "3. A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure."

Section 24 of the Act[5] provides as follows :

> "A contract of marine insurance shall not be admitted in evidence unless it is embodied in a *marine policy in accordance with this Act*. This policy may be executed and issued either at the time when the contract is concluded, or afterwards."

Section 4 of the 1963 Act—Form of policy.

6.31. The Act contains, in a schedule, the standard form of policy which may be used. This is based on the Lloyd's policy. Section 4 of the Act provides—

> "(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

1. C.F. Trenerry, Researches into the Origins of Marine Insurance, cited by Dover, A Handbook to Marine Insurance (1957), page 3.
2. Dover, A Handbook to Marine Insurance (1957), page 4.
3. Chalmers, Marine Insurance Act (1966), page 1.
4. Section 3, Marine Insurance Act, 1963.
5. Section 24, Marine Insurance Act, 1963.

(2) Where a ship in course of building, or the launch of a ship, *or any adventure analogous to a marine adventure* is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto, but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

Explanation.--an adventure analogous to a marine adventure, includes an adventure where any ship, goods or other movables are exposed to perils incidental to local or inland transit."

Sections 25-26, Marine Insurance Act.

6.32 Some of the other important provision of the Act are in sections 25-26.[1]

Section 25 enacts what a marine policy must specify.

Section 26(1) provides that a marine policy must be signed by or on behalf of the insurer.

6.33. So much as regards the important provisions contained in tne body of the Marine Insurance Act. The Schedule to the Act contains the form of the policy. Its use is permissible, not mandatory.

Usual Policy— S. G. Form...

6.34. It may be of interest to refer to history of the policy of marine insurance. The form of policy usually employed in marine insurance is generally known as the S.G. Form.[2] The words "S.G." mean "ship-goods" indicating that the policy is adapted for the insurance of *any interest* which is not itself a tangible physical object, as long as such interest is pecuniary.[3]

Sir Douglas Owan, an authority on marine insurance in the nineteenth century, said of the Lloyd's policy—'almost every clause is consecrated by centuries of usage'. Though the policy is clumsily expressed, its meaning is clear, because it has 'generations of legal interpretation hanging almost to every word, and almost certainly to every sentence'. As the Marryat Committee of 1811 reported, the 'doubtful points have been so repeatedly discussed and decided upon in Courts of law that their true legal import is ascertained.'

Lloyd's policy.

6.35. It may be stated that Lloyd's policy was settled in its present form in 1779, and some of the provisions are even of much older date.[4] Though, in the beginning, the English Judges described it as strange instrument, the mercantile community has clung to it, and, in fact, all English insurance law has been developed through cases arising on the policy. This policy appears as a schedule to our Marine Insurance Act also, as already stated.

Other standard clauses.

6.36. Besides, the standard form of policy, certain clauses are added, where required by the circumstances of the case, in a marine insurance policy. Even in such cases, standard forms evolved by Institutes are in force, such as, the Institute of London Underwriters Clauses, the American Institute Cargo Clauses, and what have come to be known as the "York-Antwerp Rules", which represent a code for voluntary adoption in contracts of affreightment to govern general average loss and contribution.

6.37. These clauses are also of great practical importance, and many of them have come up for construction before English Courts during the last 150 years. Reference may be made, in this connection, to a lecture to the Insurance Institute of London, delivered by Lord Chorley in November, 1957.[5] Lord Chorley said,—

> "If the Institute Clauses are the core of modern insurance, their construction is the wrapping, round the core, and without dealing with the wrapping, that is, without construction, we cannot get at the core."

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1. Sections 25-26, Marine Insurance Act, 1963.
2. Ship and Goods Form.
3. Dover, Analysis of Marine Insurance Clauses (1961), page 4.
4. Raynes, History of British Insurance (1964), page 159.
5. Lord Chorley, Lecture on "The Construction of the Marine Policy".

6.38. The classic exposition of this important matter is contained in a lecture delivered by Sir Patrick Devlin,[1] (when he was a Judge of the High Court of Justice) to the Norwegian Maritime Law Association on 4th July, 1952.

Various types of policies—Time Voyage, Mixed Floating Valued and unvalued.

6.39 It may be stated that marine policies are of many kinds[2]—

(1) for a voyage, *i.e.* where the contract is to issue the subject-matter "at and from" or "From *one place to another or others*".

(2) For time, *i.e.*, where the contract is to insure the subject-matter for a *definite period of time.*

(3) *For Voyage and for time (Mixed).* In this case the loss is covered only on a particular voyage and the loss must also occur within that time specified.

(4) *A floating policy.* This describes the insurance in general terms, but leaves the name of the ship or ships and other particulars to be specified later.

(5) *A valued policy.* This specifies the agreed value of the subject-matter, and the value so fixed is, as between the insurer and the assured, conclusive of the value of the subject-matter insured.

(6) *An unvalued or open policy.* This does not specify the value of the subject-matter, but, subject to the limit of the sum assured, leaves it to be subsequently determined.

Definition in the Stamp Act, section 2(2).

6.40 Reverting, now, to the Stamp Act, we may note that the definition of "policy of insurance" in the Act is based on section 92, Stamp Act, 1891 (Eng.) as it then stood. It may, however, be stated that since 1959,[3] there is, in England, no separate stamp duty on policies of marine insurance and these policies share the fixed duty of 6 pence in common with all policies of insurance except life insurance.

In fact section 92 of the English Act of 1891 and succeeding provisions were repealed in 1959.

Likely consequences of being referred to the Marine Insurance Act—Informal notes in insurance business.

6.41. It was suggested to us, that, in view of the fact that marine insurance is now the subject matter of legislation in India, it is appropriate that the definition in the Stamp Act should make a reference to that Act.

6.42. This suggestion raises the question whether, by referring to the substance of the definition in the Marine Insurance Act, any documents which are liable to stamp duty under the present definition in the Stamp Act, will escape duty. The question can be discussed in two aspects.

6.43. In the first place, there are informal documents, such as, slips, and cover notes, usually handed over in marine insurance business pending the execution of a formal policy. The informal note or memorandum which is drawn when the contract is entered into, is called the slip or covering note.[4]

It would appear that while such a slip is clearly a "contract for marine insurance", it is equally clearly not a 'policy' for the purposes *of the marine insurance law.* If the policy is duly stamped, then reference may be made to the cover note for certain evidentiary purposes.[5]

Position as to slip.

6.44 It was pointed out that though on the question whether a slip is a policy for the purposes of the Stamp Law, there is a controversy,[7] this controversy is not important in the context of marine insurance. Sections 24 to 26 of the Marine Insurance Act, 1963, now lay

1. Devlin : "The Principles of Constructions of Charter Parties, Bills of Landing and Marine Policies". Address to the Norwegian Maritime Law Association (1952).
2. Based on Smith, Mercantile Law, and Stevens, Mercantile Law.
3. Section 30, Finance Act, 1959 (Eng.).
4. See *Maignen & Co.* v. *National Benefit Assurance Co.*, (1922) 38 Times Law Reports 257.
5. *Ionides* v. *Pacific Insurance Co.*, (1871) Law Report 6 Q.B., at page 685 (Lord Blachburn).
6. Section 88, Marine Insurance Act, 1963.
7. See discussion as to policy of insurance.

down detailed provisions governing the form of the policy of marine insurance, and if these provisions are not complied with, the policy is unenforceable. Therefore, there is not much likelihood of duty escaping, whether or not a slip is regarded as a policy. If the assured does not care to obtain a formal policy, then the specific provisions in the Marine Insurance Act will render the slip inadmissible.

Position in England.

6.45 It is now well established in England that no action can be maintained in the United Kingdom upon the implied promise to grant a policy when the slip is initiated.[1] If the insurers go into liquidation, the liquidator cannot issue policies on outstanding slips.[2]. It is otherwise in countries where revenue or other laws do not interpost.[3] But the statutory provision[4] will apply to policies issued abroad which are sued upon in England.[5]

Imperfect obligation.

6.46. This is often described as a curious and important instance of an imperfect obligation, arising out of special conditions imposed on the formation of a complete contract found. In parctice, the agreement is concluded between the parties by a memorandum called a slip, containing the terms of the proposed insurance and initialled by the underwriters.[6] It is the practice of some insurers always to date the policy as of the date of slip.[7] At common law, the slip would constitute a binding contract. This, however, is not allowed in case of marine insurance.[8]

6.47. Moreover, in India, after the nationalisation of general insurance business, it is unlikely that those who carry on general insurance business will dispense with the practice of issuing policies in order to escape stamp duty. Thus, the fact that informal or temporary documents do not fall within "policy" in the Marine Insurance Act should not matter.

Inland transport.

6.48 The second question to be considered relates to insurance in respect of *inland transport*. The definition in the Stamp Act—*vide* the words that appear in brackets—specifically cover transport by inland waters. In this connection, it is to be pointed out that under the Marine Insurance Act[9] also, a contract of marine insurance "may be extended" to cover transport on inland waters.

Inland risks.

6.48A. On a comprison of the definition of "sea insurance" in the Stamp[10] Act and that of "Marine insurance" in sections 3, 4 and 5 of the Marine Insurance Act, 1963, it appears that, broadly speaking, the only kind of risk which may not conceivably be covered by the provision in the Marine Insurance Act is a risk arising from an adventure which is carried on purely on inland waters and not as incidental to a marine voyage. It could, for example, be argued that the insurance of a steamer carrying goods only on a particular river and not touching the sea at all at any point may not fall within the definition in section 4 of Marine Issurance Act, 1963[11], though it falls within the definition in the Stamp Act. Even the existence of this point of difference is doubtful, because it is hardly likely that the draftsman in 1899, when using the expression "sea insurance", was concerned with purely inland navigation.

Taxing entry—sea insurance.

6.48B. Moreover, whatever be the scope of section 2(20) which defines "policy of sea insurance", it is to be noted that the taxing entry in article 47 speaks only of "sea insurance" and makes a reference to section 7. The expression "sea insurance" should be given its ordinary meaning. Section 7(1)—now repealed—provides that no "contract for sea insurance" (other than such insurance as is referred to in section 506 of the Merchant Shipping Act, 1894), shall be

1. ***Fisher*** v. *Liverpool Mar. Ins. Co.* '(1874) L.R. 9 Q.B. 418, Ex. Ch. (b) *Genforsikrings & Co.* v. *Da Costa*, (1911) 1 K.B. 137 (open covers of re-insurance).
2. *Re Clyde Mar. Ins. Co.* (1924), 17 Li. L.R. 287; 1924 S.C 113; *Re City Equitable Fire Ins. Co.*, (1930) 2 Ch. 293.
3. ***Bhugwandass*** v. *Netherlands Sea Ins. Co.*, (1888), 14 App. Cas. 83, P.C. (Rangoon Foreign Policy).
4. Section 22, Marine Ins. Act, 1906 (Eng.).
5. ***Royal*** *Exchange Assce. Corp.* v. *Vega*, (1901) 2 K.R. 567; (1902) 2 K.B. 384, C.A.
6. For the form of this, see L.R. 8 Q.B. 471; L.R. 9 Q.B.
7. See L.R. 8 Ex. 199.
8. As to fire insurance, a policy is not compulsory. *Thompson* v. *Adam*, (1899) 23 q.B.D. 361.
9. Section 4, Marine Insurance Act, 1963 (*supra*).
10. Para. 6.30, *supra*.
11. Para. 6.30 *supra*.

valid unless the same is expressed in a "sea policy". The taxing entry in article 47 refers to section 7, and since neither section 7 nor article 47 defines "sea insurance", as such recourse should be had only to its ordinary meaning.

Now, the expression "sea insurance", according to ordinary parlance, would not cover a risk purely of river navigation. Since there is no definition of "sea insurance", it can be taken in its ordinary meaning. On that approach, it would not include purely inland navigation. The result is that though the definition of "policy of sea insurance" in section 2(20) of the Stamp Act is wide in regard to inland navigation (as explained above), the charging provision in article 47 does not appear to be so wide.

6.48C. Therefore, the fact that the definition in the Marine Insurance Act does not include pure inland adventures, is of no consequence. Of course, as a matter of commercial practice, policies of insurance of vessels on inland navigation are sometimes executed in the form normally used for marine policies. But even that fact would not attract section 7(1) of the Stamp Act or Article 47. Thus, the adoption of the definition in the Marine Insurance Act and the deletion of the present definition will make no radical change in the tax.

6.48D. Even if the above exposition of the position is not correct, the practical aspect should not be over-looked.

6.49. Thus, there should be no serious objection if the Marine Insurance Act is referred to in the defintion in the Stamp Act. It may be emphasised that that Act is the principal enactment of relevance to marine policies.

Suggested re-draft.

6.50. The following rough draft indicates the main lines on which the definition should be revised,[1] if the above approach is accepted—

> "(20) 'Policy of marine insurance which satisfies the requirements of the Marine Insurance Act, 1963."

6.51. As regards section 24, Marine Insurance Act, 1963, it may be noted that the latter part of the section does not allow a suit. It merely recognises the fact that there may be an interval between the conclusion of the contract and the issue of a policy of marine insurance.

6.52. The statutory provisions could be analysed into—

(i) those regulating stamp duties, and

(ii) others.

Section 24, Marine Insurance Act is in the second category.

The proviso to the General Exemption below article 47, Stamp Act, also does not confer substantive right to sue for a policy. If such a right exists by the substantive law, then the want of full stamp duty should not come in the way. That in all that the proviso permits.

Insurance Act, 1938.

6.53. We have already referred to the relevant provisions of the Marine Insurance Act, 1963.[2] The insurance Act, 1938, which regulates the business of Insurance, provides that[3] "Marine Insurance business"—means "the *business* of effecting contracts of Insurance upon vessels of any description, including cargoes, freights and other interests which may be legally insured, in or in relation to such vessels, cargoes, and freights, goods, wares, merchandise and property of whatever description insured for any transit by land or water, or both, and whether or not including warehouse risks or similar risks in addition or as incidental to such transit, and includes any other risks customarily included among the risks insured against in Marine Insurance policies[4]."

6.54. The last paragraph of the definition in the Stamp Act may now be considered. Normally, under the law relating to the carriage of goods by sea, the person issuing a bill of lading does not undertake liability in respect of loss of goods by maritime perils. But he

1. Some consequential changes may be necessary in section 7(4), article 47 etc.
2. Para. 6.30, *supra*.
3. Section 2(13-A), Insurance Act, 1938.
4. See *Alliance Assurance Co. Ltd.*, v. *The Union of India*, (1957-58) 62 C.W.N. 539; A.I.R. 1959 Cal. 190.

may undertake this liability if he is paid additional freight. This is one of the situations to which section 2(20), last paragraph of the Stamp Act, is addressed. In the Indian Carriage of goods by Sea Act, 1925, the Schedule, Article IV, paragraph 2, constitutes the relevant provision on the subject, and the material portion is quoted below—

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship ;

(b) Fire, unless caused by the actual fault or privity of the carrier ;

(c) *Perils, dangers and accidents of the sea or other navigable waters ;*

(d) Act of God ;

(e) Act of war ;

(f) Act of public enemies ;

(g) Arrest of restraint of princes, rules or people, or seizure under legal process.[1]"

The payment of "additional freight" (or other sum) referred to in section 2(20), Stamp Act, last paragraph, constitutes the consideration for the ship owner undertaking this liability specifically.

6.55. The present wording of the last para of section 2(20), has lost its utility, because the expression 'contract for sea insurance' has now lost its importance after repeal of section 7.

6.56. On a consideration of the various points made above, we recommend that the definition of policy of sea insurance should be revised as indicated above.[2]

APPENDIX 1

Section 2(20)—*Revised definition of "Policy of Sea Insurance" as already decided.*

"20(1). 'Policy of Sea Insurance' or 'Sea Policy'—

(a) mean any *instrument of insurance against* loss, damage or liability arising from a sea risk, made upon—

(i) any ship or vessel (whether for marine or inland navigation), or

(ii) machinery, tackle or furniture of any ship or vessel, or

(iii) any goods, merchandise or property of any description whatever on board of any ship or vessel, or

(iv) the freight of, or any other interest which may be lawfully insured in, or relating to, any ship or vessel, and

(b) includes any *instrument of insurance* of goods, merchandise or property for any transit which includes not only a sea risk within the meaning of clause (a) but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance.

(2) Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise,—

(i) agrees to take upon himself any risk attending goods, merchandise or property of any description whatever while on board of any ship or vessel, or

(ii) engages to indemnify the owner of any such goods, merchandise or property against any risk, loss or damage,

such agreement or engagement shall be deemed to be a contract for sea insurance.

1. The remaining clauses are not material.
2. Para 6.50, *supra*.

APPENDIX 2

EXTRACTS FROM THE FINANCE ACT, 1959 (ENG.)

(7 and 8 Eliz. 2, o. 58).

"30. Stamp duty on policies of insurance.—

(1) In the first Schedule to the Stamp Act, 1891, before the head of charge "Policy of Life Insurance" there shall be inserted the following—

"Policy of Insurance other than Life Insurance 0£ 0s 6d", and the head of charge "Policy of Sea Insurance" and the head of charge beginning "Policy of Insurance against Accident" shall be omitted.

(2) The following shall be exempt from all stamp duties :

(a) cover notes, slips and other instruments usually made in anticipation of the issue of a formal policy, not being instruments relating to life insurance ;

(b) instruments embodying alterations of the terms of conditions of any policy of insurance other than life insurance ;

(c) policies of insurance on baggage or personal and household effects only, if made or executed out of Great Britain.

and an instrument exempted by virtue of paragraph (a) of this sub-section shall not be taken for the purposes of the Stamp Act, 1891, to be a policy of insurance."

APPENDIX 3

SPECIMEN SLIP[1] OF MARINE INSURANCE

Insurance Brokers, Ltd.
Maria s.s.
No.,
12 months

Noon, March 30, 19——.

Ship..... £40,000
Machinery..... £10,000

Inst. Clauses.

Inst. Warranties.

Average payable on each valuation separately or on any two valuations together on the whole.

£3,500 J.S. 30s. per cent 7/12

(Subscription of J.S. for £3,500 dated December 7, 19..... The other subscriptions follow and are written on the back of the slip).

....., 19....

Chorley, Shipping Law, (1960) page 356.

CHAPTER 7

DEFINITIONS IN SECTION 2(21) TO 2(25)

Section 2(21)—"Power of attorney".

7.1. Section 2(21) defines the expression "power of attorney" as follows :—

> "21. 'Power of attorney' includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it" ;

The duty on a power of attorney is chargeable under article 48.

The definition of "power of attorney" in section 3(16) of the Stamp Act of 1879, read as follows :—

> "Power of Attorney means any instrument (not chargeable with a fee under the law relating to court fees for the time being in force) empowering a specified person to act *in the stead* of the person executing it."

The definition in section 3(24) of the Act of 1869 ran as follows :—

> "Power of Attorney" includes every instrument except a proxy empowering a person to *act in the stead* of the person executing it".

The material change in the definition in the present Act is the addition of the words as to the specified person being employed to act *in the name* of the person executing the instrument. In the remarks about this clause in the Statement of Objects and Reasons, it has been said that the amendment has been made in order to *make it clear* that the definition "relates only to powers-of-attorney and does not include all contracts creating the relationship of principal and agent".

Powers of Attorney Act, 1882.

7.2. There is a Central Act entitled, "The Powers of Attorney Act"[1], but that Act does not contain a definition of "power of attorney". In fact, that Act does not purport to deal comprehensively with the subject of powers of attorney, but deals with certain aspects thereof, which are not material for the present purpose.[2]

Definition.

7.3. Briefly speaking, a power of attorney is the formal appointment of an agent by a deed. It usually runs thus :—

> "Know all men that I, AB, have appointed CD my true and lawful attorney, *in my name or otherwise* and on my behalf to do and execute the following acts and deeds .... in witness etc..... ...."

General and special power.

7.4. The authority created by the power of attorney may be general, or it may be special. For this reason, a power of attorney is usually classified as general or special. This distinction is reflected in article 48. It is also indirectly recognised in the Indian Contract Act, section 188, which reads[3]—

> "188. An agent having an *authority to do an act has authority* to do every lawful thing which is necessarily in order to do such act.
>
> An agent having an authority *to carry on a business* has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business."

---

1. The Powers of Attorney Act, 1882.
2. That Act will be examined separately.
3. Section 188, Indian Contract Act, 1872.

24 M of Law/77—9.

Story quoted.

7.5. Story, in his work on Agency, section 17, says :—

> "A special agency properly exists, when there is a delegation of authority to do a *single act;* a general agency properly exists where there is a delegation to do all acts connected with a particular *trade, business or employment.* Thus, a person, who is authorised by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel or merchandise, is a special agent. But a person, who is authorised by his principal to execute all deeds, sign all contracts, or purchase all goods, required in a particular trade, business, or employment, is a general agent."[1]

In persons on Contracts, volume 1, page 39, a special agent is defined as one authorised "to do one or two particular things" and a general agent as one authorised "to transact all his principal's business or his business of a particular kind."

In Bouvier's Law Dictionary,[2] Volume 2, page 714, the statement is—"a general power authorises an agent to act generally in behalf of the principal : a special power is one limited to a particular act".

Wharton[3] defines a power of attorney as "a writing given and made by one person authorising another, who, in such case, is called the attorney of the person (or donee of the power), appointing him to do any lawful act *in the stead* of that person, as to receive rents, debts, to make appearance and application in court, before an officer of registration and the like. It may be either general or special, i.e., to do all acts or to do some particular Act." Stroud[4] defines it as an authority whereby one is "set in turn, stead or place" of another to act for him.

In an English case,[5] Coltman J. observed as follows :—

> "Where one is authorised, in writing, on behalf of another and *in his name* to do an act, that is an appointment of an attorney within the meaning of the Stamp Act."

7.6. The definition in our Act also lays emphasis on the use of *name*. Thus, if a person writes a letter to his brother, authorising him to sell their joint property, the letter is sufficient authority for the sale, but *is not a power of attorney* for the purposes of the Stamp Act.[6] The reason is that the use of the *name of the sender of the letter* is not expressly authorised in the letter.

Formalities when required in England.

7.7. Apart from statute, an agency can be created orally, but statute may require writing, and there may be special rules apart from statute. Thus, for example, in England, an appointment under seal is necessary to enable an agent to execute *a deed* on behalf of his principle. One person cannot authorise another to execute a deed for him except by deed.[7]

Formalities when required in India.

7.8. Under the Indian Contract Act,[8] an agent is a person employed to do any act for another, or to represent another in dealings with third person.[9] As a rule, an agent may be appointed without any special formality, in India also.

7.9. Indian statute, law, excepting for a few scattered provisions,[10] does not provide in what cases a written power of attorney is required.

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1. Story, cited in *V. Iyer* v. *Narasimha Rao*, I.L.R. 38 Mad. 134, 136.
2. Bouvier, cited in *V. Iyer* v. *Narasimha Rao*, I.L.R. 38 Mad. 134, 136.
3. Wharton, Law Lexicon (1953), page 784.
4. Stroud, Judicial Dictionary (1953), page 2257.
5. *Walker* v. *Remmett*, (1896) 135 E.R. 1181.
6. *Kala Khan* v. *Nathu Khan*, A.I.R. 1926 Lahore 229.
7. *Berkeley* v. *Hardy*, (1826) 5 B&C 355.
8. Section 182, Indian Contract Act, 1872.
9. Section 182.
10. Order 3, rule 4, Code of Civil Procedure, 1908; sections 32, 33 and 34, Indian Registration Act, 1908.

7.10. Under the Evidence Act[1], the Court shall presume that every document purporting to be a power of attorney, and to have been executed, before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated. The Registration Act also requires certain powers of attorney to be authenticated[2] Registration of a power of attorney may become compulsory in certain cases.[3]

Question of instruments liable to court fees.

7.11. So much as regards the concept of power of attorney and the formalities, if any, requisite for such powers. Reverting to the definition in the Stamp Act, we may note that an instrument chargeable with court-fees is outside the definition—vide the words in brackets. Documents chargeable with court-fees have been excluded, for the reason that otherwise they would be subject to double liability.[4] Since an advocate appearing or acting for his client does all his work in the name of his client,[5] the usual Vakalatnama would, but for the excluding words, be regarded as a power of attorney.

7.12. The principal enactment relating to court-fees is the Court Fees Act. Schedule II, Article 10, of that Act is material for the present purpose. It relates to Mukhtearnama or Vakalatnama for the conduct of a case.

7.13. There is a difference of opinion on the question whether a mukhtearnama or vakalatnama executed in favour of a person who is not a *certificated mukhtear* or *pleader* should be stamped under the Stamp Act or under the Court Fees Act.

According to the Allahabad High Court,[6] the documents referred to in Schedule II, Article 10, of the Court Fees Act, are restricted to documents given to and presented by duly certified mukhtears or pleaders under the Legal Practitioners Act, and therefore, a mukhtearnama in favour of a person who is not a certificated mukhtear falls within the definition in the Stamp Act and is chargeable with a stamp duty under this Act. A contrary view has, however, been taken in a Full Bench decision of the Punjab High Court.[7]

Recommendation.

7.14. Thus, there appears to be difference of judicial opinion on this point. In our view, if a person who is not a *legally qualified practitioner* conducts a case on behalf of a party, the power of attorney should be chargeable under the Stamp Act.

We recommend that the Act should be amended for the purpose. We may note that the suggested amendment has been generally favoured in the replies to the questionnaire issued by us.[8]

Section 2(22)—"Promissory note".

7.15. The next definition is of 'promissory note' defined in section 2(22) as under :—

> "(22) 'Promissory note' means a promissory note as defined by the Negotiable Instruments Act, 1881 ;
>
> It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available or upon any condition or contingency which may or may not be performed or happen."

History.

7.16. The definition is more elaborate than the one in an earlier Stamp Act. In section 3(25) of the Stamp Act of 1869, "promissory note" was defined as including every instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein specified or on demand or at sight. The definition was omitted in the Stamp Act of 1879.

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1. Section 85, Indian Evidence Act, 1872.
2. Sections 32(c), 33(1), 33(4), Indian Registration Act, 1908.
3. See A.I.R. 1954 T.C. 10.
4. *Ramdev* v. *Lalu Nath*, A.I.R. 1937 Nag. 65.
5. *Hormusji* v. *Nana Babu*, A.I.R. 1934 Bom. 299, 302.
6. *Permanand* v. *Sat Persad*, (1911) I.L.R. 33 All. 487, 489 (F.B.).
7. *Ganpat* v. *Prem Singh* (1922) 15 Ind. Cas. 122, 124 (F.B.) (Lah.) dissenting from I.L.R. 33 All. 487.
8. Question 13, section 2(21)—Court Fees.

Negotiable Instruments Act.

7.17. Under the Negotiable Instruments Act,[1]—

> "A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

Two parts of the definition.

7.18. The present definition in the Stamp Act consists of two parts. The earlier half simply refers to the definition in the Negotiable Instruments Act, 1881. The latter half includes notes promising the payment of any sum of money out of a particular fund which may or may not be available, or upon a condition or contingency which may or may not be performed or happen.[2]

7.19. It may be noted that the definition in the English Stamp Act, section 33(1), is rather wide.[3] It has been pointed out[4] that the Indian Stamp Act, unlike the English Stamp Act, does not ignore the definition in the Act relating to negotiable instruments. In the earlier half, it adopts the definition of 'promissory note' in the Negotiable Instruments Act.

Second half.

7.20. So far, there is no difficulty. But the second half of the definition in our Act, which is similar to English sub-section (2), raises problems. It includes many documents not covered by the Negotiable Instruments Act. Should the legislature go beyond the definition in the Negotiable Instruments Act, for the purposes of the Stamp Act? Is there any compelling consideration that would justify the extended part of the definition? This is the question that we have to consider.

7.21. A brief analysis based on comparison with the Negotiable Instruments Act[5] will be helpful—

(i) According to the definition in the Negotiable Instruments Act, the note must be signed by the maker. This requirement does not expressly appear in the latter half of the definition in the Stamp Act. However one can disregard this difference as a very minor one.

(ii) Secondly, according to the Negotiable Instruments Act, the note must be in favour of a *certain person* or bearer; this requirement does not expressly appear in the latter half of the definition in the Stamp Act.

(iii) Thirdly, both the Acts require a promise to pay in substance, though the Negotiable Instruments Act uses the expression "undertaking", while the extended part of the definition in the Stamp Act uses the expression "promise".

(iv) Fourthly, under the Negotiable Instruments Act, the sum of money must be certain, while in the extended part of the definition in the Stamp Act, "any sum of money" will do.

(v) Fifthly, under the Negotiable Instruments Act, the undertaking to pay must be unconditional,[6] while, under the extended part of the definition in the Stamp Act, it need not be so, and it also provides that the particular fund out of which money is to be paid may or may not be available.

The fourth and fifth points are of importance.

Promise to pay how far required.

7.22. Thus, under the definition in the Stamp Act, latter half, it is not necessary that the document must be a promissory note within the Negotiable Instruments Act. Even then, it has been held that it is an essential characteristic of the definition in the Stamp Act that there *should be a promise to pay* to some person or persons or to order or to the bearer of the note. A promise to pay the amount in one event, with a provision in another event to deposit it in court, does not make the document a promissory note.[7]

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1. Section 4, Negotiable Instruments Act, 1881 (Illustration not quoted).
2. Compare the definition of 'bill of exchange on demand' in section 2(3), *supra*.
3. Section 33, Stamp Act, 1891 (English).
4. *Mohammad Akbar Khan* v. *Atar Singh* (1936) I.L.R. 17 Lah. 557, 566; A.I.R. 1936 P.C. 171, 173.
5. Para 7.17., *supra*.
6. *Sankaran Namboodiripad* v. *Abraham*, A.I.R. 1973 Ker. 22.
7. *Kutta Mada Venkataratam* v. *Pali Chetty*, A.I.R. 1933 Madras 306, 308.

Whether unconditional undertaking required.

7.23. It has been held in a Madras case,[1] that the question must be decided by adopting the test whether there was an unconditional undertaking to pay a sum of money. In that case, it was held to be an unconditional undertaking. On the other hand, the Allahabad High Court has held[2] that a document containing a promise to pay *on a contingency* can fall within the Stamp Act. Thus, a promise by A to pay B Rs. 500 "seven days after my marriage with C" is not a promissory note under the Negotiable Instruments Act,[3] but may be so under the Stamp Act.

7.24. These points, it was stated, show the difficulty caused by the extended part of the definition.[4]

Two alternatives.

7.25. In order to improve the position in this regard, two alternatives were put forth before us. One alternative would be to confine the extended part of the definition to documents *analogous to promissory notes.*

The other alternative would be to omit the extended part altogether.

We appreciate the difficulty caused by the present vague definition. We have, after some discussion, come to the conclusion that the definition, wide as it is, should not be disturbed, since it has stood for a long time and revenue is involved and no compelling reason exists. But[5] we are recommending an amendment of section 35 (the principal sanction), for mitigating the hardship.

Attested promissory notes.

7.26. We now deal with another question—the question of charging duty on attested *promissory notes.* Here, one has to determine whether the document is a bond or a promissory note.

Question of attestation.

7.27. As already stated[6], the definition of 'promissory note' consists of two parts, namely, the portion referring to the Negotiable Instruments Act and the portion not so referring but added by the Stamp Act. For the moment, we are concerned with a point arising out of the earlier half of the definition of promissory note, which refers to the Negotiable Instruments Act. A controversy has arisen as to attested documents. In order to appreciate the controversy, it will be convenient if the relevant part of the definition of "bond" in the Stamp Act is quoted. It reads thus :—

> "(5) 'bond' includes, ...(b) any instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another.".

It is now proposed to add, in this part of the definition of bond,[7] the words "expressed to be", so that the revised definition of this part will read as follows :—

> " 'bond' includes—
>
> ....
>
> (b) any instrument attested by a witness and not *expressed to be* payable to order or bearer whereby a person obliges himself to pay money to another.
>
> ....

Requirement of attestation.

7.28. This amendment, however, will not solve the following question, which arises out of the requirement of attestation. The question is this. If a document is not attested, but creates an obligation to pay money, is it chargeable as a promissory note or as a bond ? It is assumed that the document contains an undertaking to pay money to a certain person etc.

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1. *Karuthappa Rowthen* v. *Bava Moideen,* (1913) I.L.R. 36 Madras 370, 372 (Sundara Ayyar and Phillips, JJ.).
2. *Sushil Chandra* v. *Valiyulla,* A.I.R. 1941 All. 155, 158, 160.
3. Section 4, illustration (f), Negotiable Instruments Act.
4. *Cf.* See discussion relating to section 2—Bill of Exchange (*Supra*).
5. See recommendation as to s. 35, Proviso (a), *infra.*
6. Section 2(5)—"bond".
7. See recommendation relating to section 2(5)(b)—"bond".

and is, in all respects, a document which satisfies the requirements of a promissory note as defined in section 4 of the Negotiable Instruments Act, which is as follows :—

> "4. *Promissory note.*—A 'promissory note' is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Controversy.

7.29. This controversy arises because the definition of 'bond' *is inclusive*. In a Patna case,[1] it has been held that an unattested document promising repayment of loan on demand after a stipulated date *is a bond only*, and is chargeable as a bond under article 15. The document in the Patna case was not attested, and was not expressed to be payable to order or bearer, and stated that the two debtors who had affixed their thumb impressions and signatures in the margin had taken the money mentioned in the letter and written letter on demand. The Patna High Court held, in the first place, that since the payment could not be enforced within a stipulated period, and the expiry of the stipulated period had to be followed by a demand, the document was not a promissory note. A demand was a condition precedent to payment, and therefore, there was no "unconditional" undertaking. It was not a promissory note. On this point, it followed an earlier Madras case.[2] But it may be noted that that case has been overruled by the Madras High Court in a recent judgment.[3]

Secondly, the Patna High Court pointed out that the definition of "bond" in the Stamp Act is not exhaustive, and does not exclude an unattested document if it is not covered by the two clauses of article 49 (promissory note).

7.30. In a Mysore case,[4] Malimath, J. observed—

> "It was next urged by Shri Joshi that as the document is attested, the same is not a promissory note. It is no doubt true that a promissory note does not require attestation. At the same time, it is necessary to note that there is nothing in the Negotiabe Instruments Act to indicate that an attestation of a "document like the promissory note is prohibited. Attestation of a document is usually got done for the sake of abundant caution even though attestation is not the requirement of law. Merely because the document in question which is otherwise a promissory note, has been attested, it does not lose its character as a promissory note. I have, therefore, no hesitation in holding that the document in question is a promissory note.".

7.31. In the later Madras case,[5] it was held that a document in the following terms was not conditional :—

> "I have already received Rs. 15,000 from your Colombo A.S. shop for doing business of my own. I shall pay it after two years on demand by you with interest at two annas per month per Rs. 100 to you or to your order and receive back this promissory note."

7.31A. The Court pointed out that, in the earlier case[6], section 5, second paragraph, of the Negotiable Instruments Act had not been discussed.

The fact that the payment was postponed did not make any difference, because of section 5. Hence, a document in this case was held to be a promissory note under article 49(b) of the Stamp Act, and inadmissible, since it was not sufficiently stamped. The question of attestation was not in issue.

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1. *Radha Devi* v. *Dhanik Lal*, A.I.R. 1971 Patna 378, 380, paragraph 6.
2. *Muthu Gounder* v. *Perumayammal*, A.I.R. 1961 Madras 347 (Ramachandra Iyer, J.).
3. *Thennappa Chettiar* v. *Andiappa Chettiar*, (1971) 1 M.L.J. 214 (D.B.).
4. *Raghunath* v. *Bihari Lal*, A.I.R. 1972 Mys. 159-161, para 4, dissenting from *Ram Narayan* v. *Ram Chand*, A.I.R. 1962 Pat. 325.
5. *Thenappa Chettiar* v. *Andiyappa Chettiar*, (1971) 1 M.L.J. 214.
6. *Muthu Gounder* v. *Perumayammal*, A.I.R. 1961 Mad. 347.

7.32. It was suggested to us that an amendment should be made in the definition of "promissory note" to exclude attested documents from the scope of that definition, for the *purposes of the Stamp Act*. This would clarify the position, and avoid needless controversies. We have, after careful consideration, accepted the suggestion. We may note that the suggestion had been included in our Questionnaire,[1] and has received substantial support.

Recommendation to exclude attested instruments.

7.33. Accordingly, we recommend that attested documents should be excluded from the definition of "promissory note" in the Stamp Act, so as to avoid controversy. The controversy is illustrated by the case law cited above. Without such an amendment, the citizen's difficulty would continue, since it is not easy to determine whether a particular document is a bond or pronote.

Section 2(22-A)—Definition of "public officer" (New).

7.34. We shall now deal with one expression not defined in the Act—"public officer". It would, in our view, be desirable to define the expression "public officer" as having the same meaning as in the Code of Civil Procedure. The want of a definition of this expression in the Stamp Act renders section 73 of the Act incomplete. It also renders section 35 incomplete.

Recommendation.

7.35. We, therefore, recommend that a new sub-section (22A) should be inserted in section 2, on the following lines :—

> "(22A) 'public officer' means a public officer as defined in sub-section (17) of section 2 of the Code of Civil Procedure, 1908."

We may note that the suggested amendment has been generally favoured in the replies to the Questionnaire issued by us.[2]

Section 2(23)—Receipt.

7.36. Section 2(23) may now be considered. It says—

> "(23) 'Receipt' includes any note, memorandum or writing :—
>
> (a) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or
>
> (b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt, or
>
> (c) whereby any debt or demand, or any part of a debt or demand, is acknowledged to have been satisfied or discharged, or
>
> (d) which signifies or imports any such acknowledgement,
>
> and whether the same is or is not signed with the name of any person."

Cash Memo.

7.37. The principal question to be considered relates to cash memos. It has been held[3] that ordinary cash memo, issued by a shop-keeper to a purchaser of goods is not a receipt unless it contains an acknowledgement of receipt of the money. Such a memo does not become chargeable by virtue of initials of the seller subscribed to a warranty written at the foot of it. Even if the initials are taken as amounting to "execution", the memo. would not be a "receipt" within section 2(23), as it is not *addressed to any particular person* and the name of the customer to whom it is given is not mentioned in it.

7.38. In an Australian case,[4] the court ruled against liability on a cash memo. where the memo. contained *no statement that the purchase price had been paid*, though the practice was to give such a document only against payment.

The same view prevails officially in Great Britain.[5]

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1. Question 14(b) of the Questionnaire.
2. Question 15—Public Officer.
3. *Financial Commissioner* v. *Indo Burma Watch Co.*, I.L.R. 12 Rang. 174; A.I.R. 1934 Rang. 49.
4. *Commissioner of Stamp Duties (N.S.W.)* v. *Swan & Co.* Pty., (1960) S.R.N.S.W. 141 and 182 [*sub. nom. Woods* v. *Small & Co. Pty.*, (1960) Australian Law Reports 333] referred to in Monroe, Stamp Duties, (1964), page 38, f.n. 15.
5. See the statement of the Chancellor of the Exchequer (made in 1949), H. C. Debates, Vol. 466 (Written Answers) cols. 136-137.

In 1949, Mr. A. Evans asked the Chancellor of the Exchequer whether his regulations still prescribed stamp duty on receipts of £ 2 and upwards and how far it is applicable to retail cash sales.

Sir S. Gripps replied : "The stamp duty of two pence upon receipts for sums of £2 or more is still in force. The form of voucher commonly given by retail shops in cash transactions where the whole of the goods purchased are taken away by the customer on payment of the price, being primarily a document used for internal book-keeping purposes, does not constitute a receipt, and is not liable to stamp duty even though it relates to a payment of £ 2 or more, provided that it contains *no words stating or implying receipt or payment of money*. The customer is, however, entitled to demand a receipt, and the Stamp Act imposes a penalty for issuing a receipt liable to duty but not duly stamped, or for refusing to give a duly stamped receipt."

Nature of Cash Memo.

7.39. Generally speaking, buying and selling is not complete with the cash memo, but with the payment. Payment is usually subsequent to the cash memo ; but, even if it is antecedent, what a "cash memo" indicates is that the goods had not been delivered on credit.

Recommendation.

7.40. It may be useful to codify the position laid down judicially, by inserting a suitable Explanation, say, on the following lines :—

> *"Explanation.—A cash memorandum, that is to say, a memorandum which records particulars of goods sold or services rendered is not a receipt, if it does not acknowledge that any money or any bill of exchange, cheque or promissory note has been received, notwithstanding that it mentions the consideration for the sale or for rendering the services."*

We recommend the above amendment.

We may note that the suggested amendment has been generally favoured in the replies to the Questionnaire issued by us.[1]

7.41. The next clause deals with "settlement". We shall consider at length the definition of "settlement" and the charging provision in article 64 relating to declaration of trust[2].

Section 2(25)— "Soldier".

7.42. Section 2(25) defines a "soldier" as including any person below the rank of non-commissioned officer who is enrolled under the Indian Army Act, 1911. The definition was inserted by the Repealing and Amending Act, 1928 (18 of 1928). That Act, by amending article 53, gave statutory effect[3] to exemptions from stamp duty which had previously been granted by notifications, and also introduced this definition. As we shall see later[4], while the scope of the definition of "soldier" has remained unchanged, the scope of the exemption in article 53 was widened.

7.43. There does not appear to be any section in the Act using the expression 'soldier'. But it seems to have been employed in some notifications, granting remission,—for example, in respect of documents chargeable as a 'power of attorney'. It also occurs in one article[5], as already stated.

Exemption under article 53— History of.

7.44. Under article 53, clauses (d), (e) and (f), certain documents executed by soldiers etc. are exempt from the stamp duty on receipts. The reasons for granting this exemption from stamp duty is not very easy to discover; but it can be presumed that the decision to exempt such receipts was taken as a matter of public policy. It would be of interest to note in this connection that concessions to soldiers in the matter of taxes have been known since the period of Roman law. For example, soldiers were exempt from inheritance taxes under Emperor Augustus.

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1. Q. 16—Receipt—Cash Memo.
2. Article 64.
3. Article 53(d), (e) and (f)—(Receipt.).
4. See *infra*.
5. Article 53(d), (e) (f) (Receipt).

Clause (d) of article 53 corresponds to, and is a modification of, Notification No. 1101 dated the 13th February, 1874, and clauses (e) and (f) contain exemptions which were first announced by the same Notification of 13th February, 1874. It would appear that this Notification was extended, by Notification No. 10 dated the 30th July, 1927, so as to cover persons who are not technically "soldiers" but are, nevertheless, below the rank of non-commissioned officers and are enrolled under the Indian Army Act, 1911.

Restricted scope of the definition of 'soldier'.

7.45. It should be noted that the definition of "soldier" in the Stamp Act refers only to man *in the army*,—and that too only to non-commissioned officers. When enactments relating to navy and air force were passed subsequent to the passing of the Stamp Act, the definition of soldier was left untouched, but changes were made in Article 53(d), (e) and (f) by adding 'soldiers' and 'airmen', so as to cover persons appointed under those enactments. Certain verbal changes were also made by the Adaptation Order of 1950.

Army Act, 1950.

7.46. Incidentally, it may be mentioned that the Indian Army Act, 1911, has been repealed and re-enacted in the Army Act, 1950. There were substantial additions when the Act was re-enacted; but these additions are not material for the present purpose. It is obviously desirable that the definition in the Stamp Act should now refer to the Act of 1950.

7.47. The definitions of "officer" in the Army, Air Force and Navy Acts are only inclusive, and are not relevant for the present purpose. In the army, the junior-most officer among the non-commissioned officers is a Lance Naik. Below Lance-Naik, there are persons who are called 'sepoys'. Thus, sepoys appear to be the only persons covered by the definition of the word 'soldier', as contained in section 2(25) of the Stamp Act. The words 'sailor' and 'airman' are words of common use. The technical terms, however, seem to be 'aircraft hand, and 'seaman'. According to the Navy Act,[1], for example, a seaman is a 'person in the naval service other than an officer'.

Recommendation.

7.48. So much as regards the present definition. In view of the passing of later enactments relating to armed forces, it is, in our view, desirable to revise the definition of 'soldier' as under :—

> "25) 'Soldier' includes *a member of the armed forces of the Union other than an officer*.".

Recommendation

7.49. This would not only enable the shortening and simplification of articles 53(d), (e) and (f), but also cover armed forces[2] of the Union other than military, naval and air forces. At present, only members of the three forces are covered,—the military by the definition of 'soldier', and the naval and air forces, by specific mention in article 53. For the purposes of the Stamp Act, other armed forces also stand on the same footing, and should be similarly treated. We recommend accordingly.

We may note that the suggested amendment has been generally favoured in the replies to the questionnaire issued by us[3].

1. Section 3(2); Navy Act, 1957.
2. To be considered under article 53(d), (e) and (f).
3. Q. 18—"Soldier".

CHAPTER 8

THE CHARGE OF TAX : SECTIONS 3 TO 7

Section 3—Introduction.

8.1. We have concluded our consideration of the definitions, and now proceed to a consideration of the charging section and connected provisions. The principal section levying the charge is section 3. As already stated[1], in the scheme of the Act, the duty is levied on the instrument, and not on the transaction. However, where the transaction is effected by more than one instrument or where the instrument relates to several distinct matters or falls within more than one category, the principle that duty is levied on the instrument must need certain refinements. For these special situations, special provisions are needed. In the scheme of the Act, the general proposition for the charge of tax is to be found in section 3, while sections 4, 5 and 6 are devoted to the special situations referred to above. Section 7 contains a provision intended to ensure payment of duty on certain policies.

Section 3—General conditions for charge of duty.

8.2. Section 3 is the charging section. The section is a long one, and deals with various matters. Its provisions are fundamental in the scheme of the Act. Before we proceed to consider in detail the various parts of the section, it would be convenient to emphasise certain general conditions for the charge of duty which are incorporated in the section. In general, there is no charge of Stamp duty under the section unless the following conditions are satisfied :—

(i) There must be an instrument.

(ii) The instrument must be one mentioned in the Schedule to the Act.

(iii) The instrument must be "executed".

(iv) The instrument must be executed in India,—clause (a)—or must be received in India in the manner specified in clause (b) or clause (c).

(v) If the instrument is not executed in India and is not a bill of exchange or promissory note, etc., it must relate to any property situated in India or to any matter of thing done or to be done in India. This is provided in clause (c) of section 3.

Exceptions.

8.3. Even where the general conditions of chargeability, as mentioned above, are satisfied, the instrument may be exempt from duty. Such exemption may arise by reason of—

(a) the proviso to section 3, or

(b) some other section of the Act, or

(c) A specific provision below the charging entry in the Schedule, under "Exemption", or

(d) a notification issued under section 9 of the Act, or

(e) A special law—for example[2], section 115, Presidency Towns Insolvency Act, 1909, section 51, Land Acquisition Act, 1894, section 28, Co-operative Societies Act, 1912, or section 29, Reserve Bank of India Act, 1934.

The principal provision—i.e., the charge—is to be found in clauses (a), (b) and (c) of the section. The provisos grant exemption for two cases.

8.4. The first proviso to the section relates to instruments executed by the Government, etc. The scope of the exemption has been narrowed down by successive Stamp Acts. Thus, under the Act of 1860, all instruments in which the Government was a party, were exempt[3]. Under the Act

1. Chapter 1, *supra*.
2. The list is not exhaustive.
3. *Ramaswamy* v. *P. Appa Reddy*, (1870) 1 Mad. High Court Reports, 190.

of 1862, instruments executed *by or on behalf of the Government* were exempt *from stamp duty*. Under the Act of 1879, the exemption was practically in the same words as the present proviso.

The second proviso, relating to registered ships, was inserted at the Select Committee stage in the present Bill, in order to bring the Indian law in line with the English law[1]. Act 19 of 1838, mentioned in the second proviso, is the Bombay Coasting Vessels Act, 1838, which provides for the registration of vessels which are trading coastwise and also fishing vessels and a harbour draft. Act 10 of 1841 also mentioned in the proviso, is the Registration of Ships Act, 1841. We shall deal later[2] with the effect of repeal of these Acts on section 3.

Place of execution and liability to stamp duty and time of stamping.

8.5. The place of execution of an instrument is of importance with reference to the charge of duty as well as with reference to the time of stamping. The provisions applicable to the following three broad categories of instruments (assuming, in each case, that the instrument is chargeable to duty under the Schedule), are as follows :—

(a) Instruments executed *totally in India* are governed by section 3(a) and section 17. They are charged under section 3. The general rule[3] is that they must be stamped at the time of execution.

(b) Instruments *executed totally outside* India are governed by section 3(b) or section 3(c), as the case may be, and section 18. They are chargeable under section 3(b) or 3(c). The general rule[4], except in the case of promissory notes, etc. is that they must be stamped, within the prescribed time limit, after they are received in India. But it must be remembered that this rule applies only where the instrument (besides being chargeable under a specific article in the Schedule) relates to property *within* India or to some act or thing done or to be done *in India*. Otherwise, there is no obligation to stamp the instrument, even if the instrument is received in India, if it is not subsequently "executed" in India[5].

(c) Instruments executed *partly outside India* and *partly in India* are governed by section 3(a) and section 17. They are chargeable under section 3(a). It is to be noted that they fall outside section 18, because section 18 applies only where the instrument is executed totally outside India[6]. Such instruments must be stamped at the time of their (first) execution in India[7].

There are, thus, three principal points of time,—execution, bringing into India, or first execution in India—which may become relevant to the charge of duty and the time of stamping.

From this charge of duty, there is an exclusion, contained in the first proviso to section 3.

Section 3, first proviso.

8.6. Under the first proviso, no duty shall be chargeable in respect of—

> "(i) any instrument executed by or on behalf or in favour of the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument".

A question of practical importance arising out of this proviso is this. What are the cases where, "but for this exemption the Government would be liable to pay the duty chargeable", in respect of an instrument? The answer may appear to be simple, but it is not really so. This is because there is no specific section in the Act dealing with the question—who is liable to pay duty?

Under section 29[8], in the absence of an agreement to the contrary, "the expenses of providing the proper stamp shall be borne" by the specified persons. This section, as the words

1. Section 721, Merchant Shipping Act, 1894 and the (English) Stamp Act, 1891, First Schedule, Second general exemption.
2. See *infra* (Para 8.9).
3. Section 17.
4. Section 18.
5. If it is later executed in India, category (c) in our analysis becomes relevant.
6. Category (b), *supra*.
7. Section 17.
8. Section 29.

quoted above show, does not state that the specified persons "shall pay the duty",— though the marginal note to the section reads—"Duties by whom payable".

8.7. The question then arises—Can section 29 be utilised for the purposes of the first proviso to section 3, when the Government, as a party to an instrument, *undertakes to bear the expenses of the stamp duty,* and is the case to be regarded as falling within the first proviso to section 3 so as to have the effect provided therein, namely, that "no duty shall be chargeable" on the document concerned ?

The position in this respect cannot be said to be beyond doubt. One view on the subject[1] is that the exemption under the first proviso will not apply in such a case. Apparently, however, the contrary paractice seems to be followed in the Government of India.

Recommendation as to section 3, first proviso.

8.8. It is desirable that the position on this point, which is of a frequently recurring nature, should be indicated more clearly.

We, therefore, recommend the insertion of the following words at the end of the first proviso—

"or where the Government has undertaken to bear the expenses of the stamp duty".

Such an amendment will avoid controversies arising from the fact that the language of section 29 is not identical[2] with that of section 3.

The proviso speaks only of the "Government", but the view has been taken[3] that where a local body acts as a Government agency for the transaction of duties devoloving upon Government as part of its ordinary administration, such as making roads, erecting Government buildings, etc., then this proviso would apply. We do not consider it necessary to suggest any amendment on this point.

Section 3, second proviso.

8.9. Section 3, second proviso, is as follows :—

"Provided that no duty shall be chargeable in respect of—

(2) Any instrument for the sale, transfer or other disposition, either absolutely or by way of mortage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act XIX of 1838, or the Indian Registration of Ships Act, 1841, as amended by subsequent Acts."

Of the three enactments, referred to in the proviso, the Merchant Shipping Act, 1894 (Eng.) has been replealed by the Merchant Shipping Act, 1958. The Coasting Vessels Act (19 of 1838) has been repealed, in so far as it applies to sea-going ships fitted with mechanical means of propulsion and to sailing vessels, by the Merchant Shipping Act, 1958. The Indian Registration of Ships Act, 1841, has also been repealed by the same Act.

Recommendation,

8.9A. It is now appropriate if reference to the Merchant Shipping Act, 1958, is substituted in place of the first and the third of the enactments referred to in the proviso.

Section 3-A (Proposed)— Effect of Exemption.

8.10. This disposes of section 3. We would, at this stage, refer to a new point relevant to the effect of exemption. A doubt sometimes arises[4] as to whether the exemption given by each article in the First Schedule is to be regarded as valid only for the purposes of that article, or whether the exemption is to be treated as a general one. In most cases, the latter is the intention, and a specific provision to that effect could be usefully added.

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1. See (1933) Madras Stamp Manual, page 18 (Citing Board Precedents) 356, Mis. 20th February, 1904 and 736, R. Mis., 15th April, 1904, cited in Chitaley, Stamp Act (1951), page 223.
2. Para 8.6, *supra.*
3. (1934), Punjab Stamp Manual, Part I-B, Ch. 3, paragraph 3, (Citing Financial Commissioner's letter No. 6073, dated 13-9-1884), cited in Chitaley's commentary on the Stamp Act (1951), page 228.
4. See, for example, the controversy as to section 2(5)(c), in the context of a bond consisting of an obligation to deliver grain etc., with reference to the exemption under article 5, exemption (a)—Agreement for sale etc.,—
   (a) *Raghubar Dayal* v. *Emp.*, A.I.R. 1934 All. 201;
   (b) A.I.R. 1936 All. 488; *Reference—Collector of Nimar* v. *Lakshmi Chand;*
   (c) A.I.R. 1927 Nag. 72, 73; *Collector of Nimar* v. *Lakshmi Chand;*
   (d) *Mira Begum,* A.I.R. 1935 Lah. 122.

Where the exemption is intended to be applicable only in respect of the chargeability of an instrument under the particular article, a specific provision to that effect could be inserted in that exemption.

Such a provision would be in harmony with the opening words of section 3 also.

8.11. We, therefore, recommend the insertion of a new section on the following lines :— **Recommendation.**

> "3A. Where, by virtue of an exemption provided for under an article in Schedule 1, an instrument is exempted from duty, the instrument shall, in the absence of an express provision to the contrary; be exempt from duty under every other article also." **Effect of exemption under an article in the First Schedule.**

8.12. A document executed outside India is, at present, liable to stamp duty, even if it is already stamped with the duty chargeable under the law of the foreign country where it was executed, provided the document is received in India[1]. There are special provisions for bills of exchange payable otherwise than on demand, and for promissory notes, drawn or made out of India, and accepted or paid or presented or endorsed, transferred or otherwise negotiated in India[2]. But, in general, the document has to be stamped within the prescribed time after being received in India, if the other conditions of chargeability are satisfied. **Section 3 B— Instruments executed outside India.**

8.13. We are of the view that some provision is needed for relief in respect of documents which have already been stamped under the law of a foreign country where the document was executed. With the growth of international commerce, such occasions are likely to increase, and, while it may not be necessary to grant an exemption for all cases, a limited exemption as to transactions with or between Indian citizens in respect of documents executed outside India and properly stamped under the law of the foreign country, could be inserted. **Relief against double taxation.**

8.14. The Indian legal system has several laws containing provisions relating to relief against double taxation. A precedent, for example, is furnished by the Income-tax Act[3]. In that Act, there are two provisions dealing with double taxation,—one is confined to cases of agreement with foreign countries, while the other is not so confined. The former—section 90—is as follows :— **Precedents.**

> "90. Agreement with foreign countries.—The Central Government may enter into an agreement—
>
> (a) with the Government of any country outside India for the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country, or
>
> (b) with the Government of any country outside India for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country;
>
> and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement".

In the Estate Duty Act[4] also, there is a provision for avoidance or relief of double taxation, with respect to estate duty, as follows :—

> "30. The Central Government may enter into an agreement with the Government of any reciprocating country for the avoidance or relief of double taxation with respect to estate duty leviable under this Act and under the corresponding law in force in the reciprocating country and may, by notification in the Official Gazette, make such provision as may be necessary for implementing the agreement.

1. Section 3(c) (See *supra*).
2. Section 3(b).
3. Sections 90 and 91, Income-tax Act, 1961.
4. Section 30, Estate Duty Act, 1953.

Explanation.—The expression "reciprocating country" for the purposes of this Act means any country which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating country.

There is another precedent in section 131 of the Trade Marks Act[1].

Need for relief.

8.15. In the light of these precedents, and also on principle, we have carefully considered the suggestion, and we are in broad agreement with it. We do not, however, think that the proposed provision should be confined to transactions with or between Indian citizens. It could extend to all documents. At the same time, we are of the view that the grant of such relief should be on the basis of reciprocity only, and in pursuance of an agreement,—as in the Trade Marks Act[2].

We, therefore, recommend the insertion of the following section in the Act :—

Cf. s. 131, Trade Marks Act, 1958.

"3B. (1) With a view to the fulfilment of a treaty, convention or arrangement with any country outside India which affords to instruments executed in India the same concessions as can be granted under this section in respect of instruments executed outside India, the Central Government may, by notification in the Official Gazette, declare such country to be convention a country for the purposes of this Act.

(2) Where an instrument is executed in a convention country and is brought into the territories to which this Act extends, the instrument shall, if duly stamped in the convention country under the law of that country, be deemed, for the purposes of this Act, also to be duly stamped".

Section 4.

8.16. The simple case of one instrument effectuating a transaction is dealt with by the general provision in section 3; but there might be cases where there are several instruments effectuating a transaction. The ordinary rule is that stamp duty is levied on an instrument, and not on a transaction. But, if this rule is applied literally and without exception, then there might be practical hardship and unnecessary inconvenience. To deal with such a situation, some special provisions are usually considered desirable in the Stamp laws of all countries. In our Act, the situation of several instruments used to effectuate a single transaction is dealt with in section 4. The section is, however, confined to transactions of sale, mortgage or settlement. The broad rule is chargeable with the duty prescribed in the First Schedule, and each of the other instruments is chargeable with a duty of one rupee, instead of the duty, if any, prescribed for it in the First-Schedule.

Under sub-section (2), the parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument. But there is a proviso to the effect that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments so employed.

Position in England.

8.17. In England, the principle is the same, but is not confined to conveyances. Referring to the situation where a single transaction is effected by more than one instrument, an English writer says[4] :—

"The general rule in these cases (which is sometimes stated expressly in the Act) is that *ad valorem* duty is not paid more than once, and that fixed duty is only paid more than once where each instrument taken by itself attracts a stamp, e.g., because it is a deed".

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1. Section 131, Trade Marks Act, 1958.
2. Section 131, Trade Marks Act, 1956.
3. The opening portion speaks of "sale". The latter portion speaks of "conveyance", because the Schedule charges duty under that name.
4. Monroe, Stamp Duties, (1964), page 31.

Thus, in England, in a case of a contract comprising an offer and acceptance[1-2] under hand, one 6d. stamp is sufficient, "which logically should be affixed to the acceptance"[3]

8.18. Having considered all aspects of the matter, we see no reason why the principle enacted in section 4 should not be extended *to all transactions*. Such cases may not be many; but the example of a gift or partition should be cited.[4] The section should, in our opinion, be extend to all cases where several instruments are employed for completing *any transaction*. This view has been generally favoured in the replies to our Questionnaire. **Recommendation.**

Also, in our view, there is no need to charge duty on the supplementary instrument. On this point, we accept a suggestion made to us[6] by the Gujarat Bar Council. If this approach is accepted, it will be necessary to make other consequential changes also.

We, therefore, recommend that section 4 should be revised as follows :—

Revised Section 4

4. (1). Where, in the case of any transaction, several instruments are employed for completing the transaction, only the principal instrument should be chargeable with the duty prescribed for it in Schedule I, and each of the other instruments shall, instead of *being chargeable* with the duty prescribed for it in that Schedule, *be exempt from duty*.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument :

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

8.19. So much as regards section 4. Its converse is to be found in the next section. Under section 5, any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act. This section is the converse of section 4, and deals with cases where *one instrument* comprises or relates to several distinct matters. Here again, the general rule that stamp duty is levied on an instrument and not on a transaction has had to be explained—this time, in the interests of revenue—by providing that such instrument will be chargeable with the *aggregate amount* of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under the Act. **Section 5.**

It is, again, in the interests of revenue that it overrides the next section[7], which deals with instruments coming within several descriptions in the First Schedule.

8.20. No doubt, the apparently simple provision in section 5 is not devoid of difficulties in its application. A writer on the law of Stamps[8] says : "Scarcely any subject, within the range of the Stamp Laws, is of so embarrassing a nature, in practice, as that which falls under the division of 'Instruments' relating to several distinct parties or matters'." **Criticism noted.**

However, such difficulties cannot be solved by an amendment of the law, and it is difficult to devise a better and more precise formula.

8.21. This takes us to section 6. In order to appreciate the significance of that section, it is necessary to examine the scheme of the Act. The scheme of the Act as regards documents falling under different heads is as follows :— **Section 6.**

1. A written offer accepted orally or by conduct requires no stamp; *Carlill* v. *Carbolic Smokeball Co.*, (1892) 2 Q.B 484; on appeal (1893) 1 Q.B. 256.
2. For detailed discussion, see Appendix.
3. Monroe, Stamp Duties, (1964) page 31.
4. *Cf. Hemming* v. *Perry*, (1828) 2 Moo page 375, cited in Halsbury, 3rd Ed. Vol. 33, page 296, para 518, f.n. (1).
5. Question 22.
6. S. No. 74 (Gujarat Bar Council) under Q. 22 of the Questionnaire issued by the Commission.
7. See the opening words of section 6—"Subject to the provisions of the last preceding section."
8. The late Mr. Tilsley, quoted by Donogh, Stamp Act, (1935), page 188.

The First Schedule to the Act specifies the duties which are chargeable upon certain descriptions of instruments. There may be instruments falling within more than one category. They have to be specifically dealt with, since the general rule in sections 4-5 would not yield a fully adequate test. Section 6 provides that in such a case the higher or highest duty is chargeable.

Gist of Section 6.

8.22. Section 6,—to put the matter very broadly,—provides that an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties. This rule is, however, subject to an important qualification, which is expressed in the section by the words "subject to the provisions of the last preceding section"—i.e., section 5. Section 5, it will be recalled, provides that an instrument comprising or relating to several "distinct matters" shall be chargeable with the aggregate amount of the duties with which separate instruments each comprising or relating to one of such matters would be chargeable, under the Act. The qualification in section 6 dependent on section 5, is of importance. In fact, it may be noted that in the previous Stamp Act 1879[1], sections 5 and 6 were combined together. If a document is, in reality, one instrument, though different names are given to it, section 6 will apply. But if, in fact, it comprises several instruments, then section 5 will apply. In order to bring a document within the terms of section 6, it has to be read as a whole.[2]

Provisions analysed.

8.22A. It may be convenient to analyse the relevant provisions.[3]

Group A.

(1) A document which really contains *more than one instrument* must be stamped separately in respect of each. (This follows from section 3).

(2) An instrument which relates to several distinct matters must, except where express provision to the contrary is made, be separately and distinctly charged in respect of each matter, and, for this purpse, distinct provisions constituting together the consideration for an instrument liable in respect of one of them to *ad valorem* duty are treated as separate and distinct matters (section 5). But two other cases may arise.

Group B.

(3) An instrument may relate to several matters which, nevertheless, *cannot be regarded as distinct* ; (section 6), and

(4) An instrument, though relating substantially to one matter, may fall into one category, or another, according to the view adopted of its legal operation (Section 6). The Act has distinct rules for Group A from Group B.

The line of division between classes (2) and (3) may sometimes be difficult to draw. But it is not possible to improve the position by any verbal amendments.

Position in England.

8.23. It is well established in England that where a document comes within each of two categories chargeable with duty under the (English) Stamp Act, 1891, the Crown is entitled to only one of the duties, but it may choose the higher. A case that went up to the House of Lords may be cited.[4] The United States of Mexico had issued 'gold coupon treasury notes' with a promise to pay principal and interest to the bearer at fixed dates either abroad or, at the option of the holder, in London. There was evidence that the notes were saleable on the London and other Stock Exchanges. It was held; the notes being, in fact, both promissory notes and marketable securities within the Stamp Act, 1891, they were liable to the higher duty imposed by that Act upon marketable securities. Collins, M.R., in the course of his judgment in the Court of Appeal, observed that the cases established that a court has not only the right to treat, but is bound to treat, an instrument as assessable under that head which involves the higher stamp duty.

1. Section 7, Indian Stamp Act, 1879.
2. (1916) 37 Indian Cases 984 (Madras).
3. Analysis adapted from Donogh, Stamp Act, (135), page 189.
4. *Speyer Brothers* v. *Comrs.*, (1908) A.C. 92 affirming (1907) 1 K.B. 246, 253.

Lord Loreburn, in the course of his judgment in the House of Lords, affirming this view, observed :—

> "In my view, the document falls within both descriptions, and where a document is by its description chargeable under the Stamp Act as a promissory note, and is also chargeable under the statute as a marketable security, the Crown has a choice whether to charge under the one or under the other description. If the Crown does claim that the document shall be stamped at the higher rate within one part of the Act, it is no answer to say that there is another part of the Act under which the same document ought to be charged of a lower rate. It can only be charged once."

These observations of Lord Loreburn lucidly explain the significance and rationale underlying the statutory provision in section 6. Briefly, the gist is this :—

(i) Duty may be charged only once.

(ii) But it must be the higher, and not the lower, of the two.

Section 6—Substance.

8.24. This, in fact, is the substance of section 6. An instrument so framed as to come within two or more of the descriptions in the First Schedule, is to be chargeable with the highest of the duties. The proviso to the section deals with the special situation of a counterpart or duplicate of any instrument chargeable with duty, where duty has been paid in respect of the (principal) instrument.

There is not much scope for improvement in section 6. What remains to be noted is only the special provision, contained not in this Act, but elsewhere.

Negotiable Instruments Act.

8.24A. We have in mind section 17 of the Negotiable Instruments Act[1], which gives a right to the holder of an "ambiguous document" to treat it as a promissory note, or as a bill of exchange. By "ambiguous document" is meant a document which can fall under either. According to judicial interpretation, this privilege cannot be taken away by anything contained in the Stamp Act, and in this sense, section 17 of the Negotiable Instruments Act must be read as overriding the Stamp Act.[2]

Recommendation to amend section 6.

8.25. In our view, it is desirable to codify this interpretation by adding a saving to section 6, to the effect that nothing in this section shall affect the provisions of section 17 of the Negotiable Instruments Act, 1881. We recommend that an Explanation should be added accordingly. Such an amendment has been generally favoured in the replies to the Questionnaire[3] issued by us.

Section 7—Policies of sea-insurance.

8.26. We now come to section 7. Before 1963, section 7 was as follows :—

> "7. (1) No contract for sea-insurance (other than such insurance as is referred to in section 506 of the Merchant Shipping Act, 1894) shall be valid unless the same is expressed in the sea-policy.
>
> 57 and 58 Vict., c. 60.
>
> (2) No sea-policy made for time shall be made for any time exceeding twelve months.
>
> (3) No sea-policy shall be valid unless it specifies the particular risk or adventure, or the time, for which it is made, the names of the subscribers or underwriters, and the amount or amounts insured.
>
> (4) Where any sea-insurance is made for or upon a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy shall be charged with duty as a policy for or upon a voyage, and also with duty as a policy for time."

1. Section 17, Negotiable Instruments Act, 1881.
2. *Alagappa Cheth* v. *Narayan*, (1932) 63 Madras Law Journal 548; A.I.R. 1932 Mad. 765, 766.
3. Q. 23.

After the passing of the Marine Insurance Act, 1963, only sub-section (4) survives.

Case law.

8.27. There are only two reported cases on the section. A Bombay case[1] dealt with one point as to whether mere initialling of a document was sufficient within the meaning of sub-section (3) of section 7, which provided that no sea policy shall be valid unless it "specifies" the names of subscribers or underwriters. The Court held, that initialling was sufficient to "specify" the names within the meaning of section 7(3).

A Calcutta case[2] has dealt with the scope of sub-section (1) of section 7 (now repealed), and held that a cover does not amount to a valid policy of marine insurance. These cases are no longer of importance for the Stamp Act, since sub-sections (1) to (3) have been repealed.

So far as sub-section (4) is concerned, we are recommending its deletion, for reasons to be given[3] under Article 47.

APPENDIX I

Section 4—English law as to two instruments used to effectuate one transaction

The general rule in England is that *ad valorem* duty is not paid more than once, and that fixed duty is paid more than once only where each instrument taken by itself attracts a stamp, e.g., because it is a deed. This, in a case of a contract comprising an offer and acceptance under hand one 6 d. stamp is sufficient, which logically should be affixed to the acceptance.

As regards conveyance, it is expressly provided by statute, that where there are several instruments of *conveyance*, the principle instrument only is to be liable to *ad valorem* duty, and the others to such duty as they may be liable, not exceeding the *ad valorem* duty.[4]

Section 58(3), Stamp Act, 1891, is as follows :—

> "58. (3) Where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but such last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument."

Section 61 is as follows : —

> "61. (1) In the cases hereinafter specified the principal instrument is to be ascertained in the following manner :
>
> (a) (b) [Repealed by Finance Act, 1949, s. 52 and Schedule XI].
>
> (c) Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.
>
> (2) In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

The position for other instruments is the same,[5] though there are no statutory provisions.

As the Revenue have in England never insisted on double *ad valorem* duty in cases where two instruments are used to effect one transaction, there is very little authority on the point, as no one cares to contest the matter.[6]

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1. *Tricamji Dambji and Company* v. *Virji Kanji*, AIR 1923 Bom 142 (Shah, C. J. and Crump, J.)
2. *Radhakrishan Dage* v. *The General Insurance Society Ltd.*, (1968-69) 73 Cal. W. N. 694, 964, 980, 981, 984 (Bijavesh Mukerji, J.). [Case governed by section 7(1), Stamp Act.]
3. See discussion as to article 47, *infra*.
4. Sections 58(3) and 61(2), Stamp Act, 1891.
5. Monroe, Stamp Duties (1964), page 31.

There appears to be an exception to this general rule where two securities are given for the same debt. Thus, if a person gives a bill of sale and a promissory note, to secure a debt, a separate *ad valorem* duty is payable on each.[1-2]

This exception has received statutory recognition, inasmuch as, under the heads of charge "Bond, Convenant,[3] etc.", a separate and lower rate of *ad valorem* duty is provided for collateral securities. The *ad valorem* duty on the collateral securities is, in some cases by statute[4] and in others by extra-statutory concession—limited to 10s. But there are, still, cases where two *ad valorem* duties are payable.

APPENDIX 2

Points concerning gifts, exchanges, trusts, etc. under section 4

(a) *Conditional gifts*

Though a gift is usually unconditional, it can be conditional. It is to be noted that a gift is a species of transfer, and is, therefore, subject to all the provisions of the law of transfer of property relating to conditional transfers. Like other transfers, a gift, therefore, may be subject to a condition precedent.[5] If the condition is not invalid,[6] the condition will be recognised by law. A gift to two sisters on the condition that they should live apart is valid.[7] If A gives Rs. 500 to B on condition that B shall marry C, the condition is valid. But, if the condition is inmoral or illegal, then it is void.[8]

Similarly, a gift may be subject to a condition subsequent.[9] In a Madras case,[10] a gift was made by a person sentenced to transportation for life to a relation, on the condition that the land gifted should be given back if the donor returned to his village.

In fact, section 126 of the Transfer of Property Act even provides that the donor and donee may agree that on the happening of any specified event not depending on the will of the donor, a gift shall be *suspended or revoked.* A condition can, therefore, even go to the extent of providing for revocation.

Apart from the Transfer of Property Act, conditions are recognised in respect of gifts by Muslim law also[11-12]

Though the Transfer of Property Act, section 123, dealing with the acceptance of a gift, does not require the acceptance to be in writing, and though the acceptance can be inferred or oral, there *can be a written acceptance* by the donee, and, in case of conditional gifts, it is prudent to have a written acceptance.

A gift to which a condition is attached is not a "sale", because, as defined in the Transfer of Property Act,[13], a "sale" must be only for a price, and "price" here means money only.[14] It has been specifically held[15] that a transaction which is in consideration of the transferor's regard for the transferee, who agreed to maintain the transferor, is not a "sale".

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1. *Monetary Advance Co.* v. *Cater*, (1888) 20 Q.B.D. 785, 788.
2. Promissory notes are no longer liable to *ad valorem* duty in England.
3. Stamp Act, 1891, Schedule 1.
4. Revenue Act, 1903, section 7, limiting the duty on collateral securities to 10s.
5. Section 21, Transfer of Property Act.
6. Section 25, Transfer of Property Act. See particularly illustration (b).
7. *Rodgmary* v. *Woodhouse*, (1844) 7 Beav. 437, 49 E.R. 1134, cited in Mulla, Transfer of Property Act (1966), page 782, footnote (Z).
8. *Ram Swarup* v. *Bela*, (1884) I.L.R. 6 Allahabad 313.
9. Section 31, Transfer of Property Act.
10. *Venkataraman* v. *Ayyaswamy*, A.I.R. 1923 Madras 67 43 Madras Law Journal 340.
11. Tyabji, Muslim Law (1968), page 305, page 366, illustration (1), and page 406, illustration (1) and cases there cited.
12. Also the leading case of *Nawab Umjad Ally Khan*, 11 M.I.A. 517, 543, 547, as explained in A.I.R. 1922 P.C. 281.
13. Section 54, Transfer of Property Act.
14. *Madan Pillai* v. *Bhadrakali*, A.I.R. 1922 Madras 311.
15. *Rati Ram* v. *Mam Chand*, A.I.R. 1959 Punjab 117. (Case relating to right of pre-emption).

Even if conditional gifts are not regarded as gifts, they are certainly not "sales". So they do not, at present, get the benefit of section 4, Stamp Act, which is confined to sales, mortgages and settlements.

(b) *Two documents constituting a gift.*

If there are two documents relating to a transaction of gift, the case does not, at present fall under section[4], unless the document is a "settlement". In an Allahabad case,[1] T. in consideration of love and affection and the promise to be maintained by his brother M, executed a deed of gift of all his property in favour of M, and M executed another deed whereby M promised that during the life time of T he would pay T's expenses. The High Court held that the second deed executed by M was one which came within section 4, because the transaction may fairly be said to come within "settlement". As to the unity of the transaction, the Court observed that the two instrument were intended by the parties to be employed in completing one transaction. In that case, the Court held the transaction to be one of settlement (no detailed reasons are given discussing this aspect of the matter). If, however, the parties had not been brothers, the document would not be regarded as a settlement, and the transaction would be substantially one of gift,--but not covered by section 4. The case is referred to here to show how section 4 could be usefully extended to gifts.

In a Bombay case,[2] the document marked A was a document on a three rupees stamp paper, and was one of conveyance of immovable property absolutely for Rs. 275. On the same deed of sale, the individual nephew of the executant endorsed his consent to the sale. It was held that the endorsement of consent and the conveyance were several instruments employed to complete a transaction within section 6 of the Act of 1879 (present section 4), and the consent ought to have been written on a separate stamp paper of the value of one rupee. This case is cited here to show how, in reality, the situation could arise in relation to gifts also, namely, where A executes a gift and B, who is his undivided nephew, indicates his consent. At present, the case could be outside section 4, but the transaction of gift is but one, and it is fair that there should be only one duty.

(c) *Trusts.*

Then, there is the case of trusts, the machinery of trust can be employed to effect a transfer for the benefit of certain persons who are not related to the author of the trust. The Trust Act does not require that there should be only one physical instrument of trust. The case would be outside present section 4, but ought to be covered by it, there being no reason why double duty should be charged on two deeds of trust and not on two deeds of settlement.

(d) *Exchange.*

There is also the case of exchange. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an exchange.[3] A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.[4] This is what the Transfer of Property Act provides. But this provision does not necessarily attract the beneficial provisions of section 4 of the Stamp Act. It merely deals with the rules as to registration etc.

(e) *Partnership.*

Then, there are also cases of partnership, where the stamp duty is higher than in case of an ordinary agreement.

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1. *Stamp reference,* (1915) I.L.R. 37 Allahabad 264 (Full Bench).
2. Hanumappa, (1888), I.L.R. 13 Bombay 281.
3. Section 118, Transfer of Property Act.
4. Section 118, Transfer of Property Act

CHAPTER 9

MODE OF PAYMENT—SECTIONS 8 TO 10A

Introductory.

9.1 The mode of payment of duty is the subject matter of the next sections with which we shall now be concerned. In general, of course, the stamp duty is indicated by "stamp", as is obvious from the scheme of the Act and its very little. But certain special situations require special provisions; and to meet those special situations, special provisions are enacted in section 8 and the succeeding sections.

Section 8—Recommendation.

9.2. Section 8 is a special provision applicable to bonds, debentures or other securities issued on loans under the Local Authorities Loans Act, 1879. The provision was originally introduced, it seems, in 1897,[1] to give facilities to local authorities for issuing debentures upon payment of composition duty. Section 8 (English), Finance Act, 1899, is in similar terms.

The Local Authorities Act, 1879, referred to in the section, has since been replaced by the Local Authorities Loans Act, 1914 ; and the section should, therefore, be amended to substitute a reference to the latter Act. We recommend accordingly. We may add that the replies received to our Questionnaire[2] have favoured such an amendment.

Section 9.—Width of the power.

9.3. Section 9 deals with the power of the Government to reduce, remit or compound stamp duties. It is one of the most important sections of the Act, and certainly one of the most frequently used sections. Whether duty should be remitted or reduced in a particular case, depends on a variety of factors, which are too numerous and fluctuating to permit codification. That is the principal justification for the section.

9.4. While the conferment of such a power can hardly be objected to in modern times, it becomes necessary to point out that the power is very wide in its ambit.

Under the section, the Government may, by an order published in the Official Gazette, grant reduction or remission. Such reduction or remission can be granted (i) prospectively, or (ii) retrospectively. The reductions and remissions can apply in (i) the whole or (ii) any part of the territories under the 'administration' of the Government. They can apply to the duties with which (i) any instrument, or (ii) any particular class of instruments, or (iii) any of the instruments belonging to such class, or (iv) any instruments when executed by or in favour of any particular class of persons, or by or in favour of any membrs of such class, are chargeable.

Government can, by similar rule or order, also provide for the composition or consolidation of duties in the case of issues by any incorporated company or other body corporate of debentures, bonds or other marketable securities.

The expression "the Government" in the section means,—

(a) in relation to stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, and in relation to any other stamp duty chargeable under this Act and falling within entry 96 in List I in the Seventh Schedule to the Constitution, the Central Government ;

(b) save as aforesaid, the State Government.

History

9.4A. As to this expression, it may be noted that before 1937, the Governor General-in-Council was the only authority empowered to remit or reduce or compound duty under the section. The Adaptation Order of 1937 substituted the words "the collecting government" for

1. The Indian Stamp Act (1879), Amendment Act, 1897 (13 of 1897).
2. Question 24.

the words "Governor General-in-Council"—and also inserted a definition of "collecting Government". The Adaptation Order of 1950 substituted the words "the Government" in section 9, and also added sub-section (2), defining the expression "Government". It also removed the definition of "collecting Government".

Delegation.— Validity of.

9.4B. Reverting to the present section, we are of the view that since the power delegated by the section in very wide, some safe-guards are needed. In one case decided by the Supreme Court,[1] which is very relevant to the point of delegation, the Court, while declaring sections 4 and 7 of the Travancore-Cochin Land Tax Act, 1955 (15 of 1955) to be unconstitutional, observed—

> "..... Further, section 7 of the Act quoted above, particularly the latter part, which vests the Government *with the power wholly or partially to exempt any bond from the provisions of the Act*,[2] is clearly discriminatory in its effect; and, therefore, infringes Article 14 of the Constitution. The Act does not lay down any principle "or policy for the guidance of the exercise of discretion by the Government in respect of the selection contemplated by section 7."

The Supreme Court in this connection also referred to the Dalmia case[3], and quoted from the judgement in that case.

Recommendation to add the criterion of public interest.

9.5. While the validity of section 9 has not been contested so far, it appears to us desirable that in order to preserve its validity, some criterion regulating the exercise of the power delegated thereby should be added. We, therefore, recommend the insertion of the criterion of "public interest" in relation to the grant of a reduction or remission by notification under section 9. This could be achieved by adding the words "if satisfied that it is necessary in the public interest" after the words "the Government", in section 9(1). We recognise that this is not a very precise test, but even then, it will give some indication of the legislative policy and lessen the possibility of a successful attack on the validity of section 9(1).

We may mention that such an amendment has been supported by most of the replies to our Questionnaire.[4]

Case law on the section reveals no conflict of views, obscurities or other difficulties in the working of section 9. Hence no other change is necessary.

Section 9A (New.)

9.6. At this stage, we would also like to deal with the question of consolidation of duties in respect of receipts. In the State of Maharashtra,[5] the following new section has been inserted, conferring power on the State Government to consolidate duties in respect of receipts.

"9A. The State Government may, by order published in the Official Gazette, provide for consolidation of duties in respect of any receipts or class of receipts given by any person (including any Government) subject to such conditions as may be specified in the order."

Recommendation.

9.6A. It would, in our opinion, be useful to have a similar provision in the Act Such a change has been approved by most of the replies,[6] to our Questionnaire. We recommend accordingly.

Section 10.

9.7. Section 10 deals with the mode of payment of duty. Duty is ordinarily paid in stamps; but in exceptional cases, it can be received in cash under certain special provisions of the Act.

We have received a suggestion to provide for payment in cash in certain other cases. Its genesis is as follows :

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1. *Kunnathat Thuthunni Moopil, Nair Vs. State of Kerala*, A.I.R. 1961 S.C. 552 ; (1961) 3 S.C.R.77.
2. Emphasis Supplied.
3. *Ram Krishna Dalmia* V. *Justice S.R. Tendolkar*, A.I.R. 1958 S.C. 538, 548-49.
4. Question 26.
5. Maharashtra Act I of 1971.
6. Question 25 of our Questionnaire.

Payment of stamp duty and court fees in cash in the event of Shortage in the availability of non-judicial stamps and court fees stamps.

9.8. A proposal[1] had originated in the Ministry of Finance to the effect that there is need for an enabling provision in the Stamp Act and the Court Fees Act for permitting levy of the stamp duty or Court fee *in cash*, in the event of a shortage in the availability of non-judicial stamps and court fees stamps respectively. This suggestion was sent to various State Governments by the Ministry of Finance for their comments in the matter. The State Governments, including the Union Territory Administrations, mostly expressed themselves in favour of the suggestion.

9.9. It may also be stated in this connection that in Gujarat, the State Government, some time ago, had prepared a Bill[2] to amend section 10. It was stated in the Statement of Objects and Reasons that owing to inadequate supply of non-judicial stamps from the Controller of Stamps, Nasik, acute shortage of stamps was felt frequently in different parts of the State. To meet this situation, it had been found necessary to amend section 10 of the Act so as to enable the State Government and the Collector to direct payment of stamp duties in cash in such contingencies. (The Bill does not seem to have become law).

Recommendation to amend section 10.

9.10. We have given cateful consideration to the matter, and are of the view that as the problem is of frequently recurring nature, it should be solved by adding the following new sub-sections, to section 10, which we recommend :

Section 10(3) *and* (4)—(to be added)

"(3) Notwithstanding anything contained in sub-section (1), where—

(i) the State Government, in relation to any area in the State, or

(ii) the Collector, in relation to any area in the district under his charge,

is satisfied that on account of temporary shortage of stamps in any area, duty cannot be paid, and payment of duty cannot be indicated on instruments, by means of stamps, the State Government, or, as the case may be, the Collector, may, by Notification in the Official Gazette, direct that, in such area, the duty may be paid in cash in any Government treasury or sub-treasury, and certify by endorsement on the instrument in respect of which the stamp duty is paid, that the duty has been paid, and state in the said endorsement the amount of the duty so paid

(4) An endorsement made on any instrument under sub-section (3) shall have the same effect as if the duty of an amount equal to the amount stated in the endorsement had been paid in respect of, and such payment had been indicated on such instrument by means of stamps, under sub-section (1)."

Section 10A (New)— Franking machines.

9.11. This disposes of section 10. At this stage, we may discuss a new point concerning the mode of payment. At present, the usual mode of payment of duty on documents is by affixing stamps.[3] In our view, an innovation worth considering is the use of franking machines. It is well-known that such machines are allowed for postal stamps.[4]

It appears[5] that the laws in Malaya and Singapore provide for issuing licences, authorising persons to pay the required duty on cheques, bills of exchange (not including promissory notes) and receipts, by postal franking machines. Apart from that, however, the utility of such a provision is obvious.

Postage stamps to be deemed to be stamps for the purpose.

9.12. Practical experience of a similar provision in the Post Office Act shows that such a provision would not lead to serious evasion. The provision in the Post Office Act as to Postal franking (Section 17, Post Office Act), is quoted below :[6]

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1. S.N. 132 in Law Commission File-Extract from File No. 471/61/71-Cus.VII, Min. of Finance (Revenue & Insurance Department.)
2. S.N. 132 in law Commission file.
3. Sections 10 and 11, Stamp Act.
4. Section 17, Indian Post Office Act, 1898.
5. Sheridan, "Malaya and Sigapore—The Development of Laws and Constitution" (1961) Page 232.
6. Section 17, Post Office Act.

"17. (1) Postage Stamps provided under section 16 shall be deemed to be stamps issued by Government for the purpose of revenue within the meaning of the Indian Penal Code, and, subject to the other provisions of this Act, shall be used for the payment of postage or other sums chargeable under this Act in respect of postal articles, except where the Central Government directs that pre-payment shall be made in some other way.

45 of 1860

(2) Where the Central Government has directed that prepayment of postage or other sums chargeable under this Act in respect of postal articles may be made by prepaying the value denoted by the impressions of stamping machines issued under its authority, the impression of any such machine shall likewise be deemed to be a stamp issued by Government for the purpose of revenue, within the meaning of the Indian Penal Code."

45 of 1860.

Recommendation

9.13. We recommend that some such provision should be inserted in the Stamp Act. Some of the replies to our Questionnaire[1] favour it. Some have raised queries about the likelihood of misuse. We have dealt with that aspect already. The new section could be numbered as section 10A.

1. Questions 27.

CHAPTER 10

STAMPS AND THE MODE OF USING THEM :

SECTIONS 11—16

Section 11.

10.1. The instruments which "may be stamped" with adhesive stamps are enumerated in section 11. These are—

"(a) instruments chargeable with a duty not exceeding ten naya paise, except parts of bills of exchange payable otherwise than on demand and drawn in sets ;

"(b) bill of exchange *drawn or made out of India*, and promissory notes *so drawn*

(c) entry as an advocate, vakil or attorney on the roll of a High Court ;

(d) notarial acts ; and

(e) transfers by endorsement of shares in any incorporated company or other body corporate."

Section 11 and the use of the word "may"

10.2. We begin with opening line of the section, which says—"the following instruments may be stamped with adhesive stamps". It has been held[1] that the use of adhesive stamps under this section is permissive and not obligatory, so that if an impressed stamp is available and suitable, it can be used instead of an adhesive stamp. In our opinion, it is desirable that this interpretation should be codified, so that the section is made self-contained. This could be achieved by inserting an Explanation to the above effect.

Section 11(a) and 11 (b)

10.3. In clause (a), the amount ten naya paise should now be increased to twenty (see Article 53). As to clause (b), it has been held[2] that the words "drawn or made out of India" govern the entire clause and are not confined to promissory notes. This is not, at first sight, apparent from the section, and it would, therefore, be useful to re-frame clause (b) as follows, so as to bring out its true scope :

"(b) bills of exchange *drawn or made out of India*, and promissory notes *so drawn or made*."

Section 11 (c) to be deleted

10.4. Section 11(c) provides that entry as an advocate vakil or attorney on the roll of a High Court may be stamped with an adhesive stamp. We are going to recommend deletion of the charging article on such instruments.[3] We, therefore, recommend that section 11(c) should be deleted.

The remaining clauses need no change.

Recommendation

10.4A. In the light of the above discussion, our recommendaton is to revise section 11 as under :

"11. The following instruments may be stamped with adhesive stamps, namely—

(a) instruments chargeable with a duty not exceeding *twenty paise*, except parts of bills of exchange payable otherwise than on demand and drawn in sets ;

(b) bills of exchange drawn or *made out of India*, and promissory notes *so drawn or made ;*

[(c) is omitted.]

(d) notarial acts ; and

(e) transfers by endorsements of shares in any incorporated company or other body corporate."

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1. (a) *Kalyan Singh v. Bhawar Singh* I.L.R. (1965) 15 Raj. 231.
   (b) *Som Dutt v. Abdul Rashid*, A.I.R. 1868 Raj 45.
2. *Devati v. Ramakrishniah*, (1880) I.L.R. 2 Madras 173, 174 (case on section 10 (b), 1879 Act).
3. Article 30, *Infra*.

24M of Law/77—12

Explanation—To be added as recommended.

Section 12.

10.5. Section 12 deals with the important topic of cancellation of adhesive stamps. Under sub-section (1), clause (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 ;"

Clause (b) of the sub-section enacts that 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 the manner aforesaid, cancel the same so that it cannot be used again.

Under sub-section (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.

The mode of cancellation is indicated in greater detail by sub-section (3). It provides that 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".

Principle.

10.6. The principle underlying the section is fairly clear. As was observed in a Bombay case[1]—

"The Stamp Act of 1899. (clause 3 of section 12) points out as a guide how the cancellation may be effected.....the law being that a used stamp cannot be used again—the object of the legislature in making cancellation obligatory is that the used stamp should bear on it some effective mark to show that it has been used."

The principle was further explained in a Lahore case[2] in these words :

"The principle underlying section 12 is that the possibility of a stamp affixed to an instrument being used again should be precluded."

Section 12(3).

10.7. The application of sub-section (3), however, is not totally free from difficulty. The first part of the sub-section (3) indicates one mode of cancellation as sufficient, namely, the writing on the stamp of the executant's name or initial and the true date. But the sub-section does not lay down[3] any special manner which must be rigidly followed in *every case*.

Modes of Cancellation.

10.8. Where the cancellation is by inscribing on the stamp the executant's name or initial and true date, as provided in the section, there is no difficulty.

As to the other methods of cancellation of stamp, indicated in sub-section (3) by the words "or in any other effectual manner", the question often arises whether the method employed is sufficient to prevent the stamp from being used again.

Thus, the Allahabad High Court has held[4] that the degree of cancellation required is not such as to make it absolutely impossible for a fraud to be committed ; and, it has, accordingly, held that the stamp was effectually cancelled when a single horizontal line was drawn across it.

Similarly, where signature without date was written across, it was held as effective[5] cancellation. In another case[6], the signature of the executant made by the scribe on the adhesive stamp under direction of the illiterate executor, was regarded as effective cancellation. Drawing lines in different directions and extended on the paper, were held to be an effective cancellation in an Allahabad case.[7]

1. *Virabhadrapa bin Adharshapa* v. *Bhimaji Balaji Saraff* (1904) 6 Bom. L.R. 436 ; I.L.R. 28 Bom. 432 (Chandavarhar & Aston JJ).
2. *Sohan Lal Nihal Chand* v *Raghunath Singh*, A.I.R. 1934 Lah 606, 607 (Shadi Lal C.J. & Rangi Lal J).
3. *G.A. Heven* v. *Sultan Khan*, A.I.R. 1936 Oudh 176 (Srivastava and Nanavutty JJ.)
4. *Mahadeo Kori* v. *Sheorj Ram Teli*, (1919) I.L.R. 41 All. 169. 180, 181, 182 (Piggott and Walsh, JJ.)
5. *Kirpa Ram* v. *Baru Mal*, 3 All. L.J. 326.
6. *Thakari Mallah* v. *Ram Tahal Tewari*, A.I.R. 1931 All. 57(1) (Niamutullah, J.)
7. *Mohammad Amir Mirza Beg* v. *Babu Kedar Nath*, 15 I.C. 202 (All.)

Parallel lines.

10.9. In this context, parallel lines create problems. The Bombay High Court, in an earlier case[1], *held that two parallel lines drawn across a stamp means no effective cancellation* in another Bombay case[2], a small part of the first letter of the executant's signature, consisting of a slightly curved line, appeared on a stamp, and this was held not to effect such a cancellation of the stamp as was provided by section 11, of the Stamp Act, 1879. But the earlier view has been criticised in a later Bombay case.[3]

The Lahore High Court has held that drawing diagonal lines across the face of the adhesive stamp was effective cancellation.[4] In another Lahore case,[5] drawing a line across the stamp was treated as effectual cancellation, since the intention to cancel was clear from what had been done. But, drawing a line across the stamp in a manner which leaves the stamp capable of being used a second time[6] was not regarded as an effective cancellation.

The Oudh view was that signatures of the executant, if run across the whole stamp, was effective[7] cancellation. But if there are several adhesive stamps which make up the required stamp, all such stamps should be cancelled, and on failure to do so, the instrument should be deemed[8] unstamped under section 12(2), as regards the uncancelled stamps.

According to the Andhra Pradesh High Court,[9] the drawing of two long perallel lines is sufficient to effectively cancel three stamps.

These decisions reveal a good deal of controversy.

Enlgish Law.

10.10. Under the English Stamp Act, 1891 (54 and 55 Vict. c. 39), section 8 of which is in similar terms,[10] *it has been held that the writing of the name or the date alone or other* marks such as lines or cross-mark on the stamp, is sufficient cancellation.[11]

Recommendation

10.11. Though cancellation is a question of fact, it appears to be desirable to make some specific provision in the section about a particular mode of it—cancellation by drawing a line across the stamp, so as to avoid such controversies as have been referred to above.[12]

We, therefore, recommend that in section 12(3), before the words "or in any other effectual manner", *the words "or by drawing a line across the stamp or", should be added, for this* purpose.

We may state that the suggested amendment has been generally favoured by the replies received to our Questionnaire.[13]

Section 13—Instruments stamped with impressed stamps how to be written.

10.12. So far we were concerned with adhesive stamps. As to impressed stamps, section 13 provides that every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument. The principal object of the section is to protect the revenue, and to avoid the frauds which may be facilitated if the instrument is written in such manner that the stamp can be used for purposes of another instrument when so desired. This general rule is sound enough. But, in applying what is enacted in the section, certain problems have arisen in parctice.

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1. *Virabhadra Din Advashapa v. Bhimaji Balaji Saraff,* (1904) I.L.R. 28 Bom. 432.
2. See *In re Tata Iron & Steel Co.* (1926) A.I.R. 1928 Bom. 80; 30 Bom. L.R. 197, 216 (Crimp J.)
3. See also *Puran Ditta* (1908) 108 P.R. 1908.
4. *Mela Ram* v. *Brij Lal,* A.I.R. 1920 Lah. 374 (Broadway J.), following Molid Amir, (1912) 15 I.C. 202.
5. *Kishori Lal Banarsi Das* v. *Ram Lal Tek Chand,* A.I.R. 1921 Lah. 120 (D.B.)
6. *Hafiz Allah Baksh* v. *Dost Mohammad,* A.I.R. 1935 Lah. 716 (Addison and Sale JJ.).
7. *G.A. Heven* v. *Sultan Khan* , A.I.R. 1936 Oudh 176 (Srivastava and Nanavatty JJ.)
8. *Babu Lal* v. *Durga Prasad,* A.I.R. 1940 Oudh 308 (Radhakrishna J.).
9. (a) *Mrs. Sundersanam* v. *Venkatarazo,* A.I.R. 1963 Andh. Pradesh 442, 444, 445, Paras 13 and 19, (Anantarayaa Ayer, J.).
   (b) *Narayan* v. *Sarojini Devi,* A.I.R. 1963 A.P. 378, 379, para 4 (Narasimham, J.).
10. Section 8, Stamp Act, 1891 (Eng.).
11. *M. Mullen* v. *Alfred Hickman Steamship Ltd.* (1902) 17 L.J. Ch. 766, 767.
12. Para 10.9, *Supra.*
13. Question 28—section 12.

Writing on the reverse.

10.13. The first question that has arisen relates to the point whether the reverse of the stamp paper could be used. The section itself does not say that only one side may be written upon; and the Bombay High Court[1] has held that the reverse of the stamp paper can also be used. In the Bombay case, the document commenced on the reverse of the side on which the stamp was impressed, and terminated on the side impressed with the stamp. It was observed that the stamp was not, in any way, defaced, nor was the paper so written as to admit of the stamp being used again. On these facts, the High Court held the document was properly stamped.[2] A Government notification prohibiting writing on the reverse of an impressed stamp paper was noted, but it had been issued after the bond in question, and it was not, therefore, material.

This prohibition (imposed by the notification) referred to above, was withdrawn in 1881, but in 1882 a rule was made which provided that when a single sheet is found insufficient to admit of the entire instrument being written on the side of the paper which bears the stamp, so much plain paper may be sub-joined as may be necessary for the complete writing of the instrument, provided that in every such case the side which bears the stamp must be covered by a substantial part of this instrument before any part of the instrument can be written on the plain paper joined to such sheet. With reference to this rule also, the Madras High Court held,[3] that it was an enabling rule, authorising the use of plain paper; but, it did not prohibit *writing on the reverse side.*

10.14. One would think that since the controversy as to writing on the reverse of the paper had arisen more than once, the rule on the subject would have been revised to make the position more liberal. However, when the rules were revised in 1925, no such clarification was made, and the rule now in force[4] is silent on the subject of writing on the reverse. Indirectly rule 7(2) disallows it. We are of the view that it is desirable to make the section specific on the subject, and to allow writing on the reverse by an express provision.

Rule 7.

10.15. The following rule of the Stamp Rules, to which we have already made a reference, raises a few other questions.

7. *Provision where single sheet of paper is insufficient.*—(1) Where two or more sheets of paper on which stamps are engraved or embossed are used to make up the amount of duty chargeable in respect of any instrument, a portion of such instrument shall be written on each sheet so used.

(2) Where a single sheet of paper, not being paper bearing an impressed hundi-stamp, is insufficient to admit of the entire instrument being *written on the side of the paper which bears the stamp, so* much plain paper may be subjoined thereto as may be necessary for the complete writing of such instrument.

> "Provided that in every such case a substantial part of the instrument shall be written on the sheet which bears the stamp before any part is written on the plain paper subjoined."

Use of Plain papers.

10.16. We have already referred to the question of writing on the reverse of the stamp paper. Then, there is another matter which requires attention. Section 13 itself does not give any guidance as to the use of plain paper, but the rule[5] provides that where the single sheet is insufficient, a plain paper may be subjoined, but in every such case a substantial part of the instrument shall be written on the sheet which bears the stamp before any part is written on the plain paper subjoined. It may be noted that rule 5(e) of the Rules made under the Stamp Act of 1879 contained a further proviso, namely, "that the part of the instrument written on the plain paper must be attested by the signatures or marks of all persons executing the document and witnesses to the same." This part of the rule was, however, held to be *ultra vires,*

1. *Dowlat Ram* v. *Vitho Radhoji,* (1879) I.L.R. 5 Bom. 188, 195, 197.
2. At that time, section 12 of the Stamp Act of 1879, was the relevant provision.
3. Reference regarding Stamp Act, (1880) I.L.R. 7 Mad. 176 (Full Bench).
4. Rule 7, Indian Stamp Rules, 1925 (*infra*)
5. Para 10.15, *Supra.*

5a. Rule 7(2), Indian Stamp Rules 1925 (*Supra*).

as going beyond the parent Act,[1] as it imposed a more stringent requirement than the Act, and, ultimately, it was rescinded by notification in 1891.

Here again, it appears to be desirable to provide specifically that it is not necessary that the plain paper should be signed by the parties. This will make the position explicit on the subject.

More than one stamp paper.

10.17. We now come to the situation of use of more than one stamp papers. The section is, again, silent as to this, but the matter is dealt with by the same rule, that is to say, rule 7 of the Indian Stamp Rules.[2] In substance, the rule provides that a part of the instrument must be written on each sheet so used, the idea being that the stamp paper should not be used for writing any other instrument. An instrument offending against the rule would not be duly stamped.

Now, this may be a good rule in general, but, in practice, some difficulties arise because one single stamped sheet denoting the entire duty is often not available, so that, although the text of the instrument is a short one, it has to be spread out over a number of stamp papers in order to comply with the section, as read with the rule. The requirement that the instrument must *appear on each of the attached stamp papers,* if taken literally, is not convenient, in the case to which we have referred above.

10.18. No doubt, the public has found a way out by adopting the practice of making a suitable endorsement on the attached paper, but the attached paper does not contain any "substantial matter" relating to the transaction and, therefore, its validity is in doubt. In general, in the case of instruments stamped with impressed stamps, *the number of stamps* which may be used can be regulated by rule.[3] But it appears to be desirable to provide that the text need not appear on each stamped sheet, and that an endorsement stating that the stamped paper is attached to another stamped paper containing the text, will do.

Need for Change

10.19. It would be convenient if the section is made self-contained, as far as possible, on the points discussed above, so that the citizen may clearly know from the Act the position in this respect. It is for this reason that we recommend an amendment of the section, to be presently mentioned.

We may state that principle of suggested scheme has been favoured by many of the replies received to our Questionnaire.[4]

Recommendation to revise section 13.

10.20. Our recommendation in the light of what we have stated above is that section 13 should be revised as follows :—

> "13. Every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face *or reverse* of the instrument and cannot be used for or applied to any other instrument.
>
> *Explanation 1.—Where two or more sheets of paper stamped with impressed stamps are used to make up the amount of duty chargeable in respect of any instrument, either a portion of such instrument shall be written on each sheet so used, or the sheet on which no such portion is written shall be signed by the executant or one of the executants, with an endorsement indicating that the sheet is attached to another sheet on which the instrument is written.*
>
> *Explanation 2.—Where a single sheet of paper, not being paper bearing an impressed hundi-stamp, is insufficient to admit of the entire instrument being written on the stamped paper, so much plain paper may be sub-joined thereto as may be necessary for completing the writing of such instrument, provided a substantial part of the instrument is written on the sheet which bears the stamp before any part is written on the plain paper sub-joined, but the fact that the plain paper is not signed by the executants shall not render the instrument not duly stamped.".*

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1. Reference on the Stamp Act, (1884) I.L.R. 8 Mad. 532, 540.
2. Para 10.15 *supra.*
3. Section 10(2)(b).
4. Q. 29—section 13.

Introductory Section 14 and Section 14A (New).

10.21. It is a general rule that only one instrument can be written on the same stamp paper. Section 14 expresses the rule thus :—

> "14. No second instrument chargeable with duty shall be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written :
>
> Provided that nothing in this section shall prevent any endorsement[1] which is duly stamped or is not chargeable with duty being made upon any instrument for the purpose of transferring any right created or evidenced thereby, or of acknowledging the receipt[2] of any money or goods the payment or delivery of which is secured thereby".

The main paragraph of the section raises no difficulty. It does not apply unless both the first and the second instrument are chargeable with duty. But the proviso to the section appears to deal with only one situation, while there are also other situations that require consideration.

Effect of alteration in an instrument on stamp duties.

10.22. In this connection, it may be pointed out that on the general question whether an *alteration* in an instrument already written affects the stamp, the section is silent.

On a study of the decided cases, both Indian[3] and English[4], it would appear that the principle is that where, by reason of an alteration made in an instrument, the instrument *becomes a new one*, a fresh stamp is required. The words "second instrument" have been so construed.

The reason is that the original stamp is spent.[5] The principle applicable is of a simple nature, though there may be difficulty in the application.

Position in England.

10.23. In England, it is well established that no further stamp is required if the alteration is :—

(a) immaterial[6], or

(b) merely declaratory,[7] or

(c) intended to render certain a point which was left open,[8] or

(d) made to correct a mistake,[9] or

(e) made by a stranger.[10]

But, in the case of a bill of exchange[11] executed in the country, the party suing on the bill must prove that the alteration does not vitiate the stamp.[12]

It has become necessary to discuss these points because the proviso to the section gives no guidance in the matter.

Consent of Parties immaterial for purposes of stamp law.

10.24. For the present purpose, a material alteration may be described as one which alters the legal effect of the instrument. A material alteration made without the consent of

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1. See article 62, as to endorsement.
2. See article 53, as to acknowledging receipt.
3. (a) Reference under Stamp Act, (1888) I.L.R. 11 Mad. 40.
   (b) Cox & Co. v. Restonji, A.I.R. 1927 Bom. 1315.
   (c) Pestonji & Co. v. Cox & Co. A.I.R. 1928 P.C. 231.
4. For English cases, see para 10.23, *Infra.*
5. (a) *Bowman* v. *Nichol,* (1794) 5 Term Reports 537.
   (b) *London and Brighton Railway Co.*, v. *Fairclough,* (1844) 2 M & C 674.
6. *Hartley* v. *Manson,* (1842) 4 *Man & G.* 172.
7. *Deo Waters* v. *Houghton* (1827) 1 Man *& Rr. K.B.* 208.
8. *Sadgrove* V *Bryden,* 1907) 1 Ch. 318.
9. *Cole* v. *Parking,* (1810) 12 East 471.
10. *Monfree* v. *Bromley,* (1805) 6 Est. 309.
11. *Knight v. Clements* (1838) 8 Ad & El. 215.
12. Halsbury, 3rd Ed., Vol. 3, Page 283, para 502 ; and Vol. 3, Page 233.

the parties may, of course, render the instrument void under the law of contract. The principle[1] is that "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when the fraud is detected." The Negotiable Instruments Act[2-3] has a specific provision on the subject. The law on the subject has been fully discussed by the Supreme Court.[4] Considerable discussion has also taken place as to the effect of alteration by accident[5], in the general law. But we are not concerned with the effect of alterations in general law.

Practical difficulty.

10.25. Having regard to the obscurity on the subject, in the Stamp Act, it is desirable that the position in this respect should be stated in the proviso. The matter is not of mere academic importance, because, in the case of a contract, the result of a rule requiring fresh stamp for a new agreement is that the old agreement cannot be sued upon as it has been superseded,[6] and the new agreement is inadmissible if not stamped afresh. Thus, a practical difficulty can arise.

Recommendation to insert section 14 A.

10.26. In view of the importance of the principles mentioned above, and the practical difficulty likely to be caused as indicated above, it is desirable to make the law self-contained, by adding a provision to ensure that immaterial alterations, as enumerated above,[7] do not bear duty but material alterations bear duty a fresh.

We my state that the suggested amendment has been generally favoured by the replies received to our Questionnaire.[8]

We recommend that the provision be inserted as section 14A. The following is a rough draft :—

> "14A. Where there are material alterations made in an instrument by a party with or without the consent of other parties, the instrument shall require a fresh stamp according to its altered character."

Section 15.

10.27. Section 15 provides that every instrument written in contravention of section 13 or section 14 shall be deemed to be unstamped. It may be recalled that section 13 deals with the manner in which the instrument stamped with an impressed stamp shall be written, and section 14 provides that only one instrument should be written on the same stamp.

The effect of section 15, as read with section 13, was illustrated in a Lahore case,[9] where a security bond taken on an order for stay of execution, was written on plain paper bearing a court-fee stamp of 7 annas, instead of on impressed stamped paper, thus contravening section 13. The bond was held not to be properly stamped in view of section 15.

As to the effect of section 15, read with section 14, a few reported cases will be referred to in due course.[10]

Verbal improvement needed.

10.28. There is no controversy about the substance of setcion 15 ; but, the wording appears to be capable of improvement. The use of the expression "deemed to be unstamped" raises a doubt as to whether an instrument governed by the section—that is to say, written in violation of sections 13-14—can be admitted in evidence on payment of penalty under section 35 or validated by endorsement of the Collector under section 41.

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1. *Master* v. *Miller*, (1791) 4 Term Reports 320, 329, 145 E.R. 855 (Lord Kenyon, C.J.)
2. Section 87, Negotiable Instruments Act, 1881.
3. As to this aspect, see Halsbury, 3rd Edn., Vol. 11, page 367; as to material alternations in bills of exchange, Halsbury, 3rd Edn., Vol. 3, Page 233.
4. *Amirudhan* v. *Thonu Co.*, A.I.R. 1963 S.C. 746.
5. *Hongkong and Shanghai Banking Corpn.*, v. *Loki Shi*, (1928), A.C. 181. For comments, see (1928) L.Q.R. at Page 406.
6. *Royal Exchange Assurance* v. *Hope*, (1928) Chancery 179 (Court of Appeal).
7. See "Immaterial alterations", *supra*."
8. Q. 30—section 14.
9. *Gurandittа Mal* v. *Firm Gurandittamal Ram Chand*, A.I.R. 1925 Lah. 552, 554 (Martinequ, J.)
10. See "Case of two instruments", *infra*.

In one of the early Bombay cases,[1] it was held that the Collector ought to refuse to make an endorsement in such cases. But this view was over-ruled in a later decision.[2] A Madras case agrees[3] with the later Bombay view.

Recommendation to subsititute the words "not duly stamped".

10.29. It is, in our opinion, desirable to avoid the recurrence of such controversies, and this could be achieved by substituting the words "not duly stamped" for the word "unstamped", in section 15. The expression "duly stamped" is defined in the Act,[4] and is used at many places in the Act. We recommend that the section should be amended as above. It is in harmony, for example, with the language used in the section dealing with the Collector's power to stamp instruments which are impounded.[5] This clarification can usefully cover section 14A (new) also.

Case of two instruments.

10.30 We shall now deal with another question arising out of section 15. It is to be noted that where two instruments are written on one paper, it is the second instrument which is to be treated as "unstamped" within the meaning of section 15, and not the first one. Thus, in a Madras case,[6] a deed of release was endorsed on a deed of conveyance for Rs. 100. The conveyance bore an impressed stamp for one rupee, but the endorsement of release was unstamped. It was held that the conveyance was valid, and the release could be validated on payment of the deficient stamp duty and the penalty under section 39 of the old Act I of 1879 (section 40 of the present Act).

10.31. A similar view (regarding the admission of a document in evidence on payment of deficient stamp and penalty), was taken in another Bombay case,[7] where an endorsement of transfer written on a duly stamped simple money bond, was in issue. The question to be considered was whether the case fell under that part of section 14 (old section 13) which forbids a second instrument being written upon a paper on which an instrument has already been written. It was held, that the endorsement was chargeable with duty, but could be stamped under old section 34—present section 35.

Recommendation to make it clear that the second instrument is intended.

10.32. In our opinion, it is desirable to codify the proposition emerging from the above cases, in so far as they hold that it is the *second instrument* which is to be deemed to be not duly stamped. The clarification will be confined to instruments falling under existing section 14 and will not extend to new section 14-A.

We may state that the suggested amendments have been generally favoured by the replies received to our Questionnaire.[8]

Recommendation

10.33. Accordingly, we recommend that section 15 should be revised as under :—

Revised section 15

"15. Every instrument written in contravention of section 13 or section 14 or *section 14A* shall be deemed to be unstamped".

Explanation.—In the case to which section 14 *applies, it shall be the second instrument which shall be deemed to be unstamped.*

Section 16.

10.34. Section 16 is as follows :—

Denoting duty.

"16. Where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another

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1. *In the matter of Hammappa,* (1888) I.L.R. 13 Bom. 281.
2. *Prahlad* v. *Vithu,* I.L.R. (1892) 17 Bom. 687 (F.B.)
3. *In the matter of Reference etc.,* (1888) I.L.R. 11 Mad. 40.
4. See section 2(11), "duly stamped."
5. Section 40 (1) (a) and (b).
6. *In the matter of reference by Collector of Stamps, Madras.* (1888), I.L.R. 11 Mad. 40; (Co llins, C.J., Kernan, M ı tusami Aiyer, Brandt & Parker, JJ.) (Case dedcided under old section 14, corresponding to pr esent sectio n 15).
7. Prahlad Laksmanrau Nikane v. Vithu, (1893) I.L.R. 17 Bom. 687 (Parsons, Telang and Candy, JJ.)
8. (a) Q.31—section 5.
   (b) Q.32—section 15 and second instrument.

instrument, the payment of such last-mentioned duty shall, if application is made in writing to the Collector for that purpose, and on production of both the instruments, be denoted upon such first-mentioned instrument, by endorsement under the hand of the Collector or in such other manner (if any) as the State Government may by rule prescribe."

Sometimes, the duty payable on some instruments depends upon the duty paid on other instruments that have already been executed and stamped. Examples of such instruments are—subsidiary instruments, as opposed to the principal ones under section 4, the counter-parts or duplicates of instruments under Article 25, leases under the proviso to Article 35, instruments of partition under proviso (a) or (c) to Article 45, and instruments of settlement under the proviso to Article 58. Similarly, at times, the exemption from duty in favour of some instruments, (for example, the entry of an advocate or attorney on the roll of a High Court when he has previously been enrolled in a High Court) depends on the duty paid on another instrument.

10.35. In order to render these instruments as either partially stamped or totally exempt from stamp duty, because of the principal documents having been fully stamped, section 16 lays down that on production of both the instruments and on an application to the Collector, an endorsement would be made by the Collector on the Subsidiary instruments, denoting the payment of the duty actually paid in respect of the principal instrument.[1]

10.36. The necessary endorsement will be made by the Collector, only if an application has been made in writing to him, for the purpose. If the party interested does not apply for the necessary endorsement and, therefore, does not obtain it, then he has to produce, when required, both the instruments, in order to render the partially stamped or exempted instrument admissible in evidence.

No change is needed in this section.

1. Compare section 11, Stamp Act, 1891 (Eng.)

CHAPTER 11

TIME OF PAYMENT—SECTIONS 17—19

Section 17.

11.1. The time of payment of duty is dealt with in sections 17 to 19 of the Act. Briefly speaking, the time of stamping is linked up with the time of execution, but special situations, such as an instrument executed out of India, may arise and have to be dealt with. The general proposition is to be found in section 17. All instruments chargeable with duty and executed by any person *in India* shall be stamped before or at the time of execution under the section.

The expression "shall be stamped" means that the instrument should be duly stamped, that is to say, a stamp of the proper description and amount should have been used at the time and in the manner prescribed by law.[1] "Executed", as defined in the Act, means signed.[2] So, stamping must precede or be simultaneous with signing.

Conflict as to time of stamping.

11.2. There has been a conflict of views with respect to the phrase "at the time of execution" in section 17. In a Bombay case[3], a promissory note was executed by A and B, a stamp was affixed afterwards and cancelled by A, by again signing it. The High Court held that the stamping must be held to have taken place *subsequent to the execution,* and therefore, it could not be said that the promissory note was stamped "before or at the time of execution", within the meaning of section 17.

In that case, the evidence clearly showed that defendant 1 wrote out the promissory note in suit, and defendants 1 and 2 put their signatures on it in the presence of the plaintiff's husband. *It was then stamped.* This, according to the Bombay High Court, was a clearly evidence to establish that the stamping of the promissory note took place *after the execution* was already complete. According to that High Court, section 17 requires that the stamping should be done sometime before the document is executed, or that a stamped paper must be placed before the executant who must execute it, or, he must first stamp it and then execute the document. But, if the executant has already finished the "execution" of the document (in the eye of the law) then any subsequent stamping, *however close in time,* could not be said to be stamping at the time of execution.

The High Court criticised an earlier decision of the Madras High Court[4], holding to the contrary. In the Madras case, there was only one executant, and the promissory note was signed by him, and subsequently, it was stamped. The Madras High Court held, that the uncontradicted evidence of the plaintiff showed that the acts were "practically simultaneous", and the stamping was, therefore, done "at the time of execution" within the meaning of section 16 of the Stamp Act, 1879, corresponding to section 17 of the present Act. The Madras High Court, further, expressed the view that, even under the present Act, where execution is defined as meaning "signature",[5] it would not make any difference if the stamp was affixed and cancelled immediately after the signature on the document, *the signing and stamping being continuous acts in the same transaction.* The Bombay High Court, however, observed that, it was difficult to understand the significance of the expression "practically simultaneous". Either the stamping is after execution, or before or at the time of the execution.

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1. (a) *Moti Lal* v. *Jagmohandas,* (1904) 6 Bom. L.R. 699.
   (b) *Jethibai* v. *Rama Chnadra.* (1899) I.L.R. 13 Bom. 484.
2. Section 2(12), Indian Stamp Act, 1899.
3. *Mrs. Rohini Chandrakant Vijaykar* v. *A.I. Fernandes,* A.I.R. 1956 Bom. 421, 423, para 4 (D.B.) (Chagla, C.J. and Dixit, J.)
4. *Surji Mull* v. *Hudson,* (1900) I.L.R. 24 Mad. 259. 261 (D.B.)
5. Section 2(12), Stamp Act, 1899.

11.3. In a Kerala case,[1] the Bombay view[2] was dissented from, and the Madras view was followed.[3] In that case, a promissory note was affixed with additional stamps after the second attesting witness pointed out that the note was insufficiently stamped. The High Court held that the execution of the promissory note was complete when additional stamps were affixed and defaced and delivery of the promissory note was effected. According to the Kerala High Court, the expression, "shall be stamped at the time of execution" must be interpreted in a reasonable manner, and it is sufficient if signing and affixing of the stamp are "practically simultaneous".

Recommendation to amends. 17.

11.4. From the above discussion, it appears that the existing phrase, "before or at the time of execution" in section 17, lands the courts in difficulty. It would, in our view, be better if the words "at the time of execution or immediately thereafter" are substituted, in place of that phrase, and we recommend accordingly. We may note that such an amendment has been generally favoured in the replies to the Questionnaire issued by us.[4]

Section. 18.

11.5. Instruments executed outside India are dealt with in sections 18 and 19. Under section 18(1), every instrument chargeable with duty executed only out of India and not being a bill of exchange or promissory note, may be stamped within three months after it has been first received in India. Under section 18(2), where any such instrument cannot, with reference to the description of a stamp prescribed therefor, be duly stamped by a private person, it may be taken within the said period of three months to the Collector, who shall stamp the same in such manner as the State Government may, by rule, prescribe, with a stamp of such value as the person so taking such instrument may require and pay for.

Thus, the instruments which are executed out of India and chargeable with duty,[5] (not being bills of exchange or promissory notes) may be stamped within three months after they have been first received in India. If stamps of the required description are not available, the party should take the instrument to be stamped within the said period of three months to the Collector who will stamp the same with the stamp of proper description. It is, however, necessary to make an application to the Collector in this regard.[6]

Instruments not chargeable with duty.

11.6. Section 18 must be read with section 3(c). Section 3(c) makes it clear, that instruments executed out of India (other than bills of exchange or promissory notes) will not be liable to stamp duty unless they relate to property situate or to any matter or thing done or to be done in India and are received in India. Thus, a simple money bond executed out of India will not be liable to duty even when received in India, because it does not relate to any property situate, or to any matter or thing done or to be done, in India. If, however, the instrument in question related to some property situate in India, it would be governed[7] by section 18. Deeds of partition, executed abroad, of property partly situate in India are also so governed as would appear from the decision in a Madras case.[8]

The same is the case with acknowledgements of debts.[9]

Bills of exchange and pre-notes—Effect of non-stamping.

11.7. If the instrument in question is not stamped within the prescribed period of three months as under section 18, but is stamped afterwards, it would be deemed to be unstamped, and would be governed by section 35 as regards the consequences of non-stamping. For example, instruments chargeable with the duty of one anna (now 10 paise) e.g.—an acknowledgement of a debt,- -if not stamped within the period of three months of their receipt in India, cannot be admitted in evidence even on the payment of duty and penalty, because section 35 does not provide for the admissibility on payment of duty and penalty.[10]

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1. *Kurivila Markose* v. *Varkey Varkey*, A.I.R. 1966 Ker. 315 (T. C. Raghwan).
2. *Mrs. Rohini Chandrakanta* v. *A.I. Fernandes*, A.I.R. 1956 Bom. 421 (para 11, *supra.*)
3. *Surjit Mull* v. *Hudson*, (1900) I.L.R. 24 Mad. 259, (D.B.), para 11.2, *supra.*
4. Q. 33.
5. *Herbert Francis* v. *Md. Akbar*, A.I.R. 1928, Patna 134.
6. Section 31.
7. *Herbert Franuis* v. *Mohd. Akbar* A.I.R 1928 Patna 134.
8. *Rajangam* v. *Rajamangamer*, A.I.R. 1920 Mad. 149. (Document executed at Trivandrum).
9. *Ali Mohamed* v. *Jagannath*, A.I.R. 1928 All. 666.
10. *Ali Mohamed* v. *Jagan nath* A.I.R. 1928 All 666.

Copies.

11.8. Again, section 18 does not make the copy of a document admissible by stamping it with the stamp required on its original. If the original instrument executed outside India requires to be stamped when brought in India, and is not stamped, then a copy of that instrument brought in India must be rejected as inadmissible, and cannot be placed on record, as the law now stands, for the reason that it cannot be stamped and no penalty can be realised on it under section 35. Section 18 applies only to original documents which, although executed out of India, attract duty in India and are brought in India.[1]

No change

11.9. The above brief discussion would serve to illustrate the implications of the section. There being no conflict of decisions or obscurity in language or other difficulty in the working of the section, we have no further comments on it.

Section 19—Bills and notes drawn out of India.

11.10. Under section 19, the first holder in India of any bill of exchange, (payable otherwise than on demand) or promissory note drawn or made out of India shall, before he presents the same for acceptance or payment, or endorses, transfers or otherwise negotiates the same in India, affix thereto the proper stamp and cancel the same.

There are two provisos to the section, which read as follows :—

> "(a) if, at the time any such bill of exchange, or note comes into the hands of any holder thereof in India, the proper adhesive stamp is affixed thereto and cancelled in manner prescribed by section 12 and such holder has no reason to believe that such stamp was affixed or cancelled otherwise than by the person and at the time required by this Act, such stamp shall, so far as relates to such holder, be deemed to have been *duly affixed and cancelled ;*
>
> (b) nothing contained in the proviso shall relieve any person from any penalty incurred by him for omitting to affix or cancel a stamp."

Proper time of cancellation.

11.11. A number of points arise on this section. We shall take them up one by one. The first point relates to the proper time of cancellation. The section makes it obligatory on the first holder to affix a stamp on the foreign bill or note and to cancel the same *before he does any of the acts set out in the section.* If the stamp is not cancelled at the proper time, it cannot be cancelled afterwards. Thus, where a stamp was affixed to a hundi which was drawn at Indore before it was presented for payment in British India, but was not cancelled before presentation, it was, in a suit on the basis of the hundi, held that in the face of the imperative words of this section, it was impossible to accede to the suggestion that the stamp could be cancelled in the court.[2]

11.12. On this point, the English law[3] is, however, different. The (English) Stamp Act of 1891, section 35, Proviso (b), enables a *bona fide* holder to cancel the stamp itself, if it was not cancelled when the foreign bill came into his hands ; and upon his so doing, such bill is deemed to be duly stamped and as valid and available as if the stamp had been duly cancelled by the person by whom it was affixed. Under the English law, therefore, a foreign bill, in order to be admissible in evidence, requires only that the proper stamp should have been affixed.[4] Construing this proviso, Blackburn, J. expressed an opinion that the cancellation may be made in open Court at any time before the verdict.[5]

Recommendation to adopt the English provision.

11.13. It would, in our view, be an improvement, if the position which prevails in England is adopted. The primary object of the requirement of cancellation is to ensure that the stamp is not used again. This object is achieved as much by the English provision as by the Indian section. The present holder should not be penalised for the faults of the previous holder. We recommend that the section should be suitably amended.

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1. *Cooperative Assurance Co., Ltd., Amritsar* v. *Lachman Singh Bhagat*, A.I.R. 1951 Pepsu 24.
2. *Ramprasad Shivlal* v. *Shrinivas Balmukund*, (1925) 27 Bom. L.R. 1122, 1126.
3. Section 35. Proviso (b) Stamp Act, 1891 (Eng.)
4. *Marc.* v. *Rovy*, (1874) 31 L.T. 372, 374 ; 23 W.R. (Engl.) 89.
5. *Valle* v. *Michael*, (1874) 30 Law Times 463, 464.

Meaning of "first holder".

11.14. The second point relates to the important opening words in section 19, viz., "first holder in India"[1]. The Act is not concerned with the possession of the bill or promissory note before then. On this point no clarification is required.

Instruments stamped with Indian stamp outside India.

11.15. The third point is important. According to the Madras High Court, the Legislature does not appear to be interested in whether a promissory note has or has not been stamped outside India *with the result that a note stamped outside India* will have to be stamped again before endorsement.[2] Thus, when a bill of exchange not payable on demand drawn out of India or a pronote made out of India has been duly stamped abroad *with Indian* stamps of the proper amount and description, and the stamps have been cancelled, the question of its being stamped in India arises, because section 19 compels the first "holder" thereof to stamp it before he does any of the acts mentioned therein.

The same view was taken in another case[3] of the Madras High Court,—"In the interests of judicial comity",—and quite apart from any consideration of the correctness of the decision therein. The facts of the case appear, however, to have been reported meagerly. It is also not clear whether the "first holder of the pronote in India" in this case was the promisee himself or his transferee.

The Punjab High Court has, however, taken a contrary view.[4] According to that High Court, if an Indian Stamp is already affixed on the promissory note, then, a fresh stamp will not be needed, because, to do so would be to charge double duty.

Recommendation for amendment.

11.16. Whatever be the correct interpretation of the existing language of section 3(b) read with section 19, it appears to us that there is no reason why an instrument bearing an *Indian stamp* should again be stamped with an *Indian stamp* when it is presented for acceptance or payment or endorsement etc. as contemplated by section 19. Indian revenue law has already been complied with, by affixing the Indian stamp.

If this approach is correct, it would be desirable to add an Explanation to section 19 to the effect that where the promissory note already bears an Indian stamp, it shall not be necessary to stamp it again. Such an amendment has been favoured by almost all the replies to our Questionnaire also.[6]

Suit to enforce the liability.

11.17. The last proposition to which attention should be drawn while discussing section 19 is that where a promissory note is executed outside India, it is admissible here if the suit is *brought to enforce the liability created by the promissory note.* The requirement of stamp under section 19 arises only when a first holder in India does one of the specified acts, namely, presentation for acceptance, presentation for payment, endorsement, transfer or otherwise negotiation in India. In an early Madras.[7] It was clearly stated, that the provisions of section 19, Indian Stamp Act, are applicable to a holder only where there is one of those acts set out in the section and that an instrument need not be stamped in the manner provided when it was not dealt with in any of the ways set out.

Thus,[8] even if a pronote executed out of India is not stamped, a suit can be brought on the pronote as between the promisor and promisee.

No amendment is required on this point.

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1. *Siva Subramania* v. *Kalankarayan,* A.I.R. 1941 Mad. 868.
2. *Siva Subramania* v. *Kalankarayan,,* A.I.R. 1941 Mad. 868, 869, 870 (Mochett, J.)
3. *I.D. Lobo* v. *Marajal Doggu,* A.I.R. 1953 Mad. 424.
4. *Rattan Chand Birooram* v. *L. Khairatiram Nandlal,* A.I.R. 1955 Punj 88, 90, para 5-6.
5. See, *supra*.
6. Q-35.
7. *Md. Rawthan* v. *Md. Hussain Rawthan,* (1899) I.L.R. 22 Mad. 337.
8. *Siva Subramania* v. Kalankarayan, A.I.R. 1941 Mad 868 (case law reviewed).

CHAPTER 12

COMPUTATION OF AD VALOREM DUTY—SECTIONS 20 TO 26

Introductory.

12.1. Duty under the Act is of two kinds—fixed and *ad valorem*. The computation of duty where it is fixed presents no difficult problems, once it is determined that the instrument belongs to that particular category. But the computation of duty *ad valorem* sometimes presents problems, either because the amount[1] or consideration is contingent[2] or unascertained or is expressed in kind,[3] or because it is expressed in other currency,[4] or because of other special circumstances,—e.g., incumbrances[5] and periodical payments.

Section 20.

12.2. Under section 20, where an instrument is chargeable with *ad valorem* duty in respect of any money expressed in any currency other than that of India, such duty shall be calculated on the value of such money in the currency of India according to the current rate of exchange on the day of the date of the instrument.

For this purpose, the Central Government may, from time to time, by notification in the Official Gazette, prescribe a rate of exchange for the conversion of British or any foreign currency into the currency of India for the purposes of calculating stamp-duty. The section needs no change.

Section 21.

12.3. Section 21 provides that where an instrument is chargeable with *ad valorem* duty in respect of any stock or any marketable or other security, such duty shall be calculated on the value of such stock or security according to the average price or the value thereof on the day of the date of the instrument.

It needs no change.

Section 22. Effect of Statement of rate of exchange.

12.4. Under section 22, where an instrument contains a statement of current rate of exchange or average price, as the case may require, and is stamped in accordance with such statement, it shall, so far as regards the subject-matter of such statement, be presumed, until the contrary is proved, to be duly stamped.

It needs no change.

Section 23 interest.

12.5. Section 23 deals with interest expressly made payable by the terms of an instrument. It provides that such instrument shall not be chargeable with duty higher than that which it would have been chargeable had no mention of interest been made therein.

The section is not confined to simple interest, it applies to compound interest also. Therefore, a stipulation in an instrument to pay compound interest need not be separately stamped as a separate instrument.[6]

Under the English law also, stamp duty is calculated on the principal sum secured by an instrument, irrespective of any sum which may become due as interest under the terms of the instrument.[7]

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1. E.G. Royalty (section 26).
2. Interest (section 23.)
3. E.g. stock (section 21 and section 23A).
4. ForeignCurrency (section 20 and section 22).
5. Sections 24-25
6. (a) Bairsal Rindan Samiti v. Sital Chandra, A.I.R. 1930 Ca'. 630, 631 (F.B.)
   (b) Also, Gomez v. *Young*, (1869) 2 Beng. L.R. (O.C. 165.)
7. (a) *Pruessing*fv. *Ing.*, (1829) 106 E.R. 912.
   (b) *Doe d Scruton v. Sneith*, (1832) 131 E.R. 356, 359.
   (c) *Prudential Mutual Assurance Investment & Loan etc. Association* v. *Curzon*, (1852) 155 E.R. 1275.

12.6. The judgment in Pruessing v. Ing.,[1] the leading English case, may be quoted :— English Law.

"*Abbott C. J.* : The Stamp Act imposes upon every promissory note for the payment at any time exceeding two months after date, of any sum of money exceeding 20s., and not exceeding 30s, a duty of 2s.6d. and other duties upon other notes in proportion to the sums thereby secured. The object of the Legislature was to impose a pro rata stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. The question, therefore, in this case, is, what was the sum due at the time when the note was taken ? For, that is the sum secured. I am quite satisfied that the words "sums of money" in the Act, mean the *principal sum mentioned in the note*, and not a sum compounded of principal and interest. A contrary decision would be most mischievous, and have the effect of avoiding many securities ; for it has been the constant practice, under similar provisions applicable to bonds in this and former Stamp Acts, to measure the stamp duty by the principal sum secured, although interest is always made payable from the date of the bond. I think, therefore, that this rule ought to be refused. Rule refused."

12.7. Where, however, the consideration of the instrument is *a lump sum made up of two constituents*, namely, the principal and the interest that might accumulate during a given period, a question may arise whether the instrument will be chargeable for the principal, or whether the instrument will be chargeable for the lump sum. In a Calcutta case,[2] a bond for a loan of Rs. 100 stipulated that the obliger should "pay twice the amount, including Rs. 100 for interest, total Rs. 200 in eight years from 1301 B.S. to 1308 B.S. according to 'kists' (instalments) given in the schedule." It was held, that the amount secured by the bond was Rs. 200 and the bond must be stamped accordingly. The High Court added that an earlier Full Bench ruling[3] of the Allahabad High Court cited in the reference had no bearing on the matter.

12.8. In a Bombay case,[4] the material portion of the Bond was as follows :—

"I have taken from you in cash a loan of Rs. 9-4-0 to which 12 annas have been added for 'Kasar', total Rs. 10 ; interest on this sum amounts to Rs. 2-8-0 ; total Rs. 12-8-0. This debt will be repaid by 25 monthly instalments of eight annas each. Instalments in default will carry future interest at the rate of two rupees per mensem."

The question arose whether stamp duty was leviable on Rs. 10 or on Rs. 12-8-0. It was held that the bond should be liable as to stamp as one for Rs. 10 only, and that the provision about interest should be left out of consideration under section 23.

The Calcutta High Court's view[5] was dissented from by the Bombay High Court. The judgment does not indicate the reasons for dissent. According to the Bombay High Court, if the interest is expressly made payable by the terms of the instrument, then the mere mention of the interest as a lump sum will not render the instrument liable to stamp duty for the total sum of the principal and the interest payable.

12.9. One can distinguish between the Calcutta and the Bombay cases on the ground that in the Calcutta case, the sum of Rs. 100, though described as (derived from) "interest", was merged with the principal, so as to bring into being a new principal amount of Rs. 200. In the Bombay case, the amount of Rs. 2-8-0 retained its character as interest. If this explanation is correct, no clarification on the point is needed.

It is also to be remembered, that, where a provision for interest changes the category of the instrument itself, section 23 would have no application. Thus, an account written on a sheet of paper signed by the debtor and addressed to the creditor and also containing a stipulation to

1. *Pruessing v. Ing.* (1829) 106 E.R 912, 23 R.P. 253.
2. *Shambhu Chandra Bepari v. Krishna Charan Bepari,* (1899) I.L.R 26 Cal. 179 (F.B.)
3. *In the matter of Gajraj Singh,* (1884), *I.L.R.* 9 All 585 (F.B.)
4. *Vithu v. Nathu,* (1901) 3 Bom. L.R. 133, 134.
5. *Shambhu Chandra Bepari v. Krishna Charan Bepari,* (1899) I.L.R. 26 Cal. 179 (above).

pay interest, is not a mere "acknowledgement of a debt", within article 1, but is an agreement, under article 5(b).[1]

Section 23A

12.10. According to section 23A,—

(1) Where an instrument (not being a promissory note or bill of exchange)—

(a) is given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or

(b) makes redeemable or qualifies a duty stamped transfer, intended as a security, or any marketable security,

it shall be chargeable with duty as if it were an agreement or memorandum of an agreement chargeable with duty under Article No. 5(c) of Schedule 1.

(2) A release or discharge of any such instrument shall not be chargeable with the like duty.

The section was introduced by Act 15 of 1904, and is a reproduction of section 23 of the (English) Stamp Act, 1891. The object of the innovation in sub-section (1) appears to have been to make provision for equitable mortagages, where the advance is made on the deposit of marketable securities.[2] The section prevents the levy of a higher duty otherwise chargeable under article 6 (or in certain circumstances, of a still higher duty under Article 40).

12.11. A promissory note would be chargeable under Article 6(2), and a Bill of Exchange would be exempt under Article 40, Exemption 2. That, apparently, is the reason why those two documents are excluded from the scope of the section.

12.12. Sub-section (2) applies to instruments which seek to extinguish the rights created by the instruments given under sub-section (1) and makes a release or discharge of any such instruments given under sub-section (1) also taxable as an agreement, i.e., with the like duty.

There seems to be no reported case law on the present section.[3] The section needs no change.

Section 24 Analysis of the section.

12.13. We now proceed to section 24. It will facilitate an understanding of the section, if before we go into details, the broad scheme of the section is dealt with. The section could be divided into four parts, namely, the main paragraph, the proviso to the main paragraph, the Explanation, and the proviso to the Explanation.

Main Paragraph

12.14. Under the main paragraph, stamp duty on the transfer of property, where it is charged *ad valorem*, is ordinarily calculated on the consideration, subject to certain special provisions which are not material for the present purpose. In determining the amount of consideration, the normal case where the consideration is paid at the time of the transfer in the form of cash or cheque—that is, in the direct manner—presents no difficulty. But, where the consideration is paid indirectly, the question may arise how it is to be calculated. There are two important situations which may require to be considered, namely, (i) the transfer may be in consideration of a debt, or (ii) secondly, the transfer may be subject to the payment or transfer of any money or stock. The main paragraph of section 24, which focusses attention on these two situations, provides that in such cases, such debt, money or stock is to be deemed the whole or part of the consideration. Of course, this rule becomes of importance only where the transfer is chargeable with *ad valorem* duty.

Section 24—Main paragraph—proviso.

12.15. The proviso to the main paragraph enacts that nothing in the section shall apply to any such certificate or sale as is mentioned in article 18 of the first Schedule. That article, it

1. *Mulchand Lala* v. *Kashi Ballar Biswas*, (1907) I.L.R 35 Cal. 111. following *Luxmi Bai* v. *Ganesh.*, (1900) I.L. R. 25 Bom. 373.
2. The expression "marketable security" is defined in section 2 (16A).
3. The decision in I.L.R 15 Mad . 134 was pronounced before the introduction of the section in 1904.

will be noted, relates to a certificate of sale granted to the purchaser of any property sold by public auction by a civil or revenue court of Collector or other revenue officer.

A special case where property is sold subject to mortgage or other encumbrances, requires be dealt with, and that is what the Explanation to section 24 seeks to do. We shall discuss later certain points of interpretation relating to some of the words used in the Explanation. But, for the present it will suffice to say that the principal object of the Explanation is to ensure that the consideration which passes *indirectly* by the vendor being relieved of his obligation in respect of unpaid mortgage money or unpaid money charged on encumbrances, should be taken into account.

The proviso to the Explanation to section 24 makes a limited provision whereunder, where property subject to mortgage is transferred to the mortgagee, he shall be entitled to deduct, from the duty payable on the transfer, the amount of duty to be paid in respect of the mortgage. This is understandable, because what the mortgagee *acquires afresh* is merely the difference between the value of the property and the value of the mortgage money. He is, therefore, now required to pay stamp duty only on the difference—provided, of course, the duty has already been paid in respect of the mortgage.

We may now deal with each of these in detail.

Principle of main paragraph.

12.16. The principle underlying the main paragraph of the section is fairly intelligible. The debt in consideration whereof (or subject to payment whereof) the transfer takes place, is, by fiction of law, to be added to the cash consideration. This fiction is understandable, because the amount was indirectly paid to the vendor in the past, or will be paid in the future.

The proviso to the main paragraph also creates no problems.

Explanation

12.17. The Explanation may sound curious at the first sight. The object of the corresponding English provision was thus described :[1]

> "The scope and object of the enactment is clear, namely, that upon every purchase *ad valorem* duty shall be paid on the entire consideration which either directly or indirectly represents the value of the free and unencumbered corpus of the subject-matter of the sale."

The Supreme Court[2] has quoted with approval the following observations in a Scottish case[3] :—

> "If any other rule was adopted, it is quite plain that the fair incidence of this tax would be altogether frustrated and defeated. A proprietor has an estate worth £ 20,000. There is bond upon it for £ 10,000. He sells that estate, and the purchaser pays to him a difference between the amount of the bond and the value of the estate, so that the bond being for £ 10,000 he pays £ 10,000. The day after he obtains instrument, he pays off the bond. Well, he practical result of that is that he has paid £ 20,000 as the purchase money of this estate, and he has obtained a conveyance with an *ad valorem* stamp of the value of £ 10,000. That is a simple defeating of the purpose and intention of the Legislature as expressed in this clause, and, therefore, I think, upon the plain meaning of this section, that there was no intention whatever to go back upon the enactment of the 16 and 17 Vict., and to restore the enactment of the 55 Geo. III, which is what the liquidators are contending for. On the contrary, it seems to me that the 73rd section is plainly intended to continue the provisions of the statute 16 and 17 Vict."

1. *Mortimore* v. *I.R.C.* (1864) 2 H & C 838 : 38 L.J. Ex. 263, referred to in A.I.R. 1931 Cal. 193, 197.
2. *Board of Revenue* v. *Sidhnath*, A.I.R. 1965 S.C. 1092, at 1094-1095, paragraph 7.
3. *Commissioner of Inland Revenue* v. *Liquidators of* City of Glasgow Bank (1881) 8 Ct. of Sessions cases 4th s 389.

History of English provision Act of 1815.

12.18. In England, the corresponding provision in the English Stamp Act of 1815 (55 Geo. III, Ch. 184) runs as follows :

> "Where any lands or other property shall be sold or conveyed in consideration, wholly or in part, of any sum of money charged thereon by way of mortgage, wadset or otherwise, and then due owing to the purchaser or shall be sold and conveyed subject to any mortgage, wadset, bond or other debt, or to any gross or entire sum of money *to be afterwards paid by the purchaser*, such sum of money or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty is to be paid."

Interpretation of words "money to be afterwards paid by the purchaser."

12.19. The words "money to be afterwards paid by the purchaser" in the above provision in 55 Geo. III, Ch. 184, were explained in *Marquis of Chandos* v. *Commissioner of Inland Revenue*[1] as follows :—

> "In the clause which is to define what is the consideration or purchase-money, the term 'to be paid by the purchaser' mean where it is stipulated that he is to pay it ; and the provision applies only to those cases, where, in consideration of the conveyance of the estate the vendee agrees to pay a certain sum to the mortgagee or incumbrancer. Where the purchaser does not bind himself to pay it, but is left to pay it or not as he pleases, it cannot be a part of the consideration money."

English Act of 1853.

12.20. In consequence of this decision, an amendment was made in 1853. The amended section ran as follows :—

> "Where any lands or other property shall be sold and conveyed subject to any mortgage, wadset or bond, or other debt, or to any gross or entire sum of money, such sum of money or debt shall be deemed the purchase or consideration money or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty shall be paid, *notwithstanding that the purchaser shall not be or become personally liable, or shall not undertake or agree to pay the same, anything in any Act or otherwise to the contrary notwithstanding*".

Later English Acts.

12.21. The words underlined above do not occur in later English Acts ; but, it has been held that there was no intention to make a change.[2]

History of section 24.

12.22. The history of the section in our Act was discussed in a Calcutta case.[3] Under section 34(b) of the Stamp Act, 1869 (18 of 1869), where any property was sold and conveyed subject to any mortgage or bond or other debt or to any gross or entire sum of money, such debt or sum was deemed the consideration money or part of the consideration money as the case may be, in respect whereof *duty should* be paid, *notwithstanding that the purchaser was not or did not become personally liable for such debt or sum, or did not agree to pay the same or indemnify the seller against the same.* In the Stamp Act of 1879, in re-enacting this section, the last portion (above referred to) was omitted. This resulted in a conflict of decisions. When property subject to a mortgage or debt was sold, the High Courts of Calcutta,[4] Madras[5] and Allahabad[6] held that *ad valorem* duty was payable in respect of such sum or debt in addition, *only when the purchaser bound himself personally to pay the same or indemnify the vendor*

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1. *Marcuis of Chandos* v. *Commissioner of Inland Revenue,* (1851) 6 Ex. 464 (481): 155 E.R. 624 (632) Z.O. L.J. Ex. 269 : 17 L.T. (I.S.) 128 (Quoted in A.I.R. 1931 Cal. 193 : 58 Cal... 33 (F.B.).
2. *Liquidators etc.* v. *C.I.R.* (1881) 18 Scott. L. R. 240;
   (b) *Wayne* v. *C.I.R.* (1900) 1 Q.B. 172.
3. *U.K. Janardan Rao* v. *Secretary of State,* A.I.R. 1931 Cal. 193 (Rankin, C.J.)
4. *In the matter of reference from the Board of Revenue,* (1884) I.L.R. 10 Cal. 92.
5. Reference from D.J. South Malabar under section 49, General Stamp Act in case No. 1/1881 (1882) I.L.R. 5 Mad. 18 (F.B.) and reference from Board of Revenue in case No. 3/1884 under section 46, Indian Stamp Act 1879 (1884) I.L.R. 7 Mad. 421 (F.B.).
6. *Jwala Prasad* v. *Ram Narain* (1882) I.L.R. 15 All. 107.

against the same. But the Bombay High Court held,[1] that *in all cases* stamp duty was payable on the total of the purchase money and the mortgage debt. We shall revert to this controversy later.[2]

Question of interest not of importance.

12.23. Another difficulty arose from the language of section 23. According to some Bombay decisions, a transferee of a property subject to mortgage need not pay duty on the interest due on the mortgage, through he would have to pay such interest before redeeming the property.

But now the express language of the Explanation to section 24, makes the mortgage debt or money charged, *together with the interest due upon it*, as part of the consideration for sale.

Relevance of distinction between sale subject to encumbrance and other sale.

12.24. As to sale subject to encumbrances and sale not so subject, the question may be raised whether this distinction, even if relevant for the purpose of the law of transfer of property,[3] has any relevance in regard to the charge of duty under section 24, Explanation. The answer is that the distinction is relevant, because the Explanation is intended to apply only where the seller purports to sell the equity of redemption. It is only where such a sale is made—a sale subject to encumbrances—that the need for adding the amount due to the mortgages can arise. In other cases, the purchaser would have calculated the price on the unincumbered value.

In *Hortimore* v. *Inland Revenue Commissioners*,[4] Baron Martin, explaining the provision then in force in England, put the matter thus :

> "The scope and subject of the enactment[5] is clear, namely, that upon every purchase, *ad valorem* duty shall be paid on the entire consideration which *either directly or indirectly represents* the value of the free and unincumbered corpus of the subject-matter of the sale."

In the case where the sale is not subject to incumbrances, the purchaser would already have paid the full value, and the need for applying the enactment does not remain.

Possibility double charge.

12.25. If the Explanation to section 24 is regarded as applicable even where the sale is free of incumbrances, there will be double charge of duty. A sells to B certain property, without stating the incumbrances. Since B was not told of any incumbrances, he would, one may assume, have paid to A the normal price as for property not encumbered. In such cases, the "property" is subject to mortgage, though the sale is not. Should the Explanation apply ? Should it be reasonable to apply it ?

The mortgage money is added (for stamp duty), because, *indirectly*, the seller is benefitted by the fact that discharge of the incumbrance is now at the cost of the purchaser.

12.26. *In construing the proviso to the Explanation, Mclood C.J.*[6] *observed in the Bombay case* :

> "The proviso belongs to and must be read with the Explanation which is to the effect that if a mortgagor sells the equity of redemption, the amount due by him to the mortgagee for principal and interest shall be deemed to be part of the consideration for the sale."[7]

As Rankin C.J. observed in a Calcutta case :

> "The first question which can be put is whether the phrase "subject to a mortgage or other incumbrance", qualifies the word "property" or qualifies the word "sale".

1. (a) *Shah Nagindand Jayachand* v. *Natkara Nathwa Chegala*, (1881) I.L.R. 5 Bom. 470.
   (b) *Meer Kaisur Khan* v. *Ebrahim Khan* (1891) I. L. R. 15 Bom. 532.
2. See "Comment on the Explanation", *infra*.
3. Section 55 (1) (g), Transfer of Property Act.
4. *Mortimore* v. *I.R.C.* (1864) 33 L.J. Ex. 263, 266; 133 R.R. 815 : 159 E.R. 347.
5. Stamp Act, 1815 (Eng.)
6. *In re Frank Portolock* (1926) I.L.R. 50 Bom. 640, A.I.R. 1926 Bom. 542 Mclood C.J.
7. In the judgment, by slip the word "mortgage" is used in place of "sale".
8. *Janardhan Rao* v. *Secretary of State*, A.I.R. 1931 Cal. 193, 195.

If the former is the correct meaning, then property which is, in fact, subject to a mortgage will, if it is sold, attract the consequences set forth in the Explanation, whether or not the property is sold on the terms that the vendor is to clear off the mortgage and give to the purchaser a clean title. In *Waman Martand* v. *Commissioner, Central Division,*[1] this question was raised and it was held that the clause "subject to a mortgage or other incumbrance" governs "sale of property" and not "property", that property may be subject to a charge and yet the sale may not be subject to it and that where a bargain between the vendor and the purchaser is that the vendor "will make a good title free from all incumbrances, the Explanation does not apply. I am clearly of opinion that this is the correct view. To begin with, an instrument is to be stamped according to the nature of the bargain. That is the general principle in the light of which a question of this character must be approached. The language of the main clause shows that the question is whether the property is transferred subject to the payment of money. The Explanation is in my judgment entirely consistent with the language of the main clause. *If property is subject to a mortgage but the vendor, in return for the purchase price, is to give a clear title free from all incumbrances, the Explanation does not apply.*[2] Nor does Illustration 2 apply, for, the case there put is clearly not a sale free from the incumbrance. It is dangerous to rest one's view of a clause in the Stamp Act upon reasons of justice or fairplay. Still, it would require very clear words to induce one to think that where the purchase price is given as the full value of the property and the vendor as part of the considerations therefor undertakes to clear off all incumbrances the amount of the incumbrance was intended to be added to the whole value of the property and stamp duty assessed upon the same thing twice over."

Criticism by Fawcett J.

12.27. Fawcett J. observed[3] i nthe Bombay case :—

> "*The Explanation and Illustration* (2) *to section* 24 *of the Indian Stamp Act have been rather loosely drafted.* But I am satisfied that the intention is that the Explanation should only cover cases *where the purchaser undertakes to pay the mortgage debt.*"

We shall refer to the view of Marten J. later[4]

Agreement relieving the vendor—whether required.

12.28. Opinions can vary as to the *ratio decidendi* of the above Bombay case. The decision could be construed as resting solely on the ground that though the property was subject to the charge, the vendor undertook to clear off the incumbrance and to perfect the title of the vendee free from all encumbrances.[5] The opinion expressed by Marten J., however goes beyond that.[6] According to him, the Explanation must be confined to cases where, as part of the consideration which the vendor gets for the transfer, the Vendor is to be relieved, expressly or impliedly from the burden of the mortgage as between himself and the purchaser.

12.28A. If the latter proposition is to be regarded as the basis of the judgment in the Bombay case, then it must be noted that it has not been accepted by the Calcutta High Court,[7] where Rankin C.J. observed, (with reference to the Bombay case)—"No such qualification is to be found in the Explanation itself or in the illustration which is given by the legislature to throw light upon its meaning." In the Calcutta case, the vendor had purchased the property in a court auction, and sold it to the vendee for Rs. 1,000. There was a mortgage on the

1. *Waman Martand* v. *Commissioner, Central Division, A.I.R. 1924 Bom. 524.*
2. Emphasis supplied.
3. *Waman Martand Hasleraa* v. *Commissioner, Central Dn.*, A.I.R 1924 Bom. 524, 526, 527 (Fawcett J).
4. Para 12.33, *infra.*
5. See Shah Ag. C.J.s, Judgment.
6. See Para 12.33, *infra.*
7. *U.K. Janardan Rao* v. *Secretary of State,* A.I.R 1931 Cal. 193-201 (Rankin C.J.)

property, on which a suit had been instituted by the mortgagee against the mortgagor. A sum of Rs. 25,636 was outstanding on that mortgage. The fact of the mortgage suit having been instituted was mentioned in the sale deed. The instrument was stamped as a conveyance for Rs. 1,000 only. It was held, that as the property was sold subject to the encumbrance, the conveyance was liable to stamp duty on Rs. 1,000 *plus the encumbrance*. Examining the meaning of the phrase "subject to a mortgage or other incumbrance", the court held *that the phrase* governs the words *"sale of property"*, and not the word "property". Where the sale is not subject to a mortgage (though the property concerned may be so subject), the Explanation has no application. Thus, if the property is subject to a mortgage, but the vendor, in return for the purchase-money, is to give a clear title free from all encumbrances, then the Explanation does not apply. The unpaid mortgage money in the case of a sale subject to a mortgage, is to be deemed to be part of the consideration for the sale, not because it is part of such consideration, *but because the legislature is determined to tax it*. Consequently, an enquiry into the question whether the mortgage amount, in fact, proved part of the consideration, is wholly irrelevant.

12.29. In an Allahabad case,[1] the High Court maintained that where an immovable property, which is encumbered by a charge or a mortgage, is sold *but not subject to the incumbrance*, then the amount of money constituting the charge or mortgage need not be added to the consideration mentioned in the conveyance as the value of the property sold. The words of section 24 beginning with "subject either" and ending with "property or not", apply to the word "transferred", and not to the word "property".

12.30. The Supreme Court,[2] in an appeal from the Allahabad case, held the view that the phrase "subject to a mortgage or other encumbrance" qualifies the word "sale", and not the word "property". If the mortgaged property is sold subject to a mortgage, then and then only the Explanation applies; the phrase does not mean that whenever mortgaged property is sold, then Explanation is to apply. It is plain from the Explanation that it is only the unpaid mortgage money that is deemed to be part of the consideration.[3]

12.31. While the judgment of the Supreme Court settles, in general, the meaning of the words "subject to", it does not concern itself with the major controversy, namely, is it necessary *that the vendor should have been relieved of his obligation ?*

12.32. It appears that the difficulty on the above point seems to survive even now, and the Explanation to section 24 should be made more specific than at present. The question that remains unsettled is--Is the Explanation applicable only where the purchaser *undertakes to pay the incumbrance*, or is it wide enough to cover other cases where the incumbrance is outstanding ? We do not think that the applicability of the Explanation should be limited to cases where the purchaser undertakes to redeem the incumbrance expressly or by implication. Once it is proved that the incumbrance is outstanding, its value ought to be added to the consideration paid, because the vendor has benefited by the sale being subject to incumbrance.

12.33. In the Bombay case,[4] Marten J. observed :—

> "This Explanation must be read along with the main portion of section 24, which refers, in my opinion, to the consideration payable to or *moving towards the vendor*[5] and not to that payable by or moving from him.....I think, therefore, that the Explanation on its true construction must be confined to cases where, as part of the consideration which the vendor gets for his transfer, *he is to be relieved expressly or impliedly from the burden* of a mortgage as between himself and the purchaser."

The question to be considered is whether this is the correct view.

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1. *Sidhnath Mehrotra* v. *Board of Revenue*, A.I.R. 1959 All 655, affirmed in *Board of Revenue* v. *Sidhnath*, A.I.R. 1965 S.C. 1092.
2. *The Board of Revenue U.P.* v. *Sidhnath Mehrotra*, A.I.R. 1965 S.C. 1092.
3. *See also Collector Abuestration* v. *Deepak Textile Industries*, A.I.R. 1966 *Gujarat* 227 (F.B.)
4. *Waman Martand* v. *Commissioner, Central Division*, A.I.R. 1924 Bom. 524, 526.
5. Emphasis supplied.

Explanation applicable only where sale subject to incumbrance.

12.34. It is settled by Supreme Court,[1] that the Explanation would apply where the sale of property is subject to a mortgage, i.e., where the vendor does not purport to give a good title free from the incumbrance. But, on the question whether the test is to see whether the purchaser is or *is not saddled with the burden,* the Supreme Court did not express a view.

Clarification suggested.

12.35. Hence a clarification is needed, and it should be by way of widening the section.

Lines on which amendment needed

12.36. In our view, it would be convenient if the correct position discussed above is incorporated into the section. What is needed is—(i) to indicate that it is the sale which is subject to mortgage; (ii) to also indicate that there need not be an undertaking by the purchaser to pay the amount, in order that the section may apply; and (iii) to revise illustration 2, in view of the criticism thereof in the Bombay case,[2] by Fawcett.

We may add that such an amendment has been generally favoured by the replies to our Questionnaire.[3]

Recommendation relating to section 24.

12.37. We recommend the following re-draft of section 24, in the light of the above discussion.

Revised section 24

"24. Where any property is transferred to any person :—

(a) in consideration, wholly or in part, of any debt due to him, or

(b) subject either certainly or contingently to the payment or transfer to *him or any other person* of any money or stock, whether the money *constitutes* a charge or incumbrance upon the property or not,

such debt, money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with *ad valorem* duty :

Provided that nothing in this section shall apply to any such certificate of sale as is mentioned in Article No. 18 of Schedule 1.

Explanation.—Where property is sold and the sale is subject to a mortgage or other incumbrance, any unpaid mortgage money or money charged together with the interest (if any) due on the same, shall be deemed to be part of the consideration, for the sale, *whether or not the purchaser expressly undertakes with the seller to pay the same or to indemnify the seller if the seller has to pay the same* :

Provided that where any property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

Illustrations

(1) A owes B Rs. 1,000. A sells a property to B, the consideration being Rs. 500 and the release of the previous debt of Rs. 1,000. Stamp duty is payable on Rs. 1,500.

(2) A sells a property to B for Rs. 500. *The property is subject to* a mortgage to C for Rs. 1,000 and unpaid interest for Rs. 200. *The sale is subject to the mortgage.* Stamp duty is payable on Rs. 1,700.

(3) A mortgages a house of the value of Rs. 10,000 to B for Rs. 5,000 B afterwards buys the house from A. Stamp duty is payable on Rs. 10,000 less the amount of stamp duty already paid for the mortgage.

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1. *Board of Revenue* v. *Sidhnath* A.I.R. 1965 S.C. 1092.
2. *Waman Martand* v. *Commissioner, Central Division,* A.I.R. 1924 Bom. 524 528 (See Fawcett, J.'s Judgement).
3. Question 36

Section 25.

12.38. Section 25 deals with stipulations for payment of annuities or other periodical payments. Such payments, since they are spread over a number of years, raise questions of the basis for calculation of stamp duty. The section makes detailed provisions in that regard. It deals with two situations :—

(i) where an instrument is executed to *secure the payment* of an annuity or other sum payable periodically, or

(ii) where the consideration for a *conveyance* is an annuity or other sum payable periodically.

The section provides that the amount secured by such instrument or the consideration for such conveyance, as the case may be, shall, for the purposes of this Act, be deemed :—

(a) where the sum is payable for a definite period so that the total amount paid can be previously ascertained—such total amount ;

(b) where the sum is payable in perpetuity or for an indefinite period not terminable with any life in being at the date of such instrument or conveyance,—the total amount which, according to the terms of such instrument or conveyance, will or may be payable during the period of *twenty years* calculated from the date on which the first payment becomes due ;

(c) where the sum is payable for an indefinite time terminable with any life in being at the date of such instrument or conveyance,—the maximum amount which will or may be payable as aforesaid during the period of twelve years calculated from the date on which the first payment becomes due.

12.39. As regards situation (a)[1], it is to be noted that the sum total (of the periodical payments) will be treated as the consideration for the purposes of valuation for stamp, even if, by a stipulation, the parties are entitled to terminate the periodical payments. Where, therefore, a lease of mines was given for a definite period (99 years), but the lessee was given an option to terminate the lease at any time during the fixed period or in the event of the mines getting exhausted before expiry of the period, it was held[2] that the lease fell under section 25(a). The Court referred to the definition of 'lease'[3] in the Transfer of Property Act, under which the right to enjoy the property is to be given for a certain period, express or implied or in perpetuity and emphasised that the mere fact that the interest is terminable before the expiry of the time fixed or after expiry of the time fixed, does not make the transaction any less a lease.

12.40. Clause (b) of section 25 applies when the payment is in perpetuity or for an indefinite period. Here, the total amount payable for a period of twenty years is the valuation.

12.41. We may refer to an Indian ruling[4] relevant to clause (b). By a document, a person bound himself and his posterity, on the security of some immovable property, for the annual payment to a temple of Rs. 21-4-0 and 3 'hadus' of oil; the Madras Board held, applying section 25(b), that it was a mortgage deed chargeable with duty calculated on 20 years' payment of oil at Rs. 15 and Rs. 21-4-0 in cash per annum.

12.42. Clause (c) of section 25 applies to cases where the sum is payable for an indefinite time terminable with any life in being at the date of the instrument. The maximum amount which will or may be payable during the period of twelve years will be treated as the amount of consideration for the instrument in question. Thus, an award by which a certain sum was made payable to a certain person, without any mention as to whether the sum was secured or intended to be secured to the heirs or representatives of the person, was held to be chargeable under this clause, as document securing an annuity.[5] Similarly, where, on retiring from a

1. Para 12.38.
2. *Devarkhand Cement Co. Ltd.*, v. *The Secretary of State* A.I.R. 1939 Bom. 215 (Rangnekar, J.) 214-222, 192.
3. Section 105, Transfer of Property Act, 1882.
4. *Madras Board Petition* 21 (*R*) ; Misc., dated 30-1-1908 Madras Stamp Manual (1933), Page 122.
5. *Reference under the Stamp Act* (1896) 16 A.W.N. 199.

firm, one of the two partners assigned his interest in the firm to his partner in consideration of Rs. 6,000 plus an allowance of Rs. 35 per month, it was held that for the purposes of stamp valuation, the conveyance must be treated as for a consideration for Rs. 6,000 plus Rs. 5,040, total Rs. 11,040.[1]

We may conclude our discussion of section 25 by stating that the cases illustrating the working of the section, mentioned above, do not suggest any need for amendment.

Section 26—Introductory.

12.43. The computation of stamp with *ad valorem* duty presents also problems where the amount or value of the subject-matter is indeterminate. According to section 26, where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty, cannot be, (or in the case of an instrument executed before the commencement of this Act could not have been), ascertained at the date of its execution or first execution, nothing shall be "claimable" under such instrument more than the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient.

Under the proviso to the section, in the case of the lease of a mine in which royalty or a share of the produce is received as the rent or part of the rent it shall be sufficient to have estimated such royalty or the value of such share for the purpose of stamp duty,—

(a) when the lease has been granted by or on behalf of the Government, at such amount or value as the Collector may, having regard to all the circumstances of the case, have estimated as likely to be payable by way of royalty or share to the Government under the lease, or

(b) when the lease has been granted by any other person, at twenty thousand rupees a year; and the whole amount of such royalty or share, wherever it may be, shall be claimable under such lease.

Under another proviso, where proceedings have been taken in respect of an instrument under section 31 or section 41, the amount certified by the Collector shall be deemed to be the stamp actually used at the date of execution.

Rationale of the section

12.44. As has been observed,[2] "unlike the evidence Act, the Stamp Act does not base its rules on the theories of relevancy or public policy. It is purely fiscal, and insists that certain documents shall pay a contribution to the State according to the purpose for which they were executed. In regard to certain documents which create a right to money, it prescribes that unless the stamp is proportionate to the valuation of the claim, the document shall be inadmissible in evidence, and where the intention of the parties is that the valuation should be unlimited, it enacts, by section 26, that the claimant will be entitled to realise a sum proportionate to the stamp fee paid, subject to certain exceptions in the case of royalties. It follows that wherever the claim exceeds the amount proportionate to the stamp, the document is not duly stamped for the purpose for which it was executed within the meaning of section 35, and the provisions of this section have to apply thereto.

A typical instance of instruments where the value is indeterminate is a lease of mines. This case is expressly mentioned in the section. In such leases, the amount which will be realised is altogether uncertain.

In regard to other instruments, a few cases have arisen under the section. These may now be referred to.

Duty on bonds—Article 15.

12.44A. Article 15 relating to bonds provides that *ad valorem* duty should be paid on the amount or value secured by the bond. An instance of a bond for an indeterminate value

1. U.P. Board's order in File No. 173/25, U.P. Stamp Manual (1945) Page 53.
2. *Kumar Brajmohan Singh* v. *Lachminarain Agarwal*, A.I.R. 1920 Pat. 50.

is to be found in an Allahabad case,[1] relating to a bond by a grower of sugarcane to deliver some quantity of rab (unrefined sugar), at a price to be fixed at the meeting of growers.

12.45. The Calcutta High Court has held that for bonds for delivery of grain, if proper stamp duty is paid on the value of the grain secured as fixed in the instrument, the document is properly stamped under Article 15, and section 26 would not operate to prevent the recovery of a higher amount as the value of such grain on account of subsequent rise in prices.[2]

Duty on mortgage deed.

12.46. In the case of mortgage-deeds executed to secure future advance on a running account, or containing otherwise a stipulation of the maximum amount of liability under the document, stamp duty would be payable on the amount fixed as the maximum limit of liability, though the amount might not have been actually advanced. If such stamp duty has been paid, then an amount upto thet limit mentioned in the deed can be recovered in a court of law, notwithstanding that more than that limit was privately realised by the mortgagee on different occasions.

In another Calcutta case,[3] a mortgage-bond, intended to secure future advances upto the sum of Rs. 10,000 at a time, was executed on a stamp paper of Rs. 50, and, under it, altogether more than Rs. 10,000 had been privately realised by the mortgagee on different occasions. It was held that there was nothing in section 26 to prevent the mortgagee from suing to recover the balance of the debt due on the mortgage. Even if the stamp is deficient, section 26 has no application to the case, and the full amount due on it can be claimed on payment of deficient stamp duty and penalty under section 35.

12.47. If such maximum is not mentioned, and if the document purports to secure an amount without limit, then it appears that section 26 would operate to restrict the amount claimable under it to the maximum amount covered by the stamp.[4]

12.48. There are decisions pointing out,[5] that section 26 applies only where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty cannot be ascertained at the date of its execution. Thus, if in an instrument, the value of the subject-matter is determinable on a reasonable basis, then, section 26 has no application.[6]

The circumstances governing the applicability of the section were examined in a Madras case,[7] in which a certain land was leased out for ten years, for being planted with a certain minimum number of casuarina trees, on the condition that at the end of the time, the trees planted should be cut and sold, and the profit of sale proceeds of the trees so reared divided equally, deducting the expenses of cutting etc. It was held that clearly, the subject-matter was an ascertainable item at the date of contract, it being a certain number of casuarina trees or their equivalent value. The contention, that the value of the trees at the end of 8 or 10 years was not ascertainable at the time of the contract was rejected.

Inter-relation between section 26 and section 35.

12.48A. We now proceed to consider the question whether section 26 is subject to, and governed by, section 35. Section 35 prohibits the admission in evidence of any unstamped document, but, under the proviso to that section, an instrument not sufficiently stamped can be admitted on payment of penalty.

Under section 26, *"nothing shall be claimable"* under the instrument in question beyond the amount or value for which the stamp is sufficient. The section is silent as to whether this prohibition can be relaxed where the claimant is prepared to supply the deficiency in stamp.

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1. *In the Matter of Gajraj Singh* (1887) I.L.R. 9 All.585 (F.B.).
2. *Bhairab Chandra Chowdhari* v. *Alak Jan (1886)* I.L.R. 13 Cal. 268.
3. *Harendera Lal Roy Chowdhary* v. *Tarini Charan Chakrabarty*, (1904) I.L.R. 31 Cal. 807.
4. *A.L.M.A..L. Chetty* v. *Maung Aung Ba*, A.I.R. 1919 *Lower Burma* 37.
5. *In the matter of Gajraj Singh*, (1887) I.L.R. 9 All. 585 F.B.
6. *Bhairab Chandra Chowdhari* v. *Alak Jan* (1886) 13 Cal. 268 ; and also *Soodamani Patter* v. *Soma Sundara*, (1894) 4. M.L.J. 201.
7. *Rondapi Shesayya* v. *Venkat Subbayya* A.I.R. 1918 Mad. 1066, 1068.

12.49. However, notwithstanding the stringent phraseology of the section, it has been held[1] that there is nothing in section 35 which necessarily excludes its operation from cases covered by section 26. As a matter of fact, it would be a strange result if an instrument bearing no stamp and, therefore, not admissible in evidence for want of stamp, could be validated by payment of penalty under the proviso to that section (section 35), whereas a similar instrument bearing a deficient stamp and, therefore, admissible and enforceable to a limited extent, could in no case, be fully enforced even by paying the penalty. It is, therefore, reasonable to read section 26 as subject to section 35.

Case law.

12.50. Thus, where a mining lease bears a stamp[2] of a certain value, the lessor's right to recover royalty under the lease is not confined to the amount covered by the stamp. If it is found that he is entitled to a greater amount, he can be given a decree for the sum to which he is entitled on compliance with the provisions of section 35. This is the position even where the second proviso to the section is not applicable.

Need for clarification.

12.51. In our opinion, it is desirable to clarify the position as to the inter-relationship of sections 26 and 35, particularly because in section 26, the words "nothing shall be claimable" do not reflect the true intention of the judicial construction. It is desirable to replace the words "nothing shall be claimable" by words which will ensure that the deficiency in stamp can be supplied. The major source of the present trouble is the disharmony in wording between the two sections. Section 26 uses the words "Nothing shall be claimable" but section 35, main paragraph and proviso (a), use the words "admitted in evidence". This disharmony ought to be rectified.

The amendment of section 26 as to applying section 35, has, in principle, been approved by the replies to our Questionnaire.[3]

No justification for levying penalty.

12.52. Besides this clarification, we would also like to recommend a change of substance. The precise question to which we have addressed ourselves is this. Is there any justification for the levy of a *penalty* in the case to which section 26 relates? As the position is now understood, this cannot be avoided, because a relaxation of the stringency of section 26 can be sought only from section 35, and that section contemplates payment of duty as well as of penalty. The question is whether this is just and equitable.

Though this point was not put in our Questionnaire, it came up for elaborate discussion. We are satisfied that the point is important enough to require examination.

In this connection, we cannot fail to notice that the situation dealt with in section 26 is in a class by itself. In the normal case for which section 35 is intended, the duty chargeable either was known, or at least could have been known with reasonable diligence, at the time of execution. In the very special situation to which section 26 applies, however, the duty could not have been known with any amount of reasonable diligence, at the time of execution. *Prima facie therefore*, it would appear to be legitimate to make a distinction between the normal case to which section 35 applies and the exceptional case for which section 26 is intended. We do not think that if such a distinction is made, there is possibility of any serious abuse.

To repeat in a different form, what we have stated above, the levy of penalty is inequitable in such cases, since there has been no default. The interests of the revenue are sufficiently protected by the levy of the deficient amount of duty. In our opinion, there is no justification for levying penalty in addition. The situation in section 26 can hardly be regarded as an analogous to the normal situation under section 35, which assumes that :—

(i) that instrument is chargeable, and

(ii) that it is chargeable 'with duty'—which seems to postulate a definite amount.

1. (a) *Kumar Braj Mohan Singh* v. *Laxmi Narain Agarwal*, A.I.R. 1920 Pat. 50, 55 (Dawason Miller C.J. and Mullick J.) affirmed in.
(b) *Lachmi Narian* v. *Rajeshwar*, A.I.R 1924 P.C. 221.

2. *Braj Mohan Singh* v. *Lachmi Narain*, A.I.R. 1920 Patna 50, 55, affirmed in *Lachmi Narain* v. *Rajeshwar* A.I.R. 1924 P.C. 221.

3. Question 37.

It is on this logic that we consider it proper to recommend that in relation to section 26, while so much of section 35 as relates to payment of the deficit may be adopted, it is not necessary that the penalty should also be levied. For the purposes of section 26, therefore, the penalty portion in section 35 should not be adopted. We may state that in so far as the amount claimed under the instrument can be ascertained only when the claim is made, the case is more analogous to *court fees,* where the penalty is levied than to the normal situation under section 35. In the Court Fees Act, in suits for accounts, deficiency can be made up.

12.53. We, therefore, recommend that section 26 should be revised as follows : Recommendation.

"26. Where—

(a) the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty cannot be, or (in the case of an instrument executed before the commencement of this Act) could not have been, ascertained at the date of its execution or first execution, and

(b) *what is claimed under such instrument exceeds the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient.*

the instrument shall be deemed to be insufficiently stamped as regards the excess and the provisions of section 35 *shall accordingly apply in relation to the admission in evidence of the instrument :*

Provided that for the purposes of such application of section 35, *to such an instrument, it shall be sufficient if the deficiency in the duty is paid, and no penalty shall be levied.*

Provided *further* that, in the case of the lease of a mine in which royalty or a share of the produce is received as the rent or part of the rent, it shall be sufficient to have estimated such royalty or the value of such share, for the purpose of stamp-duty,—

(a) when the lease has been granted by or on behalf of the Government, at such amount or value as the Collector may, having regard to all the circumstances of the case, have estimated as likely to be payable by way of royalty or share to the Government under the lease, or

(b) when the lease has been granted by any other person, at twenty thousand rupees a year; and the lease shall be deemed to be sufficiently stamped as regards the whole amount of such royalty or share whatever it may be.

Provided also that, where proceedings have been taken in respect of an instrument under section 31 or 41, the amount certified by the Collector shall be deemed to be the stamp actually used at the date of execution.

CHAPTER 13

FACTS TO BE STATED IN INSTRUMENTS—SECTIONS 27-28

Section 27—Introductory.

13.1. Section 27 provides that the consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or affecting the amount of the duty with which it is chargeable, shall be fully and truly set forth therein. Failure to do so is punishable, under another provision—section 64.[1]

What facts and circumstances affect the chargeability of the instrument or the amount of the duty, depends on the scheme as to the charge of duty and, in particular, on the article applicable to the instrument in relation to which the question arises. Confining ourselves to instruments dealing with property, we may state that there are four possible alternatives which could be thought of, for arriving at the amount of the duty chargeable, namely :—

(a) amount or value of the property as set forth in the instrument,[2] or its equivalent;[3]

(b) value of the property, but not confined to the value as set forth in the instrument ;[4]

(c) consideration as set forth in the instrument ;[5]

(d) consideration for which the transfer is made, e.g., rent[6]

Connection with Charging article.

13.2. Thus, the manner in which section 27 operates in relation to a particular instrument largely depends on how the charging article is worded, that is to say, which of the various alternatives enumerated above is taken as the governing criterion in the charging article. For this reason, amendments made in section 27 by some of the States cannot be commented upon unless the criterion adopted in the charging article is sought to be revised. In fact, it is the charging article which will be the principal subject for consideration, and an amendment of section 27 would really be consequential on the change to be made in the charging article. In regard to section 27, therefore, the discussion will be confined to those amendments which can be considered independently of the charging articles.

Orissa Amendment.

13.3. In some States, an amendment has been made empowering the Registrar to hold an inquiry. The Orissa[7] amendment is an example. Section 47A (Orissa) reads—

"*47-A. (1) If the registering officer appointed under the Indian Registration Act, 1908,* while registering any document relating to transfer of property, has reasons to believe that the value of the property or the consideration, as the case may be, has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the value or consideration, as the case may be, and the proper duty payable thereon.

(2) On receipt of a reference under sub-section (1), the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an enquiry in such manner as may be prescribed by rules made under this Act, determine the value or consideration and the duty as aforesaid and the deficient amount of duty, if any, shall be payable by the person liable to pay the duty.

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1. Section 64 (1) (a).
2. E.G. Articles 12(a), 23, 31, 55, 58 and 64.
3. Article 33 (gift).
4. This is hypothetical.
5. Article 23 (Conveyance).
6. E.G. Articles 35 and 63.
7. Section 47A inserted in Orissa by Orissa State Act, 1962 (35 of 1962), as amended by Orissa Act, 1965 (11 of 1965).

"(2-A) The Collector may *suo motu*, within two years from the date of registration of any instrument not already referred to him under sub-section (1), call for and examine the instrument for the purpose of satisfying himself as to the correctness of its value or consideration, as the case may be, and the duty payable thereon and if after such examination, he has reasons to believe that the value or consideration has not been truly set-forth in the instrument, he may determine the value or consideration and the duty as aforesaid in accordance with the procedure provided for in sub-section (2); and the deficient amount of duty, if any, shall be payable by the person liable to pay the duty.

(3) Any person aggrieved by an order of the Collector under sub-section (2) or sub-section (2-A) may, within thirty days from the date of the order, prefer an appeal before the District Judge and all such appeals shall be heard and disposed of in such manner as may be prescribed by rules made under this Act."

Scope of present section.

13.4. In order to facilitate consideration of the question whether such an amendment should be recommended, it is desirable to examine the scope of section 27. The scope would be better understood if the following propositions are borne in mind :

(1) The revenue of the Government is protected by requiring the parties to make a true and full disclosure of all facts and circumstances having any bearing on the duty payable, failing which they must suffer the consequences of their false and defective statements.

(2) If it be found that the omission to state the value of the property or the under valuation was intended to defraud the Government, then a prosecution would protect the Government against the attempted fraud.[1]

(3) In determining whether a document is sufficiently stamped, the document itself as it stands, and not any collateral circumsatnces which may be shown in evidence, must be looked into.[2]

(4) For the purpose of stamp duty, the valuation given in the instrument (where the value as set-forth is the test) would have to be accepted. If there was an intentional under-valuation, the fear of prosecution would protect the Government against the attempted fraud. There is no provision in the law[3] authorising the Collector to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained.[4] If a document—e.g., a mortgage-deed,—is silent regarding the consideration, or if it does not set-forth the circumstances from which it could be gathered that how much stamp duty is to be paid, then the Collector has no power to take any evidence to find out the consideration. The only thing left for him is to prosecute the executant for not complying with the provisions of section 27.[5]

Observations of the Supreme Court.

13.5. In *Himalaya House Co's case*,[6] the Supreme Court held :—

> "It is true that in view of section 27 (of the Indian Stamp Act), the parties to a document are required to set forth in the document fully and truly the consideration (if any) and "all other facts and circumstances affecting the chargeability of that document with the duty or the amount of the duty with which it is chargeable. But a failure to comply with the requirements of that section is merely punishable under section 64 of the Stamp Act. No provision in the Stamp Act empowers the Revenue to make an independent inquiry of the value of the property conveyed for determining the duty chargeable."

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1. (a) *Board of Revenues, Madras* v. *K.R. Venkatarama Ayyar* A.I.R. 1950 Madras 738.
   (b) *In re Venkatswami*, A.I.R. 1953 Mad. 941.
2. *Raman Chetty* v. *Mohamed Chause and another*, (1899) I.L.R. 16 Cal. 435.
3. Except for local amendments—e.g. Orissa amendment.
4. *In the matter of Muhammed Muzaffar Ali*; A.I.R. 1922 All. 82 (2) (F.B.)
5. *Miran Baksh & others* v *Comp*; A.I.R. 1945 Lah. 69.
6. *Himalya House Co.*, v *C.C.R.A.*., A.I.R. 1972 S.C. 899, 904, 905.

After reviewing the High Court decisions, the Supreme Court observed :—

> *"The legislature may have had good reasons for not empowering the Revenue to make an independent inquiry as regards the valuation of the right sought to be assigned."*.

In this case, it was held that there was no basis for holding that the consideration for the impounded assignment deed, which had declared that there was no consideration, was the total amount received by the assignor under the agreements entered into between him and the persons to whom he had assigned certain rights in the flats, offices and shops in the building. It was held that those persons had an independent right of their own, and that their rights did not flow from the impounded assignment deed. It was, therefore, held that the consideration to be taken into account under article 23 (conveyance) was nil, as the assignment deed itself mentioned that there was no consideration, and there was no intention to incorporate the other agreements into this deed which, therefore, could not be taken into account for the purpose of calculating the duty on the impounded document.

Allahabad case.

13.6. In one Allahabad case,[1] the Godavari Sugar Mills, being the owner of property consisting of land, buildings and machinery, purported to sell these to the Somaiya Organics for a certain consideration. The sale-deed recited that the land and buildings were conveyed for a certain amount X, while the balance represented the price of machinery, vehicles, stores and other goods which were treated as movable items and the transfer of which had been completed *by manual delivery*. The Advocate General, *on behalf of the State, argued that* the intention of the sale-deed was to transfer the entire properties of the Godavari Sugar Mills and that the machinery, vehicles etc. *were also transferred by the deed*, and the value of these properties too should be taken into account. The High Court did not accept this contention. It held that the deed was intended to *transfer only the property* mentioned in *Schedule A and the buildings situated therein*, and not the movable properties. The High Court observed "The authorities constituted under the Act have to adjudge the duty chargeable on a deed as presented by the executants. It is not permissible for them to embark upon an enquiry as to what the intention of the parties was when executing the deed, and then to fix a duty on such items of property which in their opinion the parties contemplated to transfer. The fact that the sale-deed *contains* recitals in respect of other transactions between the parties would not affect the duty, in case the deed which is sought to be registered does not affect transfer of these properties."

Therefore, the addition of the balance amount representing the price of the machinery, vehicles etc. for purpose of calculating the duty, was uncalled for.

Madras view.

13.7. In earlier Madras decisions,[2] it had been held th at"the value of an instrument creating a settlement of properties was the value set forth in the instrument, and not the market value of the property. In a later decision,[3] the Madras High Court reviewed its earlier cases, and said that 'value', unless the term in any enactment suggests the contrary, must of course, mean the real value, the real value of property of the nature of land and houses being ordinarily and not suitably estimated by determining what the property would fetch, if sold in the open market. In other words, value ordinarily meant 'market value'.

However, the High Court held that no machinery was set up in the Stamp Act for ascertaining the true value of the property or the consideration, as the case may be, *and it would be clearly impracticable to cast the burden on the Registrar in each case to ascertain what the true market value is*. Since the Registrar is not empowered to conduct an enquiry himself as to the market value, the value must be set out in the document itself.

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1. *Somaiya Organics* v. *C.C.R. Authority*, A.I.R. 1972 All. 252
2. (a) *Reference* I.L.R. 7 Mad. 350.
   (b) Rerence I.L.R. 8 Mad. 453 (F.B.)
   (c) *Reference* I.L.R. 20 Mad. 27.
3. *The Joint Secretary Board of Revenue, Madras* v. *V.R Venkatarama, Ayyar*, A.I.R. 1950 Mad. 738 (F.B.).

13.8. Although the Registrar cannot embark on an independent enquiry regarding the value of property, yet he has power, under section 36 of the Stamp Act, to refuse registration if the document is not duly stamped, from which it would follow that he can require the person seeking registration to furnish the particulars required for the calculation of the duty payable. Courses open to the Registrar.

In other words, as the law stands,[1] two courses are open when a document is sought to be registered on an under-valuation. First of all, if the Registrar, either from his own information or otherwise, suspects that the valuation given is an under-valuation with intent to cheat the Government of the legitimate duty, he can ask for particulars from the party and if satisfied with its under-valuation, can refuse to register the document unless proper duty was paid. Secondly, in cases where the document gets registered and the information is subsequently received that the valuation shown is an under-valuation and that the legitimate stamp duty has been intentionally evaded to defraud the State, it will be open to the Registrar to move for a prosecution under section 27, read with section 64, Stamp Act.[2]

13.9. The question that arises is whether it is necessary to introduce any amendment in the law to empower the registering officer to hold a formal inquiry on the lines on which some States have done.[3] On the one hand, it can be argued that the scope for evasion of stamp duty should be checked by giving such a power. On the other hand, it should be remembered that such an inquiry will prolong the proceedings for registration, and, while, in some cases, there may be fruitful result, there might be many cases where the inquiry may result in nothing useful. Change not recommended.

Having regard to the fact that there may be complications resulting from a provision for elaborate inquiries on the lines of the Orissa amendment, we are not inclined to suggest such amendment of the Stamp Act.

13.10. We may note that in our Questionnaire[4] a qnestion was included on the subject. The question was put in these terms— Section 27—Facts and circumstances affecting chargeability with duty to set forth in the instrument

"The question has been raised whether the law should be amended to empower the registering officer to hold an inquiry "on the question whether the consideration stated in the instrument was the true value? Have you any suggestion in this regard?"

The replies reveal a sharp difference of view. The important replies may be thus summarised.

(a) One State Government[5] was of the view that the registering officer should be so empowered, and that the stamp duty should be charged not on the consideration but on the value of the property. One High Court[6] suggested that an inquiry of the nature contemplated may be authorised.

(b) Some of the replies did not go so far. For example, one High Court Judge[7] was of the view that the decision of the registering officer in the proposed inquiry should not be final.

One State Government[8] was opposed to giving any power to the registering officer to hold an inquiry. That Government would merely like section 27 to be amended to incorporate "including, where relevant, the market value of the subject-matter".

One Union Territory Administration[9] suggested that in section 27, the words "as set forth in the instrument" should be deleted. Duty should be made chargeable on the market value, and

1. See *In re Venkatswami*, A.I.R. 1953 Mad. at P. 942.
2. On this point see *Mahabrami*, A.I.R. 1960 Pat. 470 and *Sitaram*, A.I.R. 1960 Pat. 210.
3. Para 13.3., *Supra*.
4. Q.38.
5. S.No. 88.
6. S.No. 108.
7. S.No. 90.
8. S.No. 122.
9. S.No. 100.

not on the value set forth in the instrument. For determining the value of the property, however, it would prefer rules to be made.

One Administration[1] would limit the powers of the registering officer to hold an inquiry regarding the consideration, but it suggested that the property should be subject to valuation by persons to be authorised by Government.

(c) Two District Judges[2-3] were opposed to giving the Registrar the power. They were of the view that if necessary the Registrar should report to the Collector if he feels that the true valuation has not been stated. They expressed an apprehension that an inquiry by the Registrar would give chance to unhealthy practices and would delay the transaction and would, therefore, be undesirable. Registration should be made immediately, an inquiry may follow in due course where necessary.

One State Government[4] was opposed to any inquiry by the Registrar.

Two Bar Councils[5-6] were strongly opposed to the suggested change, and so also is one Incorporated Law Society.[7] The Incorporated Law Society stated that a procedure of the nature contemplated in the question would complicate, and thereby delay, the registration of the document. One of the Bar Councils[8] pointed out that if under-valuation is discovered which affects the amount of stamp, section 64 can always be invoked. However, it has suggested that a section such as section 47A of the Andhra Pradesh Stamp Act could be incorporated.

We may state that we find considerable weight in some of the objections put forth and are not inclined to recommend any amendment.

Section 28.

13.11. So much as regards section 27. According to section 28(1), where a property has been contracted to be sold or purchased for one consideration (i.e. a consideration for the whole of the transaction), and is conveyed to the purchaser in separate parts by different instruments, then the consideration for each part as decided by the parties has to be set forth in the instruments concerned respectively, and each of the said deeds is chargeable with *ad valorem* duty in respect of the distinct considerations mentioned therein.[9]

For example, A contracts to sell to B his property consisting of a house and certain lands adjoining to the house for Rs. 10,000 and, in terms of the contract, transfers it by two *separate sale deeds* in respect of the house and lands for Rs. 7,000 and Rs. 3,000 respectively. A is lawfully permitted to convey his property by two distinct deeds, provided the stamp duty is paid on the deeds separately in proportion to the considerations which are distinctly set forth.

In a sense, this is a qualification to the general rule in section 4 that, where several instruments are employed for carrying on a transaction, then only the principal is chargeable.

13.12. Further, according to section 28(2), where property contracted to be purchased for one consideration by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts by separate instruments to the persons by, or for, whom the same was purchased, then the conveyance of each part of the property is chargeable with *ad valorem* duty in respect of the distinct part of the consideration to be set forth in each instrument in respect of the portion of property conveyed. This also seems to constitute a qualification to the general rule in section 4.

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1. S.No. 119.
2-3. S.No. 90.
4. S.No. 66.
5-6. S.No. 74. S.No. 61.
7. S.No. 69.
8. S. No. 61.
9. Section 28(1)

13.13. Then also, under sub-section (3) of section 28, where a person, having contracted for the purchase of any property but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is, in consequence, conveyed to the sub-purchaser (by the original owner), then the conveyance has to be charged with an *ad valorem* duty in respect of the consideration which the middleman has received from the sub-purchaser In a Bombay case[1] under this sub-section, it was held that a purchaser from an official assignee in insolvency, who has not taken an actual conveyance, can also insist that the official assignee should execute the conveyance in favour of his sub-purchaser. There is no reason why the purchaser from the official assignee should be deprived of the benefit of section 28(3) of the Stamp Act.

13.14. Then, under section 28(4), where an intermediary contracts to sell property or any part of it to any other person or persons, and the property is, in consequence, conveyed by the orignal owner to the ultimate purchaser or purchasers, by means of different instruments, then each of the said deeds of conveyance will be chargeable with *ad valorem* duty on the basis of the consideration received by the intermediary in respect of the particular part of the property conveyed. The amount or value of the original consideration, as agreed between the original owner and the intermediary, would be relevant only in respect of the conveyance of the residue, if any, in favour of the intermediary as a purchaser ; and such deed would be chargeable with *ad valorem* duty on the basis of the excess, if any, of the original consideration over the aggregate of the considerations paid by the said sub-purchasers. But the duty on such last mentioned conveyance shall in no case be less than one rupee.

13.15. Finally, under sub-section (5), if a sub-purchaser takes an actual conveyance of the interest of the intermediary, and the conveyance has been duly stamped with *ad-valorem* duty in respect of the consideration paid by the sub-purchaser, then any conveyance in his favour of the same property will be chargeable with a duty on the basis of the consideration obtained by the original seller. Where the duty payable on this last mentioned conveyance exceeds five rupees, then the maximum duty chargeable thereon will be only five rupees.

13.16. There is no conflict of decisions with regard to the section. The language may appear to be involved. But the section bears very little practical importance, and may be left as it is.

1. *Rahimtulla Lowji Damari* v. *Official Assignee*, A.I.R. 1935 Bom. 340 (Besumont C.J. and Rangnekar J.).

APPENDIX

STATE AMENDMENTS TO SECTION 27

In the U.P.,[1] sub-section (2) has been added in section 27, the original section being numbered as sub-section (1). The new sub-section is as follows :—

"*(2) In the case of instruments relating to immovable property chargeable with an ad valorem* duty on the value of the property, and not on the value set forth, the instruments shall fully and truly set forth the annual land revenue in the case of revenue-paying land, the annual rental or gross assets, if any, in the case of other immovable property, the local rates, municipal or other taxes, if any, to which such property may be subject, and any other particulars which may be prescribed by rules made under this Act."[2]

The Orissa amendment has been already referred to.[3]

Then, there is a Madras amendment which adds market value in section 27, and substitutes that test in article 33.

The validity of the Madras amendment was challenged before the Madras High Court, under articles 14 and 19(1)(f) of the Constitution, on the ground that this became a tax on property.[4] The challenge failed.

The Act at issue was the Indian Stamp (Madras Amendment) Act, 1967, sections 8 and 10, which required the mention of the "market value" in an instrument and provided for its determination where it is suspected to be understood. The attack was based on the ground that the duty under the amendment would fall not on the instrument, but on the market value and market value was uncertain. It would, therefore, be unreasonable.

The High Court, however, held that the stamp duty even under the amended Act, was a duty on an "instrument" as defined in the Stamp Act. The charge was on the instrument, and not on the amount or consideration indicated in the document, which was but a measure of, or the basis for the computation of the extent of, liability to stamp duty and not on the market value any more than on the consideration mentioned therein. The Court held that.[5]

".....the object of the amending Act being to avoid large-scale evasion of stamp duty, *it is not meant to be applied in a matter of fact fashion and in a haphazard way. Market value* itself, as we already mentioned, is a changing factor and will depend on various circumstances and matters relevant to the consideration. No exactitude is, in the nature of things, possible. In working the Act, great caution should be taken in order that it may not work as an engine of oppression. Having regard to the object of the Act, we are inclined to think that normally the consideration stated as the market value in a given instrument brought for registration should be taken to be correct unless circumstances exist which suggest fraudulent evasion. Even in such a case, we trust that disputes will not be raised in petty sums. *Unless the difference is consider*able or sizable and it appears patent that the amount mentioned in the document is a gross under-value no disputation as to value is expected to be started."

The Court held that the amendment had not shifted the chargeable event from an instrument to market value and the duty after the amending Act was still on the instrument, and that the amending Act was within the competence of the State Legislature.

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1. U.P. Act. 18 of 1938.
2. See also Rajasthan Act 16 of 1966.
3. Para 13.3 *Supra.*
4. *The State of T.N.* v. *Chandrasekharam,* (1973) 2. M.L.J. 89 (D.B.) (M.L.J. issue 26th July, 1973).
5. *The State of T.N.* v. *Chandrasekharam,* (1973) 2 M.L.J. 89 at 91 , 92.

CHAPTER 14

LIABILITY AS REGARDS STAMP DUTY :

SECTIONS 29-30 AND SECTION 30A (NEW)

Introductory

14.1. We now come to an important question—who is liable to pay the duty ? The matter is dealt with in the Act very indirectly or in a fragmentary manner. We shall first dispose of such provisions as now exist, and then discuss the need for adding to them.

Section 29—Introductory.

14.1A. Section 29 lays down that the onus of bearing the expenses of providing the proper stamp in the matter of particular instruments will, in the absence of an agreement to the contrary, lie on the particular party or parties as specified therein.

The parties *inter se* may, of course, enter into an agreement to the effect that the expenses of stamp duty will be borne by a particular party. Thus, where a deed contemplated that the defendant should bear the costs incidental to the preparation of the deed of trust, the plaintiffs were held to be entitled to claim the stamp duty paid by them[1]. But disputes regarding payment of stamp duty on deeds of transfer which were not an essential part of the contract, cannot affect the completed agreement already arrived at[2].

Section is not applicable after production.

14.2. Section 29 is applicable only where the document is not produced before the court. Once the document has been produced before the court and tendered in evidence, the right of recovery of duty is only by virtue[3] of section 44, and not under section 29. In order to entitle the plaintiff to recover under that section (section 44), the amount of the duty must have been included in the costs at the time of passing the decree; otherwise, he has no right to institute any proceedings in regard thereto[4].

Instruments of partition.

14.3. One point concerning instruments of partition may be noted. Section 29(g) provides that in the absence of any agreement to the contrary, the expense of providing the proper stamp is to be borne by the parties thereto, in proportion to their respective shares in the property comprised therein, or, when the partition is made in execution of an order passed by a Revenue authority, or Civil Court or arbitrator, then in such proportion as such authority court, or arbitrators directs. In the old Act also, section 29(e) declared that the expenses of providing proper stamp, (in case of an instrument of partition) would be borne by the parties thereto in proportion to their respective shares in the property comprised in the instrument of partition. By the expression "parties thereto", used in the section, must be understood not merely the party or parties applying for partition, but the whole co-sharers who must necessarily be parties in the partition proceedings and equally bear the proper stamp duty; because the effect of partition proceedings is that the property thereby loses its identity as a previously undivided property, and there is nothing unreasonable in making any instrument of partition chargeable with stamp duty pertaining to the value of the whole, even though the division is limited. This was the decision in an Allahabad case[5].

14.4. In the same case, Pearson J. observed, that in his opinion, the entire property was the subject matter of partition, and the stamp duty should be calculated upon its value and not merely on the value of the portion assigned to the applicant for partition. The portion assigned to the applicant could only be separated and allotted to him in severally *by a process which dealt with the entire property and separated and allotted the remainder of it to another party.*

1. *Dobson and Barlow Ltd.* v. *Bengal Spinning and Weaving Co.*, (1897) I.L.R. 21 Bom. 126, 136.
2. *Jatnarain Ram Lundia* v. *Surajmull Sagarmull*, A.I.R. 1949 P.C. 211, 215, 216
3. *Panakala Rao* V. *Penuganda Numaraswami*, A.I.R. 1937 Mad 763, 764.
4. *Panakala Ra* v. *Penugonda Kumars wami*, A.I.R. 1937 Mad. 763.
5. *Reference by Board of Revenue* (1880) I.L.R. 2 All. 654, 664, 666 (per Sturart, C.J.)

The opinion, he further said, appeared to be supported by the terms of clause (e) of section 29—now section 29(g)—which provided that the stamp duty shall be payable, in the case of an instrument of partition, not by the applicant for partition but by the parties thereto, and the other co-sharers in the entire undivided property must be parties to the partition of it equally with the applicant for partition,—in proportion to their respective shares in the property comprised therein, and it cannot be denied that the partition comprises the entire undivided property.[1-2]

Agreement by Government

14.5. The position regarding cases where the Government agrees to pay the duty and the effect of that agreement on section 3, has been already considered.[8]

The above resume does not show any need for change in section 29. As regards instruments not mentioned in section 29, agreement usually governs the liability to bear expenses of stamps. In the absence of material regarding commercial usage, we recommend no change in the section.

Section 30—Obligation to give receipt in certain cases.

14.6. A very special case of liability to pay duty is dealt with in the next section—section 30. Under that section, any person receiving any money exceeding twenty rupees in amount, or any bill of exchange, cheque or promissory note for an amount exceeding twenty rupees, or receiving in satisfaction or part satisfaction of a debt any movable property exceeding twenty rupees in value, shall, on demand by the person paying or delivering such money, bill, cheque note or porperty, give a duly stamped receipt for the same.

Under the same section, any person receiving or taking credit for any premium or consideration for any renewal of any contract of fire-insurance, shall, within one month after receiving or taking credit for such premium or consideration, give a duly stmped receipt for the same.

Penal provisions

14.7. The penal provisions relevant to section 30 may be noted. Under section 65, if the person concerned refuses or neglects to give the receipt when a demand has been made, as provided by section 30, he is punishable with fine which may extend to one hundred rupees[4]. But the obligation to give a receipt arises under section 30 only when a demand is made.

Under section 62, whether a demand has been made or not, if a receipt has been given, it must be a duly stamped one[5]. An unstamped receipt renders the giver punishable with a fine which may extend to five hundred rupees.

The offence under section 65 consists in not giving a properly stamped receipt. The offence under section 62(1)(b) consists in passing a receipt unstamped, whether one is demanded by the payer or not[6].

If a person required under section 30 to give a duly stamped receipt gives an unstamped receipt, (or a receipt not duly stamped), then he would be guilty of both the offences, i.e. under section 65 and under section 62.[7]

Obligation Confined to movable property

14.8. It should be noted that under section 30, it is only when a movable property exceeding Rs. 20/- in value has been received in satisfaction of a debt (and a demand for receipt has been made), that the question of granting a duly stamped receipt arises. The section has no application where an *immovable property* exceeding Rs. 20/- in value is made over by a debtor to a creditor, in satisfaction of a pre-existing liability[3].

Exemption from duty—effect of.

14.9. Several kinds of receipts have, by the exemption in the Schedule or by notification under section 9, been exempted from the obligation to stamp. A question which would arise is whether, even in such cases, the obligation to give a receipt imposed by section 30 survives. A

1. *Reference by Board of Revenue*, (1880) I.L.R. 2 All 654,664, 667 (per Pearson J.)
2. Also see *Reference under Stamp Act*, Section 46 (1892) I.L.R. 15 Mad. 164 (F.B.).
3. See discussion as to section 3.
4. Section 65(a), Stamp Act.
5. Section 62(1), Stamp Act.
6. *Girdhardas* v. *Emp.*, A.I.R. 1933 Bom. 462.
7. (a) *Girdhardas* v. Emperor A. I. R. (1933), Bom. 462.
   (b) *Queen-Empress* v. *Khettur Mehan*, (1900). I.L.R. 27 Cal. 324
8. *Emperor* v. *Sukhdas*, A.I.R. 1932 Nag. 172.

similar question can arise where a receipt has been given, but is unstamped because the situation is one where the exemption applies.

In an Allahabad case[1], the document at issue was a receipt signed by the payee in duplicate, on the Post Office form, for money remitted by money order. No stamp was put on it, as the necessity for stamp was obviated by a notification. The person who remitted the money thereafter demanded from the payee a duly stamped receipt which should mention that the payment was received *on account of a certain specified* debt. The payee refused to do so, and was presecuted and convicted under section 65. The High Court set aside the conviction, and held that since a proper receipt had been given to the Post Office which was an agent of the remitter, the remitter could not demand a second receipt. Further, section 30 did not require the person receiving to specify the particular purpose for which money was paid.

Recommendation to amend section 30.

14.10. To avoid the recurrence of such controversies,—which could arise from the present wide provision—it is desirable that the position should be clarified. The object of the law of stamps is to ensure that duty is paid where payable. The obligation requiring receipt is intended merely for such cases. We, therefore, recommend the addition of the following exception to section 30.

"Exception.—Nothing in this section shall apply to cases—

(a) *where the receipt, if given, would not require stamp, or*

(b) *where a receipt has been given but does not require stamp".*

Recommendation to increase the amount.

14.10A. We also recommend that the amount should be increased[2] to one hundred rupees, for reasons which we shall indicate under Article 53.

Section 30 A. (New)

14.11. At this stage, it becomes necessary to deal with one matter which is not adequately dealt with in the Act. The question whether a person from whose possession a document comes before a public officer—section 33—and who does not pay the duty and penalty—section 35—can be compulsorily ordered to pay it by the Collector—section 40(1)(b) and section 48—has led to a difference of views as to the scope and ambit of sections 40 and 48. We shall revert to the matter when we consider section 48, but a few important points may be referred to.

Section 48 provides that "all duties, penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the "person from whom the same are due", or by any other process for the time being in force for the recovery of the arrears of land-revenue.

As to the "person from whom the duty is due" within the meaning of section 48, the section itself is silent, and the answer has to be sought from other provisions.

Unfortunately, the other provisions are also sketchy. As a result, there is considerable obscurity in this respect, and the obscurity arises primarily from the fact that, excepting in a very limited number of cases,[3] the Act does not give any specific and comprehensive guidance as to *the person who is to be regarded as the one liable to pay stamp duty.*

14.12. The very limited number of cases specifically dealt with in this regard are contained in—(i) section 19, which relates to bills and notes drawn out of India, (ii) section 29, which, in the case of certain instruments, provides as to who shall bear the burden of proper stamp, and (iii) section 30, dealing with receipts.

1. *Emp.* v. *Balmukund,* (1907) I.L.R. 34 All. 192.
2. See discussion as to Article 53, *infra.*
3. Sections 19, 29 and 30.

Section 29 is a somewhat general provision—though not exhaustive. And even that section does not very clearly indicate whether it is to *operate as between the parties,* or whether it is to *operate* also between the State on the one hand, and the private party on the other hand, so as to be available for interpreting section 48.

In view of the obscurity and uncertainty as to the inter-relationship of section 29 and similar sections on the one hand, and section 48 on the other hand, we are of the view that the matter should be put beyond doubt, as it is neither in the interests of the State nor in the interests of the citizen that liability to bear the tax should be left in doubt.

Recommendation. 14.13. Our recommendation, in concrete terms,[1] is that the provisions of section 48 should be enforceable—

(a) against persons who are liable by virtue of section 19, agreement or section 29 or section 30, as the case may be; and

(b) where none of the above-mentioned sections applies, then against the person executing the document in question.

It may be mentioned that most replies to our Question[2] have agreed with the need for an amendment on the above lines.

Section 30 A. (New) 14.14. In the light of the above discussion, we recommend the insertion of a new section on the following lines :—

"30A. For the purposes of this Act, the person from whom duty on an instrument is due is—

(a) the person liable under sections 19, 29 or 30, or under an agreement, or

(b) where clause (a) does not apply, the executant of the instrument".

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1. See discussion relating to section 48, *infra.*
2. Q. 56. (concerning sections 40 and 48).

CHAPTER 15

ADJUDICATION AS TO STAMPS—SECTIONS 31-32

Introductory.

15.1. The Act recognises that it is not always easy for the citizen to determine the precise category in which a particular instrument falls. To enable the citizen to seek official advice in the matter, it has considered it proper to make suitable provisions.

Section 31.

15.2. The principal provision—section 31—enables a person to seek the determination of the Collector as to the proper stamp with which an instrument is chargeable. We need not go into its details, since there is no serious controversy on the section.

There was, for some time, some uncertainty as to whether the Collector can impound an instrument under section 33 when it is produced before him under section 31. The Supreme Court[1] has now held, that when an executed instrument is submitted to the Collector under section 31 for adjudication as to the proper duty payable on the instrument, the Collector becomes "functus officio" as soon as he determines the duty payable on the instrument, and has no authority to impound the instrument under section 33 if the duty so determined is not paid.

After careful consideration, we recommend that it should be accepted. The scheme of the section, including its provision for taking evidence, makes it desirable that the party presenting be heard. It is only fair that the party presenting be heard, so that the Collector may be able to decide with a full knowledge of the facts. The principal object of the law ought to be to encourage correct orders. Whether or not there is a lie, this would appear[2] to be a wise course.

15.3. In a Madras Case,[3] it was held that the Collector's determination (under section 31) as to stamp duty payable on an instrument would be final and conclusive only in cases where the Collector followed up his order under section 31 by a relative endorsement on the instrument itself under section 32 to the effect that proper duty had been fully paid, or in cases where he had expressed the opinion that no duty was payable and made an endorsement to that effect on the instrument itself. Where, however, the Collector had not certified by endorsement on the instrument either in terms of section 32(1) or in terms of section 32(2), his adjudication as to stamp duty on the instrument brought before him under section 31 could not be a bar to an examination by the other Authorities competent under the Act of the question of proper stamp duty.

15.4. Under section 32, the Collector may make any endorsement of stamp duty on an instrument brought before him under section 31. The general view is that an endorsement made on an instrument by the Collector under section 32 is final, and cannot be questioned by a civil court,—even if it was erroneous or was made out of time.[4]

Suggestion for amendment accepted.

15.5. We have received a suggestion[5] that the Collector should specify *the article* of the Schedule under which he calculates the duty, it having been said that this will facilitate registration of the document. We accept the suggestion. Though the Collector's decision will not be binding as to the nature of the instrument on the registering authority, it will be convenient if it indicates what the Collector decides.

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1. *Government of U.P.* V. *R.A. Khan,* A.I.R. 1961 S.C. 787; (1962) 1 S.C.R. 97.
2. Suggestion of Incorporated Law Society, Calcutta, accepted.
3. *Chief Controlling Revenue Authority, Board of Revenue Madras* V. *Dr. K. Manjunatha Rai,* (1976) 2 M.L.J.279.
4. (a) *Murgayya* V. *Bajgopal* A.I.R. 1942 Mad. 381 ;
   (b) *Firm Parasram Hirji* V. *Firm Parasram,* A.I.R. 1926 Sind 211.
   (c) *Tukaram* V. *Sonaji,* 10 Ind. Cases 702.
5. Suggestion of the Incorporated Law Society of Calcutta (in reply to our Questionnaire).

CHAPTER 16

INSTRUMENTS NOT DULY STAMPED—IMPOUNDING BY PUBLIC OFFICERS

SECTIONS 33-34

Section 33.

16.1. Section 33 requires persons in charge of public offices to impound unstamped documents produced before them, or coming before them in the performance of public functions. The object of the section is to prevent the parties from withdrawing instruments produced by them, when it is found that stamp duty and penalty have to be paid on the instruments.

The section reads—

Examination and Impounding of instruments.

"33. (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed :

Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 ;

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,—

(a) the State Government may determine what offices shall be deemed to be public offices ; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices.

Whether document should be valid in law.

16.2. Several questions have arisen on the section. The first question is this : Is it necessary that the document of transfer which can be impounded under this section is *valid in law* ? There has been a difference of opinion between the Madras High Court[1] and the Andhra Pradesh High Court,[2] in regard to the question whether the document should be valid in law. A full Bench of the Madras High Court[3] was dealing with an unattested and unregistered document dated 22-3-1948, one of the clauses of which was construed as creating a mortgage over the borrower's floating assets etc.

1. *Crompton Engineering Co.* V. *C.C. Rev Authority.* A.I.R. 1953 Mad. 764, 766, para 21 (Rajamannar, C.J., Rajgopalan and Venkataraman Aiyer JJ.).
2. *Hazrami Cangaram V. Kamlabai A.I.R.* 1968 A.P. 213 (F.B.) (5 Judges), *infra.*
3. *Cromton Engineering Co.* V *C.C. Rev. Authority.* A.I.R. 1953 Mad. 764,766, para 11 (F.B.).

In deciding the question whether this document was a mortgage deed, the full Bench held that the transfer provided in section 2(17) of the Stamp Act is a 'transfer' *which is valid in law*, and there can be no transfer by way mortgage unless the requirements of section 59 of the Transfer of Property Act are satisfied. Where the specified immovable property is worth Rs. 100 or upwards, a document purporting to be a mortgage deed of such property requires attestation and registration. Where it is neither attested nor registered, it is not liable to stamp duty. The Court pointed out that the document was neither attested nor registered, and the impounding authority could not have enforced registration, and that, in any case, it could not cure the failure to attest, which by itself was enough to invalidate the document as an instrument of mortgage. It further held, that the document might be an "instrument", but it was not an instrument chargeable with duty as a "mortgage-deed" as defined in section 2(17) of the Stamp Act. The very difference between the definition of "instrument" in section 2(14) and the definition of "mortgage deed" in section 2(17) showed that the transfer must be valid in law. To make a document liable to stamp duty as a mortgage, it is not enough if the document *purports to effect a transfer*. It must "transfer".

16.3. The Andhra Pradesh High Court[1] has, however, disagreed with the view of the Madras High Court, and held that there is no warrant for the importation of the requirements of either the Transfer of Property Act or the Registration Act, in construing documents or instruments under the Stamp Act, as the Stamp Act itself specifically defines the terms used therein. Further, to hold that an instrument must be a valid one under law before it is liable to stamp duty, will be to ignore the requirements of the definition and to make them otiose. In that case, the document was an unregistered mortgage deed. The High Court held that it was chargeable to duty. If the document was to require registration for its legal validity before it can be considered whether it is liable to stamp duty or not, then the Registrar cannot impound it before registration though he is authorised to impound it under section 33 read with section 35 of the Stamp Act. If an instrument is not duly stamped, then it cannot be registered or received in evidence. The definitions in the Act and the terms of every section of the Act indicate clearly that an instrument need not be valid in law or meet the requirements of law as a valid document, before it is chargeable to stamp duty under the Act.

16.4. In our view, it is desirable to settle this conflict. The Andhra view is, in our opinion, more persuasive, and should be adopted. There is no reason why liability to stamp duty should depend on the validity of a document. That is an extraneous and irrelevant consideration. A suitable Explanation incorporating the Andhra Pradesh view should be inserted, and we recommend accordingly. **Recommendation**

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[2]

16.5. There is another matter pertaining to section 33, which has proved to be controversial. In a Full Bench decision of the Madhya Pradesh High Court,[3] the majority were of the opinion that after the registration of a document, the registering authority has no power to hold an enquiry regarding the value of the property covered by the deed and to call upon the executant to pay the deficit stamp duty. The minority, however, took a contrary view. According to the majority, the power to impound an instrument under section 33(1) can be exercised only when the instrument is produced before the registering authorities in the performance of their functions—that is, only so long as the function is not performed or completed and not afterwards. As soon as the registering officer registers a document presented to him for registration, the function in the performance of which the document was produced before him is over; and he becomes 'functus officio', and has no power under section 33 to impound the instrument. **(iii) power of a registering officer to impound a document Position under Section 33**

1. *Hazrami Gangaram* v. *Kamlabai* A.I.R. 1968 A.P. 213 (F.B.) (5 Judges).
2. Question 40.
3. *Kamal Chand* v. *State of M.P.*, A.I.R. 1966 M.P. 20 (F.B.) 22, 23, Para 3, 11, 12, (F.B)

16.6. This was the majority view. But Golwalker J. dissented from the majority opinion. He observed[1] that the expression 'functus officio' means having fulfilled the function, having discharged the duty, having discharged the office, or accomplished the purpose and, therefore, of no further force or authority. *The sole function of the registering authority is to receive an instrument when duly* presented as required by the Registration Act, and to proceed to register the same in the manner provided therein. It is true that after presentation of the instrument before the registering authority, it can examine the same and see whether it is duly stamped or not, and, if it is not duly stamped, defer its registration till it is impounded and either validated in that respect or certified as duly stamped by the authority concerned. This examination of the instrument, however, would not have been a part of its *statutory functions under the Registration Act*. Moreover, the insufficiency of stamp duty paid on an instrument is not one of the bars to registration provided in the Registration Act. An instrument not duly stamped can be validly registered under the Registration Act. The registration of the instrument is not affected by the infirmity in the matter of stamp duty, or by any other infirmity not ousting the jurisdiction of the registering authority. Thus, since the invalidity or unsufficiency in the matter of stamp duty on any instrument has no bearing one way or the other *on the function* of the registering authority, it cannot be said that the registering authority, becomes *'functus officio'* as soon as it registers the instrument. It is true that under rule 4 of the Rules framed under section 69 of the Registration Act, the registering authority shall examine the instrument with a view to seeing if it is duly stamped or not, but the very fact that the Act itself lays down no such provision, and does not debar the registering authority from registering the instrument not duly stamped, rather supports the view that it is not by way of any function or part of function *which the registering authority as such* performs under the *Registration Act*. Moreover, there was no question of any authority being 'functus officio'.

16.7. It is, with due respect to the minority view in the Madhya Pradesh case, suggested that this view is wrong. If it is not part of the registering officers' legal duty to see that the document is duly stamped, then it would not be proper for him to impound the document in any case. The minority view is not, therefore, logical. The point is that once the registering officer has registered the instrument, his function (of registration) is over, and that is all that the majority view emphasises. Practical considerations, also support the majority view. We think that the section should be amended to clarify the position.

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[2]

(iii) Section 33 (1) Exception regarding officers of police whether to be extended.

16.8. Another point concerns the exception in sub-section (1) for officers of police. The question may be considered whether this exception should not be extended also to other officers connected with the investigation of offences. Such extension appears to be desirable, because under the present provision, impounding of the document is *obligatory* on the persons mentioned in the section, and the section leaves no option in this respect.[3] The result is that a law enforcement officer—e.g., a Customs Inspector—is also burdened with this duty, with the consequence that his ordinary work of investigation might suffer. There is no reason why such officers should not be treated on the same footing as police officers, in this context. We recommend such amendment, which is favoured by the replies also.[4]

(iv) Meaning of "production".

16.9. The word "produced" in the section has also come up for consideration. It has been emphasised that it is not sufficient for the purposes of the section that the document should somehow be produced or come before a public officer. In order that this section may apply, it is essential that it should be produced or come before the public officer *in the performance of his functions;* and a mere production in compliance with an illegal demand will

1. *Kamal Chand* v. *State of M.P.*, A.I.R. 1966 M.P. 20 to 23.
2. Question 41.
3. *Pyarelal* v. *Sukandram*, A.I.R. 1926 Allahabad 478.
4. Question, 49.

not confer authority on him to take action under the section.[1] A registrar requiring the production of a document on the ground that it is not duly stamped, after it has been registered and delivered to the party concerned, cannot be said to be acting "in the performance of his functions." A Full Bench of the Lahore High Court[2] has held that a document ordered to be returned because it is not proved, can no longer be considered to be part of the judicial record, and cannot, therefore, properly come before the court again in the performance of its functions, and cannot be impounded.

16.10 The word 'produced' has a technical meaning, and means either produced in response to a summons, or produced voluntarily for some judicial purpose.[3] A document which falls accidentally or incidentally into a judge's hand, cannot be said to be "produced". In a Madras case,[4] it was reiterated that a mere handing over of a document, even if it is as a result of a summons from the court, cannot be said to be 'production'. There must be volition on the part of the person bringing it to the court, to use it for some purpose.

These points of detail, however, do not call for an amendment of the section, as the position with reference to the meaning of 'produced' is fairly clean.

(v) Section 33 (2) Proviso (a)—(References to Chapters of the Code of Cr. P.C.)

16.11. A verbal point may now be mentioned. There is, in section 33(2), proviso (a), a reference to proceedings under Chapter 12 or Chapter 36 of the Code of Criminal Procedure, 1898.

Chapter 12 of that Code related to disputes as to immovable property, and Chapter 36 related to maintenance of wives and children. The Code of 1898 has now been repealed and reenacted in the Code of 1974. It is, therefore, necessary to substitute reference to the corresponding chapters of the Code of 1974 in section 33(2), Proviso (a) accordingly we recommend that section 33(2), Proviso (a) should be amended so as to refer to Chapter 9 and sections 145 to 148 of the Code of 1974, which now deal with the two matters mentioned above.

(vi) Section 33(3) Power to declare public offices.

16.12. There is an important question pertaining to section 33(3). Under that sub-section, the State Government has the power to determine, in case of doubt, (a) what are public offices, and (b) who are deemed to be persons in charge of public offices. The power given to the State Government is not limited to State Government offices, and includes even Central Government offices. The question is whether this is proper.

The point will be appreciated if the history of the sub-section is considered. As originally enacted in 1899, section 33(3) read as follows :

"(3) For the purposes of this section, in cases of doubt,—

(a) the *Governor-General-in-Council* may determine what offices shall be deemed to be public offices; and

(b) the *local government* may determine who shall be deemed to be persons in charge of public offices."

By the Adaptation Order of 1937, in clause (a), the words "the collecting government" were substituted, and in clause (b) also the words "the collecting government" were substituted. A definition of "collecting government" was inserted by the same Adaptation Order, as section 2(12A). By the Adaptation Order of 1950, the words "the State Government" were substituted in place of the words "collective government" in both the clauses and the definition of "collecting government" omitted. The power is now vested in the State Government in both cases.

1. (a) *Thakur Das* v. *Emperor*, A.I.R. 1932 Lah. 495 (S.B.)
   (b) *Collector Ahmedabad* v. *Rambhan*, A.I.R. 1930 Bom. 392 (F.B.)
   (c) *Uttam Chand* v. *Paramand*, A.I.R. 1942 Lah. 265.
2. *Puran Chand* v. *Emperor*, A.I.R. 1942 Lah. 257.
3. *In re Narayandas Nathuram*, A.I.R 1943 Nag. 97.
4. *S. Rangaraju* v. *D.S. Rameshani* A.I.R. 1953 Mad. 698.

16.13. The question to be considered is whether the power to determine what offices shall be deemed to be public offices should be left to the State Government even in cases where the public office is connected with, or under the control of, the Central Government. It would appear that in 1937 all functions of the Central Government under or in relation to section 33 were entrusted to provincial governments by the Government of India[1]. Apparently, in view of this delegation already made in 1937, it was, in 1950, considered proper to substitute "State Government" in both the clauses.

However, it must be stated that the provision as it now stands cannot escape criticism, because, in the case of an office having an apparent connection with the Central Government, it is anomalous that the State Government should determine whether it is or it is not a "public office". If, for example, a question arises whether a person holding an election under a Central Act is or is not holding a public office, the question should be decided by the Central Government and not by the State Government. In this connection, it may be noted that in 1920, when clause (a) gave the power to the Governor-General-in-Council, the question whether the office of a returning officer appointed for the purposes of an election to a legislative body constituted under the Government of India Act arose, the ruling that it was not a public office within section 33(3) was given by the Government of India.[2] If a similar question arises today, the decision will have to be given by the State Government,—which is not a very satisfactory position. Moreover, conflicting decisions may be given by different State Governments in respect of the same office.

16.14 In view of what is stated above, we are of the view that the provision in clauses (a) and (b) should be revised so as to substitute the expression "appropriate government" for "State Government". The expression "appropriate government" could, for this purpose, be so defined that it means the Central Government in relation to offices whose expenses are paid from the Consolidated Fund of India, and the State Government in other cases.

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[3]

Section 33—Suggestion to confer powers on Stamp Auditors not accepted

16.15. There has been a suggestion to amend the section to confer powers[4] on Stamp Auditors for impounding documents of local authorities. We have considered it carefully, but are unable to accept it. Stamp Auditors of Corporations should exercise their functions *before execution*. If the Stamp Auditor is an officer of the Administration, and if the document is "produced", the case is covered by section 33. After impounding, he can then take action under section 38(2). The Corporation (if an executant), can also be prosecuted, in case there is found to be a deficiency and if the other conditions for penal liability are satisfied.

On the other hand, if the Stamp Auditor is a Corporation Officer, then the suggestion cannot be accepted, since the Corporation is itself a party. It may also be stated that in doubtful cases, section 31 can be resorted to.

Recommendation to revise section 33.

16.16. In the light of the above discussion, we recommend that section 33 should be revised as follows :—

"33. (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police *or any other officer empowered by law to investigate offences*, before whom any instrument, chargeable, in his opinion, with duty, is produced of comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same, *whether or not the instrument is valid in law.*

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a

1. Government of India, Finance Department (Central Revenues) Notification No. 9 dated 13th November, 1937
2. Government of India, Finance Department Notification No. 2962 F dated 19th November, 1920.
3. Question 43.
4. Suggestion of the Delhi Administration.

stamp of the value and description required by the law in force when such instrument was executed or first executed :

Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding *under Chapter IX or sections* 145 *to* 148 *of the Code of Criminal Procedure,* 1973 ;

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf ;

(c) *nothing herein contained shall apply to any registering officer after registration.*

(3) For the purposes of this section, in cases of doubt, the *appropriate* Government may determine—

(a) what offices shall be deemed to be public offices ; and

(b) who shall be deemed to be persons in charge of public offices.

Explanation.—In this section, "appropriate Government" means—

(i) *in relation to offices the expenses whereof are paid out of the Consolidated Fund of India, the Central Government, and*

(ii) *in relation to other offices, the State Government."*

16.17. Section 34 contains a special provision as to unstamped receipts in the following terms : **Section 34.**

"Where any receipt chargeable with a duty not exceeding ten naya paise is tendered to or produced before any officer unstamped in the course of the audit of any public account such officer may in his discretion, instead of impounding the instrument, require a duly stamped receipt to be substituted therefor".

The section provides an alternative to impounding.

The statement of objects and reasons said :

"This section has been added, because under the present law (Act I of 1879) an audit officer of public accounts, before whom an unstamped receipt is produced, must *impound the instrument,* and has no power to require the substitution of a duly stamped receipt".

Thus, receipts[1] chargeable with duty[2] are governed by this section.

The section needs no change. There is hardly any case-law on the section.

1. Statement of Objects and Reasons to the 1879 Bill.
2. Section 2(6) section 2 (23) and article 53.

CHAPTER 17

ACTION UPON INSTRUMENTS NOT DULY STAMPED—SECTIONS 35 TO 37

Introductory.

17.1. With reference to "Instruments not duly stamped" we have discussed one set of provisions. With section 35 begins another important group of provisions also concerned with such instruments. They regulate the use of such instruments in evidence or "acting upon" them by public officers.

Section 35.

17.2. The principal provision is contained in section 35, prohibiting the admission in evidence of an unstamped document, as also "acting" on such document or its authentication or registration, where the document is required by law to be stamped and is not stamped or is not sufficiently stamped. This rigid provision is subject to certain exceptions, contained in the proviso to the section.

Proviso (a).

17.2A. The proviso has several clauses but the most important is clause (a), which reads—

> "(a) any such instrument not being an instrument chargeable with a duty not exceeding ten naya paise only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment "of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

17.3. Thus, while the payment of penalty under the proviso relieves a document from the prohibition imposed by the main paragraph, the relaxation under the proviso is not applicable to certain instruments. The basic question to be considered is whether, in the case of those instruments, there is need to continue the present rigid provision. The instruments in question are—

(i) any instrument chargeable with a duty not exceeding ten naya paise only (but not including a receipt);[1]

(ii) bill of exchange or promissory note.

Exception in regard to instruments chargeable with duty not exceeding 10 paise.

17.4. Taking up, first, the instruments chargeable with duty not exceeding 10 paise, the possible reason for the rigid attitude adopted by the legislature in respect of these instruments could be that the duty is so negligible that an infraction of the law is considered as deserving of no sympathy. While there may be some force in this reasoning, we must also note that in practice the rigid provision leads to hardship. It excludes from evidence documents relevant to the case, *or even material to the case,* merely on considerations of revenue. The executant of the document might have failed to affix the stamp because of ignorance of law, misconstruction of the relevant provision of the Stamp Act, difficulty in purchasing stamp, and so on—all factors which do not show an intent to evade the law. Moreover, it is one thing to levy a penalty, and another to exclude a document from evidence by a categorical provision admitting of no relaxation.

17.5. It should also be pointed out that the legislature has already recognised the hardship in the case of receipts, and allowed them to be admitted in evidence,[2] in certain limited circumstances, even though they were chargeable[3] with a duty of ten paise.

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1. As to receipts, see section 35, proviso (b).
2. Section 35, Proviso (b).
3. Article 53 (before amendment of 1976).

views expressed on Questionnaire

17.6. In our view, it is desirable that the exception in regard to documents chargeable with a duty not exceeding 10 naya paise should be removed from section 35, proviso, clause (a). We had included a specific question on the subject, and we may add that most replies to our Questionnaire favour such an amendment.[1]

Earlier suggestions.

17.7. In fact, long before we issued our Questionnaire, several suggestions were made for reducing the stringency of section 35. It was, for example, stated in one suggestion that the prohibition as regards instruments chargeable with a duty of one anna or half an anna only or a bill of exchange or a promissory note had resulted in great hardship to people in India, who are totally unacquainted with the technicalities of the Law Merchant in England. It was stated that the stamp duty payable on other documents, which are made admissible on payment of penalty under this Act, is many times greater than the stamp duty on the promissory notes and other documents referred to in section 35. Also, the number of documents of the former class is on a par with, if not greater than, that of pronotes. Yet, when the former class of documents is made admissible on payment of penalty, the latter are totally prohibited from admission in evidence even on payment of any amount as penalty. The argument that it is an effective check on evasion of stamp duty equally applies to the latter class of documents as well. Thus, this distinction does not appear to be fair. Whatever might be the state of circumstances in the commercial world at the time of passing of the Act, it can confidently be said that, with the advent of banking facilities, *pronotes, as means of negotiation, have* become otiose and scarce in the commercial circles while they have become the common instrument of transaction amongst ignorant villagers. It was, therefore, suggested that proviso (a) to section 35 should be amended by deleting the words "not being an instrument chargeable with a duty of one anna or half an anna only, or a bill of exchange or promissory note."[2]

It was stated in another suggestion[3] that the proviso (a) to section 35 should be suitably amended for admitting promissory notes in evidence on payment of the proper stamp duty and penalty, *since experience had shown that* in several genuine cases in which there was not the least intention to evade duty, the unstamped promissory notes had been excluded from evidence much to the hardship of the party.

There was yet another suggestion to the effect that the exception for bills and pronotes should be deleted[4]. A similar suggestion[5] was made by a judicial officer that section 35, which affects negotiable instruments, should be amended in such a way that a suit on an unstamped promissory note can also lie on payment of due penalty.

Recommendation as to proviso (a) regarding instruments chargeable upto 10 p.

17.8. In view of what is stated above, we recommend that the exception regarding instruments chargeable upto 10 paise should be deleted from section 35, proviso (a).

Section 35 and promissory notes and bills of exchange.

17.8A. We now discuss that part of proviso (a) to section 35 which excludes promissory notes and bills of exchange. This had a counterpart in section 34 of the Stamp Act, 1879 (but not in the earlier laws relating to stamp duties). The provision seems to have been borrowed from the English Act. In England,[6] a promissory note or bill of exchange cannot be sued upon, if unstamped. In 1961, the Stamp duty on these instruments was simplified in England,[7] but the above position remains unaltered.

17.9. English text books do not give any guidance as to why promissory-notes and bills of exchange have been selected for this harsh treatment. One can think of a possible reason,

1. Q. 44.
2. File No. F. 3(4)/57-L.C.I (regarding Revision of Stamp Act), Pages No. 78-79 (Law Department, Govt. of Andhra Pradesh).
3. File No. F. 3(4) /57-L.C.I(Vol. I, S.No. 37, (Law Department, Government of Orissa).
4. Sub-Registrar, P.O. Sikandra Road, Aligarh District (File No. F. 3(4)/57-L.C. I, Vol. I, Page 22).
5. Shri H.B. Vaishnav, Asstt. Judge, Porbandar (File No. F. 3(4) /57 L.C. I., Vol. I, Page 45).
6. Section 33 (1), Stamp Act , 1891 (Eng.), Which overrides, section 14(4) of the same Act.
7. See discussion relating to articles 13 and 49.

namely, that these instruments are negotiable and pass quickly from hand to hand, thereby facilitating a successively large number of transactions. Assuming that this argument is sound, should the law go to the extent of *totally barring* the reception in evidence of the instruments? After all, the law relating to stamp duties is concerned with revenue. The object of section 35 is to ensure effective realisation of the duty. The sanction need not be made drastic than is necessary. The object of realising the duty can be equally effectively achieved by levying a penalty. The hardship caused to the citizen by non-reception of the instrument is entirely unnecessary.

Recommendation.

17.10. There is sufficient justification for modifying this part of section 35 also. There have been suggestions also to modify the regour of section 35, in relation to bills and pro-notes, and the matter requires to be considered.

17.11. Even if pro-notes and bills can be justifiably picked out for a specially rigid provision, one should also weigh the inconvenience caused to small traders as well as to nationalised banks who advance money against pro-notes.

Another aspect of the matter, which may be relevant in this connection, is that total exclusion from evidence encourages dishonest defences. With the main security for the debt rendered useless, the debtor is induced to deny the debt itself.

Views expressed.

17.12. We may add that most replies[1] to our Questionnaire favour a change on the lines discussed above.

Case law on promissory notes under section 35

17.13. A few reported cases illustrating the practical working of this part of the section show, that (i) the present provision has been criticised as causing undue hardship, and (ii) to avoid undue hardship, courts are sometimes driven to construing the document as not falling within the category of "pronote", and (iii) in many cases it is always a matter of difficulty to decide whether a document is or is not a pronote.

17.14. In a Madras case,[2] for example, Schwabe C.J. and Ramesam J. held: "The question is whether or not (a particular document) is an acknowledgement within the definition of 'acknowledgement' in the Stamp Act, for if it is, it has to be stamped, and if it is not stamped, it cannot be admitted in evidence and in such a case the legislature has thought fit to impose what to my mind is *an appalling penalty* of the plaintiff losing his claim altogether, because there is no penalty provided by the payment of which to Government, the document can be admitted. Perhaps, in view of this provision, the draftsman of the Schedule has so worded it that it has left many loopholes, and given rise to a conflict of judicial opinion when it comes to interpretation. The words are 'acknowledgement of a debt, exceeding Rs. 20 in amount or value, written or signed by or on behalf of a debtor in order to supply evidence of such debt'. The first question that arises is whether any particular document is given to supply evidence of the debt.

17.15. In another Madras case,[3] the question was whether a person who had lent money on a promissory note can sue to recover the debt *apart from the note*, when the note is inadmissible in evidence, owing to a defect in the stamping. Counsel for the creditor argued that the principle which applied in England—that the credit is a different cause of action from the promissory note—should be held applicable in India, and that section 91 of the Evidence Act was no bar to the action on the loan. As to this, the Chief Justice observed,[4] "There is no statutory provision in England as section 91 of the Indian Evidence Act here. In England, they strain the common law rule of evidence to get over the stamp law in cases of hardship. You cannot do that in India".

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1. Q. 44 A.
2. *Surajmal Murrlidhar* v. *Ananta Lal* A.I.R. 1924 Mad. 352, 353.
3. *Perumal Chettiar* v. *Kamakshi Ammal*, I.L.R. (1938) Mad 933; A.I.R. 1938 Mad 785 (F.B.)
4. *Perumal Chettiar* v. *Kama kshi Ammal*, I.L.R. (1938) Mad 933, 937; A.I.R. 1938 Mad. 785 (F.B.).

In the judgment, he also observed :[1]

> ".....The English rules of evidence are not statutory, but Judge-made, and in the second place, the tendency in England has always been to ignore, as far as possible, stamp objections, as is pointed out in Taylor on Evidence[2]. In India, the law is statutory and the courts are given no latitude in matters of this nature".

Stodard J. in his dissenting judgment, said :—[3]

> "To me, it appears that when a man gives another a promissory note in satisfaction of a debt or for some other consideration, he gives at the same time a warranty that the note is a good and enforceable instrument. If the note is bad for want of a proper stamp, it is difficult to see how it can operate as a discharge of the debt any more than the giving of a counterfiet currency note could so operate..... .....I am not able to subscribe to the view that because the consideration is recited in the instrument, no evidence can be given of it except the instrument itself. The consideration, that is to say, the loan for which the promissory note is given, is the subject matter of the contract and not a term of the contract within the meaning of section 91 of the Indian Evidence Act. In the matter of the loan the lender consents to it only on condition that the borrower gives him a negotiable instrument in the shape of a promissory note containing or recording more, though of course they may state the consideration. Receipts and agreements generally are *not intended to be negotiable*, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid .... Being primarily a receipt even if coupled with a promise to pay it is not a promissory note".

17.17. There is another Privy Council case[4] relevant to the point. In a suit based on a *sitta* or an agreement of sale, the meaning of which was obscure, the claim was supported by copies of two documents, which were as follows :—

> "Received from you this day..... a cheque for Rs..... The amount would be repaid with interest thereon at the rate of ..... per cent. Time ten months..... The principal amount will be paid with interest after ten months from this date".

The defendants pleaded that the documents were promissory notes, and, not being stamped, they were inadmissible in evidence. It was held, following an earlier Privy Council case,[5] that these documents were "*clearly never intended to be negotiable instruments*",[6] and were not promissory notes and were not, therefore, inadmissible in evidence for want of a stamp.

17.17A. It appears that the Privy Council, when referring to the 'intention' that the documents were not meant to be promissory notes, seams to be doing so in order to avoid the ban imposed by section 35.

17.18. In a Bombay case,[7] Beaman J. said that "effect should be given to the *maxim ut magis valeat quam pereat* (it is better for a thing to have effect than to be made void),[8] in any difficulty under the Stamp Act, so that where there is *a reasonable doubt* whether a paper is subject to stamp at all, the courts should decide strictly against the Exchequer and beneficiently

1. *Perumal Chettiar* v. *Kamakshi Ammal*, I.L.R. (1938) Mad 933, 946; A.I.R. 1938 Mad. 785 (F.B.)
2. Taylor on Evidence, Vol. I, Page 276 (12th edn.)
3. Perumal Chettiar v. Kamakshi Ammal, I.L.R. (1938) Mad. 933, 965, 967; A.I.R. 1938 Mad. 785.
4. *Karam Chand* v. *Firm Mian Mir Ahmad*, A.I.R. 1938 P.C. 121, 123.
5. *Md. Akbar Khan* v. *Atta Singh*, A.I.R. 1936 P.C. 171.
6. Emphasis supplied.
7. *Sethna* v. *Mirza Mahomed Shraji*, (1907) 9 Bom. Law Reporter 1034.
8. Osborn, A Concise Law Dictionary, 4th Ed., though the word "res" is also used here after 'ut' which means 'things'.

in favour of the subject. The principle loses force where the question is not so whether a paper is liable to stamp, as whether it is liable to stamp in one character, or another, and it has no application at all, where the words of the statute directly cover the case".

17.19. In that case, it was held that, under the Stamp Act, 1899, a promissory note, unless it is payable to order or bearer, is to be deemed to be a bond, if attested.

Defect of present law.

17.20. The present law, in our view, encourages dishonesty, and causes hardship. Moreover, the proposed amendment will help the Government revenue, as has been pointed out by one State Government.[1]

Recommendation as to pronotes.

17.21. Since the hardship to the lender caused under section 35 of the Stamp Act has been noted by several persons, it is high time that this section was amended so as to "advance substantial justice", which under the present section the courts are unable to do,[2] however much they may like. We, therefore, recommend that pronotes and bills also should be included within proviso (a) to section 35.

If this recommendation is accepted, it will not be necessary to carry out our recommendation to limit the bar relating to pronotes to pronotes as defined in the Negotiable Instruments Act.[3]

Section 35 and letters of credit.

17.22. A point relating to "Letters of credit" has been discussed under an earlier section.[4] The recommendation made there was as follows :—

(i) the mention of "letter of credit" should be removed from the definition of "bill of exchange payable on demand", and

(ii) in section 35, "letter of credit" should be expressly mentioned.

The second amendment, which concerns section 35, may be carried out, if our recommendations to delete bills of exchange from section 35, Proviso (a) is not accepted.

Duly stamped

17.23. Under section 35, proviso, a deficiency in the amount of the duty can be rectified. But the situation where there is no deficiency in the amount of the duty is not specifically covered by the proviso, though it would appear that the language of the proviso to section 35 is wide enough to cover such cases.

17.24. In the definition of the expression "duly stamped", a number of ingredients are implied, such as, provisions of the Act relating to description of the stamp, mode of affixing stamp and the like. As we have pointed out while discussing the definition of that expression,[5] a difficulty may arise where the *amount of the stamp satisfies the law, but, in other respects, the instrument is not "duly stamped" as explained above.* As this is a recurring situation, it appears to be desirable to add in section 35, proviso (a), an Explanation on the point.

We recommend that section 35, proviso (a), should be amended for the purpose, by adding such an explanation. We may note that most replies to our Questionnaire favour it.[6]

17.25. As regards the case of use of a stamp of improper description, it is covered separately under section 37, which allows the defect to be rectified by applying to the Collector.

17.26. Where the full duty has been paid but irregularly stamped, no penalty except Re. 1. Where part duty is paid but irregularly stamped, then also Re. 1. Though this concerns rate, to avoid undue hardship, it is necessary. Mere irregularity should not be visited with a severe penalty.

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1. Government of Maharashtra's reply to the Law Commission Questionnaire (S. No. 88).
2. See *Perumal* v. *Kamakshi Ammal*, I.L.R. (1938) Mad. 933, 946 (FB.) (Varadachariar, J.).
3. See discussion as to section 2—"Promissory note".
4. See discussion as to section 2(3) "bill of exchange payable on demand". (supra).
5. See discussion as to section 2(11) "duly stamped".
6. Q. 45.

17.27. If the above line of reasoning is accepted, clause (a) of the proviso to section 35 should be revised on the following lines :— **Recommendation to amend section 35, proviso(a)**

"(a) any such instrument.....shall, subject to all just exceptions, be admitted in evidence, on payment of :—

(i) the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, *and*

(ii) a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion.

Explanation.—Where an instrument bears stamp of a certain amount but is not otherwise duly stamped, then for the purposes of this proviso, the instrument shall be deemed to be duly stamped to the amount of the stamp which it bears if a penalty of one rupee is paid into court."

17.28. Section 35, Stamp Act, read with section 91 of the Evidence Act, excludes both the original instrument and secondary evidence of the contents of the instrument, if it is unstamped or insufficiently stamped.[1] **Secondary evidence.**

17.29. Lord Watson stated in *Raja of Bobbili* v. *Inuganti China Sitaramaswami Garu*,[2] that, under the terms of section 34 of the Indian Stamp Act of 1879, as the copy could not be stamped, the original having been lost, it could not be admitted in evidence. This decision was followed by the Madras High Court[3] in a case where the facts were these :—

Before the trial commenced, the plaintiff produced an unstamped document purporting to support his claim to certain lands. Later on, a mob invaded the Court, and set fire to it in which the record of the case was destroyed, among other things. When the trial commenced, the plaintiff sought to put in a copy of the document and paid the penalty into Court ;

It was held that the copy of the document was not admissible in evidence, even on payment of the penalty. The fact that the original document was destroyed by the action of the mob put the plaintiff in no better position.

17.30. In another Madras case,[4] it was held that where a deed of partition is inadmissible in evidence for want of registration, the partition cannot be proved apart from the deed. The lower court had held in this case that the partition could be proved by evidence apart from the deed which was not registered. On appeal, the Madras High Court (following an earlier case),[5] held that where a deed of partition is inadmissible by reason of the fact that it had not been registered, the court can only regard the property as being still belonging to the joint family.

17.31. These cases illustrate the hardship caused by the present position. The benefit of being allowed to prove the document on penalty should be extended to copies also.

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1. (a) *Thaji Beebi* v. *Tirumulaippa* I.L.R. 30 Mad. 386.
   (b) *Lachmareddy* v. *Sham Raw*, (1966) 2 An. W.R. 251.
   (c) *Damodar Jagannath* v. *Atmaram*, I.L.R. 12 Bom. 443.
   (d) *Mung Po Htoo* v. *Ma Ma Gye*, A.I.R. 1927 Rang. 109.
   (e) *Ladha Ram* V. *Hari Chand*, A.I.R. 1938 Lah. 90, 92.
   (f) *Chanda Singh* v. *Amritsar Bank Co.*, A.I.R. 1922 Lah. 307.
   (g) *Jhanda Singh* v. *Harnam Singh* A.I.R. 1926 Lah. 415, 416.
   (h) Nalam Ramayya v. *Nalam Achamma*, (1942) 2. M.L.J. 164 ; I.L.R. (1945) Mad. 160 (F.B.).
   (i) *Subbu Naidu* v. *Varadarajulu Naidu*, (1947) 1 M.L.J. 90.
2. *Raja of Bobbili* v. *Inuganti China Sitaramaswami* Garu, (1899) I.L.R. 23 Mad 49 (P.C.).
3. *Chidambaram* v. *Mayyappan*, A.I.R. 1946 Mad 298.
4. *Ramayya* v. *Achamma*, I.L.R. (1945) Mad. 160 (F.B.) (case law reviewed).
5. *Veera Raghava Rao* v. *Gopalarao*, (1941) 2 M.L.J. 707 (Patanjali Sastri, J.).

17.32. The present position leads to the adoption of various tricks and devices by litigants. If the plaintiff can establish his case without proof of a written contract, he succeeds. And that is what he tries to do.

17.33. The defendant on the other hand, exploits the legal prohibition by suppressing the document and by stating that it was unstamped.[1]

Recommendation to admit secondary evidence.

17.34. Even an oral admission of the contents of the document by the defendant[2] is not admissible,[3] if the instrument is not stamped, unless[4] the admission is made for the purposes of the proceedings.[5]

In our view, this lacuna should be rectified.

Recommendation Omission of the word "naya"

17.35. While on section 35, we may state that the word "naya" before the word "paisa" should now be omitted, having regard to current usage.

Section 35— Power to require security.

17.36. It has been suggested[6] with reference to section 35 that provision should be made to require deposit. It will, however, increase work, and we are not inclined to accept it.

17.37. Under section 36, where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

Propositions laid down in case law

17.38. With reference to this section, courts have laid down a few propositions, of which the following are noteworthy :—

(1) When a court passes an order that the document does not require any stamp or is duly stamped, the order should be treated as final.[7]

(2) The section is mandatory. Once a document is admitted in evidence, rightly or wrongly, whether with or without objection from any party, it is not permissible to the court, whether it is a Court of appeal, revision or trial court, to reject it on the ground that it has not been duly stamped.[8-10] Stamp matters are no concern of the parties and if, notwithstanding an objection, the trial Court admits the document, the matter stops there, and the Court cannot subsequently order the deficiency to be made up and penalty paid or, on failure to do so, reject that document.[11]

(3) The section is not limited in its application to cases in which an instrument not duly stamped has been admitted in evidence by the trial court. The admission in evidence of an instrument by an appellate court is equally a bar to a subsequent objection to its admissibility.[12]

(4) The words "admitted in evidence" refer to the act of letting the document in as part of the evidence, either as a result of judicial determination of the question whether it is admissible for want of stamp, or because no objection was taken to its admissibility.[13-14]

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1. See *Subhish Pillai* v. *Muthathal Achi*, A.I.R. 1946 Mad. 457.
2. Section 22, Evidence Act.
3. (a) I.L.R. 1938 Mad. 933, 954 (Varadachariar, J.).
   (b) I.L.R. 14 Bomb. , 102, 111
   (c) Theji Bi v. Tirumalappa, I.L.R. 30 Mad. 386.
4. I.L.R. 1938 Mad. 933, 954 (Varadachariar, J)
5. Section 58, Evidence Act.
6. S.No. 119 (Chandigarh Administration).
7. *Hiralal* v. *Jagmohandas*, *A.I.R.* 1957 M.P. 206.
8. *Ma Pwa May* v. S.R.H.M.A. Chettiar Firm, A.I.R. 1929 P.C. 279,281.
9. *V.E.A. Annamalai Chettiar* v. *Veerappa Chettiar*, A.I.R. 1956 SC. 12.
10. *Javer Chand* v. *Pukhraj Surana*, A.I.R. 1961 S.C. 1565, 1656, para 4.
11. *Lal Chand* v. *Dharam Chand*, A.I.R., 1655 M.P. 102.
12. *Rasanji Bhagwanji* v. *Ram Shankar*, A.I.R. 1938 All. 619.
13. (a) *Ratan Lal* v. *Jandas*, A.I.R.1954 Raj. 173;
    (b) *Lodi* v. *Zin-ul-haq*, A.I.R. 1939 All 588.
14. *A.P. Sahib* v. *Sankalan Mandhavan*, A.I.R. 1957 Ker. 105.

Once the Court, rightly or wrongly, decides to admit a document in evidence, then, so far as the parties are concerned, the matter is closed, and the admission cannot be called in question at any stage of the suit or proceeding on the ground that the instrument had not been duly stamped.[1]

(5) What section 36 prohibits is the calling in question at any stage of the admission of a document on the ground of its not being duly stamped.[2-3]

Controversy as to "admitted in evidence."

17.39. In a Rajasthan case,[4] there was a difference of opinion about the interpretation of the words "admitted in evidence". The majority were of the view that a document can be said to be admitted in evidence *only when it is formally proved and tendered in evidence.* A mere finding that the document is admissible does not bring section 36 into operation. The High Court confirmed the view expressed on this point in an earlier Rajasthan case.[5]

17.39A. The minority (Bhargava J.), however, took the view that once the duty is paid and document regarded as admissible section 36 should apply.

17.40. We are of the opinion that the majority view in the Rajasthan case is correct, and that there is no need to amend the section.

section 37—Introductory.

17.41. Section 37 empowers the State Government to make rules providing that where an instrument bears a stamp of sufficient amount but of improper description, the instrument may, on payment of the duty with which the same is chargeable, be certified to be duly stamped; may instrument so certified shall then be deemed to have been duly stamped as from the date of its execution. The object of the section is to enable instruments bearing stamp of improper description to be validated *without payment of penalty*, the assumption being that the party has not been guilty of an attempt to defraud government revenue. The validation is done by the Collector under the Rules. The section does not mention the authority that can validate the instrument, and leaves it to the rules.

Duty not to be leviable and concession mandatory.

17.42. We are of the view that the concession should be mandatory, and that no duty should be chargeable. We may mention that many replies[6] to our questionnaire agree with this view.

Meaning of word "stamp of improper description."

17.43. Several points require discussion, with reference to the section 37. First, on the question whether the words "stamp of improper description" include also stamps appropriate to a purpose outside the Stamp Act (such as, a court fee stamp or a postage stamp), there was previously some obscurity. The Allahabad High Court, in a case[7] in which a postage stamp was used, held that these words are not to be interpreted as including a description of stamp appropriate for purposes outside the Stamp Act, and must be confined to a stamp which is used for the purpose of denoting the Stamp duty chargeable on an instrument. Thus, according to the Allahabad High Court, a postage stamp used for an acknowledgement cannot amount to a "stamp of improper description", but should be regarded as not a stamp at all within the meaning of the Act and the rules. In the judgment, there were observations that even a court-fee stamp would not fall within the section.

17.44. But this view, at least as regards court-fee stamps, must be taken as overruled by the Privy Council,[8] which has held that it is not correct to say that the section has no reference to any stamp except a revenue stamp pure and simple. The Privy Council case involved a revenue stamp surcharged "court fee", and this was held to be a stamp of improper description

1. *Ghasi Patra* v. *Brahma Tahasi* A.I.R. 1962 Orissa 35.
2. *Ettuthara Warrier* v. *Rochunarayan Menon* A.I.R. 1962, Ker. 265.
3. *Simbhadri* v. *Varalakashmi*, A.I.R. 1962, A.P. 398.
4. *Nanga* v. *Dhannial*, A.I.R. 1962 Raj. 68-78, para 36 (F.B.)
5. *Godhan Singh* v. *Suwer Lal* A.I.R. 1959 Raj 156.
6. Q.48.
7. Reference under the Stamp Act (1901) I.L.R. 23 All. 213 (Postage stamp).
8. *Ma Pa May* v. *S.R.M.M.A. Chettiar Firm*, A.I.R. 1929 P.C. 279, 282.

within the meaning of the section. Even a postal, forest or telegraph stamp, which is totally outside the purpose of the Stamp Act, has been regarded as covered by the section.[1]

Amendment needed to cover another stamp.

17.45. In our opinion it would be useful to amend the section, so as to incorporate the wider judicial construction of the phrase "stamp of improper description".

We may note that many replies to our Questionnaire favour such an amendment.[2]

Effect of certificate.

17.46. The second point concerns the relationship of section 37 with section 35. In an Andhra Pradesh case,[3] a promissory note on an impressed stamp, though certified by the Collector under section 37, was nevertheless held to be outside the scope of section 37. The reason given was, that the exception to the proviso to section 35 was a bar to the admissibility of the note, and that the certificate under section 37 could not prevail against the specific provisions of section 35, proviso. With great respect, section 37 does not necessitate such a narrow view of the scope of the section. If the certificate cures the defect in stamp, it should be taken as curing it for all purposes.

Amendment needded to override section 35, proviso.

17.47. We are of the view that having regard to the beneficial object of section 37, it should be made clear that it will override the proviso to section 35. Such a course has been favoured[4] by most of the replies to our Questionnaire.

No. need to cover cases of stamps of lesser amount.

17.48. We note that section 37 is confined to instruments bearing *sufficient stamp*. Should it be extended to instruments bearing stamp of wrong description but of lesser amount than that chargeable ?

We have considered this aspect, but are not inclined to recommend a change.

Recommendation to revise section 37.

17.48A. In the light of the above discussion we recommend the following re-draft :—

Revised section 37

37. (1) Where ..... an instrument bears a stamp of sufficient amount but of improper description, *the instrument shall, without payment* again of the duty with which the same is chargeable be certified to be duly stamped, *subject to such rules as* the State Government may make *as to the procedure for the grant of such certificates.*

(2) Any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution, *notwithstanding anything to the contrary contained in section* 35 *or in any other section.*

Explanation.—For the purposes of this section, a stamp used for indicating the court-fees or postage paid is also a stamp of improper description.

In making this recommendation, we are conscious that the constitutional scheme for the distribution of the proceeds of taxes is not identical in regard to court-fees and non-judicial stamps and postage stamps.

We presume that the Central Government will have no objection to the proposed validation of instruments bearing court-fee stamps.

1. (1911) 10 I.C. 702 (Nagpur), cited in *Ranjit Singh* v. *Bohramji*, A.I.R. 1957 Madhya Bharat 181, 182, para 5, (Chaturvedi,J.)
2. Q.47.
3. *Eranna* v. *Madappa*, A.I.R. 1963 A.P. 457 distinguished in *Anoop Chand* v. *Narhmal*, A.I.R. 1965 Raj, 114.
4. Q.48.

CHAPTER 18

IMPOUNDING AND CONNECTED PROVISIONS— SECTION 38—47

Section 38—Introductory.

18.1. An instrument not sufficiently stamped is impounded under sections 33—35. After this is done, the question arises what further action should be taken. Section 38 is one of the principal sections providing for what is to be done with an impounded instrument. If the deficit duty and penalty are paid, the impounding officer is, under section 38(1), required to send to the Collector an authenticated copy of such instrument, together with a certificate in writing setting out certain particulars. Further action in regard to the copy of the instrument is then taken under section 39.

If a party does not pay the deficit duty and penalty under section 35, the court has to impound the instrument under section 33, and forward it to the Collector under section 38(2). It is then for the Collector to give his decision under section 40 about the proper duty and penalty (if any) to be charged.

caselaw.

18.2. This, in general, is the scheme of the section. We have gone through the important[1] cases under section 38; and find that they do not reveal any serious difficulty in the working of the section.

However, one verbal point requires to be considered under section 38(1), and with reference to section 38(2), a suggestion will have to be dealt with.

Section 38(1) Recommendation for verbal change.

18.3. The point concerning section 38(1) is this.—At present, under section 38(1), when the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of "a penalty" as provided by section 35 or of "duty" as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with the prescribed certificate.

Our recommendation is that the words "duty and" should be added where section 38(1) refers to section 35.

Section 38(2) suggestion of state Government.

18.4. As to sub-section (2) of section 38, a suggestion for an amendment, received from a State Government[2] may now be dealt with Section 38(2), as already stated, provides, that in cases not falling under section 38(1), (that is to say, in cases other than those where the person impounding an instrument not duly stamped has authority to receive evidence and admits the instrument in evidence upon payment of a penalty), the person impounding the instrument shall send it in *original* to the Collector. Under section 40, the Collector so receiving the instrument may either certify by endorsement on the instrument that it is duly stamped or not chargeable with duty, or, if he is of opinion that such instrument is not duly stamped, may require payment of the proper duty together with the penalty; and, after the Collector has so dealt with the instrument, he has to return it to the impounding officer after an endorsement to that effect under section 42(2), then the instrument shall become admissible in evidence, and shall be delivered to the person from whose possession it came into the hands of the officer impounding it etc.

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[1] (a) *Peary Lal* v. *Sukhan Ram*, A.I.R. 1925 All. 478.
(b) *In re Sikdo Prasad*, A.I.R. 1934 All. 1054.
(c) *Manganese Minerals Ltd.* v. *State of West Bengal*, A.I.R. 1960 Cal. 340.
(d) *Jai Narain* v. *Yasin Khan*, A.I.R. 1955 Hyd. 21.
(e) *T.K. Rantharaj* v. *Md. Nazeer Khan* A.I.R. 1959 Mys. 172.
(f) *Vasudevan* v. *Krishan Ramnath*, A.I.R. 1953 T.C. 559.

[2] Suggestion of the erstwhile Government of Madras, File No. F. 3(4)/57-Pt. I, L.C. S. No. 8.

If the instrument so sent in original[1] is lost, destroyed or damaged before the Collector takes action under section 40, then it is not possible (under the Act as it now stands) to collect the stamp duty and penalty due, with the result that there is a loss of revenue to the Government. It has, therefore, been suggested that the person impounding the instrument should, before sending it to the Collector under section 38(2), keep an authenticated copy of the instrument in his custody. If the original which has to be sent to the Collector, is lost, destroyed or damaged, then the authenticated copy should, it is suggested, be treated as the original instrument for the purposes of levying the stamp duty and penalty due, and should be admitted in evidence on payment of such duty and penalty. An amendment of section 38(2), to achieve these two objects, has been proposed by the State Government.

Scheme of section 38(2).

18.5. Before expressing our view as to the point raised in the suggestion, we should consider in detail the scope of section 38(2). There are two cases in which impounding of instruments not duly stamped is provided for by the Act namely, (i) where a person has authority to receive evidence or (ii) where a person is in charge of a public office, provided (in both cases), the instrument chargeable with duty is produced before him or comes before him in the performance of his functions. In the first case, that is to say, where a person impounding has authority to receive evidence, if the party pays the penalty, then the instrument impounded can be admitted in evidence, and need not be sent to the Collector.[2] In that case the person impounding sends only a copy cases a Certificate (that is) to the Collector.[3] In "other cases", he has to send the original to the Collector.[4] Those "other cases" would appear to be the following.—

(i) Where the person impounding has no authority by law or consent of parties to receive evidence ;

(ii) Where he has such authority, but the party concerned does not pay the duty (or the deficiency in duty) and the penalty etc. ;

(iii) Where, even if the party concerned is prepared to pay the duty or the penalty, the instrument cannot, by virtue of the exceptions given in the proviso to the relevant section[5] be admitted in evidence,[6] under the present law.

In these cases, the person impounding must send the instrument in original. There is a provision[7] for preparing a copy of the instrument, but even when a copy is prepared under that section, *what is sent to the Collector is the original.*

Suggestion considered.

18.6. Now, the suggestion is, that before sending the original, the person impounding should keep an authenticated copy. If the original is lost before action is taken under section 40(1), then (it is suggested) the copy should be treated as the original for the purpose of the levy of the penalty etc. and also for the purpose of the Indian Evidence Act, 1872.

This suggestion of the State Government was circulated by the Government of India[8] to other State Governments. It appears,[9] that many State Governments were in favour of the suggested change. One State Government was not, however, in favour of the change suggested, on the ground, first, that the proposal would increase the work in the public offices concerned, and secondly, that the change was not necessary, as cases of original documents being lost or damaged were very few.

Another State Government suggested that the copy of the document be made at the cost of the person producing it.

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1. Section 38 (2)
2. Section 38 (1)
3. Section 38 (1).
4. Section 38 (2)
5. Section 35(1), proviso (a).
6. Compare (English) Stamp Act, 1891, (54 & 55 Vic. C 39), Section 14 (1)
7. Section 46.
8. Ministry of Finance (Revenue Division).
9. S. No. 8 File No. F· 3 (4)/57-L.C. Pt. I.

The comment of another State Government was, that the impounding officer should keep the original with himself, and should send only a copy to the Collector for the levy of duty and penalty.

18.7. We have considered the suggestion, and the points made in the comments expressed theeron. While the object of the suggestion is good, we are of the view that certain considerations—such as increase in office work—cannot be brushed aside. Cases of loss of an instrument in transit would be rare. To meet those rare cases, we do not think that a copy should be prepared in every case. And, in our view, there is no case for a change in the present law. Various alternatives.

In response to our Questionnaire[1] also, while many replies have favoured such amendment as is set out below, some do not think that, to meet rare cases, a change should be made in the section.

18.8. However, if the Government does consider some change necessary, then, in our view, the alternative suggested by another State Government, namely, that the *original* should be kept by the impounding officer and a copy should be sent to the Collector, is preferable to other alternatives. If the original is sent to the Collector and lost in transit, and the question of proof of signature or thumb impression arises, then a copy kept by the impounding officer would not be of much utility, and there would be difficulties. Where the party interested or the person producing is not prepared to pay the cost of preparing the copy, we do not think that the person impounding the instrument should be required to prepare an authenticated copy. No doubt, if the original is lost in transit and the penalty cannot be levied, a loss is thereby caused to the revenue. But, against this loss, should be offset the increase in work and cost that will arise if an authenticated copy is required to be prepared in every case. It should be remembered, that the acceptance of the suggestion of the State Government would mean *that in every case* an authenticated copy should be prepared even though the cases in which loss of the instrument occurs in transit would be only a fraction of the cases in which action is taken under section 38(2). We think that the existing provision need not be disturbed where nobody comes forward to bear the cost of preparing the copy. Even in regard to the few cases where loss may occur, an option may be left to the party.

18.9. We, therefore, recommend that if Government consider necessary that the section should be amended, the following[2] proviso may be inserted in section 38(2) :— Recommendation.

> *"Provided that where the person who produced the instrument, or any party interested, is prepared to pay the cost of preparing a copy of the instrument, then—*
>
> (a) *an authenticated copy of the instrument shall be got prepared by the person impounding the instrument ;*
>
> (b) *only the authenticated copy shall be sent to the Collector ;*
>
> (c) *the Collector shall take action on the authenticated copy as if it were the instrument in original ; and*
>
> (d) *any certificate to be endorsed with reference to the instrument by the Collector under clause (a) of sub-section (1) of section 40 or under sub-section (1) of section 42 shall be endorsed on the authenticated copy; and when that copy is received back by the person impounding the instrument[3] that person shall copy the certificate on the original instrument and also authenticate such copy of the certificate."*

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[1] Q.49.

[2]. Such consequential changes as may be necessary in other section, may be carried out.

[3]. As to return of the instrument to the person impounding, see section 40(2) and cases cited in Mulla, Stamp Act, (1963) page 146, Footnote (x).

Section 38A. (to be transposed from section 46).

18.10. At this stage, it is necessary to depart from the sequence of sections and to refer to section 46. That section reads :—

> "46. (1) If any instrument sent to the Collector under section 38, sub-section (2), is lost, destroyed or damaged during transmission, the person sending the same shall not be liable for such loss, destruction or damage.
>
> (2) When any instrument is about to be so sent, the person from whose possession it came into the hands of the person impounding the same, may require a copy thereof to be made at the expense of such first-mentioned person and authenticated by the person impounding such instrument."

Recommendation to transpose section 46 as section 38A.

18.11. In our opinion, section 46 should be transposed after section 38, since its subject matter is connected with section 38. Accordingly, we recommend that new section 38A should be inserted, incorporating the substance of section 46.

Certain verbal changes are needed in section 46, if section 38(2) is revised on the lines discussed above.[1]

(i) In section 46(1), the words "or authenticated copy", should be added, if section 38(2) is revised.

(ii) Section 46(2) becomes redundant, if section 38(2) is revised.

Section 39.

18.12. Section 39 deals with the power of the Collector to refund the penalty paid in respect of an instrument, a copy whereof is sent to him under section 38(1), that is to say, an instrument impounded by reason of deficiency in stamp.

It needs no change.

Section 40.

18.13. Section 40 deals with the Collector's power to stamp instruments impounded under the Act. Usually, the impounding of the instrument is by some other officer, who sends it to the Collector under section 38(2). But it could be by the Collector himself, if the document is produced before him in the performance of his ordinary functions. The procedure to be followed by the Collector in both the cases is laid down in section 40.

If the Collector is of opinion that the instrument is duly stamped or is not chargeable with duty, he certifies accordingly by endorsement under section 40(1)(a). Under section 40(2), this certificate is conclusive evidence of the matters stated therein, for the purposes of the Act. If the Collector thinks that the instrument is chargeable, and not properly stamped, he shall require payment under section 40(1)(b).

Obscurity as to person who can be required to pay.

18.14. While section 40, sub-section (1)(b), empowers the Collector to "require" the stamp duty or deficiency to be paid, it is silent as to the person or persons who can be required to pay the same. There is no distinct provision in section 40, or anywhere else in the Act, empowering the Collector to demand the proper stamp duty and penalty from the person who produces in Court.

According to the High Court of Allahabad,[2] it is the person who wishes a document to be admitted in evidence in Court, who is primarily the person from whom the requisite duty and penalty should be recovered in the first instance, and if it is due from a third person, he can recover it under section 44.

The Lahore High Court, has dissented from the above view. According to it, the Court or the Collector cannot compel such person (i.e., a person not originally bound to bear the expenses of providing the duty), to pay the duty and penalty. If he chooses to pay, section 44 enables him to recover the same. But the stamp duty and penalty can compulsorily be recovered only from the person liable to pay the proper stamp duty in the first instance. The

1. See discussion as to section 38(2).
2. *Secretary of State* v. *Bhasharat Ullah*, I.L.R. 30 All. 271.

person not so liable is not subject to compulsory recovery under section 48. It was also observed that if, in a particular case, the Stamp Act did not fix the liability for payment on any particular person, then the Collector should keep the impounded document in his custody, and no person interested in the deed would be able to make any use of it unless and until the necessary duty and penalty were paid.

18.15. The Lahore view appears to us to be more logical, and should be adopted. We shall deal with the matter in detail[1] under section 48. **Recommendation.**

Section 41—Introduction.

18.16. Intentional omission to stamp an instrument is dealt with strictly by the Act, particularly section 40; but there may be cases where the omission to duly stamp an instrument has been occasioned by accident, mistake or urgent necessity. To provide for such cases, section 41 enacts that a person may produce the instrument within one year from the date of its execution or first execution, and bring to the notice of the Collector the fact that it is not duly stamped, and offer to pay the deficiency. If the Collector is satisfied that the omission to duly stamp such instrument has been occasioned by one of the causes enumerated above, the Collector may receive such amount (i.e., the amount offered by the person producing the instrument), and proceed as provided in later sections of the Act.

No points of substance require to be discussed in connection with section 41. But reading of the section would be facilitated if it is split up into paragraphs. It is also desirable that the fact that the omission was due to accident etc. should be brought in the forefront in the section.[2]

Section 42.

18.17. Section 42 reads thus—

"42(1) When the duty and penalty (if any), leviable in respect of any instrument have been paid under section 35, section 40 or section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or *as such person may direct* :

Provided that—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate ;

(b) nothing in this section shall affect the Code of Civil Procedure, section 144, clause 3."

18.18. In the proviso, clause (b), there is a reference to section 144, clause 3, Code of Civil Procedure (1882), which related to the return of documents. The matter is now governed by order 13, rule 9, of the Code of Civil Procedure, 1908. Reference thereto should be substituted. **Recommendation to amend proviso clause (b).**

18.19. We are also of the view that section 42 should be placed before section 41, since the action taken under section 41 is independent of the preceding sections. The subject matter of section 42 is, in some way, conected with sections 35-40. **Transposition of sections 41, 42.**

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1. To be considered under section 48.
2. For re-draft of section 41, see discussion as to section 42.

Re-drafts.

18.20. Accordingly, we recommend that sections 41-42 should be revised as follows :—

Revised sections 41-42, *renumbered and transposed*

Endorsement of instruments on which duty has been paid— [Existing section 42(1) in part].

41. (1) When the duty and penalty (if any), leviable in respect of any instrument have been paid under section 35, or section 40, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

[Existing section 42(2) in part].

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered, on an application in this behalf *made by* the person from whose possession it came into the hands of the officer impounding it, *to that person or according to his directions* :

Provided that—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate ;

(b) nothing in this section shall affect the provisions of *rule 9 of Order XIII in the First Schedule to the Code of Civil Procedure*, 1908.

(Existing section 41).

42. (1)(a) If any instrument chargeable with duty and not duly stamped is produced by any person of his own motion before the Collector within one year from the date of its execution or first execution,

(b) such person brings to the notice of the Collector the fact that such instrument is not duly stamped *and the omission to duly stamp such instrument was occasioned by accident, mistake or urgent necessity*, and offers to pay to the Collector the amount of the proper duty, or the amount required to make up the same, and

(c) the Collector is satisfied that the omission to duly stamp such instrument has been occasioned by accident, mistake or urgent necessity, the Collector may, instead of proceeding under sections 33 and 40, receive such amount and proceed as next hereinafter prescribed.

[Section 42(1) in part].

(2) *When the duty leviable in respect of any instrument has been paid under sub-section* (1), *the Collector shall certify by endorsement thereon that the proper duty has been levied in respect thereof, and the name and residence of the person paying them.*

[Section 42(2) in part].

(3) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person who *produced it or according to his directions.*

Section 43.

18.21. No change is needed in section 43.

Section 44— Persons paying duty or penalty may recover same in certain cases.

18.22. Under section 44(1), when any duty or penalty has been paid under section 35, section 37, section 40 or section 41, by any person in respect of an instrument, and, *by agreement* or under the provisions of section 29 or any other enactment in force at the time such instrument was executed, some other person was bound to bear the expense of providing the proper stamp for such instrument, the first-mentioned person shall be entitled to recover from such other person the amount of the duty or penalty so paid.

Sub-section (2) provides that for the purposes of such recovery, any certificate granted in respect of such instrument under this Act shall be conclusive evidence of the matters therein certified.

According to sub-section (3), such amount may, if the Court thinks fit, be included in any order as to costs in any suit or proceeding to which such persons are parties and in which such instrument has been tendered in evidence. If the Court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable.

18.23. (a) In view of the proposed re-numbering of sections 41 and 42, consequential changes should be made[1] in section 44(1) ; Section 44 Changes in.

(b) In section 44(3), second sentence, (power to include costs), it is desirable to add the words "for reasons to be recorded", before the words "include the amount in such order".

We recommend that section 44 should be amended as above.

18.24. Section 45 reads— Section 45— Power to Revenue authority to refund penalty or excess duty in certain cases.

"45.(1) Where any penalty is paid under section 35 or section 40, the Chief Controlling Revenue-authority may, upon application in writing made within one year from the date of the payment, refund such penalty wholly or in part.

(2) Where, in the opinion of the Chief Controlling Revenue-authority, stamp-duty in excess of that which is legally chargeable has been charged and paid under section 35 or section 40, such authority may, upon application in writing made within *three months of the order charging the same*, refund the excess."

18.25. In section 45(2), we recommend the substitution of "one year" for "three months". The period should be uniform under both the sub-sections. Recommendation.

18.26. We have already considered[2] section 46. Section 46.

18.27. Under section 47, when any bill of exchange or promissory note chargeable with a duty not exceeding ten naye paise is presented for payment unstamped, the person to whom it is so presented, may affix thereto the necessary adhesive stamp, and, upon cancelling the same *"in manner hereinbefore provided."* may pay the sum payable upon such bill or note, and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid, and such bill or note shall, so far as respects the duty, be deemed good and valid. Section 47— Power of payer to stamp bills, and promissory notes received by him unstamped. Recommendation.

Under the proviso, the section shall not relieve any person from any penalty or proceeding to which he may be liable in relation to such bill.

We recommend that in section 47, the word "the" should be added before the word "manner".

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1. See discussion as to sections 41 and 42. *(supra)*
2. See section 38A *Supra.*

CHAPTER 19

RECOVERY FROM PERSON FROM WHOM DUTY IS DUE

Introduction.

19.1. A very important topic, which comes up again and again before the courts but which, unfortunately, is not dealt with directly and specifically in the Act, now requires to be considered.

Section 48 Obscurity.

19.2. Section 48 provides that all duties, penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and sale of the movable property of the "person from whom the same are due", or by any other process for the time being in force for the recovery of the arrears of land-revenue.

As to the "person from whom the duty is due" within the meaning of this section, the section is silent.

While discussing[1] section 40, we had said that the matter will be considered under section 48, i.e. the question as to who is the person liable to pay the duty etc. for the purposes of recovery under the Act, where the duty etc. is not paid by the party producing the document. The difficulty is created by the words "under this Chapter". Do they include section 40(1),(b) ?

The order under section 40(1)(b) *need not be addressed to any person.* It is a *determination* that the instrument is—

(i) chargeable with a particular duty, and

(ii) not duly stamped.

The order is an order in the abstract. It determines the payability, but not the person liable to pay. The person producing the document pays, but the order under section 40(1)(b) does not say that *he should pay*. The order is an impersonal order. There is an element of compulsion, inasmuch as, without payment, the Collector would not return the document under section 40(3). But there is no decision *as to the person liable.*

Obscurity.

19.3. There is considerable obscurity in this respect, and the obscurity arises primarily from the fact that, excepting in a very limited number of cases,[2] the Act does not give any specific and comprehensive guidance as to the person who is to be regarded as one liable to pay stamp duty. There are elaborate provisions in the Act as to the instruments which are chargeable to duty[3] and as to the time of stamping,[4] and also as to the mode of using stamp.[5] However, excepting for a few cases, it is not easy to ascertain from the provisions of the Act the person who is bound to pay the duty within the meaning of section 48.

Cases specifically deal with sections 19, 29 and 30.

19.4. The cases specifically dealt with are contained in—(i) section 19, which relates to bills and notes drawn out of India, (ii) section 29, which, in the case of certain instruments, provides as to who shall bear the burden of proper stamp, and (iii) section 30, dealing with receipts. Section 29 is a somewhat general provision, though not exhaustive And even that section does not very clearly indicate whether it is to *operate as between the parties,* or whether it is to operate also between the State on the one hand, and the private party on the other hand, so as to be available for interpreting section 48.

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1. See discussion as to section 40, *supra.*
2. Sections 19, 29, 30 See *infra.*
3. Section 3.
4. Sections 17, 18 and 19.
5. Sections 10 to 16.

19.4A. When the question of production of an instrument before a court or public officer arises, section 35 steps in, and provides the machinery for the recovery of stamp and penalty. But, here again, it is not clear whether the person who is interested in producing the document in evidence under section 35 is also the person against whom section 48 can be applied, if he does not deposit in court the duty and penalty. Various persons mentioned in various sections.

The executant, who is the person bringing the document into existence, would appear to be primarily liable to the State under section 17, which says that all instruments chargeable with duty and executed by any person in India, shall be stamped, before or at the time of execution. Under section 62 also, in most cases, the executant is liable to be prosecuted and punished for executing or signing, otherwise than as a witness, an instrument chargeable with duty, without the same being duly stamped.

Thus, even assuming that they can be pressed into service for the purposes of section 48,—the provisions referred to above do not yield a uniform answer as to the question, who is the person liable ?

19.5. Judicial decisions are also not unanimous. The conflict of views on the question whether persons liable to pay the duty under an agreement or under section 29 are also the persons to be regarded as liable under section 48 as the persons from whom the duty is due, can be thus summarised. Inter-relationship of section 29 with section 48—Conflict of views.

(a) One view on the subject is that such persons *are not liable* under section 48, and that only the *executant of the instrument* can be called upon to pay the duty under section 48.[1]

(b) Another view is that *only the* persons liable under section 29 or under any agreement are the persons from whom the duty can be recovered[2] under section 48. According to this view, in cases not covered by section 29, the instrument can merely be impounded, but no one is liable to be called upon to pay the duty and penalty until it is sought to use the document.

In an Orissa[3] case, there was a demand for additional duty on the vendor. No finding that there was 'agreement to the contrary' was recorded. It was held that the demand was illegal. The vendee (and not the vendor) was liable. Section 29(c) was relied upon. This case illustrates the view taking section 29 as the criterion. Section 29(c)

(c) On the liability of the person producing, there is a conflict of decisions.[4] One view on the subject is that the duty can be recovered under section 48 from the person producing the document also.[5] But this view has been dissented from.[6-7]

(d) A fourth view is that both the executant and the parties liable under section 29 or by agreement, can be called upon to pay the duty under section 48. This was the view of Bhimasankaran J., in an Andhra case.[8]

19.6. In view of the obscurity and uncertainty of the position in regard to the inter-relationship of section 29 and similar sections on the one hand, and section 48 on the other hand, it is desirable that the matter should be put beyond doubt. It is neither in the interests of the State nor in the interests of the citizen that liability to bear the tax should be left in doubt. Need for clarification.

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1. *Subramaniam Chettiar* v. *Revenue Divisional Officer*, A.I.R. 1956 Mad. 454.
2. *Roop Chand* v. *Secretary of State*, (1939) Nag. L.J. 364, referred to in *M. Ramaswami* v. *State of Travancore*, A.I.R. 1957 Travancore-Cochin 251, 252, para 6.
3. *P. Appa Rao* v. *Additional District Magistrate, Koraput*, A.I.R. 1975 Orissa 209.
4. See case law reviewed in *Mohamed Hussain* v. *Emperor*, A.I.R. 1940 Lah. 315. See also A.I.R. 1970 M.P. 74.
5. *Secretary of State* v. *Basarstullah*, (1908) I.L.R. 30 All 271.
6. *Mohamed Hussain* v. *Emperor*, A.I.R. 1940 Lah. 315.
7. As to joint and several liability, see A.I.R. 1962 Mad. 425 and (1967) 2 M.L.J. 567 and A.I.R. 1970 M.P. 74.
8. *Board of Revenue* v. *Appala Narasimhalu*, (1957) Andhra Weekly Reporter 288 (F.B.) (Bhimasankaran J.).

Lines on which amendment should be made view of Bhide J. quoted.

19.7. As to the lines on which the section should be amended, we are in broad agreement with what Bhide J. said in the Lahore High Court in *Muhammad Hussain's* case. In the Lahore case,[1] Bhide J. observed :

"If the intention of the Legislature was that the necessary duty or penalty should be recovered from the person who wishes to have the document admitted in Court, one would have expected to find some provision to that effect in the section itself or at least somewhere else in the Act. But no such provision has been made. The reason is, I think, not far to seek. When a person wishes to have a document admitted in Court for the purpose of his case, it may often be to his interest to pay the duty and penalty at once in order to get the document admitted in evidence, as the person who was originally bound to bear the expense of providing the stamp duty may not be traceable at the time or may not be prepared to pay the duty or penalty voluntarily.

"If he does so to suit his convenience, the provisions of section 44 enable him to recover the same from the person who was originally bound to bear the expense of providing the duty. But there is nothing in section 35 or section 40 to enable either the Court or the Collector to compel the person who wishes to have the document admitted in evidence in Court to pay the duty or penalty. "The only reasonable inference in the circumstances seems to be that the payment of such duty or penalty is left to his choice under these sections. There seems, in fact, no good reason why a person, who merely wishes to have a document admitted in evidence, should be compelled to pay the duty or penalty thereon, when he is not the person who was originally bound to bear the expense of providing the duty. If he does not choose to pay the duty and penalty under section 35 or section 40, he has to take the consequence of not being able to use the document. But it would be obviously hard and unfair to compel such a person to pay the duty on the document merely because he attempted to produce it in evidence. The stamp duty may be heavy and he may not be even in a position to pay it, or it may not be worth his while to do so, for the purposes of his case. The Legislature therefore seems to have advisedly left the matter to his choice. It is true that the Collector may not be able to trace easily the executant or the person bound to pay the duty on the document in such cases and there may be some inconvenience as a result in collecting the stamp duty or penalty. But this can scarcely justify penalizing a person who was not responsible for paying the stamp duty at the time of the execution of the document."

We find ourselves in broad agreement with this view.

Objections answered.

19.8. The objection that if the person producing the document is not made liable, then there is no other method of recovery, was answered in the Lahore case.[2] It was pointed out there that the document can be impounded.

Basic question.

19.9. There is also the basic question to be considered, namely, is it logical to compel the person producing the document to pay the duty and penalty *when the primary obligation was not his?* After all, provisions by way of sanctions are secondary, and are intended to enforce an original liability that has been separately created. Since sections 40 and 48 are silent as to the person from whom the duty is due, it would hardly be appropriate to apply the sanction under section 48 against the person producing the document merely because he happens to have produced the document, when the original liability was not created against him by any other provision.

19.10. The point may be raised that section 40 is mentioned in section 44, and this must have some meaning. The answer is that this part of section 44 can come into play where the person producing the document but not paying the duty etc. in court later chooses to pay the duty *in his own interest.* Exigencies of litigation force him to do so, and, in that situation, he must have a remedy against the person bound to pay the duty. Section 44 does not deal

1. *Muhammad Hussain* v. *Emperor*, A.I.R. 1940 Lah. 315, 317.

2. *Mohamed Hussain.* v. *Emperor*, A.I.R. 1940 Lahore 315 (*supra*).

with the right of the State to levy the stamp duty and penalty under sections 40 and 48.[1] The basic question to be examined is; on whom is the duty imposed? Whatever may be the correct answer to this question, it is certainly not to be answered from sections 40 and 44, which are themselves ambiguous.

19.11. Thus, apart from (i) the juristic impropriety of enforcing a *sanction* against a person not *primarily* liable, and (ii) the fact that section 44 can be satisfactorily explained otherwise, there is also the question of hardship. The person from whose possession the document came cannot be used as an instrument for recovery of the penalty merely by saying that he himself can recover it under section 44. If A is not liable to pay a tax, it would not be equitable to force A to do so and give him a remedy to recover it from B who is the person liable to pay the tax.

Various points considered.

19.12. Making the person producing the instrument liable has the merit that the Collector can easily recover the duty from him. But such a provision has several defects—

(a) *It is not in furtherance of the scheme of the Act regarding liability to bear the duty.*

There is no provision in the Act making a person, who merely presents an insufficiently stamped document for being admitted in evidence, *liable for* payment of the requisite stamp duty or penalty on the document. He cannot, therefore, be considered to be a "person from whom the stamp duty or penalty is due", and consequently the same cannot be recovered from him under s. 48. If the stamp duty or penalty has to be recovered compulsorily, it can be legally recovered, under s. 48, only from the person from whom the same is due.

(b) It is against the view of majority of the High Courts. Hence such a provision means a radical change.

(c) It is juristically wrong, when the original liability is not of the person producing. It is juristically incorrect to apply a sanction against him.

(d) It is unjust also to do so. He had no hand in the execution of the instrument and, therefore, could not have avoided the default in duty.

(e) It is poor consolation that he can, recover it in his turn, from the person "bound to bear the expenses". Imposition of an obligation without proper grounds is not excused by providing a remedy for re-imbursement which may consume *expense and time.*

(f) Moreover, the person who is bound to bear the expenses may not be traceable. In that case, the person ordered will not be in a better position than the Collector.

(g) It is even doubtful whether the remedy under section 44 will be available in cases outside section 29.

(h) Thus, to make him liable is against the scheme of the Act, against general legal principles, against equity and against convenience.

The alternative is to make the executant liable. Section 17 says :

> "An instrument chargeable with the duty and *executed by any person* in India, shall be stamped *before or at the time of* execution."

Section 62 says that the *executant* of such instrument shall, for every such offence, be punished with fine which may extend to Rs. 500, provided that when any penalty has been paid in respect of any instrument under Ss. 35, 40 or 61, the amount of such penalty shall

1. *Subramania* v. *R.D.O.*, A.I.R. 1956 Mad. 454, 458, para 13.

be allowed in reduction of the fine, if any, subsequently imposed under this section in respect of the same instrument upon the person who has paid such penalty.

Thus, these sections read together indicate, that the *executant* of such document is the person against whom the Collector should proceed under Ss. 40 and 48 for collecting the stamp duty and penalty. It is significant that the proviso to s. 62 makes mention also about the penalty levied under s. 40, and makes a provision for its deduction from the fine.

Amendment—lines of.

19.13. We are, therefore, of the opinion that the provisions of section 48 should be enforceable—

(a) against persons who are liable by virtue of section 19. agreement, or section 29 or 30, *as the case may be*, and

(b) where none of the above mentioned sections apply, then against the person executing the document in question.[1-2]

Recommendation.

19.14. We recommend that the Act should be amended on the above lines. We may state that most replies to our Questionnaire have favoured such an amendment. The appropriate place for it appears to be in the Chapter containing sections 29-30. It is for these reasons that we have recommended the insertion of a new section.[3] That will solve questions arising under section 48 also.

1. *Cf.* Section 62(b).
2. Q. 55-58.
3. Section 30-A, *supra*.

CHAPTER 20

REFUND—SECTIONS 49 TO 55

Introductory.

20.1. While, the last chapter was concerned with the recovery of stamp duties in regard to instruments not duly stamped, occasions for refund may arise in regard to instruments duly stamped. The Act deals with this topic under the curious title of "Allowances for stamps in certain cases." The sections concerned deal with spoiled stamps, printed forms no longer required by Corporations, misused stamps, stamps not required for use, stamps in denominations of annas, and renewal of certain debentures, spread over sections 49 to 55.

Section 49—Introductory.

20.2. Section 49 is a long section. The marginal note describes its subject as "allowance for spoiled stamps", but, as a matter of fact, the section does not relate to stamps "spoiled" in the physical sense, that is to say, a stamp which is covered with ink or the like. It deals with cases where, although expenditure has been incurred on a stamp, *the paper* has become useless by reason of one or more of the several circumstances enumerated in the section.

Of the four clauses in the section,—clauses (a), (b), (c) and (d),—clauses (a) and (b) are primarily meant to apply to instruments which are not executed by any person, while clauses (c) and (d) are primarily intended for instruments which are wholly or partly executed by some person but have failed in their object or become redundant because of some special circumstances. Clause (c) is confined to bills of exchange and promissory notes,—in respect of which a special provision was needed, having regard to the aspect of negotiability. Clause (d), which, in practice, is the clause most often resorted to, provides for stampt used for an instrument which is executed by a party but has failed in its object or become redundant. Such failure or redundancy may be due to a legal flaw rendering the instrument void *ab initio*—sub-clause (1)—or error or mistake—sub-clause (2)—or death of a party—sub-clause (3)—or recalcitrance of a person—sub-clauses (4) and (5),—or other causes—sub-clauses (6), (7) and (8).

Proviso and hardship caused thereby in case under section 49(d)(i).

20.3. Under the proviso appearing below clause (d) of section 49, the grant of refund is conditional. It postulates, as a condition, that in the case of an executed instrument, no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence, and that the instrument is given up to be cancelled. The condition that the instrument should not have been given in evidence creates some problems, where refund is applied for under clause (d) (1), which applies where the instrument "has been afterwards found to be absolutely void in law from the beginning". Where an instrument is found *by the parties themselves* to be void without an order of the court, this proviso creates no problems. But, where a document is found *by a court* to be void, the document would have been given in evidence, and as the law now stands, the refund of the duty cannot be granted in such a case, because of the condition. The position is not accidental, but is a result of a decision taken at the time when the present Act was passed. It was then thought, that, in England, if a document is found by a *court* to be void, refund is not allowed.[1]

The English provision—section 9(7), Stamp Duties Management Act, 1891, reads—

> "9. Subject to such regulations as the Commissioners may think proper to make, and to the production of such evidence by statutory declaration or otherwise as the Commissioners may require, allowance is to be made by the Commissioners for stamps spoiled in the cases hereinafter mentioned; (that is to say,)
>
> .....
>
> "(7) The Stamp used for any of the following instruments; that is to say,
>
> (a) An instrument executed by any party thereto, but afterwards found to be absolutely void from the beginning;".

1. Section 9 (7), Stamp Duties Management Act, 1891 (54 & 55 Vic. p. 38).

Recommendation to modify the proviso.

20.4. Whatever be the English law, the restriction in s. 49 causes hardship, because a legal decision is, in most cases, necessary to determine that an instrument is void *ad initio*. In such cases, the document has to be given in evidence, but the claim for relief[1] or the defence is based not on the document but on extraneous circumstances. The restriction has been criticised in England also. It stands to reason that in such cases, the Collector should be empowered to grant refund, and we recommend that the proviso should not apply to such a case, i.e., to a case falling under section 49(d)(1).

Points in regard to void instruments.

20.5. In support of the above discussion several points could be urged. The first point to be noted is that the case where the instrument is declared to be void by the court is not basically different from the case where it is found to be void by the parties themselves. Whether it is the parties which find that the instrument is void, or the court which holds it to be so, the consequence is the same, namely, the instrument does not operate by reason of a flaw recognised in law as having that effect.

The objection could be raised that where the parties approach the court, the time of the court is spent on determining the validity of the instrument. The answer to this objection is that, for the time of the court so spent, the fee is dealt with in the Court-fees Act.

20.6. The second point to be made is that, in the case of an instrument declared to be void, there is even a greater reason for relief than in the cases dealt with in section 49(d), clauses (3) to (8). In the other cases, it can be said that it is the conduct of some other person that made the instrument futile, and the revenue should not suffer for those accidental or similar circumstances. In the case of a void instrument, however, there is no such circumstance, and even if all the events are favourable and all the parties cooperate, the instrument cannot serve its purpose.

20.7. *Thirdly, it is* to be pointed out that an instrument which is given in evidence for the purpose of declaring its invalidity, is not "acted upon" in the sense[2] in which that expression is ordinarily used. Relief is given not in *futherance* of the instrument, but in *opposition to the instrument.*

20.8. Fourthly, the condition mentioned in the proviso should not be insisted upon where the instrument is declared void by the court. In cases falling under other clauses of section 49, the condition that the instrument should not have been admitted in evidence in a legal proceeding, causes no hardship because, in those other cases, the other legal proceeding could have proceeded without any specific adjudication about the question whether the instrument did, or did not, fall within section 49(d)(3), (4) etc. In the case of an instrument which is void and so declared, however, the condition causes peculiar hardship.

20.9. Fifthly, the question may be raised why a party should seek a judicial verdict of nullity.

In answer, it may be pointed out that there are many situations where it is advisable to obtain a judicial verdict. It may be so advisable, for example, where one of the parties does not admit the invalidity, and the other party—to quote the Specific Relief Act,[3]—"has a reasonable apprehension that the instrument, if allowed to remain outstanding, will cause him injury."

20.10. Sixthly, in most of the other cases dealt with in section 49(d), the object of the document has not been substantially carried out, while, in the case of a void instrument, not only has the object not been carried out but also it cannot be carried out.[4]

1. Mason v. Motor Traction Company, (1905) 1 Chancery 419.
2. As to the expression "acted upon" in general; for judicial usage see *Parashram v. Lakshmibai*, A.I.R. 1931 Bom. 399, 401.
3. S. 31, Specific Relief Act, 1963.
4. Samples of situations involving void documents—Appendix.

20.11. The following re-draft of the relevant portions of section 49(d)(1) and the proviso, indicates roughly the amendment which could be made to implement the point made above :— **Re-draft recommended.**

"(1) has been afterwards found *by the parties* to be absolutely void in law from the beginning ;

(1A) *has been afterwards found by the court to be absolutely void in law from the beginning, under section* 31 *of the Specific Relief Act*, 1963.

* * * * * *

"Provided that—

(i) in the case of an executed instrument *other than one falling under sub-clause (1A) of clause (d)*, no legal proceeding has been commenced in which the instrument could or would have been admitted or offered in evidence, and

(ii) the instrument is given up to be cancelled, *or has been already given up to the court to be cancelled.*"

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[1]

20.12. Section 50 provides that the application for relief under section 49 (refund in respect of spoiled stamps) shall be made within the period specified in section 50. The periods are two months and 6 months respectively,—two months if refund is claimed on the ground of refusal of a party to act under an instrument or to advance money thereunder or to accept any office thereunder, and 6 months in other cases. There is a detailed provision in the proviso for computing the starting point of the period of 6 months, in certain speical cases. **Section 50—Introductory.**

20.13. It should be pointed out that although the section prescribes the time limits mentioned above, in practice they were found to cause considerable hardship. In the beginning, the Central Government, by executive orders, permitted the local governments to grant refund within one year, but even this concession was not found to be adequate, and, in 1908, by a Resolution, Local Governments[2] were authorised to allow, *irrespective of any time limit*, refunds or renewals of spoilt or useless non-judicial stamps, or the re-purchase of non-judicial stamps no longer required in cases in which holders of such stamps had, without any fraudulent motive, been unavoidably prevented from making application within the period prescribed by law. **Hardship caused by time limits.**

20.14. We are of the opinion that in view of what is stated above, the time limit in section 50 should be made more liberal. Section 49 already empowers the State Government to make rules as to the evidence to be required or the enquiry to be made before refund can be claimed under that section. Dishonest claims for refund are thus provided against. We, therefore, think that section 50 should be made more liberal. We may state a large number of the replies to our Questionnaire agree.[3] We recommend that the period under section 50 should be one year from the date of discovery of circumstances giving rise to the claim for refund. This will avoid hardship in many situations and is, in any case, a rational course. **Recommendation.**

20.15. It sometimes happens that bankers or companies or other corporations get a number of forms printed in respect of instruments frequently used by them, and such forms are printed on stamped papers because the instrument are chargeable with duty. Later, such forms cease to be required by the banker or company or corporation, and the money spent on stamp papers goes waste. This may particularly happen where business is to be wound up. Section 51 provides for such cases, by empowering the Chief Controlling Revenue Authority to make allowance for the stamp papers so used, if satisfied that the duty in respect of such stamp **Section 51.**

1. Question 57 (section 49).
2. Resolution of the Government of India in the Finance Department, No. 4738-Exc., dated the 14th August, 1908.
3. Question 58 (section 50).

papers has been duly paid. This power can be delegated to the Collector by the Chief Controlling Revenue Authority.

No changes are required in the section.

Section 52.

20.16. Stamps are sometimes inadvertantly used in situations where, notwithstanding the expenditure on the stamp, the stamp does not serve the purpose for which it is intended. This situation arises, for example, where the stamp used is of a description other than that prescribed for such instrument by the rules made under the Act, or where a stamp of greater value than was necessary is used, or where the instrument is not chargeable with any duty, or where the stamp has been rendered useless under section 15 by reason of the fact that the instrument was written in contravention of the provisions of sections 13 and 14, dealing with the mode in which an instrument should be written and prohibiting the use of a stamp paper for more than one instrument. For stamps so misused, an allowance can be made under section 52 by the Collector, on an application made within the prescribed period.

As regards stamps of an improper description, a party has an alternative remedy, namely, getting the instrument certified under section 37. If he does so, then the procedure under section 52 will not apply. We are recommending an amendment of section 37 whereby it will not be necessary for the applicant to pay the duty again[1] where he resorts to that section. The case under section 52, however, stands on a different footing, because, under section 52, the applicant will get back the money value of his misused stamps of improper description.[2] It is not, therefore, necessary to amend section 52 on this point.

Recommendation

20.17. It is, however, desirable to widen the scope of section 52 in relation to stamps of improper description, as recommended[3] under section 37.

We may mention that such an amendment has been favoured by many of the replies to our Questionnaire.[4]

Section 52 (a)—Refund of duty paid by mistake.

20.18. Although the Act contains elaborate provisions as to refund of stamp duty in certain cases, an important case—duty paid by mistake—seems to have been left to implication. A recent decision reveals this lacuna, which, it seems to us, requires consideration.

It has been held by the Andhra Pradesh High Court[5] (Majority view) that a case of voluntary or mistaken payment of stamp duty does not fall under the Act. It is not covered by *any provision in the Stamp Act, empowering the Board of Revenue to refund the excess stamp duty paid, voluntarily or by mistake, by a party.* The Chief Controlling Revenue Authority, which is the Board of Revenue, is not, therefore, competent to direct refund of the excess stamp duty paid voluntarily or under a mistaken impression of law by the party at the time of the registration of a document.

20.19. This ruling was given on a reference made by the Board. In order to appreciate the scope of the reference in the *Andhra case*, it is necessary to state the facts that gave rise to the question. Sri Jasti Venkataratnam and his sons had executed a document styled as "sale deed" on June 12, 1962, in favour of Shri Manganti Suryanarayana (the petitioner) in respect of a land for a consideration of Rs. 5,980.

The "purchaser" paid a sum of Rs. 1,000 as advance, and agreed to pay the balance of the sale consideration with interest on June 11, 1963 and to obtain another deed so as to complete the transaction. The "purchaser" was put in possession of the property and the document was registered as document No. 2014/62 in the Sub-Registrar's Office, Kakinada with the requisite stamp duty for a sale deed. In accordance with the terms stipulated in the deed

1. See recommendation as to section 37.
2. See section 53.
3. cf. recommendation as to s. 37.
4. Question 59 (section 52).
5. *Sri Manganti Suryanarayana V. The Board of Revenue, Government of Andhra Pradesh*, (1975) 2 A.P.L.J. 256 (F.B.) (Yearly Digest for March, 1976, column 533); A.I.R. 1976 A.P. 150 (May, 1976 part—majority view).

dated June 12, 1962, another document was executed on September 2, 1963, whereunder the executant-vendor acknowledged the full consideration (i.e., the intended sale amount and the interest thereon). It also indemnified the claims against a loss to an extent of Rs. 2,700. The document was executed on a stamp paper worth Rs. 44 only, treating it as a "supplemental deed" confirming the original sale deed which was registered as document No. 2014/62. The Sub-Registrar, Kaikalur, before whom the second instrument was presented for registration, impounded it as deficiently stamped. On a dispute raised by the petitioner with regard to the nature of the second document, the District Registrar, Krishna adjudicated the document as a regular deed of sale for a cash consideration of Rupees 6,492 and ordered the collection of the deficient stamp duty of Rs. 475 together with a penalty of Rs. 5. Aggrieved by the decision of the District Registrar, the petitioner filed a revision petition under section 56(1) of the Act before the Board of Revenue which framed the following two issues for its own consideration and order :

(1) Whether the earlier document executed and registered as document No. 2014/62 of S.R.O. Kaikalur was a sale deed for a consideration of Rs. 5,980 or an agreement to sell ? and

2) Whether the subsequent document executed on 2-9-1963 is a sale deed for Rupees 6,492 or a supplemental deed confirming the earlier sale with an indemnity for a sum of Rs. 2,700 ?

20.20. The Board of Revenue, on a consideration of the facts and circumstances, held that the first document which was styled as a sale deed, was only an *agreement of sale,* executed primarily to record the receipt of a portion of the purchase price in order to safeguard the purchaser against fresh demand as the purchaser was put in possession of the land, and that the second document was a regular sale deed for a case consideration of Rs. 6,492 and, therefore, the stamp duty as a sale deed was leviable on it. In the result, the Board of Revenue upheld the decision of the District Registrar and allowed the revision petition on March 9, 1965, observing that "since stamp duty leviable on a sale deed was collected on the earlier document, the party is at liberty to seek refund of the excess duty paid under section 45 of the Stamp Act and that the party may approach the District Collector, Krishna under section 45 with a refund application."

20.21. The Inspector General of Registration and Stamps, Andhra Pradesh, Hyderabad however pointed out to the Board of Revenue that stamp duty on the first document was paid voluntarily. It had not been paid either under section 35 or section 40 of the Act.

Section 45 of the Act was confined to the refund of stamp duty charged either under section 35 or section 40, and so the petitioner was not at all entitled to the refund. The Board of Revenue, after examining the entire material on record, realised the mistake committed by it on being apprised by the Inspector General, Registration and Stamps, and rectified its earlier order dated 9-3-1965 in so far as the observation relating to the refund of stamp duty on document No. 2014/62 of S.R.O. Kaikalur was concerned, after affording reasonable opportunity to the petitioner A. Writ Petition filed by the petitioner to quash the aforesaid orders of the Board of Revenue was rejected by the High Court on March 22,1968. A Division Bench allowed the Writ Appeal preferred by the petitioner against the order of dismissal of the writ petition and directed the Board to make a reference to the High Court under section 57 of the Act, as, in its opinion, a substantial question of law arose. Hence this reference to the High Court.

The High Court held by a majority that there was no provision in the Act empowering the Board to direct refund of duty paid voluntarily or under mistake.

Need for change.

20.22. One need not examine the correctness of the conclusion reached by the High Court on the present law. But the resultant position is hardly satisfactory.

Where tax is not legally leviable and yet has been paid, it ought to be refunded,—subject, of course, to such safeguards of limitation and deduction for office expenses as are usual. To

adhere to the old doctrine that money paid under mistake of law cannot be recovered, is inequitable. There ought to be some provision empowering the Board to grant refund in such cases. One could even construe the expression "inadvertantly" in section 52(a) as covering the situation, but, since the judicial construction now does not permit the citizen to do so, we recommend that the words "or by mistake of fact or law" should be added after the word "inadvertantly" in section 52(a) at both the places.

Position under the Income Tax Act.

20.23. It may be noted that under the Income-tax Act[1] if any person satisfies the income-tax Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under the Act for that year, he shall be entitled to a refund of the excess. In the actual administration of this section, or in the case law reported thereon, one does not find any limitations to the effect that the overpayment must have been made in particular circumstances or for a particular reason. There are, no doubt, procedural formalities and also a period of limitation (current period is 2 years). But there is no substantive restriction on the right to refund. If the Income-tax Officer does not grant the refund within three months from the prescribed date, there is even a provision for interest.

According to the Contract Act[2], a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. This section is wide enough to cover mistake of law.[3]

Liability of State for refunding tax levied by mistake.

20.24. The settled position in law, as regards the liability of the State in regard to sales tax levied by mistake as laid down by the Supreme Court,[4-5-6] is that where tax is levied by mistake of law, then ordinarily it is the duty of the State, subject to any provision of the law relating to sales tax, to refund the tax.

In the Andhra Pradesh case, therefore, it could have been argued that even in the absence of a specific statutory provision, the person who paid the duty could have claimed refund on general principles. Perhaps, however, counsel may have thought that the general principles, illustrated by the judicial decisions referred to above, were confined to a tax collected under a positive order of a taxing officer and may not be applicable to a tax which a citizen pays on his own calculations. Section 72, Contract Act (money paid under mistakes was not discussed).

Recommendation to revise section 52(a).

20.25. In the light of the above discussion, we recommend that section 52(a) should be revised as follows :—

"52. (a) When any person has inadvertantly *or by mistake of fact or law*—

(i) used for an instrument chargeable with duty, a stamp of a description other than that prescribed for such instrument by the rules made under this Act, or

(ii) *used* a stamp of greater value than was necessary, or

(iii) used any stamp for an instrument not chargeable with any duty ; or".

Section 53.

20.26. Sections 49 to 52 having provided for allowance for spoiled stamps, or printed forms no longer required or misused stamps, section 53 contains a precise provision as to how this allowance is to be made. The section enacts that in any case in which allowance is made for spoiled or misused stamps, the Collector may give in lieu thereof,—(a) other stamps of the same description and value ; or (b) if required and (if) he thinks fit, stamps of any other

1. Section 237, Income Tax Act, 1961.
2. Section 72, Indian Contract Act, 1872.
3. *Sir Shiba Prasad v. Maharaha Srish Chandra* (1949) 76 I.A. 244, 52 Bom. L.R. 17, A.I.R. 1949 P.C. 297; approving Jagadish Prasad Pannanlal v. Produce Exchange Corporation (1945) 2 Cal. 41, A.I.R. 1946 Cal. 245.
4. *State of Kerala v. Aluminium Industries*, (1965) 16 S.T.C. 689 (S.C.), referred to in the Yearly Digest (1965) K.L.R. 528.
5. *State of Madhya Pradesh v. Shallal Bhai*, A.I.R. 1964 S.C. 1000, 1010, para 14 to 17.
6. *Gill & Co. v. Commercial tax Officer*, Civil Appeal No 1580-1595 of 1967, dated 9-2-1968 (1968) S.C. Notes 80, 1968 22 S.T.C. 524 (S.C.)

description to the same amount in value ; or (c) at his discretion, the same value in money, deducting 10 naye paise for each rupee or fraction of a rupee.

There are several points of detail which require discussion.

(i) It is not very clear whether this section applies also where the allowance is made in case of printed forms under section 51, and we think that that should be brought out, by providing that the section applies.

(ii) Secondly, so far as clause (c) is concerned, the grant of refund in cash is discretionary with the Collector, but we are of the view that it should be mandatory, because a party will have no use for other stamps if given under clause (a). In fact, a party cannot, in general, sell stamps.[1]

(iii) Thirdly, when refund in cash is granted under clause (c), the present section requires a deduction of 10 naye paise for each rupee or fraction of a rupee which, we think, is rather on the high side. The amount was originally one anna per rupee and was, in 1958, on the introduction of decimal coinage, relaced by 10 naye paise as a routine. There is, however, in our view, scope for a more lenient provision in so far as refund under section 53(c) is concerned.

(iv) Fourthly, there seems to be some obscurity[2] as to whether the deduction of 10 paise per rupee under section 53 is to be applied in respect of the totalled up value of the stamps of the instruments, or whether it is to be applied in respect of each stamp. This obscurity should be removed by adopting the first alternative.

(v) Fifthly, so far as refund in the situation dealt with in section 51 (printed forms no longer required) is concerned, justice requires that there should be no deduction, because here it is by reason or circumstances beyond the control of the party that the printed forms have become useless.

(vi) Sixthly, in other situations, the deduction can be said to represent office expense, incurred on applications for petty amounts which may be filed with some frequency. But, here again, it is fair that there should be a suitable maximum in respect of the deduction on each transaction, say, 5 rupees. Office expense on a particular transaction is not, in the generality of cases, likely to exceed five rupees.

(vii) Having regard to our view[3] that the action under clause (c), i.e. refund in cash, should be the rule rather than the exception, that clause should appear before the other clauses.

(viii) Finally, as to clause (b) which deals with refund in the form of stamps of other description, we are of the view that the Collector should have no discretion. If the applicant prefers that form, it should be allowed.

20.27. In the light of the above discussion, we recommend that section 53 should be revised as follows : **Recommendation.**

Revised section 53

53. (1) In any case in which allowance is made for spoiled or misused stamps *under section* 49 *or section* 52, *or in respect of printed forms no longer required under section* 51, the Collector may give, in lieu thereof,—

(a) the same value in money, deducting, *subject to the provisions of sub-section* (2), *five paise* for each rupee or fraction of a rupee, or

(b) *if the applicant so requires,* other stamps of the same description and value ; or

(c) *if the applicant so requires,* stamps of any other description to the same amount in value.

1. Section 69.
2. See the differing directions given in the various Stamp Manuals.
3. See discussion, supra point (ii).

(2) *The deduction under clause (a) of sub-section (1)—*

(i) *shall be calculated on the total value of the stamps ;*

(ii) *shall not exceed five rupees* ; and

(iii) *shall not be made where the allowance is granted under section 51.*

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[1]

Section 54.

20.28. Section 54 reads—

"54. When any person is possessed of a stamp or stamps which have not been spoiled or rendered unfit or useless for the purpose intended, but for which he has no immediate use, the Collector shall repay to such person the value of such stamp or stamps in money, *deducting ten naye paise for each rupee or portion of a rupee,* upon such person delivering up the same to be cancelled, and proving to the Collector's satisfaction—

(a) that such stamp or stamps were purchased by such person with a *bona fide* intention to use them ; and

(b) that he has paid the full price thereof ; and

(c) that they were so purchased within the period of six months next preceding the date on which they were so delivered :

Provided that, where the person is a licensed vendor of stamps, the Collector may, if he thinks fit, make the repayment of the sum actually paid by the vendor *without any such deduction as aforesaid.*"

In this section also, the provision as to deduction should be amended on the same lines as[2] in section 53, as recommended.

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[3]

Section 54A.

20.29. According to section 54A, notwithstanding anything contained in section 54, when any person is possessed of a stamp or stamps in any denominations, other than in denominations of annas four or multiples thereof and such stamp or stamps has or have not been spoiled, the Collector shall repay to such person the value of such stamp or stamps in money calculated in accordance with the provisions of sub-section (2) of section 14 of the Indian Coinage Act, 1906, upon such person delivering up, within six months from the commencement of the Indian Stamp (Amendment) Act, 1958, such stamp or stamps to the Collector.

The section needs no change.

Section 55.

20.30. According to section 55, when any duly stamped debenture is renewed by the issue of a new debenture in the same terms, the Collector shall, upon application made within one month, repay to the person issuing such debenture, the value of the stamp on the original or on the new debenture, whichever shall be less :

The proviso requires that the original debenture should be produced before the Collector and cancelled by him in such manner as the State Government may direct.

Under the Explanation, a debenture shall be deemed to be renewed in the same terms within the meaning of this section notwithstanding the following changes :—

(a) the issue of two or more debentures in place of one original debenture, the total amount secured being the same ;

1. Question 60 (Section 53).
2. See recommendation as to section 53.
3. Question 61 (Section 54).

(b) the issue of one debenture in place of two or more original debentures, the total amount secured being the same ;

(c) the substitution of the name of the holder at the time of renewal for the name of the original holder ; and

(d) the alternation of the rate of interest or the dates of payment thereof.

No changes are needed in this section.

APPENDIX

Some sample situations where an instrument would be void[1]

1. An agreement by a minor is void.[2] In general, a transfer by him is also void.[3] If the parties knew that one of the parties is a minor, the need for applying section 49(d)(1) would hardly arise, because the agreement is not "found to be void". But cases can arise where one of the parties does not know that the other party is a minor, and a suit is filed to obtain a declaration that the instrument is void.

2. An agreement which defeats the provisions of any law is void.[4] A transfer defeating a law is also void.[5] At the time of the formation of the agreement or execution of the instrument, the parties may not know that the agreement violates some law. For example, it is agreed by a charter party that a ship then in country X should go with a cargo of bay to country Y. Before the date of charter party, an order is made and published under legislation relating to Contagious Diseases of animals, prohibiting the landing of hay from country X to Y. The parties did not know of this notification, and the master learnt it for the first time on arriving in country Y. Nevertheless, the charter party would be void. Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not.[6]

3. An agreement may be void by reason of a mistake of fact common to both the parties. There is the familiar situation of an agreement relating to a subject matter contemplated by the parties as existing, which, in fact, did not exist. There is the illustration given in the Contract Act,[7] where A agrees to sell to B a specific cargo of goods supposed to be on way from England to Bombay. It turns out that before the day of the bargain the ship carrying the goods had been cost away and the goods lost. Neither party was aware of this fact. The agreement is void.[8]

The decision in such cases of mistake, as Lord Wright has said,[9] turns on the question whether the mistake was "sufficiently basic". The case of *Bell* v. *Lever Brothers*[10] demonstrates how it may not always be easy to determine whether the agreement is void by reason of mistake in such cases,—thereby illustrating why it is often advisable for a party to obtain a judicial verdict as to nullity.

4. A minor himself may challenge an agreement as void, because it was entered into by a person who was not his guardian,[11] or by a guardian but without legal competence to enter into the particular transaction.[12]

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1. These cases did not involve stamp duties, but relate to the validity of the transactions.
2. Section 11, Indian Contract Act.
3. Section 7, Transfer of Property Act.
4. Section 23, Indian Contract Act.
5. Section 6 (h), Transfer of Property Act.
6. See discussion in *Waugh* v. *Morris*, (1873) L.R. 8 Q.B. 202.
7. Section 20, Contract Act.
8. Compare *Couturier* v. *Hastie*. (1856) 5 House of Lords cases 673, and F.B. Lawson (1936) 52 L.Q.B. 79, article "Error in *Substantia*".
9. Lord Wright, Legal Essays, page 214.
10. *Bell* v. *Lever Brothers*, (1932) A.C. 161.
11. *Cf.* (a) *Imambandi* v. *Haji Matsaddi*, A.I.R. 1918 P.C. 11, 18.
    (b) *Kannusami* v. *Rabiath Ammal*, A.I.R. 1933 Mad. 806, 813.
12. *Jaffar Ali* v. *Standard Co.*, A.I.R. 1928 P.C. 762.

CHARTER 21

REFERENCE AND REVISION

SECTIONS 56—61

Introductory.

21.1. From the sections which we have so far considered, it would have been evident that the Collector is the most important public officer vested with primary responsibility for the administration of the stamp laws. The manifold functions exercisable by him render it necessary that there should be some authority which can control the exercise of his function not only to correct errors of judgment but also to secure improvement in the administration of the Act. That authority, again, can conceivably commit mistakes on questions of law. It is desirable that such questions should, so far as the particular State is concerned, be decided by the High Court, since, in the Indian legal system, the High Court is the chief judicial tribunal for questions of law. The provisions which we proceed to consider—sections 56 et seq—are important from the point of view just now mentioned, even though they may not interest the ordinary citizens who has had no occasion to litigate before public officers questions of stamp duties.

Section 56.

21.2. It is for this reason that section 56 makes detailed provisions whereunder the supervision of the Chief Controlling Revenue Authority over the Collector is ensured in all important cases. Under section 56(1), the powers exercisable by a Collector under Chapter IV and Chapter V and under clause (a) of the first proviso to section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority. These provisions embrace several important functions.

Further, section 56(2) provides that if any Collector, acting under section 31, section 40 or section 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon for the decision of the Chief Controlling Revenue Authority.

According to section 56(3), such authority shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decisions.

Section 56(2)—considered

21.3. On sub-section (2), a Supreme Court[1] case may be referred to. It was held in that case that the Chief Controlling Revenue Authority is a quasi-judicial tribunal when a reference is made to it under section 56(2). It was, therefore, necessary that the executant of the document should be heard in such a reference. The Supreme Court pointed out, that the question to be decided by the Chief Controlling Revenue Authority would be one of law, and may result in the payment of large amounts by executants of a document. This judgment should be deemed to have overruled an earlier decision of the Allahabad High Court,[2] which was to effect that there is no provision in the Stamp Act for sending a notice of hearing to the executant. The clarification by the Supreme Court is welcome. It may be stated that the position in this respect was, to say the least, obscure before the judgment.

For example, in a Madras case,[3] it was held, that there was no right to *any oral hearing* when the Chief Controlling Revenue Authority was seized of a matter under section 56(1). It was stated that it is enough if sufficient opportunity to state their case is given. The discussion in another Madras case[4] seems to consider hearing necessary, under section 56(1). But the question *of oral hearing* was not in issue.

1. *Board of Revenue* v. *Vidyawati*, A.I.R. 1962 S.C. 1217, 1220, para 5-6 (Wanchoo, J.)
2. *Kasav Prasad* v. *Chief Controlling Revenue Authority*, A.I.R. 1955 N.U.C. 3561 (M.L. Chaturvedi, J.).
3. *In re Shanmugha Mudaliar*, (1950) 2 M.L.J. 399 (Rajamannar C.J. and Balakrishna Ayyar J.).
4. *Annamalai* v. *District Registrar*, A.I.R. 1966 Mad. 36, 37, 39 (Paragraphs 3 and 9).

Recommendation as to section 56(3).

21.4. In our opinion, it would be useful, if in section 56(3), after the words "such authority", the words "after giving the parties a reasonable opportunity of being heard" are added, in order to codify the position resulting from the judgment of the Supreme Court.[1]

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[2] We, therefore, recommend that section 56(3) should be amended as above.

Section 57—Introduction.

21.5. Section 57 provides that the Chief Controlling Revenue-authority "may state any case" referred to it under section 56, sub-section (2), or otherwise coming to its notice, and refer such case, with its own opinion thereon, to the High Court specified in that section. It further provides that every such case shall be decided by not less than three Judges of the High Court to which it is referred, and in case of difference the opinion of the majority shall prevail.

Word "may" in sub-section (1).

21.6. Though the word used in section 57, sub-section (1) is "may", it has been held by the Supreme Court that[3] a reference is mandatory. The sub-section thus imposes a *duty* on the authority to state the case, if a substantial question of law is raised.

Section not limited to pending cases.

21.7. It has further been held[4] by the Supreme Court that this duty to make a reference is not affected by the question whether the case is pending before the Authority or not. The Supreme Court has observed that the Authority is in a similar position as the Income-tax Appellate Tribunal under the analogous provisions in the Income-tax Act.

Recommendation as to duty to make a reference.

21.8. In our view, it is desirable to codify the proposition judicially laid down[5] about the duty to make a reference. It is also proper to emphasise that the reference can only be compelled on a substantial question of law.

Number of Judges.

21.8A. In cases where the reference under section 57 is heard by a High Court consisting of less than three Judges[6] or by the court of a Judicial Commissioner[7] having less than three Judicial Commissioners, the present provision for hearing by a minimum number *of* three Judges is impossible of compliance. Such cases should therefore be excluded from sub-section (2), for obvious reasons.

21.9. The question may be raised whether the present provision for *three Judges* should be retained at all. We are, however, of the view that the importance, frequency and universality of questions arising under the Act renders desirable retention of the present scheme. Moreover, there has been no practical difficulty resulting from the present scheme. We, therefore, prefer to retain the present provision,—of course with certain changes to be presently noticed or already noticed.[8]

Formulation of questions by the Chief Controlling Revenue Authority.

21.10. Though the Act does not specifically state that the Chief Controlling Revenue Authority should formulate the question on which the opinion of the High Court is sought, judicial decisions hold that the question should be formulated.[9] Since the High Court cannot express its opinion on matters not referred to it, it is advisable that there should be a provision in the Act for the formulation of questions.[10] We recommend an amendment of the section for the present purpose.

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[1] Para 21.3, *Supra*.

[2] Question 62 (section 56).

[3] *Vanarashi Das* v. *Chief Controlling Revenue Authority, Delhi*, A.I.R. 1968 S.C. 497, 502, para 9 citing *Maharashtra Sugar Mills* case, A.I.R. 1950 S.C. 218.

[4] *Banarasi Das* v. *Chief Controlling Revenue Authority, Delhi*, A.I.R. 1968 S.C. 497, 502, para 9.

[5] Para 21.6, *supra*.

[6] For example, Sikkim.

[7] As to Judicial Commissioners(see also discussion) *infra*.

[8] Para 21.8A, *supra*

[9] *Vinay Construction and Development Company* v. *Inspector General of Stamps*, A.I.R. 1967 Andhra Pradesh 90, 91, para 6.

[10] Cf. Order 46, rule 1, Code of Civil Procedure, 1908.

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[1]

Meaning of "High Court".

21.11. We next come to the court to which a reference can be made under section 57. The section contains a long list enumerating the various High Courts. There was need for such an enumeration at a time when British India comprised a few areas where there were no High Courts but only Courts of Judicial Commissioners; and, apparently, the intention was that in relation to areas where there were only Courts of Judicial Commissioners, the reference should be made to the specified High Court. For example, in relation to Ajmer and Merwara, it was provided that the reference under section 57 should be made to the High Court at Allahabad. It may be of interest to know that after a long enumeration, there was a residuary clause whereunder, in other cases, the reference was to be made to the High Court at Fort William (Calcutta).

Present practice of enumeration *not convenient.*

21.12 This general structure of the section has so far been maintained, though the textual details have changed from time to time, and the legislative practice has been to substitute the name of the appropriate High Court whenever constitutional changes necessitated such a substitution. The result of this practice has been that every time when a new High Court is created or the jurisdiction of a High Court is extended over a Union Territory or a new Union Territory is created, an amendment of the section becomes necessary. In this process, the enumeration sometimes becomes incomplete also. For example, the official text of the Act, as modified upto 1st March, 1970, does not mention anything about Pondicherry, though it appears that[2] as regards Pondicherry the mention of the Madras High Court has been added separately. The Union Territory of Goa, Daman and Diu also does not find a place in the present enumeration. Thus, the present practice is cumbersome, and if a simpler method could be substituted, the change would be worth considering.

Alternatives for improving the position.

21.13 For improving the position in this regard, two alternatives could be considered. Either the enumeration of High Courts may be totally omitted, leaving the matter to be governed by the general provision in the General Clauses Act[3], which provides thtat "High Court", used with reference to "civil proceedings", shall mean the highest civil court of appeal (not including the Supreme Court) in the part of India in which the Act or Regulation containing the expression operates. Another alternative would be to insert, for the purposes of section 57, a suitable definition of the expression "High Court". Here a precedent is furnished by the Contempt of Courts Act[4], which provides that "High Court" means the High Court for a State or a Union Territory, and includes the Court of the Judicial Commissioner in any Union Territory. We prefer the latter alternative, since the first alternative—namely, relying on the General Clauses Act—may lead to a controversy whether proceedings by way of reference are or are not "civil proceedings". There is no doubt that they are : but a controversy should be avoided.

Case of Union Territory.

21.13A. The question may be raised whether the adoption of either of the two alternatives[5] would not mean a change in substance as regards those Union Territories in regard to which they are Courts of Judicial Commissioners.

21.14. In reply to this objection, it may be stated that the present section is silent as to such Union Territories, so that even now it can be argued that the Court of the Judicial Commissioner is by virtue of the General Clauses Act)[6] to be regarded as the High Court for the purposes of section 57. However, even if this view is not correct, we do not see any strong reason why a reference under the Stamp Act should not be made to the Court of the

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[1] Question 63 (Section 57).

[2] Pondicherry (Extension of Laws) Act (26 of 1968), Schedule, Part 2, inserting section 57 (ee), as follows :—
"(ee) if it arises in the Union Territory of Pondicherry, to the High Court of Madras."

[3] Section 3(25), General Clauses Act, 1897.

[4] Section 2(d), Contempt of Courts etc. Act, 1971.

[5] Para 21-12, *supra*.

[6] Section 2(13), General Clauses Act, 1897.

Judicial Commissioner. These Courts decide various questions of law under the Code of Civil Procedure and other laws, and can be safely entrusted with the duty of deciding references under the Stamp Act. Incidentally, at present, the only such case is the Union Territory of Goa.

Recommendation

21.15. Accordingly, we have come to the conclusion that in section 57, a suitable definition of the expression "High Court" should be substituted, on the lines of the definition in the Contempt of Courts Act.

Re-draft as recommended.

21.16. In the light of the above discussion, we recommend the following re-draft of section 57.

Re-draft of section 57

(1) The Chief Controlling Revenue Authority may state any case referred to it under sub-section (2) of section 56 or otherwise coming to its notice, and refer such case, with its own opinion thereon, to the High Court, *formulating precisely the question on which opinion of the High Court is requested* :

Provided that where the case involves a substantial question of law, and a party interested makes an application to the said authority without unreasonable delay for making such reference, the said authority shall make such reference.[2]

Explanation.—In this Chapter, "High Court" means the High Court having jurisdiction over the State or Union Territory, and, in relation to a Union Territory, includes the court of a judicial commissioner.

(2) *Every such case shall, where the High Court consists of three or more Judges,* be decided *by not less than three Judges* of the High Court to which it is referred, and in case of difference, the opinion of the majority shall prevail.[3]

Section 58.

21.17. Section 58 provides that, if the High Court is not satisfied that the statements contained in a case forwarded under section 57 are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue Authority by which it was stated, to make such additions thereto, or alterations therein, as the Court may direct in that behalf.

21.18. Under the scheme proposed[4] by us in regard to section 57, a reference can also be made to the Judicial Commissioner's Court. However, the definition of "High Court" in that section (as proposed) will apply to section 58 also. No further comments are needed with reference to section 58.

Section 59—Introductory.

21.19. The procedure to be followed in disposing of a case stated under section 57 is dealt with in section 59. Sub-section (1) provides that the High Court, upon the hearing of any such case, shall decide the questions raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded.

Under sub-section (2), the Court shall send to the Revenue Authority by which the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar ; and the Revenue Authority shall, "on receiving such copy, dispose of the case conformably to such judgment".

Section 59(2).

21.20. It appears to us that in sub-section (2), the words "dispose of the case" are inappropriate in regard to cases where the matter has been already disposed of by the lower authority. Having regard to the wide scope[5] of section 57, such a situation can conceivably arise.

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[1] Section 2(d), Cotempt of Courts Act, 1971, Para 21.13, *supra*.
[2] Cf. section 259, Income Tax Act, 1961.
[3] Cf. section 96 (2), Code of Criminal Procedure, 1973.
[4] See recommendation as to section 57.
[5] Para 21.7 *supra*.

Recommendation to amend section 59(2).

21.21. Although it can be stated that the reference to the High Court implies that the matter is at large, it is desirable to amplify section 59(2) to make the language appropriate for a situation where the principal case has been already disposed of by the lower authority.

The direction in sub-section (2) to the effect that the Revenue Authority should "dispose of a case conformably to the judgment of the High Court", becomes inappropriate when no case is pending before the Revenue Authority, and the case referred by the Board relates to one already disposed of by a lower authority. The procedure for a reference to the High Court by the Chief Controlling Revenue Authority applies equally when a case is not pending, as where it is pending[1] Hence, it is desirable that section 59, sub-section (2), should be amended by using language more fitted to the case. Unless the revenue authority has still resting upon it the duty of disposing of a case, the present words are not appropriate. They are more appropriate to an actual and concrete case pending before the revenue authority.

We therefore recommend that these words should be replaced by the words "shall pass such orders as are necessary for disposal of the case conformably to the judgment".

In this connection, we may cite the precedent contained in the Income-tax Act,[2] quoted below.

"260 (1) The High Court or the Supreme Court upon hearing any such case shall decide the questions of law raised therein, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and a copy of the judgment shall be sent under the seal of the Court and the signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment.

(2) The costs of any reference to the High Court or the Supreme Court which shall not include the fee for making the reference shall be in the discretion of the Court".

Section 60—Introductory.

21.22. This takes us to section 60. In the case of courts other than those mentioned in section 57, if the Court feels a doubt as to amount of duty to be paid in respect of any instrument under proviso (a) to section 35, the Judge is, by section 60, empowered to draw up a statement of the case and refer it, with his own opinion, for the decision of the High Court to which, if he were the Chief Controlling Revenue Authority, he would refer the same under section 57. This is the main proposition enacted in sub-section (1) of section 60, while sub-sections (2) and (3) deal with matters of detail.

Points for interpretation.

21.22A. There seems to be a certain amount of obscurity as to the precise stage at which such reference could be made. Some of the points in this connection have come up for decision before the High Courts and, on those points, the relevant judicial decisions furnish some guidance. But it must be stated that the position on those points is not very apparent from the language of the section ; and in order to make the section self-contained, it is desirable to insert necessary clarification on the various points, which are enumerated below.

(i)Reference not competent after impounding a document.

21.23. In the first place, the Judge desiring to make the reference must entertain a doubt as to the amount of duty to be paid before making the reference. It follows that he cannot do so where he already considers the document not fully stamped and impounds it. In such a case, he has to send the instrument[3] under section 38 to the Collector, and it is for the Collector[4] to certify that the document is duly stamped, if the Collector takes that view. Therefore, it is not competent for the Judge who impounds a document to resort to the procedure for reference under section 60. This should be made clear.

(ii) Reference under section 60 not competent at appeal stage.

21.24. In the second place, the Appellate Court cannot resort to section 60. The Appellate Court is bound by section 36, and, therefore, cannot proceed to make a reference[5] under section 60. It can, however, proceed under sub-section (2) of section 61.

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[1] Section 57.
[2] Section 260, Income Tax Act, 1961.
[3] Section 38.
[4] Section 40.
[5] (a) Reference, (1888) I.L.R. 11 Mad, 38.
(b) *Somayya* v. *Anjaneyulu*, A.I.R. 1935 Mad. 382.

21.25. Thirdly, after the levy of penalty, a reference will not be competent under this section even at the instance of the trial Judge. The case is different where the Judge had already determined, to make the reference before the levy of the penalty, though the actual reference was framed after such levy.[1] (iii) Reference not Competent after penalty.

21.26. In the result, the section should be amended on the three points mentioned above.[2] Recommendation

21.27. We, therefore, recommend that the following sub-sections should be added in section 60. Recommendation.

"(4) *No court shall take action under this section where the case is one to which section* 36 *applies; but nothing in this sub-section shall affect the provisions of section* 61.

(5) *No action shall be taken under this section where the instrument has already been impounded or a penalty levied in respect thereof under proviso (a) to section* 35".

We may add that most replies to our questionnaire[3] are in favour of such an amendment.

21.28. The provisions so far discussed related to references under the Act. Powers of appellate courts are dealt with in section 61(1). It is concerned with two situations—(a) where, in the court of first instance, an order admitting an instrument in evidence is passed because the instrument is regarded as duly stamped or as not requiring a stamp, and (b) where such order is passed because there has been payment of duty and penalty under section 35. Section 61.

Section 61(2), which is concerned with the powers of the Appellate Court (or Court of Reference), is also intended to deal with both these situations, namely, (a) where the Appellate Court is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under section 35, and (b) where the Appellate Court is of opinion that the instrument should not have been admitted without the payment of *a higher* duty and penalty than the duty and penalty paid in the court of first instance.

21.29. Thus, both sub-section (1) and sub-section (2) of section 61 can be divided into two parts, dealing respectively with the two situations mentioned above. In the present structure of the two sub-sections, this aspect is not brought out clearly. We are of the opinion that it would be useful if both the sub-sections are split up into clauses, so as to indicate that each part applies to one or other (but not both) of the two situations. Such re-structuring has been favoured by most replies to our Questionnaire also.[4]

21.30. We, therefore, recommend that section 61(1) should be revised as follows : Recommendation.

"61(1). When any court in the exercise of its civil or revenue jurisdiction or any *Criminal Court in any proceeding under Chapter IV or sections* 145 *to* 148 *of the Code of Criminal Procedure,* 1973, makes any order admitting any instrument in evidence—

(a) as duly stamped or as not requiring a stamp, or

(b) upon payment of duty and a penalty under section 35,

the Court to which appeals lie from, or references are made by, such first-mentioned Court may, of its own motion or on the application of the Collector, take such order into considereation *for the purpose specified in sub-section* (2)."

(A similar amendment to be made in sub-section (2) will be indicated at the appropriate place).

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[1] *B. Majumdar* v. *M. Sarkar*, A.I.R. 1922 Calcutta 452, 453.

[2] Para 21.23 to 21.25 *supra*.

[3] Question 64.

[4] Question 65.

Section 61(2).

21.31. The above scheme involves certain structural changes in section 61(2) also. Certain other points may be considered, with reference to sub-section (2). It has been suggested that if a party wants to pay penalty, he should be allowed to do so, and not be driven to the Collector, as at present. The present provision for mandatory impounding should, it was suggested, be modified, to provide as above. As against this, it has been stated that such amendment would create practical problem. In pursuance of the decision of the appellate Court, the Collector should be allowed to realise the penalty, as at present. If the above change proposed purely for convenience of the citizen, is carried out, the apprehension has been expressed that the judicial function of the appellate Court and the proposed administrative work of realising the amount, may get jumbled up. It is the stamp revenue in issue, having nothing to do with the appeal. We have, after careful consideration come to the conclusion that it may be worthwhile to carry out the suggestion.

Replies to our Questionnaire[1] also mostly favour the change. We recommend it.

We also propose a slight restructuring of section 61(2), for the reasons already indicated.[2]

Recommendation.

21.32. We, therefore, recommend that section 61(2) should be revised as follows :—

"(2) If such Court, after such consideration, is of opinion—

(a) *in the case referred to in clause (a) of sub-section* (1), *that such instrument* should not have been admitted in evidence without the payment of duty and penalty under section 35, or

(b) *in the case referred to in clause (b) of sub-section* (2), that such instrument should not have been admitted in evidence without the payment of a higher duty and penalty than those paid,

if may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

Provided that where such person is prepared to pay the duty and penalty, the Court shall accept the same and shall not impound the instrument."

Section 61(3).

21.32A. In section 61(3), it would be necessary to deal with the situation when, besides the declaration by the court, the penalty has also been recovered, in consequence of sub-section (2) as proposed to be amended. Accordingly, sub-section (3) should be revised, and new sub-sections added, as follows :—

"(3) When a declaration has been recorded under sub-section (2)—

(a) the court recording the same shall send a copy thereof to the Collector, and

(b) where the instrument to which it relates has been impounded or is otherwise in the possession of that court, shall also send him the instrument, and

(c) *where the amount of duty and penalty has been paid under the proviso to sub-section* (2), *shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.*[3]

(3A) *When the duty and penalty leviable in respect of any instrument have been paid under sub-section* (3), *the Court shall also certify by endorsement thereon that the proper duty or the proper duty and penalty stating the amount of each have been levied in respect thereof, and the name and residence of the person paying them.*

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[1] Question 66.

[2] Para 21.29, *supra*.

[3] Compare section 38. (1).

(3B) *Every instrument so endorsed shall thereupon be delivered on his application in this behalf to the person from whose possession it came into the hands of the Court, or as he may direct a person authorised by him.*[1]"

21.33. Section 61(4), it would be noted, while empowering the Collector to prosecute any person in respect of whom an order has been passed by the appellate court by section 61(2), enacts, in proviso (a), that "no such prosecution shall be instituted where the amount (including duty and penalty which according to the determination of the court, court, was payable in respect of the instrument under section 35, is paid to the *Collector*, unless he thinks that the offence was committed with an intention of evading payment of the proper duty". Section 61(4)

This will require modification in order to deal with cases where the duty and penalty have been already paid in court, under the new provision recommended by us to be inserted by way of proviso to sub-section (2).

21.34. In section 61(4), and in proviso (b), the reference to section 42 will require to be changed into a reference to section 41, having regard to our recommendation[2] to transpose sections 41-42.

APPENDIX

Provisions for hearing by Judges of a particular number, occurring in selected enactments

Act	Provision for minimum number of Judges	Definition of "High Court"
Income-tax Act, 1961, section 259 (Hearing of reference made by Tribunals).	Not less than two Judges of the High Court	"High Court" is defined in terms which exclude Judicial Commissioners (See section 269).
Indian Divorce Act, 1869, section 17 and section 3 (Confirmation of divorce granted by district court).	(a) Three Judges where the number of Judges is three or upwards Majority to prevail. (b) Two judges where the number of Judges is two—View of Senior judge to prevail.	"High Court" is defined in terms which exclude Judicial Commissioners.
Code of Criminal Procedure, 1973, section 96(2) and section 2(e) (application to High Court to set aside declaration of forefeiture of publication).	Section 96(2) provides that every such application shall, "where the High Court consits of three or more Judges, be heard and determined by a special Bench of High Court composed of three Judges", and "where the High Court consists of less than three Judges, such special Bench shall be composed of all the Judges of that High Court."	Section 2(e) defines "High Court". In relation to a Union territory other than the territory of Delhi, it means the highest Court of Criminal Appeal of that territory other than the Supreme Court of India.
Section 369, Code of Criminal Procedure, 1973 (Confirmation of death sentence).	Confirmation of death sentence, or passing of any new sentence or order of High Court "Shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them."	See above, under Code of Criminal Procedure, 1973, section 96(2).

1. Cf. Section 38(1).
2. See recommendation as to sections 41-42, *supra*.

CHAPTER 22

OFFENCES : SECTIONS 62 TO 69

Introductory

22.1. We now come to the provisions of the Act relating to offences.

The provisions relating to offencees may appear to be heterogeneous and are, in fact, so to some extent. There are provisions dealing with specific conduct, such as failure to cancel an adhesive stamp (s. 63), refusal to give a receipt (s. 65), failure to make out a policy (s. 66), drawing post-dated bills or marine policies (s. 67), and breach of rules relating to "sale of stamps" (s. 69). Three sections in this Chapter, however, are of a more general character. The first is section 62, which imposes a penalty for executing an instrument not duly stamped and for certain other action taken in relation to an instrument not adequately stamped. A more serious offence is constituted by section 64, which punishes certain acts done with intent to defraud the Government. Those acts may consist in failure to set out the facts and circumstances in an instrument or—vide clause (c)—"any other act calculated to deprive the Government of any duty or penalty under this Act."

Then there is section 68, under which not only the post-dating of a bill is punished—this is a specific act—but any person who, with intent to defraud the Government of duty "practises or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force" is also punished. This stands midway between sections 62 and 64. It is obvious that the same act may fall under several sections with varying penalties,—a situation which is by no means satisfactory.

While it is not our intention to suggest a radical re-arrangement of the sections, we do consider it necessary that the overlapping between some of the provisions should be removed.

Section 62—Introductory

22.2. To begin with, section 62(1) punishes any person—

(a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of, or in any manner negotiating, any bill of exchange, payable otherwise than on demand or promissory note without the same being duly stamped ; or

(b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped ; or

(c) voting or attempting to vote under any proxy not duly stamped.

The punishment is fine which may extend to five hundred rupees for every such offence.

Under the proviso, when any penalty has been paid in respect of any instrument under section 35, section 40 or section 61, the amount of such penalty shall be allowed in reduction of the fine (if any) subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty.

We shall deal with sub-section (2) later.

Meaning of 'accepting' clarification needed.

22.3. It has been held[1], that in section 62(1)(a), the word 'accepting' does not mean 'receiving'. It means "*executing as an acceptor*". Therefore, a person who merely receives an unstamped promissory note and puts it in a suit, is not guilty of an offence under section 62. It is desirable to bring out this aspect more clearly, by a suitable amendment. Only the person who makes the bill of exchange or promissory note, and not the person *in whose* favour it is made, should be liable[2] under section 62(1)(a).

1. *Queen Empress* v. *Ghulam Hussain*, (1884) I.L.R. 7. Mad. 771, 773.
2. *Queen Empress* v. *Nihal Chand*, (1898) I.L.R. 20. All. 440.

22.4. The above point deals with questions concerning promissory notes and bills of exchange in the context of section 62. A controversy in a more general form has also arisen under this section, namely, whether receiving an unstamped instrument amounts to abetment of an offence. So far as section 62 is concerned, the question has now been answered by all High Courts[1] in the negative, except by the Madras High Court.[2] This also appears to be the English law.[3] **Whether person receiving an unstamped instrument liable.**

22.5. It is desirable to make suitable clarification on this general point[4] also, by codifying the majority view. Mere receipt of an unstamped instrument should not be regarded as abetment, where there is no instigation or other prositive act by the receiver. Of course, where, on the facts, incitement can be proved, the conduct will amount to abetment. For example, a creditor *procuring* the signing of an improper entry in his account book may be guilty of abetment, by reason of such procuration. **Desirability of clarification.**

22.6. We may borrow an example from Oliver Twist.[5] In that novel, Fagin, after getting Sikes to say that he (Sikes) would murder any one who should betray him, wakes up Noah Claypole, Fagin makes him (Slaypole) tell Sikes that the girl Nancy had betrayed him.[6] As Sikes rushes out in a passion, Fagin says, "You won't be too violant, Bill; I mean not too violent for safety". Discussing the legal significance of these facts, Stephen[7] says, "I think that the whole conversation taken together would be evidence to go to a jury, that Fagin did 'counsel' or 'procure' the murder committed by Sikes, which would make him an accessory before the fact; *but if he had confined himself to merely telling* Sikes what Claypole said he had heard, it would not have been enough."[8]

This hypothetical illustration shows the distinction between active instigation (on the one hand) and passive inaction (on the other hand).

22.7. So much on the question of abetment. Clause (b) of section 62 uses both the expressions "executed" and "sign". The expression "executed", with referenc to instruments, is defined[9] in the Act, as meaning "signed". The word "excuting", in section 62, clause (1)(b), must mean very much the same as 'signing", and it must be held to mean "signing" so as to complete the document so that it may have full legal effect.[10] **Section. 62(b).**

22.8. Where certain parties to an arbitration signed an unstamped award, not as witnesses but by way of assent, (though this was unnecessary), it was held[11] that they were not liable under section 62(1)(b). The High Court observed—

> "It is impossible to say that every person who writes his name on a document of this nature otherwise than as a witness has committed an offence under the Act, because, if that was so, even a Judge who signed the document as an exhibit would be liable to a fine. It is a pity. No. definition is given in the Act as to the meaning of the expression 'signing otherwise than as a witness'.".

This point does not necessitate an amendment.

22.9. But there is another matter which needs amendment. The Act specifically provides[12] in section 43, proviso, that a prosecution cannot be started in the absence of proof of a dishonest **Proof of dishonest intention.**

1. (a) *Emp.* v. *Janki*, (1883) I.L.R. 7 Bom. 82, 83.
   (b) *Queen Empress* v. *Mithulal*, (1885) I.L.R.8 All, 18.
2. I.L.R. 23 Mad. 155, 158 (Case under old section 67—Observations as to old section 62).
3. *I.R.C.* v *Maple*, (1907) 77 L.J. K.B. 55, 59.
4. See cases listed in *Chhanganlal* v. *Emp.* A.I.R. 1934 Nag. 261, 263.
5. Oliver Twist, Chapter, 47.
6. Oliver Twist, Readers' Enrichment Edition (1966) p. 397.
7. Stephen, Digest of Criminal Law, 3rd Ed. page 152, note.
8. See *Howells* v. *Wynne*, 15 C.B.N.S. 3.
9. Section 2(12).
10. *Emperor* v. *Brij Pal Saran*, (1910) I.L.R. 32 All. 198 (per Richards, J.)
11. *Emperor* v. *Brij Pal Saran (1910) ILR 32 All 198.*
12. See section 43, proviso.

intention to evade the payment of stamp duty,[1] where penalty has been paid. This, in our view, should be expressly stated in section 62 also. In fact, we are of the opinion that intention to evade payment of duty should be an essential ingredient of the offence, in every case under section 62, and we recommend the insertion of a proviso to that effect. If this recommendation is carried out, obviously it will not be necessary to refer to section 43, proviso.

Vicarious Liability—Sub-section (2).

22.10. As regards vicarious liability under the section, one particular case of vicarious liability—companies—is dealt with specifically in sub-section (2), (in relation to the issue of share warrants). That sub-section is as follows :—

> "(2) If a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees'.[2]

Vicarious liability in general.

22.11. The position regarding vicarious liability *in general*, i.e., in cases not dealt with in sub-section (2), is outside the section. It was held in a Calcutta case,[3] that where a servant, in the course of his employment gives an unstamped receipt for an amount exceeding Rs. 20/-, *the master* also can be held guilty of an offence under this section. Prima facie, it appears to us that this view may require reconsideration. In fact, we may note that a different view was taken in a later case[4] of the same High Court, where a sole surviving partner of a firm was held not liable for the clerk's failure to give a stamped receipt. We have carefully considered the matter, and are not inclined to recommend any widening of the scope of the present provision.

Recommendation.

22.12. In the light of the above discussion, we recommend that section 62 should be revised as follows :—

> "62. (1) Any person—
>
> (a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or *executing as an acceptor*, paying or receving payment of, or in any manner negotiating, any bill of exchange (payable otherwise than on demand) or promissory note without the same being duly stamped ; or
>
> (b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped ; or
>
> (c) voting or attempting to vote under any proxy not duly stamped ;
>
> shall, for every such offence, be punishable with fine which may extend to five hundred rupees.
>
> "Provided that, when any penalty has been paid in respect of any instrument under section 35, section 40 or section 61, the amount of such penalty shall be allowed in reduction of fine (if any) subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty.
>
> *"Provided further that nothing in this[5] section shall apply unless the act is done with the intention of evading the payment of stamp duty.*
>
> *Explanation.—A person who receives an unstamped instrument does not, merely by reason of such receipt, become guilty of abetment of an offence under this section.*
>
> (2) If a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing

1. (a) *Kanhaiya Lal* v. *Emperor*, (1919) 54 Indian cases 406 (Allahabad), distinguished in (1926) 24 A.L.J. 358;
   (b) Compare (1933) 146 Indian cases 1055 (Lahore).
2. Compare section 35, Companies Act, 1882 (repealed).
3. *Queen Empress* v. *Khetter Mohan*, (1900) I.L.R. 27 Cal. 324, 332, 333; 4 C.W.N. 440. (Prinsep and Hill JJ.)
4. *Golam Hossain* v. *Emperor*, (1904) 8 C.W.N. 378, 380.
5. See para 22 (9). If this wide change is made, a saving for section 43, proviso need not be introduced.

director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees."

22.14. We may mention that the suggested amendment as to section 62(1)(a), and the added Explanation, and the added proviso saving section 43, proviso, has been favoured by most of the replies to our Questionnaire.[1]

Section 62A (New).

22.15. This disposes of section 62. It will be convenient at this stage to deal with one new provision which appears to be necessary. In our view, where the court of first instance had admitted an instrument after a specific decision that the instrument was duly stamped or that it did not require any stamps, there should be no prosecution. Such a provision should be inserted in the Act, say, as section 62A. What we have stated in this paragraph represents what we contemplate as the gist of the new provision. There should, we hope, be no difficulty in putting it in precise legislative language. Such a provision is needed because the very fact that one court has decided that the instrument did not require stamp affords very cogent grounds for assuming not only that the parties did not wish to evade duty, but also that their legal understanding was prima facie justified. In such circumstances, a prosecution is, in our opinion not justified.

Section 63—Recommendation.

22.16. Under Section 63, any person required by section 12 to cancel an adhesive stamp, and failing to cancel such stamp "in manner prescribed by that section", shall be punishable with fine which may extend to one hundred rupees. The only change required is addition of the article "the" before the word "manner", which we recommend.

Section 64—Introductory.

22.17. Section 64 is one of the important penal provisions of the Act. Clause (a) of the section punishes a person who executes an instrument which does not fully and truly set forth the circumstances which are, by section 27, required to be set forth. Clause (b) punishes a person who, while employed or concerned in the preparation of any instrument, neglects or omits to set forth those facts and circumstances. Clause (c) punishes a person who, with intent to defraud the Government, "does any other act calculated to deprive the Government of any duty or penalty under this Act."

Controversy as to clause (c).

22.18. The ambit of clauses (a) and (b) is obviously limited, being, speaking broadly, confined to a full and true statement in the instrument of the relevant facts. But clause (c) is wide, and the question that has arisen is whether clause (c) is to be construed *ejusdem generis* with the preceding clauses (a) and (b)[2], or whether it is not to be so construed.[3] The actual controversy has arisen in respect of a person who receives an unstamped instrument; but it could arise in many other situations.

Overlapping between section 62(c) and section 64(c).

22.19. The marginal note to the section would seem to support a narrower view. No doubt, the wording of clause (c) is capable of a wide construction; but, if taken literally, it would take in almost every case which falls within another sections—section 62. Of course, section 62 does not require an intent to defraud, while section 64 requires such intent. But there would be overlapping as regards *the conduct* punishable under the two sections. Again the punishment under section 62 (fine up to five hundred rupees) is milder than that under section 64 (fine up to five thousand rupees),—apparently because section 62 does not require mens rea at present. It can, therefore, be argued that clause (c) of section 64 should be given a wide construction in order to cover cases where *intentional* evasion of duty has taken place. Even then, it appears reasonable to exclude, from clause (c), cases not analogous to clauses (a) and (b). Under the present wording, section 64, clause (c) overlaps not only section 62, but also section 68, as is explained below.

Overlapping between section 64(c) and section 68(c).

22.20. Section 64, clause (c) overlaps clause (c) of section 68,—which punishes a person, who, with intent to defraud the Government of duty, "practises or is concerned in any act, contrivance or device not specifically provided for by this Act or any law for the time being in force." (Punishment is fine upto one thousand rupees). The ingredients are so prescribed that most cases which fall under one will also fall under the other.

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[1] Question 67.

[2] *Chhakmal v. Emperor*, (1916) I.L.R. 44 Cal. 321; A.I.R. 1967 Cal. 665.

[3] (1934) 153 Indian cases 952 (Nagpur).

In fact, section 64(c) would even cover many acts covered by specific laws. For example, the act of manufacturing or selling fictitious stamps would fall under section 64(c), though that act is an offence under the Indian Penal Code. It would not fall under section 68(c), because the acts specifically covered by the Penal Code are excluded by section 68(c). In this respect, section 64(c) creates an anomaly.

22.21. In view of the wide scope of section 64(c) as explained above, and the overlapping between section 64(c) and section 68(c) as mentioned above, as also the anomaly referred to above, it appears to be desirable to confine section 64(c) to acts analogous to violations of section 27, say, false statements (whether made in an instrument or not), calculated to deprive the Government of duty or penalty.

Recommendation to amend section 64(c).

22.22. In the light of the above discussion, we recommend that section 64(c) should be revised as follows :

Revised section 64(c)

64. Any person who, with intent to defraud the Government,—

* * * * * *

(c) *Makes any false statement* calculated to deprive the Government of any duty or penalty under this Act,

shall be punishable with fine which may extend to five thousand rupees.

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[1]

Section 65—Amendment.

22.23. Section 65 punishes any person who,—

(a) being required under section 30 to give a receipt, refuses or neglects to give the same ; or

(b) with intent to defraud the Government of any duty, upon a payment of money or delivery of property *exceeding twenty rupees* in amount or value, gives a receipt for an amount or value *not exceeding twenty rupees*, or separates or divides the money or property paid or delivered.

The punishment is fine which may extend to one hundred rupees.

The amount "twenty rupees" should be replaced by "one hundred rupees"[2] in view of section 30 as proposed.

Section 66.

22.24. According to section 66, any person who,—

(a) receives, or takes credit for, any premium or consideration for any contract of insurance and does not, within one month after receiving, or taking credit for, such premium or consideration, make out and execute a duly stamped policy of such insurance ; or

(b) makes, executes or delivers out any policy which is not duly stamped, or pays or allows in account, or agrees to pay or allow in account, any money upon, or in respect of, any such policy,

shall be punishable with fine which may extend to two hundred rupees.

We have no comments on this section.

Section 67.

22.25. Section 67 punishes any person drawing or executing a bill of exchange (payable otherwise than on demand) or a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly

[1]Question 68 [Section 64(c)].

[2] *Cf.* amendment as to section 30.

stamped the whole number of bills or policies of which such bill or policy purports the set to consist. The punishment is fine which may extend to one thousand rupees.

Though the language is somewhat involved, the substance is clear, and needs no charge.

22.26. Section 68 is important, and may be quoted in full.

Section 68. Penalty for post-dating bills, and for other devices to defraud the revenue.

"68. Any person who, –

(a) with intent to defraud the Government of duty, draws, makes or issues any bill of exchange or promissory note bearing a date subsequent to that on which such bill or note is actually drawn or made ; or

(b) knowing that such bill or note has been so post-dated, endorses, transfers, presents for acceptance or payment, or accepts, pays or receives payment of, such bill or note, or in any manner negotiates the same ; or

(c) with the like intent, practises or is concerned in any act, contrivance or device not specially provided for by this Act or any other law for the time being in force ;

shall be punishable with fine which may extend to one thousand rupees."[1]

With reference to this section, we have offered our comments under *section* 64.[1]

It may be noted that clause (c) is new, and seems to have been modelled on section 21 of the Stamp Duties Management Act, 1891 (Eng.), which reads as follows.[2]

"21. Any person who practises or is concerned in any fraudulent act, contrivance or device not specially provided for by law, with intent to defraud Her Majesty of any duty, shall incur a fine of 50 pounds."

No change is needed in the section.

22.27. Section 69 punishes— Section 69.

(a) any person appointed to sell stamps who disobeys any rule made under section 74, and

(b) also any person not so appointed who sells or offers for sale any stamp other than 10 naye paise or 5 naye paise adhesive stamp.

The punishment is imprisonment upto six months or fine upto Rs. 500 or both.

In so far as the section relates to private persons dealt with in clause (b), the prohibition against the sale of stamps by a private person is, in our opinion, too widely worded, inasmuch as a person having surplus stamps which he purchases *bona fide*, is prohibited from passing them on for consideration to another person who requires them. It is, in our view desirable that the prohibition in clause (b), should be restricted to persons who sell stamps *as business*, and not to persons who have to sell a stamp in an isolated transaction.

22.28. It may be noted that in England, the penalty is not for unauthorised sale of stamps or private sale of stamps, but only for unauthorised *dealing in stamps*. The relevant provision[3] is quoted below : Position in England.

"4. (1) If any person who is not duly appointed to sell and distribute stamps deals in any manner in stamps, without being licensed so to do, or at any house, shop, or place not specified in his licence, he shall for every such offence incur a fine of twenty pounds.

(2) If any person who is not duly appointed to sell and distribute stamps, or duly licensed to deal in stamps, has, or puts upon his premises either in the inside

[1] See discussion as to s. 64, *supra*.
[2] Section 21, Stamp Duties Management Act, 1891 (Eng.).
[3] Section 4(1), Stamp Duties Management Act, 1891 (54 & 55 Victoria c. 38).

or on the outside thereof, or upon any board or any material whatever exposed to public view, and whether the same be affixed to his premises or not, any letters import in or intending to import that he deals in stamps, or is licensed so to do, he shall incur a fine of ten pounds."

Need for amendment.

22.29. We are of the view that since there can hardly be any serious abuse when the sale is confined to isolated transactions, the English provision is perferable in substance. In the present scheme of the Act, a person who has unused stamp has to approach the Collector and obtain refund under section 49 or section 50. This procedure is cumbersome, and it also involves a deduction of percentage. Further, section 54(c) imposes a limitation of 6 months for grant of such refund. This position causes hardship to a person who happens to have, in his possession, unused stamps where there is a person ready and willing to purchase them. We do not think that there will be any loss of magnitude to Government if such persons are permitted to transfer such stamps. Nor do we think that such an amendment will create any serious scope for sale of forged stamps.

We therefore recommend that section 69(b) should be revised so as to read--

"(b) any person not so appointed *who carries on the business of dealing in stamps* other than 10 naya paise or 5 naya paise adhesive stamps".

CHAPTER 23

PROCEDURE IN REGARD TO OFFENCES—SECTIONS 70—72

Introductory.

23.1. There are three sections dealing with procedure in regard to offences- -sections which constitute modifications of, or additions to, the general provisions of the Code of Criminal Procedure, 1973. They deal with—

(i) the conditions requisite for the initiation and continuance of proceedings.

(ii) the Court competent to try the offence, and

(iii) the venue.

Section 70.

23.2. The conditions requisite for the initiation and continuance of proceedings are to be found in section 70. A large number of matters are mixed up in that section. Under sub-section (1), no prosecution in respect of any offence punishable under this Act or any Act hereby repealed, shall be instituted without the sanction of the Collector or such other officer as the State Government generally, or the Collector specially, authorises in that behalf.

Under sub-section (2), the Chief Controlling Revenue Authority, or any officer generally or specially authorised by it in this behalf, may "stay any such prosecution or compound any such offence". It may be noted that this sub-section really comprises two topics : (i) compounding and (ii) stay.

Under sub-section (3), "the amount of any such composition shall be recoverable in the manner provided by section 48".

Section 70(2) to be amended.

23.3. We have no comments on section 70(1). As regards section 70(2), we think that the authority competent to initiate and the authority competent to compound under sub-section (2) should not be different[1], and, therefore, the Collector should also have power to compound an offence under sub-section (2), since he is the person who ordinarily sanctions prosecutions. He is in the know of facts, and is conversant with the general policy for the initiation of prosecutions. He should, logically, be empowered to determine whether or not the offence should be compounded. It is, therefore, desirable that the Collector should be added in sub-section (2), while retaining the present authorities.

Criticism of Provision as to stay in Section 70(2).

23.4. While we see no objection to the power given to the Chief Controlling Revenue Authority and others regarding the institution of prosecutions and compounding, we have serious objection to the present provision as to "stay" in sub-section (2). The word "stay" in this sub-section has led us to a consideration of the important principle involved. We do not think that in this context, the power of "staying the proceedings" is appropriately vested in an executive officer. It is for the court to adjourn its proceedings from time to time when the exigencies of its business or other considerations of justice require. An executive officer should not be given the power of staying judicial proceedings. Perhaps, what the legislature intended was withdrawal of the prosecution. If so, the word "stay" is inappropriate and in any case, such withdrawal can be safely left to be dealt with by the general provision in the Code of Criminal Procedure, 1973.

We may mention that the suggestion put in our Questionnaire[2] was that the stay under section 70 should be by the court, and not by the Collector, and that section 70(2) should be amended for the purpose. That has received general approval in the replies to the Questionnaire. Although what we are recommending is slightly different from what we put in the Questionnaire, there is identity of approach between the two.

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[1] *Cf.* section 279, Income Tax Act, 1961.

[2] Q. 69.

Recommended re-draft.

23.5. In the light of the above discussion, we recommend that section 70 should be revised as under :

"70. (1) No prosecution in respect of any offence punishable under this Act[1]..... .....shall be instituted without the sanction of the Collector or such other officer as the State Government generally, or the Collector specially, authorises in that behalf.

(2) The Chief Controlling Revenue-authority, or *the Collector* or an officer specially authorised by the Chief Controlling Revenue Authority in this behalf, may.... .....compound any such offence.

(3) The amount of any such composition shall be recoverable in the manner provided by section 48".

Recommendation to delete Section 71.

23.6. It is provided by section 71 that no Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act.

The net effect of this section is that a Magistrate of the third class cannot try an offence under the Act. Under the revised Code of Criminal Procedure,[2] there are no third class Magistrates. We therefore recommend that the section should be omitted.

Section 72—Introductory.

23.7. Under section 72, "every such offence" (offence under the Act) committed in respect of any instrument may be tried in any district or presidency-town in which such instrument is found, as well as in any district or presidency-town in which such offence might be tried under the Code of Criminal Procedure for the time being in force.

The words "such offence" refer to "an offence under this Act",—the words used in section 71. As section 71 is proposed to be omitted[3], these words will require a slight verbal change. It is also desirable to substitute "metropolitan area" for "presidency town" in view of the phraseology adopted in the new Code of Criminal Procedure.[4]

Recommendation to revise Section 72.

23.8. We, therefore, recommend that section 72 should be revised as follows :

"72. Every offence *under this Act* committed in respect of any instrument may be tried in any district *or metropolitan area* in which such instrument is found, as well as in any district *or metropolitan* area in which such offence might be tried under the Code of Criminal Procedure for the time being in force."

We may state that the proposed change has been approved by all replies[5] received on this question.

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[1] Reference to repealed Act is omitted.
[2] The Code of Criminal Procedure, 1973.
[3] See discussion as to section 71, *supra*
[4] See the Code of Criminal Procedure, 1973.
[5] Q. 71.

CHAPTER 24

RULES : SECTIONS 74 to 76

Desirability of combining the sections.

24.1. Departing slightly from the sequence of the sections, we would, at this stage, like to deal with the rule-making power as contained in sections 74 to 76. At the outset, we would like to state that we do not see any need at the present day for dealing with this topic in three sections. When the Act was originally enacted, this scheme was considered necessary, presumably because at one stage section 74 vested the power in the local government (later, the provincial government), subject to the control of the Governor General-in-Council, while section 75 vested the power in the Governor General-in-Council. This is no longer the case now. It is, therefore, proper to combine section 74 (rule relating to the sale of stamps) and section 75 (rules generally to carry out the Act). As regards section 76 (publication of rules), it refers to "rules made under this Act", and it can be argued that it is wider than the subject matter of section 74 and 75, inasmuch as it may, to cite one example,[1] take in rules under section 9. Even if that is so, there is hardly any strong reason for retaining it as a separate section, particularly because, in view of the recommendation which we are going to make concerning that section[2], its text will be considerably shortened.

Section 76(2) to be deleted.

24.2 So much as regards the arrangement of the sections. As to the amendment to be made therein, we have comments to offer only on section 76(2), which provides that rules made under the Act shall, upon their publication, "have effect as if enacted by this Act." According to current doctrine on the subject, the quoted words can add nothing to the validity of the rules. They are out of tune with current legislative usage. Being unnecessary verbiage, they should be omitted. In fact, they create confusion. Whatever may have been the earlier assumptions, today it cannot be asserted that rules not consistent with the parent Act can be valid.

Accordingly, we recommend the substitution of one section for all the three sections, as under :—

Existing section 75 and section 76(1).

"74(1) The State Government may, *by notification* in the Official Gazette, make rules to carry out generally the purposes of this Act, and may by such rules prescribe the fines, which shall in no case exceed five hundred rupees, to be incurred on breach thereof.

. . . . . .

Existing section 76(2) omitted.

Existing Section 74.

74(2). *Without prejudice to the generality of the power conferred by sub-section (1), and in particular, rules made thereunder may regulate,*

(a) the supply and sale of stamps and stamped papers,

(b) the persons by whom alone such sale is to be conducted, and

(c) the duties and remuneration of such persons :

Provided that such rules shall not restrict the sale of ten naye paise or five paise adhesive stamps.

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[1] See also sections 10, 16 and 18.

[2] See section 76, *infra*.

CHAPTER 25

MISCELLANEOUS SECTIONS 73 and 77 to 78A

Introductory.

25.1. The remaining four sections of the Act are concerned with miscellaneous matters, such as inspection, delegation of powers, savings and sale of copies of the Act. These are mostly administrative matters, involving no questions of principle.

Section 73.

25.2. Under section 73, every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to inspect for such purpose the registers, books, papers, documents and proceedings and to take such notes and extracts as he may deem necessary, without fee or charge.

This section was inserted for the first time in 1899, and has been taken from the (English) Stamp Act,[1] 1891.

Meaning of "Public officer".

The expression "public officer", which occurs in this section, has been defined in the Evidence Act, section 74, and in the Civil Procedure Code, section 2, but not in the Stamp Act. We are separately[2] recommending the insertion of a definition of that expression.

Authority by whom to be given.

25.3. It is not understood why authority to inspect records under section 73 could be sought only from *the Collector*,[3] and not from an officer authorised by the State Government, *e.g.*, from the Inspector-General of Stamps (if so authorised). The section is defective in this respect.

Recommendation to revise section 73.

25.4. We, therefore, recommend that section 73 should be revised as follows :—

> "73. Every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the *State Government* or by the "Collector to inspect for such purpose the registers (rest as in present section)."

We may add that the amendment has been favoured by almost all the replies to our Questionnaire.[4]

Sections 74-76.

25.5. We have already dealt[5] with sections 74 to 76 which relate to rules.

Section 76A.

25.6. Section 76A, which was inserted by the Decentralisation Act, 1914, empowers the State Government to delegate certain powers, and needs no comments.

Section 77.

25.7. Section 77 provides that nothing in this Act contained shall be deemed to affect the duties chargeable under any enactment for the time being in force relating to court fees. The section requires no change.

Section77A

25.8. Under section 77A, all stamps in denominations of annas four or multiples thereof shall be deemed to be stamps of the value of twenty-five naye paise or, as the case may be, multiples thereof and shall, accordingly, be valid for all the purposes of this Act. It requires no change.

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[1] Section 16, Stamp Act, 1891 (Eng).
[2] See discussion as to section 2(22A).
[3] Section 2(9) defines "Collector".
[4] Question 72.
[5] Chapter 24, *supra*.

Section 78 to be amended.

25.9. Section 78 requires every State Government to make provision for the sale of translations of this Act "in the principal vernacular language of the territories administered by it" (at a price not exceeding twenty five naye paise per copy).

The only change required in the section is substitution of "languages of the States"[1] for the words "vernacular languages of the territories administered by it", and we recommend accordingly. The present phraseology is inappropriate. Such a change has been favoured by all the replies[2] received on this questionnaire.

Section 78A (New)—Rounding off of fractions.

25.10. The Act does not contain any provisions for the rounding off of fractions of a rupee. In this connection attention may be invited to provisions on the subject inserted by State amendments.[3] The utility of such a provision is obvious. After taking into consideration various State amendments, we had, in our Questionnaire,[4] suggested that the follwing new section should be inserted :

> "In determining the amount of duty payable or of allowances to be made under this Act, any fraction of five paise shall be rounded off by treating it as equivalent to five paise."

We are now of the view that a fraction of five paisa, if less than 2-1/2 paisa, should be treated as zero, and in other cases, it should be equated to 5 paisa. We recommend the insertion of a new section on those lines.

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[1] *Cf.* sections 95.97, Employees State Insurance Act, 1948.

[2] Question 74.

[3] Section 77B, insrted in Madhya Pradesh; Section 78 substituted in Tamil Nadu and in Andhra Pradesh.

[4] Question 75.

CHAPTER 26

SCHEME OF THE ARTICLES

Introductory.

26.1. Having concluded our consideration of the sections, we proceed to a discussion of the articles in the First Schedule to the Act.

The First Schedule to the Stamp Act contains the arithmetic of stamp duties. The Schedule is to be read with section 3, clauses (a) and (c) of which specifically refer to this Schedule. The rates of duties on various instruments are given in articles arranged alphabetically. These articles (65 in number) levy a duty either of a fixed sum or according to value or, in some cases, according to the duty leviable on some other instrument under another specific entry. The last mentioned category could raise nice problems, for example, where the duty on the other instrument is raised.

Grouping.

26.2. It is not easy to trace the rationale underlying the rate of stamp duty prescribed in each article However, the classification attempted below might throw light on some of the featires of the scheme of eaxation.

The charging articles can be divided into two principal groups, namely, those charging duty *ad valorem* and those charging a fixed duty. In regard to *ad valorem* duties, again, there are three principal patterns which may be noticed. There is, first, the group of instruments falling under the category of bonds. Secondly, there is the group of instruments falling under the category of conveyances. Thirdly, there is the group of instruments which are chargeable *ad valorem* in some other manner, for example, bills of exchange, debentures, mortgage deeds in certain cases and policies of insurance. In fact, the charging entry as to Mortgage Deed—Entry 40—itself illustrates, in its three clauses (a), (b) and (c), the three different patterns of *ad valorem* duty.

Economics value.

26.3. Apart from this possible classification of instruments on the basis of *ad valorem* duty and fixed duty, there are other considerations which enter into the picture. As to the division between *ad valorem* duty and fixed duty, the selection seems to depend primarily on the economice value of the rights created or transferred by the instrument. On this principle, many instruments relating to immovable property or creating a charge thereon are selected for *ad valorem* duty. Similarly (even where the instrument does not relate to immovable property), if it is possible to predicate with reasonable certainty that the right created is of a certain monetary value, *ad valorem* duty is adopted, as in the case of mortgage deeds of movables. On the other hand, where the proprietary or monetary aspect is not prominent or easily ascertainable and the principal object of *entering into the instrument* or executing the instrument is not directly one of a proprietary or monetary character, then fixed duty is adopted. This is illustrated by the charge on adoption deed, affidavit, agreement, articles of association of a company, award and the like.

This is not to say that in every case where the monetary or proprietary element is directly involved, the legislature has necessarily selected the imposition of an *ad valorem* duty. Considerations of prompt execution of business or other aspects of convenience might have induced a different choice,—as is illustrated by the articles charging duty o npromissory notes.

Selction of duty.

26.4. Assuming that the case is one where a fixed duty would be appropriate, the amount of duty to be selected could vary in theory. In fact, the duty does vary from one anna (now 10 paisa) to Rs. 500. What particular amount should be chosen, must not have been a very easy matter for the legislature, but here also certain broad principles seem to have been borne in mind. For example, much depends on the question whether the document merely furnishes evidence of a transaction, or whether it goes further and creates a right. This consideration

seems to have regarded as relevant in fixing the duty on acknowledgments and agreements, so that an acknowledgment is chargeable with a duty only of one anna, while an agreement is chargeable with a duty of 8 annas. That documents constituting mere evidence receive a sympathetic treatment is also illustrated by the charging article relating to certificate (article 19), share warrant (article 65) and the like.

Again, it is on the principle that a document which really evidences a certain fact need not be chargeable with *ad valorem* duty, that a receipt carries only a fixed duty, not fluctuating with the value of the money or other property the receipt whereof is acknowledged.

Nature of the right.

26.5. Of course, "agreement" is a very wide term, and depending on the nature, value, extent or duration of the right created or transferred, the legislature naturally decided to impose, on specific types of agreement, a higher fixed duty. It is apparently on this principle that an apprenticeship deed is made chargeable with a duty of Rs. 5, because the rights created thereunder may be expected to endure for a long time and would increase considerably the earning capacity of the beneficiary. The nature of the right created or potentially created seems to have been regarded as relevant in charging a duty of Rs. 25 on the articles of association of a company. Here a number of persons are interested, and a new corporate entity is brought into being, representing a pooling of resources and talent. The nature of the right created might also have been one of the considerations for charging a duty of Rs. 500 for entry as an advocate.

Convenience.

26.6. Even within the category of instruments appropriate for fixed duty, considerations of convenience or the urgency of the matter might have induced the legislature to adopt a liberal view, as is illustrated by the comparatively small amount of duty fixed for bills of lading. protest of Bill or Note, protest by the Master of a ship, and the like.

Apart from these legal and commercial considerations, and economic aspects, the legislature may also regard, as relevant, certain matters of policy. It is on this basis that an assignment of copyright is exempted from the duty. Otherwise chargeable as on a conveyance and, again, it is on this principle that numerous exemptions have been granted by the legislature in respect of documents otherwise chargeable as receipts.

Number of considerations

26.7. From this discussion, it is clear that a host of considerations enter into the legislative determination of the amount of stamp duty to be properly charged. This discussion may appear to be academic; but unless one is conscious of these aspects, one is likely to miss the point in the scheme for charging tax under the Act.

Scope for Improvement

26.8. The articles themselves are numerous, and might appear to have been devised meticulously. The alphabetical arrangement is undoubtedly convenient, and there is sufficient cross-referencing—a feature not often noticed in legislative measures. Notwithstanding this scaffolding of categories created by the legislature for building up its own scheme of taxation, disputes do arise in practice as to whether a particular instrument falls in one category or the other. In so far as such disputes arise from the unavoidable fact that human relationships are of an infinite variety and people do not always enter into transactions with the articles of the Stamp Act in mind, such disputes may be difficult to avoid. But, in so far as the disputes arise by reason of obscurity or ambiguity in the description of an instrument in a particular article or by reason of avoidable overlapping, with a view to considering whether any improvement could be devised, so that disputes might be reduced in frequency and complexity, even if they cannot be totally eliminated. Such amendment would reduce the occasions for resorting to the provisions in sections 4 to 6 of the Act—provisions which might be described as designed to operate in the last resort when the court must decide the dispute one way or the other in order to determine the proper amount of duty chargeable.

Direction in which amendments will be considered.

26.9. Since the rates of stamp duty on many of the instruments mentioned in the Schedule fall within the State Legislative List, it is not our intention to suggest any substantial changes regarding the rate structure in respect of those instruments. Apart from this, even in respect of instruments falling in the Union Legislative List, it is not our intention to suggest any substantial changes in the rate structure. This is, however, subject to the qualification that such

rationalisation as appears to be necessary, and as can be achieved without affecting the rate structure basically, will be considered in both cases.

The desirability of considering verbal improvements in many of the articles will also be borne in mind.

When the Act was revised in 1899, several changes were made in the Schedule. First, the alphabetical order was improved. Secondly, the legislature removed exemptions from their position in a separate "schedule of exemptions", and placed them in the schedule of duties under the articles to which they referred. Thirdly, the ascertainment of duty was made more direct and more easy. For example, the three tables of duty under the heads of bill of exchange, bond and conveyance were, at that time, drawn up in a very curtailed form. When considerable amounts were involved, it was impossible, without the aid of paper and pencil, to make out from the different tables, the duty payable on a particular instrument. By expanding the tables, the legislature made it easy for a person by a reference to the schedule to ascertain directly what the particular duty was.

Nevertheless, there was no attempt made to go into each article from the point of view of public convenience or ease of understanding.

It will be our endeavour to suggest improvements wherever practicable, bearing in mind the limitations to which we have already referred.

CHAPTER 27

ARTICLE 1

27.1. Article 1 is as follows : Article 1.

> "Acknowledgement of debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of a debtor to *supply evidence of such debt in any book* (other than a banker's pass book) or on a separate piece of paper when such book or paper is left in the creditor's possession : provided that such acknowledgement does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.....One anna[1].

The proviso did not occur in the Act of 1879.

27.2. A brief historical discussion of the article may be useful.

History.

Prior to the Act of 1869, there was no provision for charging stamp duty on an acknowledgement. The Act[2] of 1869 provided for such stamp duty. The article in that Act read—

"Note or Memorandum written in any book or written on a separate paper whereby any account, debt or demand therein specified, and amounting to twenty rupees or upwards, is expressed to have been balanced or is acknowledged to be due."

27.3. Thus, the article in the Act of 1869 did not contain the requirement as to the instrument having been given for the purpose of *supplying evidence of the debt.*

27.4. Thus, in order to fall within the scope of this article, it was necessary that document should either balance an old account or should show that the sum acknowledged was due.

In 1879 the High Court of Calcutta was called upon to determine the applicability of the above noted article in the case of seven advance entries in a document called a hattachhitra having two sides : "amount advanced," and "amount received". And they rightly held that none of the entries taken singly denoted that the sum mentioned therein was due and could be hit by the provisions[3] of Article 5. It was observed that in order to find whether a particular sum was or was not due at a particular date it was necessary to look to both sides of the document, since the entries on one side controlled those on the other. To quote the relevant observations :

> "Now, if any one of the entries in the hattachhitta had stood alone and had been intended by the parties to form an isolated entry in the book, it might have been contended with considerable force that it fell within the description of document mentioned in Article 5, as requiring a stamp. We think however that the entries cannot be detached from the account of which they form a part. That account has two sides to it, the one headed 'amount advanced' and the other 'amount received'."

The amount due varies from time to time and depends upon the relation of the amount advanced to the amount received. In the present case, no sum is entered under the head of "amount received," but that is an accident and makes no difference in considering the question as to what is offered in evidence. The intention of the parties in requiring the signature or seal of the borrowers to each sum advanced is strictly speaking, to secure under their hands an acknowledgment that the sum is advanced, whether or not that sum is due or a larger sum or a less

1. The duty of one anna should now be read as ten naya paise.
2. Indian Stamp Act (18 of 1869), Schedule II, article 5.
3. *Brojendra* v. *Bromomoyee*, (1879) I.L.R. 4 Cal. 885.

sum, depends upon the state of account. In determining whether a document comes within the description of a document upon which a stamp is imposed by the Stamp Act, we must look at the entire document, and see whether it fairly falls within the description.

> "The document in this case which is offered as evidence is not a note or memo, acknowledging a debt or part of a debt to be due nor a series of such entries and memos, but an account between the parties of the character above mentioned and as such did not in our opinion require a stamp."

27.5. In 1879, an Act (1 of 1879) was made "to consolidate and amend the law relating to stamps," and Article 1 (which corresponded to Article 5 of the previous Act) was recast as under :

> "Acknowledgement of a debt exceeding Rs. 20 in amount or value written or signed by or on behalf of a debtor in order to supply evidence of such debt in any book (other than a Banker's Pass Book) or on a separate piece of paper when such book or paper is left in the creditors' possession."

This Act, therefore, by omitting the words "amounting to Rs. 20" and "is expressed to have been balanced or is acknowledged to be due", brought about two material changes in the law, namely : (1) That the debt must exceed Rs. 20, and (2) the document need not show that it is a balance entry or that the sum mentioned therein is really due.

27.6. It appears that the original proposal in the Bill of 1878 was to have an article in the following form[1] :—

> "46. NOTE OR MEMORANDUM OF entry made in any book, or written on a separate paper, whereby any account, debit or demand, or any part of any account, debt or demand, therein specified and exceeding twenty rupees is acknowledged to have been balanced or to be due."

Some Members of the Select Committee, however, objected to this article at the preliminary stage.[2] Mr. G. H. P. Evans said that this article must be 'further altered or struck out altogether'. Whitley Stokes said, "On consideration I agree with Mr. Evans. The clause as it stands would apply to the statement of the balance in a banker's pass book not signed by the constituent".

Judge Plowden's view.

27.7. It may also be noted that Mr. Plowden, Judge of the Punjab Chief Court, in his comment[3] on the Stamps and Court Fees Bill, 1878, made a suggestion relevant to acknowledgements, in the following terms :—

> "In this connection, I venture to make another suggestion, not without some hesitation and doubt as to whether it is practicable to devise a remedy. The native custom of taking acknowledgments of debts coupled with a promise to pay by an entry in a book of account is of daily or even hourly occurrence, and is eminently convenient to the persons directly concerned. Cannot any method be devised, consistent with due regard to fiscal interests, by which such promises, which cannot invariably be regarded as promissory notes (the term itself when translated is mere jargon to 99 out of 100 persons in the Punjab who make their written promises in account books), might be stamped with adhesive stamps, at least when the accounts are small, if not in all cases. The alternatives as it seems to me now are that the debtor must be induced to write a formal tamassuk on a separate paper, or the book must be taken to be stamped by the Collector and after all it may turn out (See Schedule II, 7, note (a), and section 28) that the promissory portion of a book entry is void, because it requires an additional one-anna stamp".

1. Stamp Bill, 1878, Second Schedule, Article 46.
2. See Preliminary Report of the Select Committee, 28th August, 1878.
3. Proceedings of the Legislative Department, No. 1 to 167 [February, 1879 (National Archives)].

In its final Report,[1] the Select Committee said :

"We have, with reference to the opinions expressed by many of the authorities consulted and to the dissents appended to our preliminary report, recast (in article 1 of the first Schedule as now settled), the 46th article of the same Schedule in Bill No. II.....".

The Select Committee did not, however, indicate why the words "*in order to supply evidence of such debt*" were added.

27.8. The article in the Act of 1879 (First Schedule, article 1), as ultimately enacted, was as follows :—

> "Acknowledgment of a debt exceeding twenty rupees in amount or value, written or signed by or on behalf of a debtor in order to supply evidence of such debt in any book (other than a banker's pass book) or on a separate piece of paper when such book or paper is left in the creditor's possession".

27.9. The proviso was added when the Act was revised in 1899. In the Report of the Select Committee[2], on the 1898 Bill, the following reasons were given for adding the proviso :—

Schedule I—No. 1 *Acknowledgement.—*

We have reverted to the old duty of one anna for all acknowledgements, and have added words to make it clear that the provision relates only to mere acknowledgements and does not include acknowledgements containing in addition any promise or agreement".

27.10. In addition of the proviso, however, did not prove to be an improvement, as will be shown later.[3]

27.11. So much as regards the history of the article—history which shows how certain difficulties were anticipated even at that time. In order to fall within the purview of Article I, a document must fulfil the following conditions :

(1) The debt must exceed Rs. 20.

(2) The document must be written or signed by or on behalf of the debtor.

(3) It must be intended to supply evidence of the debt.

(4) It must be left with the creditor.

(5) It must not contain any promise to pay the debt or any stipulation to pay interest.

27.12. The English law may be contrasted. Under English law, a bare acknowledgement of liability is not chargeable with duty. Thus an I. O. U. or a bare acknowledgement of a loan or of indebtedness, containing no provision as to payment or other evidence *of the terms of an* agreement, does not require any stamp[4] in England. English law.

27.12A. The article in the Indian Stamp Act appears to be simple enough at first sight. But the words "in order to supply evidence of such debt" and the proviso relating to promise to pay, have been found to create difficult problems of application. Since, under proviso (a) to section 35, an unstamped acknowledgement cannot be admitted even on payment of penalty (as section 35 does not apply to documents chargeable with a duty of one anna—now ten naya paisa), hardship arises in practice. Words "in order to supply evidence of such debt".

27.12B. In competition with bonds and agreements, an acknowledgment bears a lower duty. But agreements and bonds (if unstamped) can be admitted under section 35, on payment

1. Final Report of the Select Committee, 31st December, 1878.
2. Report of the Select Committee on the Indian Stamp Bill, 1898, para 18.
3. See discussion below, relating to promise to pay.
4. (a) *Childers* v. *Boulnois*, (1822) 171 E.R. 898 (I.O.U.).
   (b) *Elsher Gent* v. *Leslie*, (1795) 170 E.R. 407.
   (c) *Israel* v. *Israel*, (1808) 170 E.R. 1035.
   (d) *Goodyear* v. *Simpson*, (1845) 153 E.R. 742, 743; (Statement of account containing admission of a certain balance being due from the defendant to the plaintiff).

of penalty. An acknowledgement cannot be admitted in evidence if unstamped. This causes hardship.

27.13. As Schwabe, C.J., observed in a Madras case[1]—

> "This question is whether or not that is an acknowledgement within the definition of acknowledgement in the Stamp Act, for if it is, it has to be stamped, and if not stamped, it cannot be admitted in evidence, and in such a case the legislature has thought fit to impose what to my mind is an appalling penalty of the plaintiff losing his claim altogether, because there is no penalty provided, by the payment of which to Government, the document can be admitted (see section 35). Perhaps, in view of the seriousness of this provision, the draftsman of the Schedule has so worded it that it has left many loopholes, and has given rise to a conflict of judicial opinion when it comes to interpretation."

Promise to pay.

27.14. There is another point which needs to be considered. Under the proviso to article 1, it is necessary that an acknowledgement should not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods etc. Difficulty is created by the question how far an express promise is required in order that the proviso to this article may come into play. It is generally stated that the question whether an instrument is an acknowledgement containing a promise to pay the debt is one of construction of the document.[2]

27.15. The question must be decided with reference to the language used in, and not to the legal obligation arising from, the instrument[3]. This is, no doubt, a sound test. But, as a study of the decided cases shows,[4] the application of the test is not an easy affair. And, if some other alternative could be adopted, which would reduce this difficulty, it would be an improvement.

Cases illustrating obscurity.

27.16. In illustration of the obscurity as to what is and what is not a promise to pay, we may refer to the Allahabad case of *Abdul Rafiq*,[5] in which the Judges were inclined to take opposite views regarding the unconditional acknowledgement *implying* a promise to pay. Even if the interpretation that an *express* promise to pay is required in order to exclude an instrument from article 1 is adopted, it is not, in practice, easy to come to a conclusion whether the words used in the particular instrument do or do not amount to an express promise to pay. Besides the cases already cited, the under-mentioned cases may be referred to in this connection.[6]

27.17. Sometimes, the question also arises whether a memorandum of the rate of interest to be payable in future, when appended to an acknowledgement, is to be regarded as a stipulation to pay interest within the meaning of the proviso to article 1. In general, the Courts hold that mere mention of the rate of interest without more is as good as an express stipulation.[7-8] Sometimes, nice questions have arisen also by reason of the placing of the signature of the debtor in relation to the stipulation for interest.[9]

27.18. In a Patna case[10], Courtney Terrell, C.J. observed that the policy of the article seems to be to provide for cases where the debtor and the creditor came to an agreement between themselves, that, in consideration of grant of some time to the debtor, the creditor demands

1. *Chandick* v. *Ananta Lal Damani*, (1923) I.L.R. 46 Mad. 948 (per Schwabe, C.J.).
2. *Dauala* v. *Gounda* (1903) Punj. Rec. No. 35, pages 111-113(F.B.).
3. *Shiv Ram Punnam Ram* v. *Faiz*, A.I.R. 1942 Lah. 50, 54, 56 (F.B.).
4. See" Decided cases," *infra*.
5. *Abdul Rafiq* v. *Bhaja*, A.I.R. 1932 Allahabad 199; 1932 Allahabad Law Journal 77.
6. (a) *Munilal* v. *Natwarlal*, AIR 1947 Bom. 337
   (b) *Jogendra Chandra Banerjee* v. *Sachindra Kumar* 40 Calcutta Weekly Notes 399.
   (c) *Narayan* v. *Marayya*, A.I.R. 1951 Madras 605.
   (d) *Jeevraj v. Lal Chand*, A.I.R. 1969 Rajasthan 192.
7. *Mahadev* v. *Shivraj* I.L.R. 41 Allahabad 169 (F.B.).
8. *Lakshmi Bai* v. *Ganesh*, I.L.R. 25 Bombay 373.
9. Contrast *Ram Prasad* v. *Parshottam*, A.I.R. 1937 Allahabad 256 (Full Bench, with *Saidllan* v. *Daru*, A.I.R. 1931 Lahore 4.).
10. *Habibul Rahaman* v. *Anwar Dhan*, AIR 1934 Pat. 629 630 (D.B.).

as a condition that the debtor shall relieve him from the apprehension *that the debt may be barred by limitation* or that the evidence upon which he would be able to rely may not be available at the time of the suit ; and it refers, therefore, to the special bargain where the debtor agrees to give the creditor *evidence* upon which he may rely to enforce the debt, as a condition of a concession by the creditor to the debtor.

27.19. But it may be noted that according to the Nagpur view,[1] mere intention to extend limitation is not enough.

Where the acknowledgement relates to the balance of an account, a nice distinction is often made between an admission of the correctness of an account and an acknowledgement for the purpose of supplying evidence of a debt. Thus, a Bombay case[2] holds that a debtor's admission as to correctness of an account, taken in writing in order that he may not subsequently dispute its correctness, cannot be regarded as an *acknowledgement intended to supply evidence of debt.*

An acknowledgement of the correctness of account does not (for its validity) require a stamp.[3] The debtor's admission of correctness of account taken on a memo, so that he might not subsequently dispute its correctness cannot, according to a Nagpur case,[4] be regarded as an acknowledgement under Article 1 executed to "supply evidence of" the debt.

These decisions rest on a distinction which, at least, is a fine one and which is worth avoiding in a taxing statute.

27.20. To remove the difficulties referred to above, one or more of the following possible alternatives could be considered[5] : **Alternatives for improvement considered.**

(i) The article may be improved on specific points, so as to reduce the difficulty caused in its application by the ingredients relating to (i) intention to supply evidence ; and (ii) absence of promise to pay.

(ii) The provisions of section 35 may be applied to acknowledgements, so as to mitigate the hardship caused by the present position.

(iii) The article itself may be deleted, thus, bringing the position in line with English law.[6]

27.21. Alternative (iii) above may be considered too drastic. But both alternatives (i) and (ii) have much to commend themselves. As regards (i), enough has been said above to bring out the difficulties caused by the present working, which, though well-intentioned, causes unnecessary controversies and suffering. The words "in order to supply evidence of such debt", as well as the proviso excluding a promise to pay, are intended, perhaps, just to indicate broadly the description of the instrument. But these have been over-emphasised, and require to be deleted. Their deletion will create less difficulty than their retention. If the instrument amounts to a bond or agreement, it will be chargeable accordingly. **Recommendation to delete the words "in order to supply evidence" etc. and to amend section 35, proviso (a).**

27.22. At the same time, alternative (ii) above should also be adopted[7], and the provisions of section 35, main paragraph, should be extended to acknowledgements. If our recommendation to liberalise section 35, Proviso is accepted, then, of course, no further change is needed. What we would like to say is that even if article 35, Proviso is not liberalised by accepting our recommendation in *toto,* what we have stated in this Chapter as to article 1 and the application of section 35 should be carried out on its own merits. **Recommendation to liberalise the law with reference to section 35.**

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1 ***Pachkodi Gulab*** v. *Krishnaji,* A.I.R. 1947 Nag. 145, 150

2 ***Manilal*** v. *Natwarlal,* A.I.R. 1947 Bom. 337, 338.

3 ***Ramprabha Ojha*** v. *Bishunath Oja,* A.I.R. 1938 Pat. 139. 140.

4 ***Madhavrao*** v. *Hanmant,* A.I.R. 1941 Nag. 707.

5 These are not necessarily mutually exclusive.

6 See under "English law," *supra.*

7 This, of course, involves amendment of section 35, roviso (a). See recommendation as to that section.

27.23. We had in our Questionnaire[1] put a Question whether article should not be totally deleted, having regard to the practical difficulties caused. While some replies have expressed agreement with the suggestion for deletion, some have not. We appreciate that this would be too radical a course.

But we do consider it necessary to recommend such modifications as would take the case outside the stringent provision in section 35, proviso (a).

Expression "Written or signed".

27.23A. Let us now deal with a verbal point. Article 1 levies duty on an acknowledgement "written or signed" by the person acknowledging. There is a small discrepancy between this article and the charging section. Section 3 is the charging section, and an instrument is chargeable thereunder with duty if it is "executed". "Executed" and "execution" are defined in section 2(12) as "signed" and "signature" respectively. A document, though not executed, may yet be an instrument[2]; but is not chargeable with duty. Article 1 refers to acknowledgement as being "written or signed by or on behalf of the debtor". Now, an acknowledgement which is "signed by or on behalf of the debtor", is duly "executed", and, in this respect, the reference to "signed" does not create any substantial discrepancy,—though there is no reason for not employing the expression "executed". But, in so far as mere "writing" attracts duty in respect of an acknowledgement (article 1), there is a discrepancy between section 3 read with section 2(12) (on the one hand) and article 1 (on the other hand).

Recommendation to substitute the word "executed."

27.24. This discrepancy should be rectified by substituting, in article 1, for the words "written or signed", the word "executed"[3]. An acknowledgement which is only written by or on behalf of the debtor should not become liable to stamp duty until it is signed. It may, in this connection, be noted that the word "executed" is used in some other articles[4], and, for the sake of uniformity of language, wherever the word "signed" is used, it should be changed to "executed"[5]. We may note that such an amendment has been approved by most replies to our Questionnaire[6].

Increase of amount.

27.24A. We also recommend that the amount "twenty rupees" should be increased to hundred rupees, having regard to the present purchasing power of the rupee.

Recommendation.

27.25. The following re-draft of article 1 is recommended, in the light of the above discussion and subject to what we have stated above relating to the points that should not be carried out if section 35, proviso is revised according to our recommendation.

	Proper Stamp duty
"1. ACKNOWLEDGEMENT of a debt exceeding one hundred rupees in amount or value, *executed by*, or on behalf of, a debtor.....in any book (other than a banker's passbook) or on a separate piece of paper when such book or paper is left in the Creditor's possession....	*Ten naye paise.*

1. Question 76(a).
2. In re the Application of Chet Pa (1903), 22 I.C. 75, 76 (F.B.) (Lower Burma.)
3. Compare recommendations as to articles 28 and 42.
4. Article 22 and 48.
5. See also recommendation as to articles 28 and 42.
6. Q. 76(b).

CHAPTER 28

ARTICLES 2 TO 4

28.1. Article 2 levies a duty on an administration bond. The article does not define the expression "Administration Bond" ; Mulla defines[1] it as "a Bond with one or more sureties (unless sureties are dispensed with), which must be given for the due collection, getting in and administration of the estate of the deceased, by any person to whom letters of administration are granted". It should, however, be noted that an administration bond can be demanded even otherwise than proceedings for the grant of *letters of administration*. For example, there may be a suit for administration[2-3]. Forms of plaints in such suits are given in the Code of Civil Procedure[4]. Article 2 Introductory.

There does not appear to be any case law on this article, raising doubts.

28.2. The reference in the Article to section 256 of the Indian Succession Act, 1865, to section 78 of the Probate and Administration Act, 1861, and to Sections 9 and 10 of the succession Certificate Act, 1889, must now be read as a reference to the Indian Succession Act, 1925, and to sections 291, 375 and 376 of that Act respectively. Recommendation to substitute references to the Indian Succession Act, 1925.

Administration bonds include, therefore, bonds under sections 291, 375 and 376 of the Indian Succession Act, 1925, and section 6 of the Government Savings Act, 1873. The article should be so amended.

28.3. Article 3 levies a duty on an adoption deed, that is to say, an instrument (other than a will) recording an adoption or conferring or purporting to confer an authority to adopt. Article 3.

History of the article is of interest. In the previous Stamp Act of 1879[5], the relevant article provided that "an instrument (other than a will) conferring or purporting to confer an authority to adopt", was liable to stamp duty. Under the 1879 Act, thus, *the record of an adoption* was not chargeable with stamp duty. In two Bombay cases[6] decided under that Act, the document declared that the adopted son was to be the heir to the interest of the adoptive father in the undivided family property, but the court held that no stamp duty was chargeable on this instrument.

As regards the present Act, the following extract from the proceedings of the Legislature is of interest[7].

"It has been pointed out, that adoption is a religious ceremony, and under these circumstances it ought to be free from any duty. We perfectly admit it, but what I desire to point out is, that we do not in any way levy a duty upon adoption. So far as adoption is a religious ceremony, it goes free, naturally and inevitably, but if a deed of adoption is drawn up which is to be used as a document of title to property, it is then, and only then, that the duty is levied, not upon the adoption but upon the deed which records it, and which is meant to be effective as an instrument creating a right to property".

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1. Mulla, Indian Stamp Act (6th Edition), p. 202.
2. Order 20, Rule, 13, Code of Civil Procedure, 1908,
3. Cf. *Shtyprasad* v. *Prayag Kumar*, A.I.R. 1936 Cal. 39.
4. Code of Civil Procedure, 1808, Schedule 1, Appendix A, Forms 41—43.
5. Stamp Act, 1879, Schedule I, Article 38.
6. (a) In the matter of Ambai, (1889) I.L.R. 13 Bom. 280;
   (b) In the matter of Hanmappa, (1889) 13 Bom. 281.
7. Sir James Westland's Speech (1898).

Case-Law.

28.4. There are not many reported cases on the section. The expression "recording", as used in this article, means, according to one Lahore case[1],—

> "committing to writing an authentic evidence of a matter having legal importance, evidence of which is thus preserved and may be appealed to in case of dispute. It is not legally necessary that the matter and the record thereof should be contemporaneous ; there may be cases in which a fact is reduced to writing as authentic evidence thereof long after it came into existence."

The deed in this case referred to the adopted son as the successor of all the property of the adoptive father, but no reference to this part of the deed was made by the court in deciding whether stamp duty was payable on the deed.

No change.

28.5. Article 3, of course, does not assume that a deed of adoption, or an authority to adopt, is required by law. In fact, under the Hindu Adoptions Act, a deed is not required—nor is it sufficient. It is, therefore, in very rare cases that article 3 will be attracted. However, it is not necessary to disturb the article on this ground.

Article 4—Affidavit.

28.6. Article 4 levies a duty of one rupee on an affidavit, including an affirmation or declaration in the case of persons by law allowed to affirm or declare instead of swearing. It provides for the following exemptions :

Affidavit or declaration in writing when made—

"(a) as a condition of enrolment under the Indian Army Act, 1911, or the Indian Air Force Act, 1932 ;

(b) for the immediate purpose of being filed or used in any Court or before the officer of any Court ; or

(c) for the sole purpose of enabling any person to receive any pension or charitable allowance".

The Act does not define the expression "affidavit".

28.7. In the U.P. amended article 4 runs as below[2] :—

"Affidavit, including an affirmation or declaration in the case of persons by law allowed to affirm or declare instead of swearing—

(a) for the immediate purpose of being filed or used in any Court or before an officer of any Court.....one Rupee ;

(b) in any other case.....Four Rupees and fifty paisa.

Exemptions—Affidavit or declaration in writing when made—

(a) as a condition of enrolment under the Army Act, 1950, the Air Force Act, 1950 or the Navy Act, 1957, or

(b) for the sole purpose of enabling any person to receive any pension or charitable allowance[3];

Meaning of "affidavit"—recommendation for amendment.

28.8. In this article, the words "including an affirmation or declaration in case of persons by law allowed to affirm or declare instead of swearing", seem to have been modelled on the lines of the present definition of "affidavit" in the General Clauses Act[4]. We have, in our Report on the General Clauses Act[5], discussed at length, how the definition in the General Clauses Act is inaccurate. An 'affidavit' really means a written statement made on oath or solemn affirmation, etc. and not the affirmation itself. For this reason, in our Report on that Act, we have

1. Labh Singh v. Mehr Singh, A.I.R. (1932) Lah. 118, 120 (S.B.)
2. U.P. Taxation Law Amendment Act (U.P. Act 11 of 1969)
3. See *Ramashanker* v. *Collector*, A.I.R. 1971 All 287
4. Section 3(3), General Clauses Act, 1897.
5. 60th Report, General Clauses Act, paragraphs 3.4 to 3.8, relating to section 3(3)—'affidavit.'

recommended a revised definition of "affidavit", as meaning 'a statement in writing purporting to be a statement of fact, signed by the person making it and confirmed by him on oath'. Similar phraseology should be used in article 4 of the Stamp Act also, and we recommend accordingly.

Exemption(a)—recommendation to substitute reference to current Army Act and to add Navy Act, 1957.

28.9. Exemption (a) below the article refers to the Indian Army Act, 1911, and the Indian Air Force Act, 1932, in place of which references to the relevant current Acts should be substituted. These are—the Army Act, 1950, and the Air Force Act, 1950. The Navy Act, 1957, should also be mentioned.

Exemption (b) to be defined.

28.10. Exemption (b) below article 4 exempts, from stamp duty, affidavits for immediate use in court. When the affidavit is filed in support of an application, the application has usually to bear court fees.

With reference to the expression "immediate" it has been held that[1], by virtue of exemption (b), affidavits made with the intention of filing in court are not subject to stamp duty, even though they are sowrn at a different place (i.e. not in the place where the court is situated), and are filed in the court on a later date. The word 'immediate' refers to the purpose of the affidavit, and not to time. Thus, in an Allahabad case[2], an affidavit for a pending proceeding in Meerut, sworn at Bombay and filed in a Meerut Court after three weeks, was held to be exempt.

28.11. In Bihar and Andhra Pradesh, however, this exemption has been deleted,—in the former with effect from 31st March, 1958, and in the latter, by Act 26 of 1965. In the U.P. the exemption has been removed and duty levied, although the duty is less. In an Andhra Pradesh case[3], the High Court made the deletion of this exemption for affidavits, sworn or declared for the immediate purpose of filing in court, liable to stamp duty under article 4. The High Court, however, agreed with counsel's argument that this would make litigation costly, and would also cause practical difficulties and hardship to the litigant public and lawyers.

We agree with the observations of the Andhra Pradesh High Court. The exemption should not, therefore, be deleted.

We are further of the opinion that in view of the difficulty caused by the word "immediate" in exemption (b), that word should be replaced by "sole". When the affidavit is filed in court, it will usually accompany an application, and the application will be chargeable with court fee.

Recommendation.

28.12. In the light of the above discussion, we recommend that the article should be revised as under :

> "4. AFFIDAVIT, that is to say, a statement in writing purporting to be a statement of fact, signed by the person making it and confirmed by him by oath, or, in the case of person by law allowed to affirm instead of swearing, by affirmation.
>
> "Exemptions
>
> Affidavit or declaration in writing when made—
>
> (a) as a condition of enrolment under the Army Act, 1950, the Navy Act, 1957 or the Air Force Act, 1950 ;
>
> (b) for the sole purpose of being filed or used in any court or before the officer of any court ; or
>
> (c) for the sole purpose of enabling any person to receive any pension or charitable allowance."

We may mention that the proposed amendment has been approved by most replies to our Questionnaire[4].

1. *In the application of Sheshamme*, (1888) I.L.R. 12 Bom. 276.
2. *Siri Kishan Das* v. *Mohd. Nazir*, A.I.R. 1947 All. 37 (F.B.)
3. *Sambasiya raju* v. *Chandrayya*, A.I.R. 1967 A.P. 87
4. Q. 77.

Appendix to Chapter on

Article 4—"Affidavit"

Regarding exemption (a).

The Army Act, 1950[1] and the Air Force Act, 1950[2] provide for the form of oath or affirmation of allegiance and obedience to be taken by a person who is reported fit for duty or has completed the prescribed period of probation after enrolment. Under the Army and Air Force Acts, the oath or affirmation is taken by a person who is to be enlisted, *i.e.*, (a) all persons enrolled as combatants, (a) all persons of non-commissioned or acting non-commissioned rank and (c) all other persons prescribed by the Central Government.

They Navy Act, 1957[3] provides for the *oath of allegiance and obedience* that every officer and every seaman has to take before the Commanding Officer of the ship to which he belongs, as soon as may be after appointment or enrolment.

The nature of the oath is the same under all the three Acts, viz., allegiance to the Constitution and obeying orders of the superior officer.

The oath of affirmation to be taken by a person under the Navy Act seems to be for *every* officer or seaman who is appointed or enrolled. In this respect, thus the Navy Act would be wider than that under the Army or Air Force Acts, as under the latter two Acts, oath or affirmation has to be taken *only by* those persons who are to be attested after he is reported fit for duty or after the period of probation.

1. Section 17(2), Army Act, 1950.
2. Section 17(2), Air Force Act, 1950.
3. Section 13, Navy Act, 1957.

CHAPTER 29

ARTICLE 5

29.1. Article 5 levies duty on an agreement or a memorandum of agreement. There are three clauses in the article, and three exemptions. The exemptions are important. Introductory

29.2. The expression "agreement", used in the article could have a wide scope. In a Lahore case[1], the Court held that a written promise to pay a timebarred debt coming within section 25(3) of the Contract Act is not a "bond". The High Court had, however, no occasion to consider whether it was an "agreement". In a Calcutta case[2], the defendants had executed a document which stated the amount due, and the rate of interest, and "stipulated time for payment". The Court held that though this was not a promissory note, it was an agreement to pay, and therefore, chargeable with duty under article 5. Meaning of "agreement".

29.3. These points may not recur often, and therefore, do not call for any clarification. But there are certain points relating to Exemption (a), which should be considered. This exemption relates to the "sale" of goods or merchandise. The Sale of Goods Act[3] defines a "contract of sale of goods" as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Thus, even where property in the goods is actually transferred to the buyer, the transaction is called a *contract* of sale of goods. Apparently, for this reason, article 5 assumes that an instrument relating to a *completed* sale is also an agreement,—see exemption (a). Although such a contract may not be an agreement "for the sale" of goods, it will clearly be an agreement *relating* to the sale of goods within exemption (a). Such an instrument is assumed to come under article 5, but it will be covered by Exemption (a) and will, therefore, be exempt from duty[4]. Such an instrument will also be a "conveyance", as a conveyance on sale is expressly included in the definition of a "conveyance"[5]. But, since it is otherwise provided for, article 23 relating to "conveyance" will not apply to it. Exemption (a)— Meaning of "sale."

Where the document is a memorandum of a *completed sale,* it will be a memorandum of an agreement relating to the sale of goods, and, as such, will be[6] within exemption (a), even if it is chargeable as "agreement".

29.4. A more important question arises from the words "for or relating to the sale of goods or merchandise *exclusively*", which occur in the exemption (a). The question to be considered here is, whether the word "exclusively" governs the entire clause in the exemption, or only the words "goods or merchandise". Difficulty caused by the word "exclusively in exemption (a).

Difficulty arises when the same instrument combines a sale of goods and a mortgage. The majority of the full Bench of the Allahabad High Court in one case[7] has held, that the word "exclusively" governs the phrase "goods or merchandise", and, therefore, an agreement for the sale of goods or merchandise is exempt from stamp duty, even though the instrument evidences certain other transactions also pertaining to goods or merchandise (e.g., a mortgage). Verma J. in his dissenting judgment however, held that the exemption applied only if the instrument is so framed as to amount to a mere agreement to sell goods and has not got any other

1. *David Sutherland Clerk* v. *Rose Crimshew*, A.I.R. 1923 Lah. 481, 483.
2. *Prasana Kumar* v. *Panaulia*, A.I.R. 1923 Cal. 659, 661 (D.B.).
3. Section 4, Sale of Goods Act, 1930.
4. A separate recommendation is being made as regards the effect of specific exemptions in one article on chargeability under another article.
5. Section 2(10), Stamp Act.
6. *Raghubar Dayal* v. *Emperor*, A.I.R. 1934 All. 201.
7. *L.H. Sugar Factory* v. *Moti*, A.I.R. 1941 All. 243 (F.B.).

characteristics. Agreeing with the minority view in this case, the Patna High Court has held[1] that a similar document is not covered by the exemption, and is chargeable as an agreement. In the Patna case, the document combined the characteristics of a sale as well as of a mortgage. It was held that the word "exclusively" governs the entire clause, and not only the words "goods or merchandise."

29.5. In the Allahabad case, the facts were somewhat complicated, because, by the same document, the executant executed a hypothecation of the sugarcane crops and also promised to sell the sugarcane at a specified sum as advanced on interest by the Sugar Factories Ltd. The price of the sugarcane supplied was to be set off against the loan, and the surplus of the loan was to be paid by the executant, interest free. The majority took the view that the document did not lose its character of "agreement" or the right to claim exemption under exemption (a) merely because it also contained the hypothecation, of course, in so far as it contained the hypothecation, it was chargeable with duty. But the minority (Varma and Mulla JJ.) took the view that the exemption would apply only if the instrument is so framed as to amount to a mere agreement to sell goods or merchandise and possesses no other characteristics. The majority pointed out that if the executant had executed two agreements separately, he would have to pay the stamp duty only on the instrument of mortgage. There is no reason why the position should be worse for the executant when he combines the mortgage and the sale in one instrument. As to this, the answer of the minority was that the frame of the instrument does matter in stamp law.

29.6 The Patna High Court has agreed[2] with the minority view of the Allahabad High Court as already stated.

The Rajasthan High Court has held[3] that a document which did not exclusively relate to the sale of goods did not come within this exemption and was chargeable with duty. Here, the document relating to the sale of a truck provided for payment of price in instalments, and also for interest on the unpaid price. It also entitled the seller to seize the truck, if instalments were not paid in time, and to sell it thereafter, The document was held not to be exempt, because the right to seize the truck was not a statutory right of the seller, and such terms were in addition to the agreement relating to the sale of goods. It was therefore taxable as an agreement.

Recommendation to amend Exemption (a) so as to delete the word "exclusively."

29.7. Thus, there is a conflict of views, and the need for clarification is obvious.

A decision on the question, what should be the law, requires an examination of the policy of the exemption. In our opinion, the policy of the legislature appears to be not to tax an agreement which is for the sale of goods or merchandise. Such sales should be capable of being effected without any formality like stamping, and the loss of revenue that might be entailed by the exemption is offset by the convenience of speedy transfer of the goods or merchandise.

This reason holds good equality where there is one instrument, as where there are two instruments.[4]

It will be proper to observe that if the Legislature intended to confine the operation of the exemption only to agreements *simpliciter* for the sale of goods or merchandise, the proper place for the word "exclusively" would not have been at the end. It would have been before the phrase "argeement or memorandum of agreement" and not words in juxtaposition with "goods or merchandise". Further, the phrase "agreement or memorandum of agreement" used in the opening portion of the "exemptions" in Article 5, control the three clauses (a), (b) and (c) of the "exemptions". If the other view is well-founded, the word "exclusively" would have been used not only in one of those clauses, viz. in clause (a), but would have been used in conjunction with the opening words of the "exemptions" quoted above. To give effect to the other view would be to hold that the word "exclusively" controls the opening words "agreement or

1—2. *Sasa Musa Sugar Mills Ltd.* v. *Sugani Pandey*, A.I.R. 1961 Pat. 9, 10, paras 4 and 5 (Rai & Sinha, JJ.).
3. *Poonamchand* v. *Bastiram Deokishan*, A.I.R. 1969 Raj. 313.
4. Para 29.5, *supra*.

memorandum of agreement" and thus governs *all the three clauses of the exemptions*. This is not permissible, having regard to the phraseology of the "exemptions". The opposite view further leads to an obvious anomaly that is illustrated by the following example. Take a case in which a person executes an agreement for the sale of crop and, by a separate instrument of even date, mortgages the same crop. The former instrument will, in that case, admittedly fall within the "exemptions" and he will have to pay stamp duty only on the latter instrument. But if he joins the two transactions in one and the same instrument he will, according to the argument, have to pay the stamp duty provided for not only by Article 41, but also by Article 5(c). This obviously could not have been intended by the Legislature.

Having regard to these considerations, we recommend that Exemption (a) should be amended by revising the last few words as "sale of only goods or only merchandise". This will make the exemption applicable even where the instrument combines as sale and some other transaction, so long as it does not purport to deal with immoveable or intangible property. Of course, even as regards tangible moveable property, it will not include a pure transaction of hypothecation, gift, exchange and the like. But the controversy created by the word "exclusively" will not recur.

We may mention that the suggested amendment has, in substance, been favoured by most of the replies to our Questionnaire.[1]

1. Q. 78.

CHAPTER 30

ARTICLE 6

Introductory.

30.1 While agreements, in general, are dealt with by article 5, special agreements are dealt with in the subsequent article. Article 6 levies duty on an agreement relating to (i) deposit of title-deeds, (ii) pawn, or (iii) pledge. Duty is chargeable on an instrument evidencing an agreement relating to such deposit, pawn or pledge where the deposit etc. has been made by way of security (i) for money, advanced or to be advanced by way of loan, or (ii) for an existing or future debt. If it is an agreement relating to deposit of title deeds, the title deeds must relate to property other than a marketable security[1]. If it is an instrument of pawn or pledge, the pawn or pledge must be of movable property.

The article is not confined to loans on security of movable property. But, in practice, most instruments falling under the article relate to movable property.

Transactions by way of security.

30.2. The principal legal transactions as a result of which a person may create a security in favour of another, so far as movable property is concerned, are mortgage, charge, pledge and hypothecation. In mortgage, there is a conveyance of an interest[2] in property as security for the payment of a debt or for the discharge of some other obligation[3]. In a charge, there is no conveyance of interest in the property, but the charge simply confers upon the charge-holder certain rights over the property. Mortgages are separately dealt with by article 40.

Pledge.

30.3. A pledge is a species of bailment. In the leading English case on bailments,—*Coggs* v. *Bernard*[4]—Holt, C.J., enumerated various types of bailments, of which the fourth was *vadium*, that is, delivery of goods by a debtor to his creditor, to be kept by him until the debt is discharged. A pledge is to be distinguished from a mortgage, inasmuch as there is no transfer of property in the goods and, accordingly, no incidental right of foreclosure. This distinction was strikingly illustrated in one of the English cases[5], where the pledge of a picture of Madonna and the child, attributed to a famous painter , was refused a foreclosure order, there being no mortgage.

Under the Indian Contract Act, the bailment of goods as security for payment of a debt or performance of a promise is called a pledge[6]. It should be pointed out that that Act uses the expressions "pawn" and "pledge" as equivalents of each other. In fact, in the definition of "pledge" in that Act, the bailor is called the pawnor, and the bailee is called the pawnee. The element of bailment (transfer of possession) is an essential element of pledge[7].

A "pawn" is really another name for a pledge, though it is sometimes taken as indicating those transactions of pledge where the person taking pledge does so *as a matter of business*. In England, legislation relating to pawn-brokers imposes certain restrictions on this kind of business.

30.4. A mere license to take possession, given to the creditor, is not a pledge[8], though it may amount to hypothecation. The twin elements requisite for a pledge—(i) security, and (ii) delivery of possession—furnish a basis for distinguishing it from other allied transections.

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[1] As to deposits of marketable securities, see section 23A.
[2] Compare the definition of "mortgage deed" in section 2(17).
[3] Lord Chorley, Law of Banking (1974), page 289.
[4] *Coggs.* v. *Befnard*, (1703) 2 Ltd. Rayni, 909.
[5] *Fraser* v. *Byas*, (1895) 11 Times Law Reports 481.
[6] Section 172, Indian Contract Act, 1872.
[7] *Lallan Prasad* v. *Rahmat Ali*, A.I.R. 1967 S.C. 1322; (1967) 2 S.C.R. 233
[8] *Ex parte Persons*, 16 Q.B.D. 532.

Pledge Intermediate between lien and mortgage.

30.5. In his judgment *in Hallday* v. *Holgate*[1], *Willes*, J., described a pledge as a security intermediate between a lien and a mortgage. By contract, a deposit of goods is made a security for a debt, but the right to the property vests in the pledge only *so far as is necessary to secure the debt.*

Hypothecation.

30.6. Mortgage, charge and pledge were well known to common law lawyers. Hypothecation on other hand, is a civil law institution. The word is derived from "hypotheca". It was introduced in England through international trade. It was treated as effective in equity, being regarded as the equivalent of a charge. It is a legal transaction as a result of which goods are made available as security for a debt wthout transferring either the property in them or the possession to the lender[2]. It may, in brief be described as a security for a debt, which security remains in the possession of a debtor.

The security is granted by means of a letter of hypothecation. There are two principal situations where hypothecation is convenient, because a pledge is not practicable. The first is when the goods are temporarily in the custody of third parties[3]. The second is where the goods are stored in the customer's own warehouse, which cannot be sealed off in such a way as to enable the bank to become a pledgee. Where it is practicable to seal off the godown, the practice is to hand over the keys to the bank, in order to give the bank constructive possession of the goods,—thereby creating a pledge[4].

Lien.

30.7. A lien, answering to the *tacita hypotheca* of the Civil Law is a right conferred by law, and not by contract, upon one man to retain possession of, or to have a charge upon, property real or personal belonging to another, until certain demands are satisfied[5].

Distinction between hypothecation and pledge.

30.8. We have adverted to the distinction between hypothecation and pledge. This has been noted in a few Indian decisions[6], and is of importance for the stamp law, the precise charging article being different in the case of a hypothecation without delivery of possession. Thus, in an Allahabad case[7], it was contended that the instrument in question was a hypothecation of movable property, falling within the notification[8] remiting the duty on an unattested deed of hypothecation, and not a pledge falling within Article 6. The contention was, however, negatived, on the ground that the goods were *handed over* to the Bank in whose favour the document was executed, and there was, therefore, a pledge and not a mere hypothecation.

History of the article.

30.9. This distinction has figured in the history of the Act also. In the corresponding Article 29 of the Stamp Act of 1879, the word "hypothecation" was used, while in the present article the words "pawn or pledge" occur. The article in the 1879 Act could, on its language, be applicable even where possession was not delivered. But a Calcutta case[9] took the view that the word "hypothecation" was used only in the sense of a pledge, and hence, in the absence of a provision for delivery of possession, that article would not apply. The words "pawn or pledge" were substituted in article 6 when the Act was revised in 1899. Thus, a hypothecation of movable property, where possession is not given to the creditor, does not fall under article 6 though it may fall under "mortgage" (article 40).

Security for future Loans—Amendment of 1904.

30.10. An amendment of 1904, relevant to another point under article 6, may also be noticed. Article 6(2) (as amended in 1904) includes not only loans which are contemporaneous with the agreement (as held to be the case under[10] the original article where the words "loan made" were used), but applies also to the case where the security is for money to be advanced in future. The effect of the amendment is to place all such instruments on the same footing, whether

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[1] *Halliday* v. *Holgate*, (1868) Law Reports 3 Exch. 399.
[2] Lord Chorley, Law of Banking (1974), page 291.
[3] See, *Re Hamilton Young and Co.*, (1905) 2 King's Bench 772.
[4] Lod Chorley, Law of Banking (1974), page 322.
[5] Fisher, Law of Mortgage (6th Ed.), para 5 cited by Donough, Stamp Act, Commentary on Article 6.
[6] (a) *Nadar Bank Ltd.* v. *Canada Bank Ltd.*, A.I.R. 1961 Mad. 326.
(b) *Simla Banking Co.* v. *Pritams*, A.I.R. 1960 Punj. 42.
[7] *Sri Harish Chandra* v. *Punjab National Bank Ltd.*, A.I.R. 1958 All. 864.
[8] See para 30.11, *infra*.
[9] *Ko Shway Aung* v. *Strang Steel & Co.*, (1894) I.L.R. 21 Cal. 244.
[10] *Queen Empress V. Debendra Rrishna Mitter*, (1890) I.L.R. 27 Cal 87

or not their execution is simultaneous with the loan advanced. On this point, of course, no modification of the article is required.

Effect of reductions and remissions.

30.11. For a complete statement of the position relevant to article 6, the effect of certain reductions and remissions should also be taken into account, though they ostensibly relate to article 40. The levy of duty on hypothecation under "mortagage" (article 40) created hardship and Government had to issue certain remissions and reductions, now consolidated in a notification of 1931. The following reductions and remissions should, therefore, be noted[1] :—

> "98. *Attested instrument* evidencing an agreement relating to the hypothecation of movable property where such hypothecation has been made by way of security for the repayment of money advanced or to be advanced by way of loan, or of an existing or future debt—Duty reduced to the amount chargeable on a bill of exchange under article No. 13(b) of Schedule I of the Stamp Act, 1899, for the amount secured, if such loan or debt is repayable on demand or more than three months from the date of the instrument; and to half that amount if such loan or debt is repayable not more than three months from the date of the instrument.
>
> 99. *Unattested instrument* evidencing an agreement relating to the hypothecation of movable property, where such hypothecation of movable property, has been made by way of security for the repayment of money advanced or to be advanced by way of loan of an existing or future debt.".[2]

Effect of the notification.

30.12. The notification deals with two cases. In the first case, the duty is reduced, while in the second case, it is remitted.

The net result of these reductions and remissions is that an instrument of hypothecation, without delivery of possession, though ostensibly under the article relating to mortgage[3],—(i) if attested, is leviable with the duty on a pledge,—that is the practical effect, since the terms of article 6 are identical with the terms as in the notification mentioned above; (ii) if unattested, is totally exempt by virtue of the notification.

In other words, a person concerned with an attested instrument of hypothecation has first to read article 40, and then to read the notification referred to above, and then he virtually comes back to article 6. Such instruments are nominally chargeable under article 40, but actually under article 6. This is a somewhat complicated position. (An unattested instrument of hypothecation without delivery is exempt from duty).

Recommendation to add instrument of hypothecation in article 6.

30.13. To simplify the position, we recommend that (a) an instrument of hypothecation without delivery of possession should be added to article 6, (b) an instrument of hypothecation without delivery of possession, if *unattested*, should be added in the exemption under article 6. If attested, it should be chargeable as in the notification. No change of substance will result from such an amendment, which will merely help the citizen by enabling him to ascertain the law from one place.

Recommendation

30.14. We, therefore, recommend that, after the words "pawn or pledge", the words "or hypothecation" be added at four places (three places) in the main article, and one in the Exemption. Consequential changes[4] will be needed in Article 40. Exemption (2), and it may even be advisable to provide expressly in that article that hypothecation of movables shall not be charged as a mortgage.

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire[5].

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[1] Government of India, Notification of 1931, items 98-99.
[2] Duty remitted.
[3] Article 40.
[4] Article 40 to be amended.
[5] Question 79

CHAPTER 31

ARTICLES 7—12

31.1 Article 7 deals with two kinds of powers, viz., (i) power to appoint trustees, and (ii) power to appoint property. It provides that an instrument, not being a will, by which such power is exercised, is chargeable with a duty of fifteen rupees. Article 7.

Where a person is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.[1]

The case law on this article reveals no serious difficulty.

An Allahabad case[2] decides what is an "appointment".

A Bombay case[3] holds that where the executors of a will, holding property in trust for a charity, execute a deed appointing the property to an orphanage, the deed is chargeable under this Article. A Calcutta case[4] decides that where the Panch of a community is given power to remove a Shebait and to appoint new Shebaits, duty is chargeable, when a new Shebait is appointed.

We have no further comments on the article.

31.2 Article 8 levies duty on appraisement or valuation. An appraisement is distinguished from an award[5] though the duty is the same on both. An award requires a judicial determination, which an appraisement does not. Article 8.

Exemption (a) to the article is based on an early English decision[6], that an appraisement made for the information of one party only and not in any manner binding between the parties is not liable to stamp duty. In the same case[7] Lord Ellenborough C.J. said :

> "An 'appraiser' is a person who values or appraises any estate or property real or personal, or any interest, in possession or otherwise in any estate or property, or any goods, merchandise or effects, for or in expectation of any hire, gain, fee or reward (46 Geo. III, c. 43, S. 4). This has been interpreted to mean a person who bears the character or follows the calling or occupation of an appraiser."

No changes are required in this section on which there is very little Indian case-law.

31.3 Under article 9, an apprenticeship deed is chargeable to duty (5 rupees). It includes every writing relating to service or tuition of any apprentice or servant, placed with any master to learn any profession, trade or employment. Article 9—Apprenticeship deed.

A deed of articles of clerkship by which a person is articles to any attorney, is chargeable with a much higher duty[8] (Rs. 250).

The exemption under article 9 refers to the Apprentices Act, 1850, which has been replaced. The proper reference should be substituted by the Apprentices Act, 1961. Magistrates no longer work as apprentices, and this part of the exemption should be omitted. We recommend that the article should be so amended. Recommendation

31.4 Article 10 levies duty on the articles of association of a Company. It has been held[9], that a special resolution altering the articles of association of a company is not liable to duty, even Article 10.

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[1] See section 69, Explanation, Indian Succession Act, 1925.
[2] *In re reference under section* 57, *Stamp Act*, A.I.R. 1956 All. 25 (S.B.).
[3] *In re Abdulla Haji Dawood Bomla Orphanage*, (1911) I.L.R. 35 Bom. 444.
[4] *Amritlal* v. *Gassain Ganpat*, A.I.R. 1919 Cal. 730, 736, 737.
[5] Article 12.
[6] *Atkinson* v. *Fell*, (1860) 5 M & S 240; also see *jackson* v. *Stopherd*, (1834) 3 Law Journal Ex. 95.
[7] *Atkinson* v. *Fell*, (1860) 5 M & S 240.
[8] Article 11.
[9] *In the matter of New Egerton Mills*, (1900) I.L.R. 12 All. 131.

if the special resolution supersedes all the articles, and substitutes another set of articles in their place.

Another article in the Schedule levies duty on a memorandum of association[1]. That article prescribes a lower rate of duty when the memorandum of association is accompanied by articles of association.

Recommendation.

31.5. The exemption below article 10 refers to "Articles of any Association not formed for profit and registered under section 26 of the Indian Companies Act, 1882". This should now refer to section 25, Companies Act, 1956, which is the provision corresponding to section 26, Companies Act, 1882. We recommend that article 10 should be so amended.

Article 11 to be deleted.

31.6. Article 11 levies a duty of 250 rupees on Articles of clerkship or contract whereby any person first becomes bound to serve as a clerk in order to his admission as an attorney in any High Court. Now that the system of attorneys is being abolished, this article should be deleted. We recommend accordingly[2].

Article 12.

31.7. Article 12 levies duty on an "Award", that is to say, any decision in writing by an arbitrator or umpire, not being an award directing a partition, on a reference "made otherwise than by an order of the Court in the course of a suit".

The article is silent on the question whether a *written agreement* of arbitration is required. It would be of interest to note that section 2(a) of the Arbitration Act, 1940, defines an arbitration agreement as a *written* agreement to submit present or future differences to arbitration, whether an arbitrator is named thereunder or not. Section 2(b) of the Arbitration Act defines an "award" as meaning an arbitration award. Thus, under the Arbitration Act, there can be no award without an agreement for arbitration is writing[3]. Every decision by an arbitrator is not an award. It must be a decision on a written arbitration agreement.

This aspect of the matter is not brought out very clearly in article 12 and the result is that controversy arises as to whether an arbitrator's award in writing, given on an *oral agreement* for reference, falls within the article. This question usually arises where there is a family arrangement as aresult of an award[4]. It is proper that the expression "award" in article 12 should be given the same meaning as under the Arbitration Act. That in fact, has been the judicial interpretation[4] in a recent case. It is also obvious that in article 12 the words "on a reference made otherwise than by an order of the Court in the course of a suit" govern the whole article, and are not to be read merely with "award directing a partition".

Recommendation.

31.8. In the light of the above discussion, we recommend that article 12 should be revised as under :

> "12. Award, that is to say, any decision in writing by an arbitrator or umpire, on a reference made otherwise than by an order of the Court in the course of a suit, *being an award made as a result of a written agreement to submit present or future differences to arbitration* and not being an award directing a partition.".

Most replies to our Questionnaire favour such an amendment.[5]

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[1] Article 39.

[2] Latest amendment to the Advocates Act, 1961.

[3] *Mohanlal* v. *Bishashar Lal*, A.I.R. 1947 Bom. 268.

[4] See *G. Chinna Kondaiah* v. *G. Redda Kondaiah*, A.I.R. 1974 A.P. 238 (issue).

[5] Q. 80 of the Questionnaire.

CHAPTER 32

ARTICLES 13-14

32.1. Article 13 levies duty on a bill of Exchange (other than one payable on demand). The duty varies according to the period within which the Bill is payable (after date or sight). It also varies according to the value. Article 13.

It is not necessary to go into details of the scheme prescribed by the article for calculation of duties. But even a cursory reading of the article will show that, in the first place, there is a difference in the duty depending on whether the bill is payable within 3 months after date or sight, or whether it is payable within 6 months after date or sight, or whether it is payable within 9 months after date or sight, or whether it is payable within one year after date or sight, or whether it is payable at more than one year after date or sight. After the date of payability is so ascertained, the next step is to have a look at the amount of the bill. The amount of the duty varies according as the bill is for Rs. 500 or less, Rs. 1000 or less, and more than rupees one thousand. In the first two cases (Rs. 500 or less, or one thousand or less), the duty is fixed, while in the last mentioned cases, the duty is *ad valorem*.

Prima facie, this appears to be a complex scheme. A bill of exchange is a commercial document and negotiable. If, therefore, a simple provision could be devised which would reduce the calculations and labour necessitated by the present complexity, the attempt would be worthwhile. It was with this object in view that we put a specific question in our Questionnaire[1], setting out the scheme which, we thought, could be considered. Since many of the replies received agree with the scheme which, we thought, could be considered. Since many of the replies received agree with the scheme proposed by us, we think that it is proper that the suggestion put by us in our Questionnaire should be pursued and carried out.

32.2. It may be noted that in England, now, the duty on an inland bill of exchange or a promissory note has been simplified[2] as follows[3] :— Position in England.

> "Bill of Exchange or Promissory Note of any kind whatsoever (except a bank note)—drawn or expressed to be payable, or actually paid or endorsed, or in any manner negotiated, in the United Kingdom."
>
> s. d. (The duty is 2d)
> 2d

32.3. We, therefore, recommend that in article 13, in clauses (b) and (c) respectively, a duty of 2 rupees 50 paise and 5 rupees for every one thousand rupees should be substituted (for the present duty). A flat duty would be still better, but, will, perhaps, be unacceptable. (The duty has already been reduced by a Government notification to 1/2 of that given in the Act)[4]. Recommendation to revise article 13(b) and (c).

32.3A. It would appear that by a very recent notification,[5] the remission of stamp duty that was granted so far in regard to stamp duty on Bills of Exchange and promissory-notes has been modified. The remission under the previous notification reduced the duty from what is mentioned in article 13(b)(c) to 1/5th thereof. In modification of this remission, the recent notification adopts the proportion of 1/2 of the rate given in the Act. Certain proposals were made in our Questionnaire in regard to these instruments in order to simplify the rate structure so as to avoid elaborate calculations. The rates now require revision in view of the notification which was issued after the Questionnaire.

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[1] Q. 81.
[2] Finance Act, 1961, section 33(1) (Eng.).
[3] The duty (expressed in the previous currency), is 2d.
[4] See reduction of duty notified under S.O. 199 (E), dated 16th March, 1976.
[5] Notification No. S.R.O. 199(E), dated 16th March, 1976.

Hence the rates which should now be recommended for these instruments should be as in the table below. A fresh notification for "usance" notes issued by certain institutions (mentioned in the notification of March 1976) will be necessary.

We may state that principle of suggested scheme has been favoured by many of the replies to our Questionnaire.[1]

32.3B. We would have been happy to have the comments of the Ministry of Finance on this particular point, but as they have not been recovered[2], we have considered it proper to make our recommendations as best as we could. Those comments would have enabled us to work out the implications in greater detail.

This avoids the elaborate calculations which were required in England under the law before the 1961 amendment, and which are still required in India under article 13(b) and 13(c). We see every reason for simplifying the scheme of calculating duty on bills of exchange.

The effect of the proposed change can be thus illustrated by a comparative table. (This is not a draft).

Comparative table

		Present Act[3]		*Proposed*[4-5]	
Article 13. (b)	(i) If payable within three months.				
	(b) if the bill does not exceed Rs. 500	Rs.	0.62½	Rs.	2.50
	upto Rs. 1,000	Rs.	1.25	Rs.	2.50
	for Rs. 2,000	Rs.	2.50	Rs.	5.00
	for Rs. 5,000	Rs.	6.25	Rs.	12.50
	(ii) If payable between 3-6 months.				
	if the bill does not exceed Rs. 500	Rs.	1.25	Rs.	2.50
	for Rs. 1,000	Rs.	2.50	Rs.	2.50
	for Rs. 2,000	Rs.	5.00	Rs.	5.00
	for Rs. 5,000	Rs.	12.50	Rs.	12.50
	(iii) If payable between 6-9 months.				
	if the bill does not exceed Rs. 500	Rs.	1.87½	Rs.	2.50
	for Rs. 1,000	Rs.	3.75	Rs.	2.50
	for Rs. 2,000	Rs.	7.50	Rs.	5.00
	for Rs. 5,000	Rs.	18.75	Rs.	12.50
	(iv) if payable between 9-12 months.				
	if the bill does not exceed Rs. 500	Rs.	2.50	Rs.	2.50
	for Rs. 1,000	Rs.	5.00	Rs.	2.50
	for Rs. 2,000	Rs.	10.00	Rs.	5.00
	for Rs. 5,000	Rs.	25.00	Rs.	12.50
Article 13. (c)	if payable at more than one year.				
	if the bill does not exceed Rs. 500	Rs.	5.00	Rs.	5.00
	for Rs. 1,000	Rs.	10.00	Rs.	5.00
	for Rs. 2,000	Rs.	20.00	Rs.	10.00
	for Rs. 5,000	Rs.	50.00	Rs.	25.00

APPENDIX

Notification S.R.O. 199(E) 16th March 1976.—In exercise of the powers conferred by clause (a) of sub-section (1) of section 9 of the Indian Stamp Act, 1899 (2 of 1899) and in supersession

[1] Question 81.
[2] Our Questionnaire was sent to that Ministry.
[3] In calculating the present duty, the notification of 1976 is to be borne in mind.
[4] The proposed rate is Rs. 2.50 for every 1,000 rupees or part in (b), and Rs. 5 for every 1,000 rupees or part in (c).
[5] A fresh notification for usance notes issued by certain institutions mentioned in the notification of March, 1976 will be required.

of the notifications of the Government of India in the Ministry of Finance (Department of Revenue) No. 15, dated the 15th May, 1957, and No. 6, dated the 14th July, 1961, the Central Government hereby directs that with effect from the 1st June, 1976 the proper stamp duty chargeable on Bills of Exchange specified in items (b) and (c) in article 13 of the First Schedule to the said Act and promissory notes specified in item (b) of article 49 of the said Schedule shall be reduced to one-half of the rates specified against the said items (b) and (c) in the said article 13 :

Provided that the rates of stamp duty mentioned above shall not apply to usance Bills of Exchange or promissory notes drawn or made for securing finance from the Reserve Bank of India, Industrial Finance Corporation of India, Industrial Development Bank of India, State Financial Corporation, Commercial banks and co-operative banks for (a) bona-fide commercial or trade transactions, (b) seasonal agricultural operations or the marketing of crops, or (c) production or marketing activities of cottage and small scale industries and such instruments shall continue to bear the rates of stamp duty at one-fifth of the rates specified against the said items (b) and (c) in the said article 13.

Explanation 1.—For the purposes of the proviso—

(a) the expression "agricultural operations" includes animal husbandry and allied activities jointly undertaken with agricultural operations;

(b) "crops" include products of agricultural operations;

(c) the expression "marketing of crops" including the processing of crops prior to marketing by agricultural producers or any organisation of such producers.

Explanation 2.—The duty chargeable shall, wherever necessary, be rounded off to the next five paise.

[No. 16-F. No. 471/17/76-Cus. VII]
O. P. MEHRA, Dy. Secy.

Article 14—Introductory—Recommendation to add exemption.

32.4. Article 14 imposes a duty on a bill of lading (including a through Bill of lading), subject to certain exemptions. A bill of lading in respect of inland navigation also falls within this article.[1]

There is an important remission granted by the Government which, as already pointed out,[2] should be incorporated in article 13, in so far as it relates to a bill of lading. We, therefore, recommend that the following exemption should be added below article 14 :—

"Exemption.—Bill of lading issued by a railway company or administration or an Inland Steamer Company for the conveyance of goods or animals."

Exemption (a)—Recommendation regarding.

32.5. Exemption (a) to article 14 also requires change. At present, it reads—

"(a) Bill of lading when the goods therein described are received at a place within the limits of any port as defined under the Indian Ports Act, 1889, and are to be delivered at another place within the limits of the same port."

It should be pointed out that the Indian Ports Act, 1889 was replaced in 1908 by the Indian Ports Act, 1908 (15 of 1908). Apart from that, certain Acts dealing with major ports, have also been passed. In view of the above position, we recommend that Exemption (a) should be reworded as follows :

"(a) Bill of lading when the goods therein described are received at a place within the limits of any port as defined under the Indian Ports Act, 1908 or any other Act relating to ports, and are to be delivered at another place within the limits of the same port."

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire[3].

[1] *Reference under the Stamp Act*, (1904) I.L.R. 30 Cal. 565.
[2] See discussion relating to section 2(4), definition of "bill of lading".
[3] Question 82.

CHAPTER 33

ARTICLE 15

Article 15—Conflict of views as to words "not otherwise provided for".

33.1. Article 15 levies duty on a bond. We are not concerned now with the case law as to the meaning of this expression—a matter which we have already dealt with while considering the definitions. Nor do we pause to consider the details of the rate structure as given in the article.

Confining ourselves to the text of the article, we note that there is a difference of opinion as to the interpretation of the words "not being otherwise provided for by this Act," which occur in this article. According to one view,[1] these words mean "not being provided for by any other *provision of this Act dealing with bonds*". According to this view, it is only where the other provision of the Act (under which the instrument falls) *deals with bonds*, that the applicability of this article to the instrument is excluded. It may be noted that there are, in the Schedule, articles dealing with bonds of specific types e.g., Administration-bond (No. 2), Bottomry bond (No. 16), etc. According to this view, it is only where the instrument falls under one of those articles dealing with *specific types of bonds* that it can be held to be "otherwise provided for" within the meaning of article 15.

The other view takes the words "not otherwise provided for" in an unrestricted sense, and simply as meaning, "not provided for in *any other* part of the Act." According to this view, article 15 will not apply to an instrument falling within any other article, irrespective of the question whether such other article deals with bonds or not.[2]

33.2. To illustrate the controversy, let us take an instrument which amounts to a bond as defined by section 2(5) and also to a mortgage deed (article 40). According to the first view, such an instrument is not "otherwise provided for by this Act", and can, therefore, fall under article 15, while, according to the second view, the instrument must be regarded as "otherwise provided for by this Act" and, therefore, as not being within the scope of article 15.

Recommendation.

33.3. Although the express exemption of "debenture" and the Note at the end of the article would seem to support the first view, we are of the opinion that the second view is preferable, because if a document is covered by a specific entry,—in whatever form—it should not be regarded as a bond. Such a construction is more in consonance with the general scheme and intendment of the Act, and with the rule of construction that the specific must exclude the general.

Recommendation.

33.4 It is, in our opinion, desirable to clarify the position, by giving effect to the second view. We, therefore, recommend that for the words, "not being otherwise provided for by this Act or by the Court Fees Act, 1870", the words "not being otherwise provided for by any *provision of this Act whether or not relating to particular types of bonds* or by the Court Fees Act, 1870, *or any enactment corresponding to that Act in force in any part of India*" should be substituted in article 15.

We may add that the views expressed in response to our Questionnaire[3] have, in general, favoured such an amendment.

1. *L. H. Sugar Factory, Pilibhit* v. *Moti*, A.I.R. 1941 All. 243, 258, 266 (per Verma and Mulla, JJ.).
2. *L. H. Sugar Factory, Pilibhit* v. *Moti*, A.I.R. 1941 All. 243, 254, 274 (per Bajpai and Dar, JJ.).
3. *Question* 83.

CHAPTER 34

ARTICLES 16—21

34.1. Article 16 levies duty on "bottomry bonds", (so named after the "bottom" or keel of a ship). **Bottomry bond.—section 16.**

A bottomry bond is a contract in the nature of hypothecation of a ship, as a security for money lent or expended upon her *without reserving any claim against the owner in person*, and usually made by the master-abroad, stipulating that the money advanced, together with the agreed premium, shall be paid within a stipulated number of days after the safe arrival of the vessel at a named port of discharge. The master of a ship has, as an agent of necessity, under certain circumstances, authority[1] to pledge or hypothecate the ship and its cargo as security for the money advanced to be expended upon her. The contract is called "bottomry", and the bond a "*bottomry bond*".

From the language of the article, it appears that it is confined to a bond executed by the master only. Hypothecation of the cargo is called a "respondentia bond".

34.2. The money is lent *only* upon the security of the ship. Hence, where the owner undertook *a personal liability* which was to subsist for a period of about five months from the date of the bond, it was held, that it was not a bottomry bond.[2]

34.2A. It should be noted, that there is no such provision as article 16 in the (English) Stamp Act, 1891. The English Act expressly exempts "instruments for the sale, transfer, or other disposition, either absolutely or by *way of mortgage*, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel". This would cover bottomry-bonds. In India also, a similar exemption has been introduced by section 3(2). Article 16 must, therefore, be read with and subject to section 3(2), the effect of which will be to exclude, from its purview, bonds on all ships registered in the manner indicated by section 3(2), though not others. **No duty in English law.**

34.3. It may be noted, that bottomry bonds were in vogue before the days of submarine cables and wireless communications. Authority had to be given to the masters to act on behalf of the owners and cargo owners when, in emergency, they could not communicate with them. Bottomry-bonds and respondentia bonds are now obsolete[3]. The article however may be left as it is since it may be useful for those exceptional emergencies where wireless fails. **Bottomry bonds now absolete.**

33.4. Article 17 levies a duty of five rupees on instruments of cancellation, (if attested and if not otherwise provided for), including an instrument by which an instrument previously executed is cancelled. The inclusive portion is unnecessary, and should be omitted. We recommend accordingly. **Article 17**

We are also of the view that an instrument cancelling a will should be exempted from tax.

34.5. It should be noted, that an instrument cancelling a will has by notification[4] been expressly exempted from the duty under Article 17. This is an important exemption, and should find place in the Act. As regards the phraseology to be used for incorporating the substance of the notification, the word "cancellation" is used in the notification and could be adopted, though the Indian Succession Act, in its provisions relating to wills, uses the word "revoked".[5] **Recommendation.**

1. Chorley, Law of Shipping (1960), page 178.
2. *Asam Kutha Sahib Mercoyar* v. *Mamanathan Chetti*, (1899) I.L.R. 22 Mad. 26; 8 M.L.J. 159.
3. Chorley, Law of Shipping (1960), page 32.
4. Notification of 1931, item No. 112.
5. Section 62, Indian Succession Act, 1925 (unprivileged wills) and section 72 (privileged wills).

We recommend that the article should be amended on the above points. We may note that such an amendment has been favoured by many replies[1] to our Questionnaire.

Article 18—Introductory.

34.6. Under article 18, stamp duty is levied on a certificate of sale (in respect of each property put up as a separate lot and sold), granted to the purchaser of any property sold by public auction by a civil or revenue court or Collector or other revenue officer.

Position regarding incumbrances.

34.7. Before 1894, there were conflicting decisions as to whether incumbrances should be included in the computation of stamp duty under this article. The majority view was that where property was sold in execution of a decree *subject to an incumbrance*, the amount of stamp duty payable on the sale certificate would be calculated only on the amount of the purchase money, and not on the amount of the purchase money plus the incumbrance.[2] But the Bombay High Court took the view that where property was sold at a court sale subject to a charge, the certificate of sale should bear duty calculated *ad valorem* for the amount of the purchase money, plus the principal mortgage money charged upon the amount.[3] A subsequent case[4] of the same High Court discusses the question how far mortgages *should be entered in the certificate*.—the decision being that they should be entered only if the mortgage is admitted by the party or had been established by a decree or had been declared under section 282 of the Code of 1882 and the sale had been subject to them. The case does not discuss the question of stamp.

To overcome these conflicting views, Act 6 of 1894 added the word "only", after the words "purchase money", in the second column, opposite to clause (c) of the article, and thereby accepted the majority view.

34.8. There is, however, still some difference of opinion in a few Bombay decisions with respect to a *second certificate for sale*, issued when the first certificate is found to be deficient in stamp. Thus, in one case,[5] where a certificate of sale was granted on insufficient stamp, and the insufficient stamp and penalty were ordered to be recovered from the grantee, who wanted a fresh certificate of sale from the civil court, it was held that the civil court having granted a certificate was not bound to grant a fresh certificate so that the grantee might escape the penalty. But in a later case[6] the court said that the earlier case merely decided that the court was not obliged to grant a second certificate. It did not hold that the court could not do so.

34.9. As to the decision in the earlier Bombay case, it is difficult to see how penalty can, with any propriety, be recovered from the grantee when the certificate is prepared and signed by a government officer. The stamp has to be borne by the grantee according to section 29 (f), but, in practice, the stamp too is purchased according to the advice tendered by some officer of the court.

As the point is not found in any recent case, an amendment on the point is not required.

Article 19.

34.10. Article 19 levies a duty on certificate or other document evidencing the right or title of the holder thereof or any other person, either to any shares, scrip or stock in or of any incorporated company or other body corporate or to become proprietor of shares, stock or scrip of any such company or body.

'Share' means share in the share capital of a company, and includes stock except when a distinction between stock and share is expressed or implied.

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1. Q. 84.
2. (a) *Jwalaprasad* v. *Ram Narain*, (1893) I.L.R. 15 All. 107.
   (b) *Reference from the Board of Revenue*, (1884) I.L.R. 10 Cal. 92.
   (c) *Reference under Stamp Act*, s. 49 (1882) I.L.R. 5 Mad. 18 (F.B.).
   (d) *Reference under Stamp Act*, s. 46 (1884) I.L.R. 7 Mad. 421.
3. (a) *Meer Kaisur Khan Marad Khan* v. *Emgrahim Khan Musakhan*. (1891) I.L.R. 15 Bom. 532.
   (b) *Sha Nagin das Jey Chand* v. *Halalkare Nathawa Gheesla* (1881) I.L.R. 5 Bom. 471 (F.B.).
4. *S. C. Chedambarays* v. *Subrao Ram Chandra Yellapur*. (1894), I.L.R. 18 Bom, 1975.
5. *Nandram Matiram* v. *Kacha Bhan*, (1885) I.L.R. 9 Bom. 526.
6. *Collector of Ahmedabad* v. *Rambhan*, A.I.R. 1930 Bom. 392, 394.

Scrips are also in the nature of certificates. When debentures are allotted to subscribers upon terms that the same shall be payable by instalments, a provisional scrip is issued to the subscribers, to be exchanged for a regular debenture after all the instalments are paid up.

34.11. In a Bombay case,[1] a certificate of membership issued by a provident society, insuing the payment of money on the death of the member of the society, was held to be chargeable under article 47 (Policy of insurance), and not under article 19.

There does not appear to be any conflict of decisions or obscruity of language or other serious difficulty with respect to this article.

Article 20.

34.12. Article 20 deals wth a Charter-party, which is any instrument (except an agreement for the hire of a Tug-steamer), whereby a vessel or some specified principal part thereof is let for the specified purposes on the charter, whether the instrument includes a penalty clause or not. A charter party is a contract made between the freighter (i.e. the person who charters or hires the ship or a *part for the carriage of his goods*) and the owner (or the masters or their agent) (the master generally having authority written or implied, from the terms of his employment), containing the terms for freight, and, in this contract, the owners or masters bind themselves, the ship, tackle and furniture that the goods freighted shall be delivered (dangers of the sea excepted), at the place of consignment : and they also covenant to provide seamen, rigging etc. and then equip the ship completely which they also warrant seaworthy. The freighter, on his part, stipulates to pay the freight. A charter party is distinguishable from a bill of lading, inasmuch as the charter-party relates to the entire ship where as the bill of lading only ascertains the contents of the *particular cargo*.

34.13. The word "charterparty" is derived from the expression "carta partita", which, in medieval latin, meant an instrument written in duplicate, on a single sheet and then divided by indented edges so that each part fitted[2] the other.

There are three types of charter party :—

(a) Voyage charter party ;

(b) time charter party ;

(c) charter party by demise, i.e. lease of the vessel.

A voyage or a time charter party confers simply the right to have the goods carried by a particular vessel, while, in the case of charter by demise, the possession and control is also transferred to the charterer[3].

Article 20 to be deleted.

34.14. It may be of interest to note that in England, the duty on charter parties has been abolished, having been found to be unproductive,[4] we put in the Questionnaire[5] a question whether a similar course would not be useful for facilitating the development of shipping in this country. There has been considerable support for such a course in the replies. We, therefore, recommend, deletion of Article 20.

Article 21

Article 21 was omitted in 1927.

1. *In re Himmat Provident Society Ltd.*, (1901) I.L.R. 25 Bom. 376.
2. B. C. Mitra, Carriage by Sea (1972), page 8.
3. Payne, Carriage of Goods by Sea (1968), page 9.
4. Finance Act, 1949 (Eng.).
5. Question 85.

CHAPTER 35

ARTICLE 22

Article 22—Introductory.

35.1. Article 22 levies a duty, under the head of "composition-deed", on four kinds of instruments by which a debtor arrives at some agreement with his creditors for the discharging of his debts, namely :—

(1) an instrument whereby a debtor conveys his property for the benefit of his creditors.[1] This is often referred to as an assignment.[2-3] It covers what is known in England as a clausio bonorum,[4] but, in England, it is expected that it should require the creditors to accept less than the full amount ;

(2) an instrument whereby payment of a composition or divident on their debts is secured to the creditors[6] ;

(3) an instrument whereby a debtor is allowed to continue his business, under the supervision of inspectors, for the benefit of his creditors ;

(4) an instrument whereby a debtor is allowed to continue his business, under letters of licence[6], for the benefit of his creditors.

The duty is ten rupees in each case.

Operation independent of bankruptcy law.

35.2. Ordinarily, the article operates before adjudication. Independently of bankruptcy law, an insolvent debtor, that is, a debtor who is not able to pay his debts in full or as they become due and payable, can enter into a valid arrangement with his creditors by which, without paying his debts in full, he obtains a release from the claims of the arranging creditors. These arrangements usually take the form either of a composition with creditors, or of an assignment of the arranging debtor's property to a trustee for their benefit.[7] The England, there exists legislation prescribing certain formalities for such deeds of arrangement.[8] There is no such restriction in India.

35.3. A debtor who is unable to pay his debts in full may arrange his affairs with his creditors without having recourse to a petition for his own adjudication.[9] Arrangements between debtors and creditors are known as composition agreements. A composition agreement may take the form of an agreement by which the creditors agree to abandon their claims in consideration of receiving a composition on their debts, that is, a smaller sum bearing an agreed proportion to the amount of their respective claims.[10] Or it may take the form of an assignment by which the debtor assigns the whole of his property to a trustee for the realisation and rateable distribution of the proceeds amongst all his creditors, or amongst those who assent to and take the benefit of the assignment, and the creditors, in consideration of such assignment, release their original claims and accept *the dividend payable under the agreement in discharge of their debts.*[11] The difference between these two methods is that while a simple composition agreement does not, of itself, operate as an act of insolvency, an assignment amounts to an act of insolvency.[12-13]

1. *Subbaraya* v. *Vythilinga,* (1893) I.L.R. 16 Mad. 85, 89.
2. *Chandrashankar* v. *Bai Magan,* (1914) I.L.R. 38 Bom. 576; A.I.R. 1914 Bom. 55, 56, 57.
3. Compare section 1(2)(a), Deeds of Arrangement Act, 1914.
4. *Reg.* v. *Cooban,* (1886) 18 Q.B.D. 269, referred to in I.L.R. 38 Bom. 576.
5. *Chandrashankar* v. *Bai Magan,* (1914) I.L.R. 38 Bom. 576, 590.
6. See below, point relating to article 38.
7. See Halsbury, 3rd Ed., Vol. 22, pp. 388-89.
8. See *infra.*
9. Mulla, Insolvency Law (1958), page 341.
10. Mulla, Insolvency Law (1958), page 341.
11. See (a) *Malackchand* v. *Manilal,* (1904) I.L.R. 28 Bom. 354, 367-368;
    (b) *Re Hatton,* (1872) L.R. 7 Ch. App. 723, 726.
12. Section 9(a), Presidency-towns Insolvency Act;
    Section 6(a), Provincial Insolvency Act.
13. Section 1(1)(a), Bankruptcy Act, 1914 "conveyance or assignment".

But it is not open to every creditor to base an insolvency petition upon it. Thus, a creditor who has been a party or privy to the assignment is estopped from setting it up as an act of insolvency. It should be noted that the assignment must be for the benefit of all creditors; otherwise it may amount to a fraudulent preference, which is an act of insolvency on which any other creditor may base a petition.

Analogous article—Article 38—Letter of Licence.

35.4 Composition agreements of both the classes[1] are covered by the article in the Stamp Act. In addition, it covers instruments providing for inspectors and for continuance of business under letters of licence.

An analogous article[2] levies a duty of 10 rupees on a "letter of licence,"—i.e. an agreement that the creditors shall, for a specified time, suspend their claims and allow the debtor to carry on business at his own discretion. In England, letters of licence are, by the Deeds of Arrangement Act,[3] required to comply with certain formalities prescribed by statute.

35.5. After this preliminary discussion, we shall proceed to consider the various instruments to which article 22 applies.

(1) and (2) Assignments and compositions.

35.6. Out of the four categories mentioned above,[4] assignments and compositions may be taken together. In a Madras case[5], a debtor and the firm of which he was a member had been adjudicated bankrupts in Mauritius, and a receiver appointed by the court. Subsequently, the creditors met, and resolved that if the adjudication was annulled, a composition payable by instalments be accepted in full satisfaction of their debts, and that the bankrupt's estate be assigned to that firm, and the plaintiff be appointed trustee to carry out such agreement. An instrument was executed to give effect to this resolution, which was also approved by the insolvency court. The court ordered that the bankrupt's estate should vest in the plaintiff, who was appointed trustee to carry out the composition, with full powers of realisation. The plaintiff now sued to recover the moveable and immovable property of the bankrupt in India. The Court held that the transaction substantially amounted to a transfer by the debtors of their property for the benefit of their creditors, and had been duly stamped as a composition deed.

In a Bombay case,[6] it was held that the deed in question fell under the first class. In this case, the debtor, with the consent of the creditors, executed a deed making over all the specified assets to certain named creditors. The creditors coming in by a particular date under the deed agreed that after all the goods and properties had been made over to the trustees, no other claims with regard to the amounts due to them should remain outstanding against the debtor. The deed also provided that the trustees were to manage the properties for the benefit of the creditors, and the money realised from time to time was to be distributed among such creditors in proportion to their claims. Subsequently, in a suit brought by the trustees to recover possession of a house comprised in the deed, the question arose whether the deed was a composition deed. The Appellate Court held that the deed was a composition deed, as it fell within class (1) of the definition in article 22 as an instrument executed by a debtor whereby he conveys his property for the benefit of his creditors.

(3) Inspectorship deed, and (4) Letter of Licence.

35.7. The third and fourth categories of instruments mentioned above can be distinguished thus. In the case of the inspectors mentioned in article 22, though the article is silent as to who should appoint these inspectors, it is presumed that the inspectors are nominated *by the creditors*. In the letter of licence, the claims of the creditors are suspended for a specified time, and the debtor is allowed to carry on his *business at his own discretion.*[7]

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1. Para 35.3 *supra.*
2. Article 38.
3. Section 1(2)(c) and (d), Deeds of Agreement Act, 1914 (Eng.), Williams on Bankruptcy (1958), page 368.
4. Para 35.1. *supra.*
5. *Subbaraya* v. *Vythialinga,* (1893) I.L.R. 16 Mad. 85.
6. *Chandrashankar* v. *Bai Magan,* (1914) I.L.R. 38 Bom. 576, A.I.R. 1914 Bom. 55, 56.
7. *Cf.* Article 38.

Article 38.

35.8. Where it is a deed falling under article 38 as a letter of licence, the business is carried on at the discretion of the debtor. It is doubtful how far such a deed is of practical importance, as presumably the debtor has already mis-managed his business earlier, thus incurring the debts, and one wonders if the creditors would allow him to manage his business further at *his own discretion.*[1]

Position after adjudication.

35.9. Under the Insolvency Acts,[2] *after adjudication*, the court appoints the insolvent to manage the trade or his property in *such manner as the court directs*. In such cases, the discretion of the insolvent is controlled by the court. Therefore, where it is a deed whereby provision is made for the continuance of the debtor's business "under the supervision of inspectors", it can be assumed that the inspectors would be nominated by the creditors.

Procedure under Insolvency Acts.

35.10. As regards the procedure for inspection, the relevant provisions in the Insolvency Acts[3] provide for a committee of inspection for the purpose of superintending the administration of the insolvent's property by the official receiver. Under the Insolvency Acts, the committee of inspection are the creditors themselves or those who hold general powers of attorney from the creditors. *The court has to authorise* the appointment of such a committee.

Meaning of "Inspectors" in Article 22.

35.11. The question whether, under the Stamp Act, Article 22, 'inspectors" means those appointed from among the creditors themselves to supervise the debtor's business, and whether they have to be approved by the court (as under the Insolvency Act),[4] is not beyond doubt. However, one general comment that can be made with respect to deeds of inspectorship (similar to the comment already made with regard to letters of licence), is that such deeds do not appear to be commonly used. No case law on these two types of composition deeds is available.

Practical utility limited.

35.12. With regard to the practical use of these deeds, it is interesting to note the history of section 67A of the Provincial Insolvency Act, 1920. This section was added by section 5 of the Act of 1926. Before the amendment, there was no such provision in this Act, though there were, in the Presidency towns Insolvency Act, sections 88 and 89, which provided for the setting up of a committee of inspection by the creditors for the purpose of superintending the administration of the insolvent's property by the receiver. In 1924, the Civil Justice Committee made a recommendation for the addition of such a section, making the following observations :—

"So little use is made of these sections in the Presidency Towns Act that one hesitates to recommend their introduction into the mofussil. In principle, however, it seems hopeless to expect good administration of a fund which really belongs to the creditors, unless the creditors are given a means whereby they may have a proper voice in superintending the administration."

Recommendation to amend article 22.

There does not appear to be any case law under these sections providing for a committee of inspectors under the Insolvency Act also.

35.13. If these two types of composition deeds are retained in the Stamp Act, then the following changes are recommended for the improvement of the relevant parts of the article :—

(1) In the case of instruments for the continuance of business *under inspectors*, the article should make it clear that they are appointed by the creditors.[5]

(2) Since article 38 denies a letter of licence, reference should be made in article 22 to that article.

We may add that such an amendment has been favoured by most replies to our Questionnaire.[6]

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1. See also Mulla, The Indian Stamp Act, (6th ed.) page 292.
2. (a) Section 66 of the Provincial Insolvency Act, 1920; Mulla Law of Insolvency (1958), pages 699 and 714;
   (b) Section 75 of the Presidency Towns Insolvency Act, 1909;
   (c) Compare sections 57-58, Bankruptcy Act, 1914 (Eng.).
3. (a) Section 67-A, Provincial Insolvency Act, 1920.
   (b) Sections 88 and 89, Presidency Towns Insolvency Act, 1909.
4. Para 35.10 *Supra*.
5. Para 35.7 *supra*.
6. Q. 86.

APPENDIX

Extract of Section 1. *Deeds of Arrangements Act,* 1914 (*Eng*).

1. (1) A deed of arrangement (Eng.) to which this Act applies shall include any instrument of the class hereinafter mentioned whether under seal or not—

(a) made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally ;

(b) made by, for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors :

otherwise than in pursuance of the law for the time being in force relating to bankruptcy.

(2) The classes of instrument referred to are—

(a) an assignment of property ;

(b) a deed of or agreement for a composition ;

and in cases where creditors of the debtor obtain any control over his property or business—

(c) a deed of inspectorship entered into for the purpose of carrying on or winding up a business ;

(d) a letter of licence authorising the debtor or any other person to manage, carry on, realise or dispose of a business with a view to the payment, of debts ; and

(e) any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise or dispose of the debtor's business with a view to the payment of his debts.

CHAPTER 36

ARTICLES 23—25

Article 23—Introduction.

36.1. Article 23 levies duty on a conveyance. There are many other instruments analogous to conveyance, but we need not enumerate them here. As to instrument of release, we have already discussed the position.[1]

No change recommended as to basis of charge.

36.2. In the discussion relating to section 27,[2] we have referred to certain State amendments which alter the basis of the charge under article 23 from the amount of the consideration (which is the present basis), to the value of the property. Such an amendment basically affects the rate of duty. We do not propose to consider the merits or demerits of such an amendment having regard to the fact that the question is one of policy, and no difficulties resulting from complexity of law arise.

Exemption relating to copyright.

36.3. There is, in this Article, an exemption from duty in respect of *assignments of copyright by entry* made under section 5 of the Copyright Act, 1847.

It should be pointed out that the Copyright Act, 1847 was repealed by the Copyright Act, 1914. That Act has, in its turn, been repealed by the Copyright Act, 1957. Both the Act of 1914 and the Act of 1957[3] prohibit assignments of copyright by entry in the register, and the exemption under article 23, in the form in which it appears, is obsolete.

There can be an assignment of a copyright in a different form, under the Copyright Act, 1957, section 18. However, section 19 of that Act is material, and provides as follows[4] :—

> "19. No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor, or by his duly authorised agent."

This section corresponds to the Act of 1914. First Schedule, section 5(2). Thus, the assignment of a copyright must, under the present Act, be in writing, and signed by the assignor.

State Amendments as to copyright.

36.4. Reverting to the article in the Stamp Act, we may note that State Amendments of article 23, while taking note of the fact that the Copyright Act of 1847 has been repealed, run on divergent lines. Briefly, the position is as follows :—

(a) In Gujarat and Maharashtra, a reference to the Copyright Act of 1957 has been substituted, in place of the reference to the Act of 1847. But adequate notice does not seem to have been taken of the details of the scheme in the Act of 1957.

(b) In Andhra Pradesh, Madhya Pradesh, Madras (now Tamil Nadu), Mysore and Punjab, all assignments under section 18 of the 1957 Act have been exempted.

(c) In Uttar Pradesh, the exemption appears to be limited to assignments of copyright in musical works by a resident in India or first published in India.

(d) In Bihar, the exemption has been deleted with effect from 31st March, 1958.

Need for exempting all assignments of copyright.

36.5. Having taken note of the divergent approaches adopted by State Legislatures, and after a careful consideration of the merits, we have come to the conclusion that all assignments of copyright ought to be exempted. The assignment of literary, musical or artistic works should be treated differently from the transfer of other property. We need not elaborate the reasons.

1. See discussion relating to section 2(10)—"Conveyance".
2. See discussion regarding section 27.
3. Section 18, Copyright Act, 1957.
4. Section 19, Copyright Act, 1957.

It will be enough to say that barring a few exceptions, artists and musicians must assign their copyright if they are to eke out their living. It is then only that they can put their products before the public. It is hardly proper to treat the sale of a house and an assignment of a copyright on an equal footing.

Copy right to be treated on a special footing.

36.5A. Deletion of the exemption should, in our view, be regarded as a retrograde step. Nor is it proper to restrict the exemption to assignments of *musical works*. Creative activity, whatever be the medium, ought to be treated on a special footing. There is no reason why only musical works should be granted protection, and not paintings or sculptures or literary works or choreography.

The primary reason for which the law has, in the field of stamp duties, made a distinction between material property and what is conveniently described as intellectual property, would appear to be that the latter represents man's journey into spheres bordering on the region of the spirit. To nourish that laudable endeavour ought to be an object of the law. This is not to say that if profit is made out of the pursuit of such activity, such profits should never be taxed. The point to be made is that in the context of the stamp law, the assignment should not be subjected to tax.

Another aspect also ought not to be overlooked. In the case of *International News Service*,[1] Brandeis J. observed :—

> "The general rule is that the noblest of human production, knowledge, truth ascertained, conception and ideas become, after valuntary communication to others, free as the air to common use."

Freedom from taxation places the work of art at the disposal of many more persons than would be possible if there were no exemption.

Recommendation.

36.6. We, therefore, recommend that the present exemption should be retained, after substituting a reference to sections 18-19, Copyright Act, 1957 (which deal with assignments), in place of the reference to assignment under section 5 of the Copyright Act, 1847.

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[2]

Article 24—Introductory.

36.6A. Article 24 levies duty on a copy or extract certified to be a true copy or extract by or by order of "any public officer" and not chargeable with court-fee. The article applies to all copies certified to be true copies by public officers, whether the original was or was not chargeable with stamp duty. The duty is eight annas if the original was not chargeable with duty or if the duty on the original does not exceed one rupee. In other cases, the duty is one rupee. It should be noted that the article applies also to copies of documents which do not create rights[3] or liabilities

Article applicable even to copies of instruments not creating rights.

36.7. There are two exemptions. Their details are not material for the comments that we are going to make on the article. But we may note that. Exemption (b) under the article exempts, from duty, copies of registers of births and deaths,—which are all documents which do not *create* a right or liability. This exemption itself shows that in other respects the article is wide, as stated above.[4]

Amendment required as to portion referring to "public officer".

36.8. We shall first dispose of a minor point. We may point out that with reference to the expression "public officer", which is used in the article but not defined in the Act, the absence of a definition was regretted by Edge C.J.[5] who observed—

> "....a fiscal Act, which imposes the payment of duty on the subject, ought to contain definitions of all terms which have to be considered in apply the Act and which are not accepted as well recognised terms of universal application."

1. *International News Service* v. *Associated Press*, (1918) 248 U.S. 215, 25.
2. Question 87 (Article 23).
3. Section 2(24), definition of "instrument" (inclusive definition).
4. Para 36.6, *supra*.
5. *Reference*, (1897) I.L.R. 19 All. 293, 294.

He pointed out (by way of example), that under the Indian Penal Code,[1] apparently, the Secretary of a Municipal Board would be a "public servant" but he would not be a "public officer" according to the term as defined in the Code of Civil Procedure.[2] Referring to sections 74, 76 and 78 of the Indian Evidence Act, 1872, he held that the record of the proceedings of a Municipal Board is a "public document" and the officer who is authorised by the ordinary course of his official duties to give copies of public documents, is, for these purposes, a "public Officer". Hence, a copy of an order passed by a Municipal Board on a petition presented to it, certified as a true copy by the Secretary to the Board, came within article 24, and required to be stamped.

This particular difficulty will not survive if our recommendation to insert a definition of "public officer" is accepted.

No duty on copies in England.

36.9. It may, incidentally, be noted that in England, the entries in the Schedule to the Stamp Act, 1891 relating to copies and extracts were repealed in 1949.[3]

Recommendation to add reference to section 76, Evidence Act.

36.10. *In one respect, it is still desirable to define the scope of the article more precisely* than at present. Certified copies of public documents are issued under section 76, Evidence Act, and that is the principal provision of significance for the purposes of article 24. We, therefore, recommend that after the words "public officer", the words and figures "under section 76 of the Indian Evidence Act, 1872" should be added in this article; the Stamp Act will then be brought into harmony with the Evidence Act.

We are separately recommending the insertion[4] of a definition of "public officer", but an amendment is also needed in article 24, as suggested above.

Amendment required where original is not required.

36.11. Another point relevant to this article raises certain issues of substance. At present, duty is leviable on a certified copy or extract given by a *public officer, even if the original was not chargeable with duty*, by virtue of article 24(i). The rationale of charging duty on such copies is not readily understandable. No doubt, taxing provisions are meant to collect revenue, and one cannot always find their rationale. But, in this case, the provision obviously causes hardship and inconvenience. If, for example, a student seeking admission to a college gets copies of his academic diplomas certified by a public officer, the copies so certified would become chargeable with stamp duty on a literal reading of the article. Again, where copies of miscellaneous correspondence in a pending case are certified, each of them becomes chargeable, thus making their use in a proposed litigation costly. Even copies issued for private use, or for private record, become chargeable. This causes considerable hardship. We are of the view that this is a situation where the considerations of revenue should yield to those of convenience, and there should be no duty on a copy if the original is not chargeable.

Recommendatino as to charging portion.

36.12. In the light of the above discussion, we recommend that the charging portion in article 24(i) and (ii) should be revised, so as to read as follows :—

(i) *if the original was chargeable with a duty not exceeding one rupee.* Fifty paise.

(ii) if the original was chargeable with a duty exceeding one rupee. One rupee.

Exemption

(a) *if the original was not chargeable with duty.*
(Other Exemptions as at present, after suitable re-lettering).

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1. Section 21, Indian Penal Code.
2. Section 2(17), Code of Civil Procedure, 1882.
3. The Finance Act, 1949, sections 35 and 52(1), and Eight Schedule, Part I, *entry* 12, and Eleventh Schedule; Monroe, Stamp Duties (1964), page 261, 262.
4. See discussion as to section 2, definition of "public officer" (new).

We may mention that the suggested amendment has been favoured by most of the replies to our Questionnaire.[1]

Article 25—Counterpart or Duplicate.

36.13. Article 25 deals with the counterpart or duplicate of an instrument. This is of particular importance to leases. A lease is generally prepared in two identical forms, called the lease and the counterpart respectively. The lease is executed by the lessor alone, and the counterpart is executed by the lessee alone, then, the lease and the counterpart are exchanged. Sometimes, the lease is in duplicate. The counterpart or duplicate is chargeable with duty if the original is chargeable with duty. Where the proper duty has not been paid on the original, the intention of the law is that the counterpart itself should bear duty.

Where article 25 applies, the counterpart which is stamped under the article would not be admitted in evidence, unless the original is produced to show that it was duly stamped or the Collector certifies[2] the duty paid on the original.

In this article, the exemption relating to the counterpart of a lease granted to a cultivator which is itself exempt from duty[3] is, strictly speaking, redundant, because the Article itself would apply only if the original is chargeable with duty. However, the exemption is harmless, and need not be disturbed.

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1. Question 88 (Article 24).
2. Section 16.
3. Article 35, Exemption (a), as to leases to cultivators.

CHAPTER 37

ARTICLES 26—29

Article 26.

37.1. Article 26 levies duty on a customs-bond. It needs no change.

37.2 Article 27 levies duty on debentures. It needs no change.

Recommendation regarding Article 28.

37.3. Article 28 (Delivery order in respect of goods) refers to the "instrument being *signed* by or on behalf of the owner of such goods" ..... Obviously, in this article, the instrument described as "signed" is one "executed", for the purpose of section 3. It would be desirable to substitute the word "executed" for the word "signed", in this article. We recommend that the article should be so amended. We may note that such an amendment has been favoured by almost all the replies to our Questionnaire.[1]

Article 29

37.4. Article 29 levies a duty of one rupee on an instrument of divorce, that is to say, any instrument by which any person effects the dissolution of his marriage. Of course, so far as the law of domestic relations is concerned, such instruments can have legal effect only in cases where extra-judicial divorce is permitted by law and the scope for the application of the article is, thus, limited. The article needs no change.

1. Question 90.

CHAPTER 38

ARTICLE 30

38.1. Article 30 levies duty on entry as an Advocate in the following terms : Article 30—Introduction.

Description of Instrument	Proper Stamp-duty
30. ENTRY AS AN ADVOCATE, VAKIL OR ATTORNEY ON THE ROLL OF ANY HIGH COURT UNDER the Indian Bar Councils Act, 1926, or in exercise of powers conferred by Letters Patent or by the Legal Practitioners Act, 1884—	
(a) in the case of an advocate or Vakil	Five hundred rupees.
(b) in the case of an attorney	Two hundred and fifty rupees.
Exemption	
Entry of an advocate, vakil or attorney on the roll of any High Court when he has previously been enrolled in a High Court.	

38.2. It should, at the outset, be pointed out that the article has become obsolete, with the coming into force of the Advocates Act, 1961, which has practically superseded[1] the various enactments relating to advocates referred to in the article—that is to say, the Bar Councils Act, and the Legal Practitioners Act. Even as regards attorneys, recent amendment abolished the system. Position under Advocates Act 1961.

A certificate of enrolment as Advocate is now issued under section 22 of the Advocates Act,[2] which reads—

"22. There shall be issued a certificate of enrolment, in the prescribed form—

(i) by the State Bar Council to every person whose name is entered in the roll of advocates maintained by it under this Act ; and

(ii) by the Bar Council of India, to every person whose name is entered in the common roll without his name having already been entered in any State roll."

Under the same Act,[3] an enrolment fee of two hundred and fifty rupees is to be paid to the State Bar Council, before enrolment as an advocate. Section 20 of the Act provides for a common roll, and section 46 provides for the payment of a part of the enrolment fees to the Bar Council of India by all State Bar Councils.

After the passing of this Act, the article in the Stamp Act has become practically out of date.

38.3. Taking note of the passing of the Advocates Act, 1961, many States have dealt with the Stamp duty in this respect by specific provisions. State Amendments.

Below, an attempt has been made to summarise the position with regard to the levy of Stamp duty for enrolment as an advocate under the various stamp laws vis-a-vis the Advocates Act, 1961.

(1) In the following States, the duty under the stamp law has been specifically repealed/omitted, and only the fee under the Advocates Act, 1961, is now payable :

(a) *Madhya Pradesh.*—Article 30, relating to entry as advocates etc. on the roll of any High Court, has been omitted by Madhya Pradesh Act 11 of 1962.

1. See section 22, Advocates Act, 1961.
2. Section 22, Advocates Act, 1961.
3. Section 24(1)(f), Advocates Act, 1961.

(b) *Maharashtra.*—Article 31 of the Bombay Stamp Act, 1958, relating to entry as advocates etc., has been deleted by Maharashtra Act 10 of 1965.

(2) In the following States, the duty under the Stamp law continues to be leviable and the Stamp Act has been specifically amended after the passing of the Advocates Act. The fee under the Advocates Act, 1961, is also chargeable :

(a) *Andhra Pradesh.*—Article 26 (substituted by A.P. Act 26 of 1965) levies, for entry as advocate in conformity with the Advocates Act, 1961, a Stamp duty of Rs. 250/-.

(b) *Mysore.*—Article 17 (new) of the Mysore Stamp Act, 1957 as amended by entry as advocate in conformity with the Advocates Act, 1961, a stamp Mysore Act 29 of 1962, levies on certificate of enrolment in the roll of advocates under the Advocates Act, 1961, a duty of Rs. 250/-.

(c) *Uttar Pradesh.*—Article 30 of Schedule IB, inserted by U.P. Act 28 of 1952, as substituted by Act 25 of 1962, levies, on entry as an advocate on the State roll under the Advocates Act, 1961, a stamp duty of Rs. 500/-.

(3) In some States (Bihar, Gujarat, Haryana, Kerala, Punjab and West Bengal)[1], the provision as to duty on entry as advocate under the various Stamp Acts, in the form prior to the Advocates Act, 1961, has not been specifically revised or repealed[2].

Recommendation to delete article 30.

38.4 Having carefully considered the position resulting from the Advocates Act, 1961, and after giving due thought to the State Amendments, we have come to the conclusion that the article in the Stamp Act relating to entry as advocate should be deleted. In our view, it is not proper to continue the stamp duty after the imposition of the fee mentioned above by the Advocates Act.

1. The enumeration is not intended to be exhaustive.
2. See Krishnamurthy, Indian Stamps Law (3rd ed.) pages 458, 630, 732.

CHAPTER 39

ARTICLES 31—34

39.1. Article 31 levies stamp duty on an instrument of exchange of property. No changes are needed in this article. Article 31.

39.2. Article 32 levies stamp duty on an instrument of further charge. It needs no change. Article 32.

39.3. Article 33 levies duty on an instrument of gift, not being a settlement, will or transfer. We have no comments on this article. Article 33.

39.4. Article 34 levies duty on an indemnity bond. The duty is the same as on a security bond (Article 57). It may be noted that the duty on a security bond is lower than that on a bond in general. Bonds in general are chargeable with duty *ad valorem* without any maximum (Article 15), while security bonds (and consequentially, indemnity bonds) are subject to a maximum. Article 34—Indemnity Bond—Introductory.

The article applicable to bonds in general—Article 15—applies only to a "bond" as defined in section 2(15), not being a debenture (No. 27) and not being otherwise provided for by the Stamp Act or by the Court-fee Act. Since, in respect on an indemnity bond or a security bond, provision has been made in article 34 and 57, the duty on these bonds would be payable in accordance with those articles, and not in accordance with article 15.

39.5. Article 34 does not define an indemnity bond. The Indian Contract Act defines a "contract of indemnity"[1] as follows :— Indemnity—Meaning of.

> "124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity."

In general, this definition is utilised by the Courts in interpreting the Stamp Act also.[2]

39.6 While article 34 does not require any amendment, a few points arising out of the case law may be briefly referred to. Case law.

It has been emphasised[3] by the Bombay High Court that the article applies only when the contract of indemnity is in the form of a bond. An indemnity note passed by a consignee to the Railway company, in respect of goods for which the railway receipt was lost, was, therefore, held to be chargeable only as an agreement[4] and not as an indemnity bond.

Then, there is an Allahabad case[5] relating to an agreement by a company for compensation to be paid to the Managing agent, on the happening of one of the events specified therein. This provision for compensation was a term of the Managing Agency Agreement. It was held that the term could not be treated as a separate contract of indemnity, as there was no separate consideration for it. The provision for compensation was not a distinct matter, but was part and parcel of the agreement as a whole, and it was not, therefore, liable to duty as an indemnity bond. The agreement was an ordinary service agreement, chargeable with stamp duty as an agreement, and was not a bond.

39.7. The cases discussed above illustrate the application of the article. They do not, however, call for an amendment of the article.

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1. Section 124, Indian Contract Act.
2. *Hindustan Sugar Mills* v. *State of U.P.*, A.I.R 1972 All. 8 (S.B.).
3. *Reference from the Chief Commissioner of Central Provinces*, I.L.R. 5 Bom. 478 (F.B.).
4. Article 5.
5. *In re Dhanpur Sugar Mills*, A.I.R. 1956 All. 25. (Special Bench).

CHAPTER 40

ARTICLE 35

Article 35—Introductory.

40.1. Article 35 levies duty on a lease, including an under-lease or sub-lease and any agreement to let or sub-let. The duty varies according to the nature of the consideration for the lease. We shall deal with this aspect later, in detail. The duty also varies according to the duration of the lease. The amount of duty is linked up either with the duty on a bond, or with the duty on a conveyance.

Under the proviso to the article, where an agreement to lease is stamped with a duty as on a lease, the duty on the subsequent lease is not to exceed eight annas. The exemption to the article exempts certain leases executed in the case of a cultivator and for the purpose of cultivation.

Sub-lease and under-lease and agreement to let.

40.2. As already stated, the article also levies a duty on a sub-lease, and under-lease, and an agreement to let or sub-let. Ordinarily, the expression "sub-lease" is understood as denoting a lease granted by the lessee who remains liable to the lessor. The expression "under-lease" is usually understood[1] as indicating a lease by a lessee for a period *less than the residue of the term.*

As regards agreement to let or sub-let, it should be noted that, with reference to the Registration Act, it is now well-settled that only an agreement which creates a present demise is compulsory registrable as a lease. We shall revert to this point later.[2]

Meaning of "fine"—Recommendation for adding Explanation.

40.3. The word "fine" used in clauses (b) and (c) of the article does not mean any pecuniary penalty, but appears to be intended to denote the amount paid by the lessee on entry or the fee paid for renewal of the lease. This appears to be the sence in which it is used in England. Since this word is not intelligible to the layman, we recommend that the word "fine" should be explained by a suitable Explanation.[3] We may note that such an amendment has been approved, in substance, by most replies[4] to our Questionnaire.

We may state that in England, the Law of Property Act provides that "Fine" includes premium or fore-gift, and any payment, consideration or benefit in the nature of a fine, premium or fore-gift.[5] Again, under General Rate Act,[6] "fine" means fine, premium, or fore-gift, or other payment or consideration in the nature thereof.

It has been held[7] that the "fitness" referred to in Schedule A, No. II, r. 6, of the Income Tax Act, 1918 (8 and 9 Geo. 5, C. 40) are indistinguishable from premium, and are money payments in consideration of a demise.

Scheme analysed.

40.4. The scheme of the article, in one of its aspects, deserves somewhat detailed examination. The article is divided into three clauses—(a), (b), (c)—and the mode of calculation of the duty varies according to the clauses under which the instrument of lease falls. Clause (a) applies where, by the lease, "the rent is fixed and no premium is paid or delivered". Clause (b) applies where the lease is granted "for a fine or premium or *for money advanced* and when no rent in reserved". Clause (c) applies where the lease is granted, again, "for a fine or premium for money advanced *in addition the rent reserved*".

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1. Mozley and Whiteley, Law Dictionary (1970), page 372.
2. Para 40.11, *infra.*
3. Explanation to be added.
4. Q. 92.
5. Law of Property Act, 1925, section 205(1)(xxiii).
6. General Rate Act, 1967, section 36.
7. *Utting (B. G.) and Co.* v. *Hughes,* (1939) 2 K.B. 231.

40.5. Broadly, the scheme is based on the principle that where the consideration for the lease is "rent" *i.e.*, a sum to be calculated *on the basis of a period*—then clause (a) should apply; where the consideration is *not a periodical payment as above* but a lump sum, clause (b) should apply; and where the lease partakes of the character of both, clause (c) should apply. Period.

40.6. Some difficulty, however, is created by the discrepancy in wording between the various clauses. While the phrase used in clause (a) is "rent is fixed", the wording used in clauses (b) and (c) is "rent . . .reserved". The two expressions not being identical, an obscurity arises. It often happens in practice that while the lease provides for a monthly or annual rent, a substantial part of the rent is paid by the lessee in advance, in order to comply with the demand which the lessor might have made at the time of the negotiations for the lease. Now, the question that falls to be determined is whether such a case comes within (a) of article 35—"rent" is fixed,—or whether it falls under clause (b) or clause (c)—"advance of money". It may also be noted that clause (b) applies only where "no rent is reserved". Rent paid in advance.

40.7. The reported cases on the subject reveal a conflict of views between the Bombay High Court and the Punjab High Court. Although the Punjab case (to be presently referred to) seeks to distinguish the earlier Bombay judgment, it would, with due respect, appear that the two judgments cannot be really reconciled. Case law on the subject.

In the Bombay case,[1] a certain amount was paid to the lessor in respect of a lease before the execution of the lease. The lease was executed on 9th December, 1949. The lessor demised unto the lessee *for a period of five years the salt pans and land known as Hormuzed Salt* Pans near Vadala Station in Dadar Taluka. In respect of this lease, two amounts were paid : Rs. 33,000 on 2-11-1945, and Rs. 22,000 on 24-6-1948, and the question that arose was whether this lease fell under Article 35(a)(iii), or whether it fell under Article 35(b). In order to determine that question, the Court had to decide whether these two amounts paid constituted "rent reserved", or whether they constituted a "fine or premium or *money advanced*". If they constituted "rent reserved", they were outside clause (b).

There was no covenant to pay the rent, but there was an appropriation of the amount actually paid towards rent, *which was stated as being for certain fixed amounts spread over the period of the lease.*

It was held that there was no "reservation of rent", but that whatever was paid in advance was "money advanced" within the meaning of clause (b), and the instrument taxable accordingly. *If the lessee pays the amount in respect of the rent prior to the liability arising under the lease,* the payment is nothing more than an advance paid by the lessee to the lessor. This was the reasoning of the Bombay High Court, which pointed out that a proper case of "rent reserved" could only mean rent in respect of which *there is a convenant* on the part of the lessee to pay the amount mentioned. If there is no convenant as there could be none because the amount had already been paid—then there is no "reservation of rent".

40.8. In the Punjab case[2] the lease was for a term of five years from the date of occupation, the monthly rent being Rs. 700.

Clause 1 of the lease deed was as follows :

"Provided always and it is hereby mutually agreed as follows :

(1) A sum of Rs. 25,500 shall be paid to the lessor on the date of occupancy, as advance rental for the first 36 months from the date of occupancy at the rate above mentioned, namely, Rs. 700 per month."

The question to be considered was whether the case fell under clause (a) or clause (c) of article 35.

1. *In re Chief Controlling Revenue Authority*, A.I.R. 1952 Bombay 285 (Chagla C.J. and Gajendragadkar, J.).
2. *Union of India* v. *Caltex Ltd.*, A.I.R. 1966 Punjab 488 (F.B.).

It was held that the sum of rupees 25,000 and odd, which was agreed to be paid to the lessor on the date of occupancy as advance rental for 36 months, was rent; and merely because the rent was paid in advance under a covenant, its character did not change. The Bombay case was distinguished on two grounds, first, that in that case the payment by the lessee was prior *to the liability* for rent arising, and, secondly, that the Bombay High Court was concerned with clause (b), which does not contain the words "in addition to rent reserved"—words which occur in clause (c). In the Punjab case, the lessee was required to pay the amount as rent for 36 months, and the liability was, therefore, to pay rent, and not the money advanced *in addition to* rent reserved.

Need for change.

40.9. Even assuming that the situation in the Punjab case can be distinguished from the situation in the Bombay case, there is, in our opinion, scope for re-defining the various categories in a neater form. Essentially, the question is this—where an amount is paid in advance, not as premium but as the sum total of the periodical payments of rent, attributable to a part to the period of the lease, should it be treated as a case of rent reserved or as a case of "money advanced"? On this basic question, the two judgments show a conflict of approach.

Recommendation to substitute the word "fixed" for the word "reserved".

40.10. It would appear that on the language of the article, there is much to be said for the Bombay view, since clauses (b) and (c) use the word "reserved". However, so far as the question what *ought to be the law* is concerned, in our view, the law will be simpler if the case where the rent is paid in advance is also treated as falling within clause (a), because, essentially, what the lessee pays is "rent". The lessee, instead of paying the rent *during occupation,* pays it at the initial stage. Though the lessor gets it in lump, the case is distinct from "premium", because, unlike premium, the rent apportioned period-wise. If this suggestion is accepted, the object could be achieved by replacing the word "reserved" by the word "fixed", in clauses (b) and (c), on the lines of clause (a). This will remove the disharmony between clause (a) on the one hand and clauses (b) and (c) on the other hand and will eliminate the possibility of the view being taken that where the amount is paid in advance, though it is apportionable, it ceases to be rent.

Article 35—Agreement to let.

40.11. There is another point requiring consideration with reference to this article. While 'lease', as defined in section 2, does not cover an agreement of lease, Article 35 makes an agreement of lease chargeable as a lease, by an express inclusive provision. What, then, is the precise scope of the article in relation to an "agreement"? Does article 35 cover every such agreement, or is it to receive a narow construction ? The question came up recently before the Delhi High Court.[1] The premises in dispute were held by the plaintiff in the suit as a tenant from the defendant. By an agreement entered into between the parties, it was provided that the defendant (landlord) would set up, in place of the premises, a multi-storeyed building on the side, and in consideration of the plaintiff delivering vacant possession of the leased premises to the defendant, the defendant would give to the plaintiff a flat on the ninth floor (with certain specified dimensions), in the multi-storeyed building, on terms and conditions set out in the agreement. In case the work on the proposed multi-storeyed building was not commenced before a certain date, the defendant would hand over to the plaintiff vacant possession of the premises on the same terms and conditions on which it had hitherto been held by the plaintiff. It was further provided that the agreement shall be valid for a period of 10 years from the date on which the flat in the proposed multi-storeyed building was handed over to the plaintiff.

40.12. Pursuant to this agreement, the plaintiff delivered vacant possession of the premises to the defendant, but the defendant did not pursue the project for constructing the multi-storeyed building. The plaintiff filed the present suit for enforcement of the agreement and return of the premises. The defendant took the plea that the agreement was inadmissible in evidence because, being a lease, it was insufficiently stamped. The agreement was on a paper of Rs. 2. The lower court rejected this contention of the plaintiff, and the filed the present revision before the High Court.

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1. *Mrs. Birender Amarjit Singh* v. *General Marketing & Mfg. Co. Ltd., Calcutta*, A.I.R. 1976 Delhi 15, 16, para 5 (H. L. Anand, J.).

The High Court held that the agreement could not be said to be either a lease or an agreement to lease and was not, therefore, liable to be stamped under Article 35. In the opinion of the High Court, in order to be treated as a lease, an agreement must satisfy the test of immediate and present demise in respect of the property covered by it, and an agreement to lease was no exception to this rule. Reference was made on this point to the two cases mentioned in the footnotes.[1-2]

Further, the right conferred by this document on the respondent was contingent on a number of imponderables, and, at best, would be a right to ask for a lease of the flat after one comes into existence.

Recommendation regarding "agreement to let".

In our view, the interpretation placed in this case on the scope of the expression "agreement of lease" is, with respect, sound, and it should be codified in order to indicate the true scope of the article. We may note that independently of this judgment of the Delhi High Court, a Bar Council[3] has suggested to us that the scope of Article 35 should be so confined. The object could be achieved by inserting an Explanation that an agreement shall not be chargeable as a lease unless there is an immediate and present demise. We recommend that the article should be so amended. What we have stated above is the gist of the provision that we would like to be inserted.

1. *Hemanta Kumari Devi* v. *Midnapur Zamindari Co. Ltd.*, A.I.R. 1919 P.C. 79, 80, 81.
2. *Trivedi Bai* v. *Smt. Lila Bai*, A.I.R. 1959 S.C. 620.
3. Suggestion of the Andhra Pradesh Bar Council (S. No. 61).

CHAPTER 41

ARTICLES 36—45

Article 36—Allotment of shares.

41.1. Article 36 levies a duty on a letter of allotment of shares, and needs no change.

Article 37—Letter of credit.

41.2. Article 37 levies a duty on a letter of credit, and needs no change. Certain points relating to letters of credit have been discussed while dealing with the definition of "bill of exchange payable on demand".[1]

Article 38—Letter of licence.

41.3. Article 38 levies a duty on a letter of licence. Certain points relevant to this article have been discussed earlier under "Composition"[2] The article itself needs no change.

Article 39—Memorandum of association.

41.4. Article 39 levies duty on a Memorandum of Association of a Company. The duty is fifteen rupees if the Memorandum is accompanied by articles of association under section 37 of the Indian Companies Act, 1882. The duty is forty rupees, if it is not so accompanied. The exemption exempts a "Memorandum of any association not formed for profit and registered under section 26 of the Indian Companies Act, 1882."

We recommend substitution of reference to the relevant sections[3] of the Companies Act, 1956, in this article.

Article 40—Mortgage deed.

41.5. Article 40 levies duty on a mortgage-deed, not being an agreement relating to deposit of title-deeds, pawn or pledge (No. 6), Bottomry Bond (No. 16), Mortgage of a crop (No. 41), Respondentia Bond (No. 56), or Security Bond (No. 57). Under clause (a), the duty is linked up with the duty on a conveyance where possession of the property or any part of the property comprised in such a deed is given by the mortgagor or agreed to be given.

When possession is not given or agreed to be given as aforesaid, the duty is linked up with the duty on a bond. This is provided in clause (b).

However, when the mortgage deed constitutes a collateral or auxiliary or additional or substituted security, or is executed by way of further assurance for the above-mentioned purpose, and the principal or primary security is duly stamped, the stamp duty is levied at a much lesser rate, under clause (c).

Under an Explanation below the article, a mortgagor who gives to the mortgagee a power-

41.8. Article 42 levies duty on certain notarial acts. In doing so, it refers to the "instrument.....*made or signed* by a Notary public in the execution of the duties of his office..... ". Article 42—Notarial acts Recommendation.

We recommend that in this Article, for the words "made or signed", the word "executed" should be substituted, in order to maintain harmony with the language of the charging section (section 3). The legislature perhaps avoided the word "executed" in the present article for reasons of euphony—thinking that the word "execution" which follows later, would then jar on the ears. If so, that word could be replaced by the word "performance". Incidentally, it may be stated that in India, notaries are appointed under the Notaries Act, 1952.

41.9. Article 43 levies duty on a note or memorandum by a broker or agent to his principal, intimating the purchase or sale on account of the principal— Article 43—Note or memorandum by a broker.

(a) of any goods exceeding in value twenty rupees ;

(b) of any stock or marketable security exceeding in value twenty rupees.

We recommend that the amount "twenty rupees" should now be increased to one hundred rupees, having regard to the fall in the purchasing power of the rupee.[1]

41.10. Article 44 levies duty on a note of protest by the master of a ship. The "protest" made by the master is chargeable separately[2]—Article 51. Article 44 deals with the *note* made of such protest. The "note" is usually made by a notary public, or by a consular officer.[3] Article 44.

In England, a "protest" is a declaration made by the master when damage has been caused to a ship or her cargo, made before a notary or British Consul at the first port of call.[4] The object of the protest is to record promptly, in an authentic form, the circumstances in which loss or damage occurred so as to exonerate the master or his crew from blame.

41.11. In England, a protest is not obligatory, but, in many countries abroad, the swearing of protest is a condition precedent to the establishment of legal rights.[5] When a claim for marine insurance is made, the practice is to "exhibit" the protest.[6] Use of protests.

Protests are not receivable in evidence in English Courts, although they may be used in cross-examination.[7-8-9]

Explaining the importance of protests, Dr. Lushington observed—

> "Protests are important for this purpose, and this only to state the damage which has occurred, and that it has taken place, for the sake of supporting a claim against the under-writers ; not that the owner of the ship would be debarred from claiming against the under-writers, but, of course, unless it is stated in the protest, suspicion arises that the damage did not occur."[10]

41.12. The object of requiring the protest to be "noted" by a notary public is that his office is universally recognised not only in the Courts of this country, but also in those of every civilized nation. By the law of nations, he has credit everywhere.[11] No change needed.

We have no changes to recommend in this article.

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1. Compare discussion as to article 53, Receipt, *infra*.
2. See article 51.
3. Dover, Handbook to Marine Insurance (1957), page 548.
4. Halsbury, 3rd Edn., Vol. 35, page 133.
5. Dover, Handbook to Marine Insurance (1957), page 548.
6. Dover, Handbook to Marine Insurance (1957), page 567.
7. (a) *R.* v. *Scrivener Co.*, (1830) 1 B & C;
   (b) *Brown* v. *Thornton*, (1837) 6 Ad & El 185.
8. Halsbury, 3rd Edn., Vol. 35, page 134.
9. Abbot on Shipping, 13th Edn., page 547, cited in Bouvier, Law Dictionary (1914), page 2757.
10. *The Santa Anna*, (32 L J., P.M.A., page 200) (per Dr. Lushington).
11. *Hutcheon* v. *Warrington*, (1802) 6 Ves. 823. (per Lord Eldon, L.C.).

Article 45 Partition.

41.13. Article 45 levies duty on an instrument of partition as defined by section 2(15).

41.14. A Bar Council has made a suggestion[3] that even an instrument *recording the terms of a past transaction* should be taxed as a partition. We have given due consideration to the suggestion, but are unable to accept it. Such a provision, if inserted, is bound to cause harassment in a very large number of cases. It may, for example, take in even casual correspondence in which a partition is referred to. An instrument which falls short of the creation of a separate status, ought not to be regarded as a partition, merely because it "records" a partition that took place in the past. To do so is to disregard the distinction between a vestitive fact and a mere piece of evidence. The legal effect—and therefore the economic value—of the two differ.

In the result, no change is needed in article 45.

3. Andhra Pradesh Bar Council.

CHAPTER 42

ARTICLE 46

42.1. Article 46 levies duty on an instrument of partnership.

42.2. In the law of partnership a question which is often debated is whether there can be a partnership between two firms. In the Partnership Act a partnership is described in terms of relationship between "persons". According to the definition of "person" in section 3(42), General Clauses Act, a firm is not regarded as a person for the purposes of that Act.[1] Hence, a firm as such is not entitled to enter into partnership with another firm, or with a Hindu undivided family or with an individual.[2] It has been observed[3] that "the real partnership is constituted not between the individual and the firm, but between the individual and the aggregate of the persons who constitute the firm".

On this point, no change is considered necessary.

42.3. The Supreme Court has, in *Dulichand's case*,[4-5] traced the history of the law of partnership in India, which is based on the English law and mercantile usages relating to a firm. Under the English common law, a firm, not being a legal entity, could not sue or be sued in the firm name, or sue or be sued by its own partner, for one cannot sure oneself. Later on, this rigid law of procedure, however, gave way to considerations of commercial convenience, and the law permitted a firm sue or be sued in the firm name, as if it were a corporate body.[6] In the absence of such special provisions, the general rule that a firm is not a legal entity operates.

Question as to whether a deed is a conveyance or partnership deed.

42.4. The second question under this article concerns conveyances. Questions sometimes arise whether an instrument is a conveyance or a partnership deed. In one case,[7] the Madras High Court has dealt with the difference between a partnership deed and a conveyance.[8] In that case, the parties to a protracted partition suit, in which the assets of a trading joint Hindu family were involved, executed an instrument styled as a "partnership deed". By virtue of the decree in the suit, one of the parties to the litigation agreed to take over the assets on payment of a certain amount in court, and those assets were declared as properties of the partnership firm. The court held that this instrument was not a "conveyance", but was a deed of partnership, and, therefore, there was no presumption that the partner "sold" his property to the partnership came into existence under the document.

There were no words which expressly or by implication amounted to a *transfer of interest* as between the partner who threw his property in the partnership and the rest of the partners, and, therefore, there was no presumption that the partner "sold" his propery to the partnership firm. The document was held to be an instrument of partnership.

42.5. Of course, the case does not call for an amendment of the law, since the question is one of applying the legal principle, which appears to be this—that a conveyance transfers assets from one person to another, while a partnership pools them together.

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1. (a) *Basanti* v. *Babu Lal*, A.I.R. 1931, All. 225;
   (b) *In re Messrs Jai Dayal*, A.I.R. 1933 All. 77.
2. *Dulichand* v. *I. T. Commissioner*, A.I.R. 1956 S.C. 354, 358, para 15.
3. *Chhotalal Devichand* v. *I. T. Commissioner*, A.I.R. 1959 Bom. 152, 154 (per Chagla C.J.).
4. *Dulichand* v. *I. T. Commissioner*, (1956) A.I.R. S.C. 354, followed in A.I.R. 1967 Mad. 449, 451, para 5 (D.B.).
5. See also *Bhagwanji* v. *Alembic Chemical Works*, A.I.R. 1948 P.C. 100.
6. *Cf.* order 30, Rule 9, Code of Civil Procedure, 1908.
7. *State* v. *Chidambaram*, A.I.R. 1970 Mad. 5.
8. Article 23.

Present position to a duty.

42.6. It may be noted that at present, under article 46, an instrument of partnership is chargeable with a duty of two rupees eight annas if the capital of the partnership does not exceed rupees five hundred, and with ten rupees in any other case. A partnership between firms, if it does not fall under article 46 because of the stricter view taken in the law of partnership, would fall solely under "agreement" [article 5, clause (c)], for which the duty is eight annas. Of course, it is not our direct object to impose a higher duty as such on instruments of partnership. The principal object is to take note of business reality, for the limited purpose of the stamp law, and to state the position clearly so as to avoid controversies.

No change.

42.7. Article 46 therefore needs no change.

CHAPTER 43

ARTICLE 47—POLICIES OF MARINE INSURANCE

Introductory.

43.1. Article 47 levies duty on policies of insurance.

The duty varies according to the nature of the policy, the article having been divided into different divisions—A.B.C. and so on—for the purpose. We shall discuss only those portions of the article which require consideration having regard to the need for amendment in the particular portions or suggestions made for amendment of those portions.

Policies of marine insurance—Suggestion of the Insurance Association of India.

43.2. We begin with the question of stamp duties on policies of marine insurance (described in the Act as policies of sea insurance). A suggestion for amendment of the law on the subject was received from the Insurance Companies Association of India, and the suggestion was forwarded by the Ministry of Finance to the Law Commission for its consideration.[1] The suggestion is to substitute duty for a fixed amount in place of the present duty, which is *ad valorem* in most cases. The duty suggested by the Association is as follows :—

(a) if the amount of the policy does not exceed Rs. 5,000	50 Paise.
(b) in other cases.	1 Rupee.

43.3. Although general insurance business has now been nationalised, we think that that would not make any difference as to the points raised and discussed below on the basis of the above suggestion.

Present law.

43.4. The present law on the subject of stamp duties on policies of marine insurance is contained in Article 47--Division A, read with section 2(20) and section 7(4) and sections 66-67 of the Act.

43.5. Existing section 2(20)[2] defines a "sea policy" as follows :—

Section 2(20)

Policy of sea-insurance or sea-policy.

"(20) "Policy of sea-insurance" or "sea-policy"—

(a) means any insurance made upon any ship or vessel (whether for marine or inland navigation), or upon the machinery, tackle or furniture of any ship or vessel, or upon any goods, merchandise or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in, or relating to, any ship or vessel, and

(b) includes any insurance of goods, merchandise or property for any transit which includes, not only a sea risk within the meaning of clause (a), but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance :

Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself "any risk attending goods, merchandise or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise or property from any risk, loss or damage, such agreement or engagement shall be deemed to be a contract for sea-insurance ;"[3]

1. Suggestion of the Insurance Companies Association of India (Regional Councils of Delhi and Calcutta). Law Commission File No. F. 3(4); 57-L.C. Part I, S. No. 24; Finance Ministry File No. F. 1/64/63-Cust. VII, S. No. 1.
2. Certain drafting changes are proposed in the definition in section 2(20). (See Appendix 2).
3. For revised section 2(20), please see Appendix 2.

24 M of Law/77—30.

43.6. Section 7(4) reads--

"(4) Where any sea-insurance is made for or upon a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy shall be charged with duty as a policy for or upon a voyage, and also with duty as a policy for time."

43.7. Article 47, Division A reads—

47. *POLICY OF INSURANCE*

	If drawn singly	If drawn in duplicate for each part
A. Sea-insurance (See section 7)—		
(1) For or upon any voyage—		
(i) where the premium or consideration does not exceed the rate of fifteen naye paise or one-eighth per centum of the amount insured by the policy;	Ten naye paise	Five naye paise
(ii) in any other case, in respect of every full sum of one thousand five hundred rupees and also any fractional part of one thousand five hundred rupees insured by the policy;	Ten naye paise	Five naye paise
(2) For time—		
(iii) in respect of every full sum of one thousand rupees and also any fractional part of one thousand rupees insured by the policy—		
where the insurance shall be made for any time not exceeding six months;	Fifteen naye paise	Ten naye paise
where the insurance shall be made for any time exceeding six months and not exceeding twelve months.	Twenty-five naye paise	Fifteen naye paise

43.8. Sections 66-67 read--

"66. Any person who--

Penalty for not making out policy or making one not duly stamped.

(a) receives, or takes credit for, any premium or consideration for any contract of insurance and does not, within one month after receiving, or taking credit for, such premium or consideration, make out and execute a duly stamped policy of such insurance ; or

(b) makes, executes or delivers out any policy which is not duly stamped, or pays or allows in account, or agrees to pay or allows in account, any money upon, or in respect of, any such policy ;

shall be punishable with fine which may extend to two hundred rupees.

Penalty for not drawing full number of bills or marine policies purporting to be in sets.

"67. Any person drawing or executing a bill of exchange payable otherwise than on demand or a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly stamped the whole number of bills or policies of which such bill or policy purports the set to consist, shall be punishable with fine which may extend to one thousand rupees."

Provision in the Marine Insurance Act.

43.9. and 43.10. Mention may also be made of sections 25 and 27 of the Marine Insurance Act,[1] which have a bearing on the subject.

Main point— reduction of stamp duty from *ad valorem* duty to fixed amount.

43.11. The main point of the suggestion[2] lies in the proposal for reduction of the present stamp duty which [except in the case covered by Article 47A(1)(i)] is calculated *ad valorem* on the sum insured. The suggestion is to reduce the duty to a fixed amount.

1. The Marine Insurance Act, 1963 (11 of 1963).
2. See para 43.2, *supra*.

43.12. The suggestion further says that if the duty is not reduced to a fixed amount, then many statutory provisions which were in force in England before 1959 on the subject of stamp duties on marine insurance[1] should be incorporated. If, on the other hand, the duty is to be reduced to a fixed amount, then those provisions need not be incorporated. **Alternative point in suggestion—to adopt pre-1959 statutory provisions.**

43.13. It may be mentioned that the pre-1959 statutory provisions in England were principally intended to mitigate hardships felt in certain cases.

43.14. The Finance Act, 1959 (Eng.), made important changes in the English law as to stamp duties on policies of marine insurance.[2] The alteration made in 1959 was mainly due to the reduction of the duty to a fixed amount of six pence. The principal question to be considered by us is, whether there should be a similar reduction in the duty on marine insurance policies under our law, as is the suggestion. **Position in England after 1959.**

43.15. The reasons for the passing of the Finance Act, 1959 (in England) have been thus stated[3] : **Reasons for the English Act.**

"Stamp duties were first levied in the reign of Charles II, but for a time were allowed to lapse, being re-established in the reign of William III to raise revenue required to carry on the war with France. As far as *marine policies were concerned,* the duties were levied *ad valorem* and payment thereof was denoted by a stamp on the policies. In the years which followed, the scale of duties was varied from time to time, but throughout successive generations continued on a basis regarded as oppressive by the mercantile community. Repeated pressure on governments one after another for long failed to secure a remission of these duties, although it was evident that they had deleterious effects upon the operations of British underwriters. *At best, they represented a tax on exports and on prudence.*[4] Abroad, objection was raised by foreign nationals to the necessity of contributing substantially to British taxation. At the same time, British underwriters were at a competitive disadvantage as compared with those markets where taxation requirements in respect of marine insurance were less onerous. The disabilities under which marine insurances suffered were accentuated by the statutory requirement that, to be valid in the Courts, contract of marine insurance needed to be expressed in policies in due form. In respect of re-insurance business, the stamp duty provisions in effect imposed double taxation, in that separate stamp duty had to be paid on policies of re-insurance notwithstanding that duties already would have been paid on the original business when the policies thereon were issued to the assured. A considerable volume of re-insurance business is aranged by treaty. It was impracticable to stamp re-insurance treaties, if only for the reason that it would have been impossible at the outset to calculate the sum insured. Thus, the re-insured under such a contract of re-insurance was unable to sue the original underwriters unless in possession of a duly stamped policy covering the particular insurance in respect of which the dispute had arisen. Whereas solvent insurers would not have sought to escape their moral obligations in such circumstances, and would undoubtedly have insured that a policy in due form was issued to the re-insurer, a receiver or liquidator would have been impelled to refuse to issue any policies after the date of the bankruptcy or liquidation order.

"In very great degree, the disabilities were removed by the Finance Act, 1959. This replaced the *ad valorem* scale of marine stamp duties previously applicable with a stamp of six pence per policy, thus bringing marine policies into line with other indemnity policies. Further, the Act provided that the following shall be exempt from all stamp duties :

(a) cover notes, slips, and other instruments usually made in anticipation of the issue of a formal policy, not being instruments relating to life insurance ;

(b) insruments embodying alterations of the terms or conditions of any policy of insurance other than life insurance ;

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1. See Appendix 3 for pre-1959 English l aw.
2. Appendices 4-5.
3. Dover, Analysis of Marine and other Insurance clauses (1961), page 557.
4. Emphasis added.

(c) policies of insurance on baggage or personal and household effects only, if made or executed out of Great Britain ;

and an instrument exempted by virtue of the provisions of this sub-section shall not be taken for the purposes of the Stamp Act, 1891, to be a policy of insurance.

"An instrument shall not be charged with duty exceeding six pence by reason only that it contains or relates to two or more distinct matters each falling within the head of charge.

"At the same time, certain amendments were made in the Marine Insurance Act, 1906. Thus, no longer is there any statutory provision to the effect that a policy of marine insurance shall not be effective for a period of time exceeding twelve months. Although the Continuation Clause will still be retained in those current clauses in which it was previously incorporated, no longer will the inclusion of this clause call for the payment of an additional stamp duty of six pence as was requisite under the provisions of the Finance Act, 1901, which validated the use of this clause. Moreover, all that by statute a policy of marine insurance is now bound to specify is the name of the assured or of some person effecting the insurance on his behalf, this retained provision containing the long-standing prescriptiono of issuing policies of marine insurance "in blank". No longer is it necessary, although in practice this will continue to be done, to specify in the policy the subject-matter insured and the risk insured against, the voyage, or period of time, or both, as the case may be, covered by the insurance; the sums or sum insured ; and the name or names of the insurers.

"The relevant provisions of the Finance Act, 1959, became operative as from 1st August, 1959. One consequence was that re-insurance treaties executed after that date have the same standing as policies of insurance and must be stamped accordingly. They now become legally binding.

"With regard to marine policies executed outside the United Kingdom but in any manner enforceable within the jurisdiction thereof, other than policies on personal household effects, it is to be assumed that these must be duly stamped within ten days of arrival here. In any case, an unstamped policy may be legally stamped after the execution thereof for the purpose of its production in evidence by the payment of a fine of £ 100 in addition to the stamp duty attracted."

Similar reasons applicable in India.

43.16. and 43.17. So much as regards the English Act of 1959. It appear to us that, of the reaons which led to the passing of the Act of 1959 in England, many apply to India. In particular, a tax upon insurance policies is a tax upon prudence, and a proposal for reduction of the stamp duty thereof deserves careful consideration. Moreover, Indian insurers are at a disadvantage, in that they pay more stamp duty than the insurers of other countries where the duty has been reduced. These considerations would seem to justify a reduction of the duty to a fixed one.

43.18. No doubt, any proposal for alteration in the rate of stamp duties usually raises questions of policy, but here, in our view, there are strong reasons why we *should recommend* a change.

43.19. To the reasons already stated, we may add that heavy penalty (as in England) for policies unstamped and brought into the country is not needed for India, since the magnitude is not comparable.

Recommendation to substitute fixed duty. Recommendation regarding Article 47, Division A.

43.20. After very careful consideration, we have come to the conclusion that the stamp duty on marine insurance policies should be reduced to a small fixed amount, say, one rupee, irrespective of the question whether it is a voyage policy or time policy. We, therefore, recommend that in Article 47, Division A, the rate of stamp duty should be reduced to one rupee as indicated above.

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1. See para 43.15, *supra*.

Changes needed to bring stamp duties on marine insurance in India in line with the position in England as resulting from the Finance Act, 1959.

43.21. If this recommendation[1] (substitution of fixed duty) is accepted, the following amendments are required in the Stamp Act and in the Marine Insurance Act :

(1) Section 25(2) to 25(5), Marine Insurance Act, 1963 [corresponding to repealed section 23(2) to (5), (English Marine Insurance Act, 1906)] should be repealed [See section 30(5), Finance Act, 1959 (Eng.)]

(2) Section 27(2), Marine Insurance Act, 1963 (11 of 1963) [corresponding to repealed section 25(2), (Eng.) Marine Insurance Act] should be repealed. [See section 30(5), Finance Act, 1959 (Eng.)].

It may be noted that the corresponding provisions in the (English) Marine Insurance Act (before 1959) were intended to safeguard revenue. This is evident from the fact that, since the introduction of stamp duties in 1795 (35 Geo. 3 Ch. 63), the requirements as to writing have been in existence.[2]

(3) Section 7(4), Indian Stamp Act, 1899 [corresponding to repealed section 94 (English), Stamp Act, 1891] should be repealed. [See section 30(4)(a), Finance Act, 1859]. The reason is that section 7 (4) becomes useless if the distinction between "voyage" and "time policies" is abolished, in relation to stamp duties.

(4) Article 47, Division A, should be amended in order to exclude from liability, slips, cover notes etc.[3-5] for marine insurance unconditionally. This would not affect the provisions in the Marine Insurance Act.[6] The present exemption is conditional, but should be made absolute, in view of proposed less stringent approach as to duty. (See section 30(2), Finance Act, 1959).

(5) In consequence of (4) above, the general exemption, at the end of Article 47, should be amended so as to exclude marine policies from that exemption, as these would be governed by a specific exemption, under our recommendation.

(6) In view of item (4) above, section 66, of the Stamp Act, should be amended so as to exclude cases where the policy of insurance is totally exempt. The object of section 66 is to prevent the loss of revenue that would occur if insurance business were done on slips unstamped. As the stringent provisions as to policies in section 7 are repealed or proposed to be repealed, and as the duty is to be reduced, the provision in section 66 is not required for marine insurance policies.

[Cf. section 30(4), second paragraph, Finance Act, 1959, amending section 100 (English), Stamp Act, 1891, which corresponds to section 66, Indian Stamp Act.].

(7) Article 47, Division A, Stamp Act should be *amended* by substituting a fixed duty of ***one rupee*** for every marine insurance policy whatever be the amount.

(8) In consequence of (7) above, section 67, Stamp Act (sets of policies) should be suitably amended, as the duty will now be a small and fixed amount. There was no exactly corresponding provision in the English Act, even before 1959. But there was a somewhat similar provision in section 97(3), Stamp Act, 1891, now repealed.

[See section 30(4), Finance Act, 1959].

Re-draft.

43.22. We give below a rough draft of the amendments that will be required in the Stamp Act, in order to carry out the changes recommended above. We may add that some of the changes were put forth in our Questionnaire and such replies as were received to the particular question have been favourable.[7]

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1. ***See Supra***
2. See Dover, Hand Book to Marine Insurance (1957), pages 31, 129, 333.
3. See para 43.20, *supra*.
4. As to existing law, see A.I.R. 1964 S.C. 1396, on appeal from *National Security Assurance Co.* v. *R. Ratilal & Co.* A.I.R. 1961 Cal. 48, 50, 51, 53, paragraphs 11, 13, 16 and 26.
5. Also see Mulla Stamp Act (1963), pages 41, 74 and 317.
6. Sections 24,25(1) and 88, Marine Insurance Act, 1963 (11 of 1963), corresponding to sections 21,22 (1) and 89 of the (English) Marine Insurance Act, 1906.
7. Q. 97 to 99.

Section 7 (Stamp Act)

In section 7, sub-section (4) shall be omitted.

Section 66, Stamp Act

To section 68, the following Exception shall be added, namely :—

"Exception.—Nothing in this section applie sin relation to an insurance or a policy effecting an insurance if the insurance is such that a policy effecting it is exempt from duty under this Act."

Section 67, Stamp Act

In section 67, the words "or a policy of marine insurance" the words "or policies" and the words "or policy" shall be omitted.

Article 47—Division A, Stamp Act

In Article 47, for Division A, the following shall be subtituted, namely,—

"A. Sea Insurance — *One rupee*

Exemption

The following shall be exempt from all stamp duties :

(a) *cover notes, slips and other instruments usually made in anticipation of the issue of a formal policy of marine insurance ;*

(b) *instruments embodying alterations of the terms or conditions of any policy of marine insurance :*

(c) *policies of marine insurance on baggage or personal and household effects only, if made or executed out of India ;*

and an instrument exempted by virtue of paragraph (a) of this Exemption shall not be taken for the purposes of this Act to be a policy of insurance."

Article 47—General Exemption

11 of 1963. In Article 47, in the General Exemption, after the words "a policy of insurance", the words *"other than a policy of marine insurance"* shall be inserted.

Amendments to Sections 25(2) to 25(5) and section 27(2), Marine Insurance Act, 1963

In the Marine Insurance Act, 1963,—

(a) in section 25, sub-section (2) to sub-section (5) shall be omitted ;

(b) in section 27, sub-section (2) shall be omitted.

Suggestion regarding stamp.

43.23. It may also be added here that there are certain provisions in the English Stamp Law, namely, section 11 of the Finance Act, 1901 (regarding policies with a continuation clause) section 8 of the Revenue Act, 1903 (for builders' etc. risks) and section 8 of the Finance Act, 1912 (for increase in premium), which are relevant and important on the subject of stamp in marine insurance. The necessity of making similar provisions in the Indian Stamp Law requires to be considered.

Builders' risk policies.

43.24. In England, the Stamp Act of 1891 does not include builders' risks insurance in the definition of "policies of sea insurance". The position was met by the Revenue Act, 1903 (3 Edw. VIII, c. 46), section 8 of which reads as follows[1] :

"Section 8. A policy of insurance made or purporting to be made upon or to cover any ship or vessel, or the machinery or fittings belonging to the ship or vessel, whilst under construction or repair or on trial shall be sufficiently stamped for the purpose of the Stamp Act, 1891, and the Acts amending the Act, if stamped as a policy of sea insurance made for a voyage, and though made for a time exceeding twelve months, shall not be deemed to be a policy of sea insurance made for time."

1. Dover, Handbook to Marine Insurance (1937), pages 134, 135.

43.25. The effect of these provisions is that Builders' risks policies, although invariably effected for time, are appropriately stamped as for voyage. As it may be difficult at the outset to fix with precision the time which must elapse before delivery of the vessel to her owners, such policies are usually arranged in the first instance for a period of time anticipated to be adequate, but a clause is normally inserted in the policy agreeing to hold covered any necessary extension. Strictly speaking, such extensions might be regarded as new contracts rather than as continuations, but in practice are endorsed on the original policies and signed before the period originally mentioned has expired ; otherwise, the extension would need to be stamped as a separate contract.

43.26. After a policy has been effected, by an alteration of the risk the rate of premium may, by the imposition of an additional premium, be increased so as to bring the total rate of premium outside the concession : To meet this position, the Finance Act, 1912, provided as follows in England[1] :

> "Section 8. Where the premium or consideration for a policy of sea insurance is expressed to be a sum not exceeding the rate of half-a-crown per cent of the sum insured, and is subject to an increase (whether defined or not in the policy) in the event of the occurrence of a specified contingency, the premium or consideration shall, for the purpose of the Stamp Act, 1891, be treated as a premium or consideration not exceeding the rate of half-a crown per cent on the sum insured. But if, owing to the occurrence of the contingency which is the occasion for an increase of the premium or consideration, the premium or consideration, is increased so as to exceed the rate of half-a-crown per cent of the sum insured, the policy or a new policy to be thereupon issued small be stamped with such an additional sum as is required to represent the additional duty payable, and may be so stamped without penalty at any time not exceeding thirty days after the date on which the increased premium or consideration becomes ascertained.

Anomaly in Stamp Act.

43.27. Section 4(2), Marine Insurance Act, 1963 covers construction, building, and launching risks. There is one anomaly, namely, that while such insurances are treated as analogous to marine insurances, the policies themselves are stamped with the duty applicable to non-marine insurance. In England, builders' risks policies are under the Revenue Act, 1903 (3 Edw. VII, Ch. 46), section 8, to be stamped as if for a "voyage" and not deemed to be policies for time, even if made for more than a year. Other policies on adventures "analogous to marine adventures" would presumably be liable to stamp only as non-marine policies.[2] In India, there is a no express provision, but entry 47 of the First Schedule to the Indian Stamp Act, sub-division 'A' relating to "sea insurance", could not in terms apply and a fixed duty under sub-division 'B' would be leviable, because such policies would not be "sea insurance policies" as defined in section 2(20) of the Indian Stamp Act.

43.28. The position is, in our view, anomalous. It is desirable that at least a provision requiring all policies governed by sub-section (2) of section 4 of the Marine Insurance Act to be stamped as marine insurance policies (for voyage) should be inserted in the Indian Stamp Act.

Insurance against construction risks.

43.29. The point is mentioned in the 21st Report of the Law Commission (Report on Marine Insurance).[3] Construction, building and launching of sea going vessels is a costly and lengthy process with attendant risks. It is customary to take out insurance policies against such risks.

43.30. Section 2(20) of the Stamp Act defines a "policy of sea insurance", in terms under which policies taken out for these purposes will not be taken as "sea policies" for voyage.[4]

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1. Dover, Handbook to Marine Insurance (1957), page 135.
2. See section 79, English Act.
3. 21st Report of the Law Commission (Marine Insurance), page 49, paras 2-3.
4. File No. 3(4)/57-L.C. Pt. I. [Precis of important points in Ministry of Finance, Department of Revenue, File No. 1/60/62. Cus. VIII, notings dated 28th December, 1962 and 21st March, 1963.).

Recommendation to amend Article 47.

43.31. We, therefore, recommend the insertion of the following proviso to Article 47 of the Stamp Act :

"Provided that all policies governed by sub-section (2) of section 4 of the Marine Insurance Act, 1963, shall be stamped as policies of sea insurance for voyage."

Policy underwritten by more than one company.

43.32. Then there are policies underwritten by several persons. With reference to the discussion contained in the Report[1] of the Law Commission on Marine Insurance, it is desirable[2] that a policy underwritten by more than one company should be considered as *only one contract* for the purposes should be added to Aritcle 47.

Voyage and time policies.

27. (1) Where the contract is to insurance the subject-matter at and from or from one place to another or others, the policy is called a "voyage policy", and where the contract is to insure the subject-matter for a definite period of time, the policy is called a "time policy". A contract for both voyage and time may be included in the same policy.

(2) A time policy which is made for any time exceeding twelve months is invalid.

Designation and subject-matter.

28. (1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

APPENDIX 2

Section 2(20)—Revised definition of "Policy of Sea Insurance".

"20. (4) 'Policy of Sea Insurance' or 'Sea Policy'—

(a) *means any instrument of insurance against loss, damage or liability arising from a sea risk*, made upon—

(i) any ship or vessel (whether for marine or inland navigation), or

(ii) machinery, tackle or furniture of any ship or vessel, or

(iii) any goods, merchandise or property of any description whatever on board of any ship or vessel, or

(iv) the freight of, or any other interest which may be lawfully insured, in or relating to, any ship or vessel, and

(b) includes any *instrument or insurance of goods,* merchandise or property for any transit which includes not only a sea risk within the meaning of clause (a) but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance.

(2) Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise,—

(i) agrees to take upon himself any risk attending goods, merchandise or property of any description whatever while on board of any ship or vessel, or

1. 21st Report of the Law Commission (Marine Insurance) page 63, notes to clause 21.

2. File No. F. 3(4)/57-L.C. Part I (Precis of important points in Ministry of Finance, Department of Revenue File No. 1/60/62-Cus. VII notings dated 28th December, 1962 and 21st March, 1963).

(ii) engages to indemnity the owner of any such goods, merchandise or property against any risk, loss or damages,

such agreement or engagement shall be deemed to be a contract for sea insurance.

APPENDIX 3

Statement showing law of Stamp Duty in England before 1959 *regarding marine insurance.*

The Stamp (Consolidation) Act, 1891

(54 & 55 Vict. Chap. 39)

Section 92(1), *Act of* 1891

(1) Defined policy of marine insurance to mean any insurance (including re-insurance) made upon any ship or vessel or upon machinery, tackle or furniture of any ship or vessel or any goods on board of any ship or vessel so as to cover the risk from the commencement of the transit to the ultimate destination.

Section 92(2), *Act of* 1891

Defined a contract of sea insurance to mean an agreement whereby any person in consideration of any sum of money takes upon himself any risk attending goods, merchandise, or property of any kind while on board of a ship or vessel or engages to indemnify the owner of any such goods, merchandise or property from any risk, loss or damage.

Section 93(1), *Act of* 1891

Section 93(1) says that a contract of sea insurance, excepting the one referred to in section 55 of the Merchant Shipping Amendment Act, 1862, shall not be valid unless expressed in a policy of sea insurance.

Section 93(2), *Act of* 1891

It says that a policy of sea insurance for time shall not be for a period exceeding 12 months.

Section 94, *Act of* 1891

It says that a policy of sea insurance, if made for voyage and also for time or to cover a time beyond 30 days after arrival at the destination and having been moored shall pay the duty as a policy for voyage and also duty as policy for time.

Section 95, *Act of* 1891

It provides how a policy of sea insurance, if not stamped at the time of execution, is to be stamped.

Section 96, *Act of* 1891

Section 96 permits alteration of the policy after it has been underwritten, provided the alternation is done before notice for determination of the risk originally insured, and does not extend the period beyond six months (in case of policies shorter than six months), or beyond 12 months (for policies of over six months).

Provided further that the property remains the property of the same person, and the alteration does not extend the amount of the sum insured.

Section 97(1), *Act of* 1891

Provides for penalty of one hundred pounds as fine, if one becomes an insurer or enters into a contract of sea insurance in any manner without issue of a duly stamped sea insurance policy, or if one is concerned in a fraudulent contrivance or device or any wilful act or neglect with an intent to evade stamp duty.

Section 97(2), *Act of* 1891

Provides for a fine as above, if a broker, agent or other person transacts a sea insurance contrary to the true meaning any intent of this Act, or writes any policy upon material not duly stamped. Further, he shall lose the commission or brokerage or agency, any money paid to him shall be deemed to be paid without consideration, and shall remain the property of his employer.

Section 97(3), *Act of* 1891

Provides for a fine as above, if one makes a copy of the policy of sea insurance without there being, in existence, any duty stamped policy.

Section 11(1), *Finance Act*, 1901

(1 *Edw.* 7, *ch.* 7)

The Act of 1891 (section 91) was intended to insure a regular revenue, and to minimise tax evasion.

But it caused hardship to the assured where the previous policy expired, when the ship was encumbered with bad weather or due to some casualty. This was sought to be met by a "continuation clause", but the same was held invalid, as it extended the period of insurance beyond 12 months. This disability was removed by the Finance Act, 1901.

The Act of 1901 section 11(1) provided that notwithstanding anything contained in the Stamp Act, 1891, a policy of sea insurance made for time may contain a continuation clause and the same shall not be invalid on the ground that it makes the policy available beyond 12 months.

Act of 1901, *section* 11(2)

The same Act provided that an additional duty of six pence shall be chargeable on a policy having a continuation clause.

Act of 1901, *section* 11(3)

The Act also provided for payment of separate duty without penalty, if the risk covered by the continuation clause attaches and the duty is paid within 30 days after the risk has so attached.

Act of 1901, *section* 11(4)

It defines "continuation clause" to mean that the subject of insurance shall stand covered until its arrival if the voyage is not completed within the time of the policy, or for a reasonable time not exceeding 30 days after arrival.

Revenue Act, 1903 : (3 *Edw.* 7 c. 46)

The definition of policy of sea insurance as given in the Act of 1891, did not include builders' risk, and hence that position was met by the Revenue Act of 1903.

Act of 1903, *section* 8

A policy of insurance made or purporting to be made upon or to cover any ship or vessel or the machinery or fittings belonging to the ship or vessel, while on construction, repair or trial, shall be sufficiently stamped for the purposes of Stamp Act 1891 as a policy for voyage, and, though made for a period exceeding 12 months, shall not be deemed to be a policy of sea insurance for time.

Finance Act, 1912

The Act of 1891 had provided for a concession in stamp duty where the preminum did not exceed 2s. 6d. But a practice started of availing the concession, and then, after the concession was availed of, of altering the policy by increasing the premium. To meet this situation, the Finance Act, 1912 was enacted.

Act of 1912, *section* 8

Section 8 of the Act of 1912 provides for payment of additional stamp duty, if more duty was payable on account of increase of premium on the original premium. No penalty was payable if the additional duty was paid within 30 days.

The Act of 1920 revised the scale of stamp duty, and the same is now in force except where repealed by the Act of 1959. It did not increase the stamp duty where the premium did not exceed 2s. 6d. per cent of the sum insured (gross), nor did it interfere with the previous law relating to builders' risks and the continuation clause.

The Finance Act, 1959 (7 ' 8 *Eliz.* 2 *c.* 58).

Section 30(5) of the 1959 Act says that paragraphs (2) to (5) of section 23 and sub-section (2) of section 25 of the Marine Insurance Act, 1906 shall cease to have effect.[1]

APPENDIX 4

Provisions of the Finance Act, 1959 (7 ' 8 *Eliz.* 2 *c.* 58) *relevant to stamp duties on Marine Insurance Policies.*

"*Finance Act*, 1959

(7 ' 8 Eliz. 2 c. 58)

Part IV

Stamp Duties

Stamp duty on policies of insurance

30.—(1) In the first schedule to the Stamp Act, 1891, before the head of charge "Policy of Life Insurance" there shall be inserted the following—

	£.	s.	d.
"Policy of Insurance other than Life Insurance	0	0	6".

and the head of charge "Policy of Sea Insurance" and the head of charge beginning "Policy of Insurance against Accident" shall be omitted.

(2) The following shall be exempt from all stamp duties :

(a) cover notes, slips and other instruments usually made in anticipation of the issue of a formal policy, not being instruments relating to life insurance ;

(b) instruments embodying alterations of the terms or conditions of any policy of insurance other than life insurance;

(c) policies of insurance on baggage or personal and household effects only, if made or executed out of Great Britain;

and an instrument exempted by virtue of paragraph (a) of this sub-section shall not be taken for the purposes of the Stamp Act, 1891, to be a policy of insurance.

(3) An instrument shall not be charged with duty exceeding six pence by reason only that it contains or relates to two or more distinct matters each falling within the head of charge inserted by sub-section (1) of this section.

(4) In consequence of sub-section (1) of this section, the Stamp Act, 1891, shall be amended as follows :—

(a) sections 92 to 97 (which make special provision for policies of sea insurance) shall cease to have effect ;

(b) section 100 (which imposes penalties in cases where there is no duly stamped policy of insurance) shall have effect as if the exceptions therein as to sea insurance were omitted;

[1] For detailed discussion of each provision of the Marine Insurance Act, see Dover, Handbook of Marine Insurance, (1957), pages 129—136.

(c) section 116 (which enables composition to be made for stamp duty on accident policies) shall apply in relation to all policies of insurance other than life insurance, and the second part of the Second Schedule shall have effect accordingly;

and the said section 100 shall not apply in relation to an insurance or a policy effecting an insurance if the insurance is such that a policy effecting it is exempt from all stamp duties.

(5) Paragraphs (2) to (5) of section 23 of the Marine Insurance Act, 1906, and sub-section (2) of section 25 thereof (which are derived from provisions contained in section 93 of the Stamp Act, 1891) shall cease to have effect.

(6) Notwithstanding the repeal of section 93 of the Stamp Act, 1891, a contract for such insurance as is mentioned in section 506 of the Merchant Shipping Act, 1894, shall continue to be admissible in evidence although not embodied in a marine policy as required by section 23 of the Marine Insurance Act, 1906.

(7) This section shall apply in relation to instruments made or executed after the beginning of August, 1959."

"EIGHTH SCHEDULE

Part II

Repeals Relating to Stamp Duty on Insurance Policies

Section and Chapter	Short Title	Extent of Repeal
54 & 55 Vict. c. 39.	The Stamp Act, 1891.	Sections 92 -97. In section 98, in sub-section (1), the words from "against accident ; and" to "a policy of insurance" and from "or as compensation" to the end, and and sub-section (2). In section 99, the words "sea insurance or". In section 100,) the words "other than sea insurance" and the words "other than a policy of sea insurance". In the First Schedule, the head of charge "Policy of Sea Insurance" and the sea of charge beginning "Policy of Insurance against Accident".
58 & 59 Vict. c, 16.	The Finance Act, 1895.	Section 13.
59 & 60 Vict. c. 28	The Finance Act, 1896.	Section 13.
62 & 63 Vict. c. 9.	The Finance Act, 1899.	Section 11.
1 Edw. 7, c. 7.	The Finance Act, 1901.	Section 11.
3 Edw. 7, c. 46.	The Revenue Act, 1903.	Section 8.
6 Edw. 7 c. 41.	The Marine Insurance Act, 1906.	In section 22, the words "although it be unstamped". In section 23, paras. (2) to (5). In section 25, sub-section (2).
7 Edw. 7 c. 13.	The Finance Act, 1907.	Section 8.
2 & 3 Geo. 5. c. 8.	The Finance Act, 1912.	Section 8.
10 & 11 Geo. 5, c. 18.	The Finance Act, 1920.	In section 40, sub-section (1), and in sub-section (2) the words "ninety-eight". Section 41.
21 & 22 Geo. 5, c. 2.	The Cunard (Insurance) Agreement Act, 1930.	In section 3, in sub-section (1) the words from "be invalid" to "Sea Insurance, or", and sub-section (3).
12, 13 & 14 Geo. 6, c. 47.	The Finance Act, 1949.	In section 35, sub-section (3).
15 & 16 Geo. 6 & Eliz. 2c. 57.	The Marine and Aviation Insurance (War Risks) Act, 1952	In section 7, in sub-section (1), the words from "be invalid" to "seal insurance, or, and in sub-section (3) the words "ninety-seven or" and the words from "or be liable" to be end.

APPENDIX 5

English law as to Stamp Duties on Marine Insurance Policies after 1959.

(1) Certain provisions as in force in England in 1959 have now been altered[1].

(2) The present position in England is this. The following provisions have been repealed by the Finance Act, 1959[2].

Section 8 f (increase in premium)	Finance Act, 1912
Section 11 (continuation clause)	Finance Act, 1901
Section 8 (Builders Risk)	Revenue Act, 1903

By the Finance Act, 1959, section 30(1) the previous *ad valorem* duty was replaced by a fixed duty of six pence in the case of all policies of insurance other than life insurance.

The Finance Act, 1959, section 30(2) exempts from all stamp duties cover notes, slips and other instruments usually made in anticipation of the issue of a formal policy, and instruments embodying alterations in the terms or conditions of any policy of insurance and policies of insurance on baggage or personal and household effects only, if made out of Great Britain.

There is no corresponding section in the Indian Stamp Act.

(The repealed provisions of the 1906 Act correspond to section 25(2) to (5) and section 27(2) of the (Indian) Marine Insurance Act, 1963 (11 of 1963).

(4) The Finance Act, 1959, section 30(4) has also repealed sections 92-97 of the Stamp Act, 1891. [Section 94 of the Stamp Act, 1891 correspond to section 7(4) Indian Stamp Act] Section 97(3) correspond to some extent to Section 67 Indian Act.

(5) The Finance Act, 1959 also amends section of the Act of 1891 (penalties) (Section 100 corresponded to section 66, Indian Stamp Act).

(6) Further, the Finance Act, 1959 amends section 116 of the 1891 Act (composition of Stamp duty) on accident policies by extending it to all policies other than life. (There is no section corresponding to section 116 in the Indian Stamp Act).

(7) Section 30 of the Finance Act, 1959 read with the Stamp Act, 1891 now governs stamp duties in England on marine insurance policies. The position in England now is discussed, in the undermentioned books[3].

[1] As to position in 1959, *see* 21st Report of the Law Commission (Marine Insurance), page 62.

[2] See Finance Act, 1959 (7 & 8 Eliz. 2 c. 58), section 30.

[3] *See*-(a) Dover, Analysis of Marine and other Insurance Clauses (1961), pages 45 & 93
(b) Chalmers, Marine Insurance Act (1966) pages 165-166, where the Finance Act, 1959 is quoted.
(c) Monroe, Stamp Duties (1964), page 133 and pages 267-268.

CHAPTER 44

ARTICLE 47 AND ACCIDENT POLICY

Introductory.

44.1. This Chapter deals with the question of stamp duty on policies of *insurance against accident and sickness.* A suggestion for reducing the duty on such policies was made by the Indian Insurance Companies' Association, Bombay,[1] and the suggestion has been referred to the Law Commission by the Ministry of Finance.[2]

44.2. The subject of rates of stamp duty on policies of insurance falls within the competence of the Union[3]. The duties are levied by the Government of India[4], but they are collected by the State[5] within which the duties are respectively leviable[6]. The proceeds of the duty leviable within a State are assigned to the States[7].

44.3. The existing provisions relating to Stamp Duty on fire insurance, etc. and accident insurance i.e., Entries 47-B and 47-C the First Schedule to Indian Stamp Act, 1899—are quoted below :—

Description of Instrument	Proper stamp-duty
"47-B. Fire Insurance *and other classes* of insurance, not elsewhere included in this article, covering goods, merchandise, personal effects, crops, and other property against lose or damage—	
(1) in respect of an original policy	
(i) when the sum insured does not exceed Rs. 5,000 ;	*Fifty* naye paise
(ii) in any other case ; and	One rupee
(2) in respect of each receipt for any payment of an premium on any renewal of an original policy.	One half of the duty payable in respect of the original policy addition to the amount, *if any, chargeable under No. 53."*
"47-C. Accident and sickness Insurance	
(a) against railway accident, valid for a single journey only.	Ten naye paise.
Exemption	
When issued to a passenger travelling by the intermediate or the third class in any railway.	
(b) In any other case-for the maximum which may become payable in the case of any single accident or sickness where such amount does not exceed Rs. 1,000, and also where such amount exceeds Rs. 1,000, for every Rs. 1,000 or part thereof.	*Fifteen* naye paise : *Provided that, in case* of a policy insurance against death by accident when the annual premium payable does not exceed Rs. 2.50 per 1,000, the duty on such instrument shall *be ten naye paise for every Rs. 1,000 or* part thereof or the maximum amount which may become payable under it."
Article 47 Division CC CC.—INSURANCE BY WAY OF INDEMNITY *against* liability to pay damages on account of accidents to workmen employed by or under the insurance or against liability to pay compensation under the Workmen's Compensation Act, 1923, for every Rs. 100/- or part thereof payable as premium.	Ten naye paise.

Question raised by the suggestion under consideration.

44.4. The suggestion that has been forwarded to us for consideration[8] raises two major questions, first, reduction of the stamp duty on original policies of accident insurance, and, secondly,

1. For details of the suggestion, *see infra.*
2. File No. F. 3(4)/57-L.C. Part I,S. No. 35, being a copy of the suggestion in the Ministry of Finance (Deptt. of Revenue) Cus. VII Section, File No. F. 1/77/6-Stamp.
3. Union List, Entry No. 91 of the Constitution.
4. Article 268 (1) of the Constitution.
5. Article 268 (1) (b) of the Constitution.
6. In the case of Union territories, they are collected by the Government of India.
7. Article 268 (2) of the Constitution.
8. See I, *supra*

clarifications regarding stamp duty on renewal of such insurance of stamp duty is not only on point the suggestion points out (giving illustrations), that the rate of stamp duty is not only on the high side but is also out of proportion to the premium charged by the companies. It states that in view of the hardship caused to Insurance Companies, the stamp duty under Article 47-(B) should be reduced and brought in line "more or less with that under Article 47-B".

44.5. As regards the second point, the suggestion states that in article 47-C and 47-CC there is no provision (as in article 47-B) for renewal, so that the proper stamp duty for renewal "could be nil, one half or anything". It is stated, that it is difficult for Insurance Companies to follow a uniform practice in the absence of a clear-cut provision for their guidance in this behalf. It is also stated, that the omission should be made good by prescribing a specific duty payable on renewals, "which any case could not be more than half the stamp duty payable on original policies."[1]

Scheme of the Report.

44.6. Before dealing with the merits of the suggestion, we shall try to deal with the history of the existing law, the English law on the subject, the contract of insurance and the meaning and scope of accident insurance, and other related matters. This is necessary, because without such a study some important legal aspects are likely to be overlooked, and also because the nature of the subject is such that a mere reading of the provisions of the Stamp Act may not give a full and concrete view of the problem which we have to deal with.

Comments of State Governments, received by the Ministry of Finance on the suggestion in question, will be considered later[2].

History.

44.7. The history of the particular provision regarding policies of insurance may be referred to. In the Act of 1860, Schedule A, entries 43 and 44 levied stamp duty on a policy of insurance on life or upon ship etc. or goods on ship etc. or freight of ship etc. (There was no definition of "policy").

44.8. The Stamp Act (10 of 1862), Schedule A, entries 55 and 56, levied a duty on certain policies of insurance [roughly speaking, life insurance, insurance against loss or damage by fire upon any building or property (not being ship etc.) and policy of insurance upon any ship etc. or goods or board or freight etc.] The Stamp Act of 1869, First Schedule, item 3, levied a duty on "Policy of life insurance", but the definition of "policy" in that Act[3] stated that it did not include a policy of life insurance[4]. The Act of 1879 contained a definition of "policy of insurance" which included, *inter alia* a life Policy[5]. Life Insurance Policies, thus *became chargeable* under "other insurances" by Article 49(c) of the Act of 1879.

44.9. Upto 1879, policy of *accident insurance* was not specifically mentioned. It was chargeable (if at all) only on the assumption that the duty on a "policy of insurance" covered accident insurance policies also, by reason of the definition in the Acts of 1869 and 1879.

44.10. Thus, in the Stamp Act of 1879, section 3(15) (so far as is relevant to accident insurance) read as follows :—

> "(15) 'Policy of Insurance' means any instrument by which one person in consideration of a premium, engages to indemnify another against loss, damage or liability arising from an unknown or contingent event. It includes a life policy....."

[Schedule II, exemption 14(a) of the Act of 1879 exempted a letter of cover or engagement to issue a policy of insurance, subject to a proviso].

44.11. Fire insurance became a separate clause under Act 1 of 1888, which amended the Act of 1879.

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1. Analogy of Article 47-B is in the suggestion given in this context).
2. See *Infra*
3. c.f. The Stamp Act, 1870 (33 & 34 Vic. c. 97).
4. Section 11 (23), Act 18 of 1869.
5. Section 3 (15), Act 1 of 1879.

The Act of 1888 added a clause as to the renewal of a policy of fire insurance, which was remitted to Article 47 by Act 5 of 1906. Act 6 of 1894 added two clauses including a policy of sea insurance, whether of ship or of cargo, which now forms part of section 2(20)[1].

44.12. Accident Insurance became a *separate clause under the Act* of 1899 (i.e. the present Act).

The proviso relating to policies wherein the annual premium for accident insurance does not exceed Rs. 2.50 per Rs. 1,000, was introduced by the Repealing and Amending Act 18 of 1928, to give statutory recognition to a reduction of duty granted previously[2] by notification No. 3 dated the 4th February, 1928.

44.13. The article was re-arranged in the Act of 1899, and the words in Division D—"Life insurance or other insurance not specifically provided for" were added to include all other forms of insurance[3-4].

44.14 Act 43 of 1923 transferred some of these to Division B, by adding therein the words "and other clauses of insurance not elsewhere included in this Article, covering goods, merchandise, personal, effects, crop and other property against loss or damage."

44.15. Division CC of Article 47 was inserted by Act 15 of 1925, providing for stamp duty on the policy of indemnity insurance under the Workmen's Compensation Act, 1923. It was introduced in consequence of the passing of the Workmen's Compensation Act, 1923.

44.16. A specific provision for the levy of stamp duty on a policy of "group insurance" was made in the Act 43 of 1955, by substituting, in Division D of Article 47, the words "or group insurance or other insurance" for the words "or other insurance".

44.17. Certain amendments, not important for the present purpose, were made in 1961, besides the amendment made in 1958 to implement decimal coinage.

English Law.

44.18. The law in England may now be summarised.

In the (English) Stamp Act, 1891,[5] as originally enacted, there were three heads of charge relating to policies of insurance, namely, "Policy of Life Insurance", "Policy of Sea Insurance" and "Policy of Insurance against Accident". The stamp duty for accident policy was one pence. By the Act of 1920,[6] the duty on accident policies was increased to six pence. But, by the Act of 1959,[7] the separate heads of "Sea Insurance", and "Insurance against accident" were omitted. Consequential changes in the provisions in the nature of definition were also made.

Schedule to the English Act.

44.19. The Schedule to the English Act now reads thus[8] :—

"Policy of Insurance other than life insurance	..	..	6
Policy of Life Insurance—			
Where the sum insured does not exceed £10	..	..	1
Exceeds £10 but does not exceed £25	..	..	3
Exceeds £25 but does not exceed £500	..	..	
For every full sum of £50, and also for any fractional part of £50, of the sum insured	..	..	6
Exceeds £500 but does not exceed £1000 for every full sum of £100, and also for any fractional part of £100, of the amount increase	..	1	0
Exceeds £1000 :			
For every full sum of £1,000 and also for any fractional part of £1,000, of the amount insured	..	10	0

[1] See Mulla, Stamp Act (1963), page 40.
[2] See Donogh's Indian Stamp Law, edited by Rustomji, (1935), pages 698-699.
[3] The Statement of Objects and Reasons appended to the Bill, says (under Article 47), "The drafting of this article has been altered to make its provisions clearer."
[4] As to the suggestion made in 1898 to reduce the duty on accident insurance, see paragraph 33, *infra*.
[5] Stamp Act, 1891 (54 & 55 Vict. c. 38) First Schedule, head of charge "Policy of Insurance etc."
[6] The Finance Act, 1920 (10 & 11 Geo. 05c. 18).
[7] Finance Act, 1959 (7 & Eliz. 2c. 58), s. 30.
[8] Stamp Act, 1891, (54 & 55 Vic. c. 38) as amended up-to-date. See Monroe, Stamp Duties (1964), pages 213-214.

Policies under the Friendly Societies Act, 1896, section 33, are exempt from stamp duty."

Contract of insurance.

44.20. We shall now deal with insurance and its various classes. Insurance is a contract whereby one person, called the "insurer", undertakes to indemnify another person, called the "assured", against a loss which may arise or to pay a sum of money on the happening of a specified event.[1] It is a contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified events.[2] "Insurance is indemnification against the risk of loss, by distributing the loss over a group."[3]

44.21. The two major types of insurance are marine and non-marine.[4] For convenience, non-marine insurance may be studied in its various species.

Personal insurance and Accidents Insurance.

44.22. In the classification of insurance against main types of non-marine risks, as given by Halsbury[5] *personal insurance* is thus described :—

"(1) Personal insurance in which the event insured against effects the assured in relation to his life and limb and physical well-being. This class includes life insurance, endowment and retirement annuity insurance, *personal accident insurance* and sickness insurance."[6]

Accident policies insure against the contingency of accidental injury or accidental death. Accident insurance, liability insurance and automobile insurance, all share this feature,—that the insurance covers loss or damage resulting from accident or unanticipated contingencies except fire and the elements.

Contingency and indemnity.

44.23. Every insurance, whatever its nature, postulates that a sum of money will be paid by the insurer on the happening of a specified event.[7] In one sense, all categories of insurance are related to a "contingency".[8] But, as a distinction is sometimes made between an "indemnity insurance" and "contingency insurance", it would be desirable to discuss "indemnity"[9] in some detail.

Indemnity.

44.24. The question of indemnity is thus dealt with in Halsbury[10] :—

> "Most contracts of insurance[11] belong to the general category of contracts of indemnity in the sense that the liability of the insurers is limited to the actual loss which is in fact proved"[12]

The happening of the event does not of itself entitle the assured to payment of the sum stipulated in the policy;[13] the event must in fact result in a pecuniary loss to the assured[14] *and*

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[1] Slater, Merchantile Law, (1956), page 275. See also Stevens, Merchantile Law (1965), page 319.

[2] Bouvier, Law Dictionary (1914), Vol.I, page 1613

[3] Lavine, Modern Business Law (1959), page 350.

[4] Halsbury, 3rd Edn. Vol. 22, pages 7 *et seq.* and 179 *et seq.* deal with the two separately.

[5] Halsbury, 3rd Edn., Vol. 22, page 184, para 353(a).

[6] Emphasis added.

[7] Halsbury, 3rd Edn. Vol. 22, page 180, para 347.

[8] See Halsbury, 3rd Edn. Vol. 22, p.394, para 803.

[9] As to how far insurance is a contract of indemnity, see the opinion of the Judges in *Irving* v. *Manning*, (1847) 1 H.L.C. 287, 307; 6 C.B. 391 (Case of marine insurance).

[10] Halsubry, 3rd Edn. Vol. 22, pages 180, 181, 182 paragraphs 348, 349.

[11] Exceptions are life insurance, personal accident and sickness insurance, and some forms of contingency insurance; see Halsbury, 3rd Edn. Vol. 22, pages 181, 182, 394, 395.

[12] See e.g., *Darrell* v. *Tribbitts* (1880). 5Q.B.D. 560, C.A. *Castellain* v. *Preston* (1883), 11 Q.B.D. 380, C.A. *Meacock* v. *Bravant & Co.* (1942) 2 All. E.R. 661.

[13] *Dane* v. *Mortgage Insurance Corpn.*, (1894) 1 Q.B. 54, C.A. at p. 61, per Lord Esher, M.R.; see also *West Wake Price & Co.* v. *Ching*, (1956) 3 A.E.R. 821, at p. 825, per Devlin J.

[14] *Garden* v. *Ingram* (1852) 23 L.J. Ch. 478, at p. 479 per Lord St. Leonards.

the assured then and then only becomes entitled to be indemnified, subject to the limitation of his contract.[1]

> "He cannot recover more than the sum insured, for that sum is all that he has stipulated for by his premium and fixes the maximum liability of the insurers[2]. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of his loss;[3] the contract being one of the indemnity, and of indemnity only, he can recover the actual amount of his loss and no more,[4] whatever may have been his estimate of what his loss would be likely to be, and whatever the premiums he may have paid, calculated on the basis of that estimate."

"In the *strict sense* previously indicated,[5] contracts of life insurance,[6] personal accident and sickness insurance[7] and some forms of contingency insurance[8] are not contracts of indemnity. in the case of contracts of this class there is *normally no necessity to prove a pecuniary* loss[9].

If the assured chooses, for example, to value a leg or an eye at £50,000, and to pay premium accordingly, he is entitled to recover the stipulated sum in the event of his losing the member in question.

> "His estimate of his possible loss is, in effect, regarded as genuine and acceptable, even if not agreed, because no one is likely "deliberately to inflict such damage on himself, and no one can in fact foresee, even at the date of loss of the member, what the full pecuniary loss is likely to be. Similarly a person can value his life at any figure that he can afford, particularly as he is unlikely to be able to foresee, at the date when he taken out the policy, what at the date of his death his financial obligations to dependants may be. Indeed, as has been said,[10] such an insurance is really a form of investment."

44.25. As, however, we shall show later[11] there are many points of difference between life insurance and accident insurance.

History of accident insurance.

44.26. We shall now trace in brief the history of accident insurance. We would like to quotd a passage from the judgment in an Australian case,[12] where the history is lucidly stated.

> "Personal accident insurance began with railways. Many companies were formed between 1845 and 1850 to insure passengers against the consequences of railway accidents. From this beginning, personal accident insurance was extended to death or disablement resulting from other accidents, and then to various forms of insurance against incapacity from sickness. But all this occurred long after life insurance policies had become well-known distinctive instruments. And originally accident insurance was transacted by companies not engaged in other forms

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1. *Dalby* v. *India and London Life Assurance Co.*, (1854), 15 C.B. 365.
2. *Westminster Fire Office* v. *Glasgow Provident* Investment Society, 1(888), 13 App. Cas. 699, H.L. at p.711, per Lord Selborne, L.C.; *of. Curtis & Sons* v. *Mathews* (1918), as reported in 35 T.L.R. 189, C.A.
3. *Chapman* v. *Pole* P.O. (1870) 22 L.T. 306, at p. 307, per Cockburn, C.J.
4. *Castellain* v. *Preston* (1883), 11 Q.B.D. 380, C.A., at p.386, per Brett, L.J.
5. See Halsbury, page 120 ante.
6. *Dalby* v. *Indian and London Life Assurance Co.*, (1854), 15 C.B. 365.
7. *Theobald* v. *Railway Passengers Assurance Co.*, (1854), 10 Exch. 45, at page 53, per Alderson, B. A Policy insuring a third person against personal accident is, however, a contract of indemnity (*Blascheck* v. *Bussell*, (1916), 33 T.L.R. 51; 3 B & S. 579).
8. Halsbury, page 394 *et seq.*,
9. *Dalby* v. *Indian and London Life Assurance Co.*, (1854), 15 C.B. 365; *Law* v. *London Indisputable Life Policy Co.* (1855), 1 K & J, 233, *Gould* v. *Curtis*, (1913) 3 K.B., 84, C.A., at page 95, per Buckley, L.J.
10. *Gould* v. *Curtis*, (1912) 1 K.B. 635, at p. 640. per Hamilton J; affirmed, (1913) 3 K.B. 84 C.A.
11. Paragraph 29, *Infra.*
12. *National Mutual Life Association* v. *Federal Commissioner for Taxation* (1959-60) 33 Australian Law Journal Reports, 16, 21-22 (Windeyer J.).

of insurance. It was only towards the end of the nineteenth century that companies which had been engaged in fire insurance began to undertake accident insurance.[1] The separate and late origin of accident insurance emphasises its distinctive character, and emphasises, I think, that in a strict sense the term life policy is not appropriate for modern forms of combined insurance. Insurances against accidental death do in some ways resemble life policies; and they are within the Act of 1774.[2] Yet ordinary accident policies providing for payment on accidental death have been held not to be life policies for the purposes of provisions in bankruptcy and similar legislation by which life policies are protected."[3]

Industrial Revolution.

44.27. The inception of accident insurance is bound up with the Industrial Revolution.[4] With the use of mechanical transport, the whole outlook changed. Serious accidents upon railways occurred with frequency in the early days and the demand for accident insurance was manifest. Travel by air also increased the demand. With the passing of the Employer's Liability Act, 1880, which placed a burdon on the employers, a demand came for shifting that burden. The advent of motor vehicles led to the further development of insurance. Further (in respect of motor vehicles) legislation made third party insurance compulsory.[5]

If the past history is any indication, it would seem that with the passage of time, the scope of insurance against accidential risks is bound to increase.

Accident insurance scope of.

44.28. The scope of "accident insurance"[6], in *insurance business practice*, seems to be rather wider than mere "personal accident" insurance[7-8]. The scope of accident insurance will be best understood from its classification, which has been thus given[9].

"Accident Insurance for the purpose of classification may be divided into the following main clauses, vis., :

(a) *Insurance of the person.*—Personal accident and sickness risks, with which must be considered coupon and similar facilities.

(b) Insurance of *property* against personal loss, of which burglary and plate glass are good examples.

(c) Insurance of *liability*, such as employers' liability and public liability risks where the insured is not the claimant with whom settlement has to be made.

(d) Insurance of *interest*, such as fidelity guarantee.

Certain types of accident business represent a combination of two or these classes, while others include no less than three. Comprehensive motor policies (private cars) embrace (a), (b) and (c) under the one policy, as do Household Policies."

Business.

44.29. It has been said that the business transacted by the Accident Department of a composite office comprises all these sections of Insurance business for which provision is not made by a Marine, Life and Fire Department[10]. The variety of its scope will be evident from the contents of the Accident Section of one of the year Books on Accident Insurance[11], which covers persons accident, disease and sickness insurance, burglary insurance, "All Risks" In-

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1. See Raynes "History of British Insurance", pages 283-299, 373-376.
2. *Shilling* v. *Accidental Death Insurance Co.*, (1857) 2 H & N, 43; (1853) 1 F. & F. 116.
3. *In re Corteen*, (1941) V.L.R. 254; *In re Farley* (1933) V.L.R. 271; *In re Karr* (1943) S. S.R. 8; *Re Packer* (Clyne, J.—not yet reported).
4. See Stone and Cox, Accident Insurance Year Book, (1963), page 7.
5. See Stone and Cox, Accident Insurance Year Book, (1963), page 8-9.
6. As to "accident", see Chitty, contracts, (1961), Vol. 2, para 837.
7. The definition in section 98(2), Stamp Act, 1891 (now partly repealed), was narrower, as it was confined to personal accidents.
8. See also *Lancashire, Insurance* v. *Inland Revenue* (1899) 1 Q.B. 535.
9. Stone and Cox, Accident Insurance Year Book, (1963), page 12.
10. Stone & Cox, Accident Insurance Year Book, (1963), page 11.
11. Stone & Cox, Accident Insurance Year Book, (1963), Table of Contents.

surance, Insurance of Money, Baggage Insurance, "Combined Travel" Insurance, Storm & Tempest Insurance, Houseowners' Insurance, Subsidence Insurance, Glass Insurance, Public Liability Insurance, Product Liability Insurance, Personal Liability Insurance, Motor Insurance, etc.

44.30. In England, policies on motor vehicles are wider[1] than required by the Road Traffic Act[2], and may cover (a) damage to the vehicle, (b) liability for damage to property, (c) death or, or injury to, the assured and (sometimes) his or her spouse, (besides liability to third parties.)[3]

Object of personal accident insurance.

44.31. We shall now deal more specifically with personal accident insurance. The object of personal accident insurance is to make provision for payment of a sum of money in the event of the insured sustaining accidental injury.

"*It resembles life insurance,* and differs from other types of insurance in that it is not a contract of indemnity[4]; it is merely a contract to pay a sum of money on the happening of a specified event[5]; namely, the sustaining by the assured of personal injury by such accidental means as may be defined in the policy[6]. The event may involve the death of the insured, *but the insurance is not for that reason a contract of life insurance*[7]. In the case of life insurance, the assured is bound to die some day, the uncertainty being as to the date when the death will take place[8]. In the case of personal accident insurance, on the other hand, no accident may ever happen; and, even if it does, there is no certainty that it will result in death of disablement of the assured[9].

44.32. Halsbury, further, states[10] :—

> "584. *Need for insurable interest.*—As in life insurance, an insurable interest is required by statute[11], the interest normally being the *potential pecuniary loss of the* assured as a result of the disablement, either of himself, or of the third party if a third party is insured."

Halsbury adds, "In fact, personal accident insurance developed out of life insurance[11], but it is necessary now to regard it as a different kind of insurance, and it is in fact generally so regarded."

It may be added that the distinction is recognised in England in the Assurance Companies Act[12].

44.33. Personal Accident Insurance is ordinarily effected by policies. But there is also a system of "coupon insurance" prevalent in England.

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1. Chitty on Contracts (1961) Vol. 2, paragraph 908.
2. Road Traffic Act, 1960 (8 & 9 Eliz 2 C. 16).
3. See also analysis in Halsbury, 3rd Edn., Vol. 22, pages 353, 354, para. 726(7) and 727.
4. *Theobald* v. *Railway Passengers Assurance Co.*, (1854) 10 Exch. 45, at p. 53, per Alderson, B. Policy insuring the accused against loss arising from any accident to a third person is, however, a contract of indemnity (*Blascheck* v. *Bussell*, (1916), 33 T.L.R. 51; affirmed, 33 T.L.R. 74 C.A.)
5. *Bradburn* v. *Great Western Rail Co.*, (1974), L.R. 10 Exch. 1, at p. 2, per Bramwell, B., (1874-1880) All. E.R. Rep. 195.
6. *Lloyds Bank Ltd.* v. *Eagle Star Insurance Co., Ltd.* (1961) 1 All. E.R. 914 (insurance against personal injuries held to include personal injuries resulting in death). For form of personal accident policy, see 7 Encb. Forms and Precedents (3rd Edn.) 532.
7. *General Accident Assurance Corpn.* v. *Inland Revenue Commissioners* (1906), 8 F. (Ct. of Sess.) 477.
8. See Halsbury, 3rd Edn. Vol. 22, page 272.
9. *General Accident Assurance Corpn.* v. *Inland Revenue Commissioners* (1906), 8 F. (Ct. of Sess.) 477; of. *Lancashire Insurance Co.* v. *Inland Revenue Commissioners*, (1890) 1 Q.B.-353, at p. 359, per Bruce J.
10. *Halsbury*, 3rd Edn. Vol. 22 page 293, para 584.
11. Life Assurance Act, 1774 (14 Geo. 3 c. 48), section 1 ; *Shilling* v. *Accidental Death Insurance Co.* (1857) H. & N. 42.
12. The Assurance Companies Act, 1909 (9 Edw. 7 c. 49), section 1.

44.34. The nature of "coupon insurance" is thus described in Halsbury[1-2] :—

"604. *Nature of coupon insurance.*

The purchase of a newspaper or other article frequently confers upon the purchaser the right to an insurance against personal accident. The insurance arises by virtue of some arrangement made by the proprietors of the newspaper or article sold with insurers, and the position of the purchaser is defined in a document or coupon which is annexed to the article or, in the case of a newspaper, printed as part of it, and in some cases nothing beyond the purchase is necessary to complete the insurance[3]. In other cases the coupon has to be filled up, and it may, further, have to be registered with the insurers. The protection given by the coupon is usually in a narrow compass, being limited to accidents to vehicles in which the holder of the coupon is a passenger, or accidents to pedestrians.

605. *Payment in case of death.*

Provision is usually made, in the event of a fatal accident, for payment of the sum insured to a specified person, such as the holder's wife or next of kin. Where the coupon is issued by a newspaper, power is usually reserved to make the payment to the person adjudged by the editor or some other person to be holder's next of kin, in which case his decision is final."

44.35. As to stamp duty on instruments by way of coupon insurance, the relevant Stamp on coupons section in the English Act is section 116[4]. Where any person issuing policies so carries on the business as to render it impracticable or inexpedient that the duty of six pence be charged upon the policies, the section empowers the Commissioners to enter into an agreement with such person. The agreement provides for the delivery of quarterly accounts of sums received as premium on such policies. Duty is charged on the aggregate (of the sums recovered), at the rate of five pounds per cent, as stamp duty. This section, and the Second Schedule, (Second Part) to the Act, make other detailed provisions, which need not be gone into.

44.36. We shall now discuss the meaning of the expression "policy". The term "policy" is borrowed from the Italian merchants who introduced insurance into England.[5] The Italian "polizza"[6], it is stated[7], may be derived from the word "polythcha"—a tablet of several folds—used in late Latin for an account memorandum book. The expression "policy" may be used to describe any contract of insurance, however, informal[8-9]. A policy must be issued within a certain time after the receipt of premium[10-11]. Policy.

The definition of "policy" in the Indian Stamp Act[12] is not very helpful for a consideration of the question which we have to discuss.

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1. Halsbury, 3rd Edn., Vol. 22, pages 302, 308, paras, 604-605.
2. Matter in footnotes not important for the present purpose is not reproduced.
3. See *Carbill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256, C.A. Payment is not essential (*Shanks* v. *Sun Life Assurance Co. of India*, 4 S.L.T. 65).
4. Section 116, Stamp Act, 1891 (54 & 55 Vic. C. 39).
5. Chitty on Contracts (1961), Vol. 2, pages 344, 345, para 803, 804 and f.n. 5.
6. The full word is "polizza d' assecurazione". See Arnould, Marine Insurance (1961), Vol. I, page 9.
7. Chitty on Contrarts (1961) Vol. 2, page 344, 345, para 803 804 and f.n. 5.
8. *Forsikring Saktiesed Skabet* v. *Attorney General*, (1925) A.C. 639, 642.
9. For detailed discussion, see Halsbury, 3rd Edn., Vol. 22, page 209, paragraphs 393, 395, "Meaning of Policy", and footnote 10.
10. Section 66, Indian Stamp Act, 1899.
11. Cf. section 100, Stamp Act, 1891 (54 & 55 Vic. c. 39).
12. Section 2(19) and 2(19A), Indian Stamp Act, 1899.

English law.

44.37. The definition of policy in the English Act of 1891 (as amended in 1959), relevant to the topic under discussion, may be quoted[1] :—

"Policies of Insurance"

"91. For the purposes of this Act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made, or agreed to be made or is evidenced, and the expression "insurance" includes assurance."

44.38. Policy of life insurance has been thus defined in English Act of 1891 (as amended in 1959).

98. *Policies of Insurance except policies of sea insurance*

(1) For the purposes of this Act the expression "policy of life insurance" means a policy of insurance upon any life or lives or upon any event or contingency relating to or depending on any life or lives except a policy of insurance for any payment[2] agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause.....[3]"

The stamp duty is thus prescribed in the Act of 1891 (as amended in 1959).

"99. The duty of six pence[4] upon a policy of insurance (other than policy of.....[5]life insurance) may be denoted by an adhesive stamp which is to be cancelled by the person by whom the policy is first executed."

Definition of policy of insurance against accident.

44.39. The definition of "policy of insurance against accident" which was given in section 98(1) of the (English) Stamp Act, 1891 is useful. The definition has now been repealed by the Finance Act, 1959, which places all policies other than life insurance policies in one class. The definition, so far as is relevant, was as follows[6] :—

".....the expression 'policy of insurance against accident' means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice only from accident or violence or otherwise than from a natural cause[7]."

Resemblance between life and accident insurance.

44.40. There are, no doubt, some points of resemblance between life insurance and accident insurance. A policy of insurance against accidents, as usually drawn, is not a contract of indemnity.[8] It is a contract to pay a certain *fixed sum* per week in case of injury, and a certain other fixed sum in case of death.[9]

44.41. The position regarding indemnity in regard to accident has been thus stated[10] by a writer on mercantile law :

1. Section 91, Stamp Act, 1891 (54 & 55 Vic. c. 39); Monroe, The Law of Stamp Duties, (1964), page 229.
2. Omitted words were repealed by Finance Act, 1959, section 37, and Schedule VIII.
3. Omitted words were repealed by Finance Act, 1959, section 37, and Schedule VIII.
4. "Six pence" was substituted for "one penny" by the Finance Act, 1920, section 40(2). See also the Finance Act, 1959, section 30(1).
5. Omitted words were repealed by the Finance Act, 1959, section 37, and Schedule VIII.
6. Halsbury, 3rd Edn., Vol. 22, page 229, footnote (o).
7. Stamp Act, 1891 (54 & 55 Vict. c. 39), section 98(1), before its amendment by the Finance Act, 1959.
8. Chitty, Contracts, (1961), Vol. 2, Paragraphs 856-857.
9. Chitty, Contracts, (1961), Vol. 2, paragraph 857.
10. Slater, Mercantile Law, (1956), pages 280-281.

"ACCIDENT INSURANCE—

An accident insurance can be a contract of indemnity, but it can also be a contract for the payment of *specified sum* in the event of accidental death of the assured or of his losing, say an eye or a limb. This kind of accident insurance is similar to the valued policies which are common in maring insurance and in the insurance of art treasures against fire.

"Where, in the event of an accident, the insurers pays the sum named in the policy, he is not subrogated to the rights of the insured. Accordingly, the assured, or in the case of his death his personal representative, can claim damages against the person who has caused the death or the injury, for the insurance has been effected against this very contingency."

44.42. The distinction between "indemnity insurance" and "contingency insurance" is recognised in some decisions.[1-2] The observations of Bramwell, B in Bradburn's case, state the position accurately[3] :—

> "A man pays the premiums upon these accident policies upon this kind of footing, namely, that his right to an indemnity in case of an accident shall be an equivalent for the mischief or injury that happens to him. He gets more, no doubt, if the mischief happens than all the premiums which he has paid would amount to; but he runs the chance that he will not get any thing at all ; and therefore it is, I say, that he ought to have this sum in addition to the damages that he may have sustained at the hands of the defendants by reason of the accident itself; for otherwise he would be a loser by insuring against accidents in a case where the railway company was in the wrong. I am, therefore, clearly of opinion that the verdict stands at present for the right amount."

Distinction between life insurance and accident insurance.

44.43. The distinction between life insurance and accident insurance, is equally important. This is very well elaborated in an Australian case.[4] It points out, first, that marine, fire burglary, personal accident, motor vehicle and other miscellaneous insurances indemnity the insured against loss from events which may or may not occur, while life insurance is related to a contingency which must occur, the only uncertainly being about its time. Secondly, life policies are capable of advance calculation, while in other forms of insurance the determination of probabilities would seem to have a less scientific basis. Thirdly, accident and sickness policies are ordinarily annual contracts, (like fire etc.), and have no surrender value.

Question of reduction of duty—previous discussion.

44.44. We shall now proceed to consider the specific question which forms the subject-matter of this Chapter. The point that we have to consider has a history.[5] It would appear that on 18th February, 1898, the Chamber of Commerce, Bombay, sent a representation[7] to the Government regarding stamp duty on accident insurance policies, for bringing the law inline with the English Act. (This was with reference to the Draft Bill to amend and consolidate the Stamp Act).

44.45. The Select Committee[8] which examined the 1898 Bill, considered this representation.[9] (The representation is mentioned in its Report, in the marginal list of papers considered). The Select Committee did not, however, adopt the suggestion *in toto,* but stated :

> "No. 47. *Policy of Insurance*—We have provided a *reduced duty* for insurance against accident or sickness which is at present chargeable on the same footing as life insurance."

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1. *Cf. West Wake Price & Co.* v. *Ching*, (1957) 1 W.L.R. 45, 51.
2. As to "indemnity", see *In re Miller, Gibb & Co. Ltd.*, (1957) I W.L.R. 703, 708.
3. *Bradburn* v. *Great Western Rail Co.*, (1874) L.R. 10 Exch. 1; (1874-1880), A.E.R. Rep. 195, 196 (per Bramwell B.).
4. *National Mutual Life Association* v. *Federal Commissioner of Taxation*, (1959-60) 33 Australian Law Journal Reports 16, 21-22 (Windeyer J.).
5. Paragraph 5, *supra.*
6. For history of the provision itself, see paragraphs 7 to 9, *supra.*
7. Papers of Act 2 of 1899, Vol.2 (National Archives).
8. Report of the Select Committee, dated 19th March, 1898. (Papers of Act 2 of 1899, Vol.2) (National Archives).
9. See *Supra.*

44.46. The draft as suggested by the Select Committee on the Bill of 1898 was as follows[1] :

Art. 6, Sch. I, Notification No. 5199-S.R., dated 1st November, 1895.

"47. Policy of Insurance—

C—Accident and Sickness Insurance—

(a) against Railway Accident, valid for a single journey only	*Proper Stamp duty* One anna.

EXEMPTION

When issued to a passenger travelling by the intermediate or the third class in any Railway.

Art. 12(b), Sch. II, Notification No. 5199-S.R., dated 1st November, 1895.

"(b) in any other case—for the maximum amount which may become payable in the case of any single accident or sickness where such amount does not exceed Rs.1,000/-, and also where such amount exceeds Rs. 1,000 for every Rs. 1,000/ or part thereof.	Two annas.
D.—Life Insurance or other Insurance not specifically provided for, except such a re-insurance as is described in Division E[2] of this article . . . . for every sum insured not exceeding Rs. 1,000 and also for every Rs. 1,000 or part thereof insured in excess of Rs. 1,000	
(i) if drawn single	Six annas.
(ii) if drawn in duplicate, for each part	Three annas.

Exemption

Art. 12, Sch. II, Notification No. 5199-S.R., dated 1st November, 1895.

"Policies of life insurance granted by the Director General of the Post Offices of India in accordance with rules for Postal Life Insurance issued under the authority of the Government of India."

Considerations to be borne in mind in recommending changes.

44.47. We have now to consider whether the law on the subject should be changed. For this purpose, a consideration of the rationale of the existing law appears to be desirable. Now, it is not always easy to discover the rationale of the provisions of a taxing law.[3] For that reason, it is not easy to formulate the considerations which should be taken into account while coming to a conclusion whether a change should be made in such provisions or not.

On the one hand, from the point of view of the insurance corporation, a policy of insurance is a business document. It brings profit, and its taxability is supportable on that ground.

44.48. On the other hand, from the point of view of the insured, the policy is merely a protection against a possible risk; there is no *motive* of profit, and it is not a commercial transaction so far as the assured is concerned. He does not view it as such. It is not even an 'investment', i.e., the conversion of money into some species of property from which income or profit is expected to be derived in the ordinary course of trade or business.[4] It may be noted that in contrast, some forms of life insurance—e.g., endowment—are investments.

44.49. Again, in modern times, with the increasing risk of accidents, in the factory, from transport, from the complexity of urban life and other similar factors, there is every need to encourage accident insurance, so that the loss is not borne by one person, but is distributed amongst many. From that point of view, there appears to be ample justification for keeping the stamp duty to the minimum.

Comments of State Governments regarding duty on Original policy.

44.50. We shall now consider the comments received by the Ministry of Finance from State Governments on the two points raised in the suggestion of the Indian Insurance Companies Association.[5] The points made in these comments may be thus summarised.

1. This draft seems to have been adopted without further discussion.
2. The printed copy speaks of Division F, but this seems to be a slip for Division E. (Division E related to Re-Insurance).
3. Ranking C.J.—". . . . . the legislature may have reasons and good reasons which do not appear upon the surface"—*Janardhan v. Secretary of State*, A.I.R. 1931 Cal. 193, 200.
4. See Chamber's Encyclopaedia (1951), Vol. 7, Page 609.
5. See, *supra*.
6. The summary is based on S. No. 35 and 36 in the Law Commission File No. F.3(4)/57/LC Part I, Vol.II.

(1) Duty on original policy.

One State Government and the Administrations of most Union Territories agreed to the proposed change. Two State Governments and the Administration of one Union Territory, had no comments.

Nine State Governments were opposed to the proposed change. The reasons for opposing the change, as stated in the various replies taken together, were—

(i) that the rate is not high when compared with life insurance policies;

(ii) that any concession in respect of policies under article 47-C and 47-CC will give rise to similar requests by persons interested in policies governed by articles 47-A and 47-D;

(iii) that accident and sickness insurance premia are paid by well-to-do people either for themselves or for their workmen, and there can be no hardship involved in paying the present rates;

(iv) that no reduction of Government revenue can be contemplated during the present emergency;[1]

(v) that the Insurance Companies Association has not been able to furnish points of similarity between policies under article 47-B and those under article 47-C;

(vi) that looking to the huge amount insured for comparatively small amounts or premiums, the stamp duty under article 47-C(b) is not likely to affect the insurance business;

(vii) that under section 29, it is the person taking out the policy who bears the duty, and insurance companies "are not directly concerned with the incidence of this stamp duty."

One State Government,[2] which was opposed to the reduction, suggested that *bus journey may be* included alongwith railway accidents, for exemption under rule 47-C(a), "which may lead to greater popularity of accident insurance among the less well-to-do classes."

Comments of State Governments regarding Duty on renewal

44.51. As regards the duty on renewal, two State Governments were of the view that renewals are chargeable at the same rates as for the original, and that a specific provision to that effect may be inserted to remove confusion. One State Government expressed this view—"Reduced rates in regard to renewals under item 47-B of the article have been prescribed with a view to encourage insurance against fire and damage of property. Accident and sickness insurance premia are paid by well-to-do people either for themselves or for their workmen."

One State Government stated that in the absence of any provision, the duty for renewal will be the same as on originals. Three other State Governments were opposed to the suggested reduction.

Two State Governments, and the Administrations of several Union Territories were agreeable to the reduction of the duty on renewal to one-half of the duty on the original.

44.52. We have given anxious consideration to the points made in the comments sent earlier to the Ministry of Finance. We think, that while likelihood of reduction in the revenue of States has to be taken into account, it should also, at the same time, be remembered, that there is a strong need for popularising accident insurance. The similarity of accident insurance with life insurance is mainly historical. A person taking out an accident policy has no motive

1. This was a reference to the emergency of 1962.
2. S. No. 36 (Enclosures), in Law Commission's File No. F. 3(4)/57/LC Part I, Vol. II.

of profit, and any profit that he makes is incidental. There are many points of difference between life and accident policies[1]. It is therefore legitimate to make a distinction between the two in regard to the scheme of taxation, particularly if other relevant considerations present themselves.

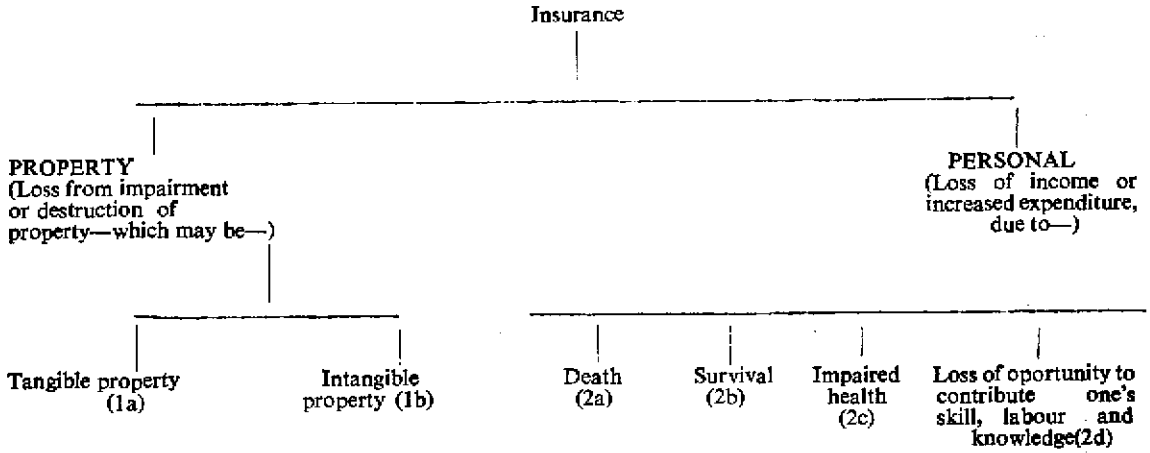
44.53. The limited similarity[2] between life and accident insurance in respect of the fixed amount payable, appears to be due to the nature of the loss insured against.

It has been pointed out[3] that when an individual's life or earning power is affected, no accurate measure of its value is possible. The insurance contract therefore assigns the risk a fixed value, which is all that the insured recovers when the policy falls due."

To put the matter differently, in a personal accident policy, the fixed sum dispenses with the proof of the extent of the loss, by specifying the nature and effect of the injury sustained.[4]

Classification of Insurance with reference to subject matter.

44.54. A classification of the various types of insurance[5] from the point of view of the subject-matter would be helpful for appreciating the relevant points.



44.55. Examples of each category given in the above classification[6] are :—

1a. Marine, Automobile, Fire, Flood, etc. Insurance.

1b. Compensation and liability insurance. Credit insurance. Insurance against interruption of business, Mortgage insurance. Title insurance. Re-insurance.

2a. Life Insurance.

2b. Endowment Insurance.

2c. Sickness Maternity, Accident and Invalidity, Insurance.

2d. Unemployment Insurance.

44.56 Though both accident insurance and life insurance fall under "personal" insurance, yet, in fact, accident insurance stands much nearer to the other classes of insurance than to life insurance. Assuming (as is stated in one comment)[7] that accident insurance is taken out at present by only well-to-do people, there is no reason why others should not be encouraged to do so.

1. See *supra*.
2. See *supra*.
3. Encycloapedia of Social Sciences (Macillan) (1951-Reprint), Vol. 8, page 96.
4. Cf. Ivamy, General principles of insurance law (1966), page 8 and 357.
5. This is based mainly on Encycloapedia of Social Science
6. See *supra*.
7. See *supra*.
8. See *supra*.

44.57. As regards the objection[1] that similar requests will be made by other persons (in respect of other types of policies), we can only say, that any request by a person interested in other policies—for example, policies governed by article 47-A and 47-D—can be considered on the merits when it is put-forth.

44.58. Lastly, the fact that the stamp duty is paid by the Insured and not by the company, does not mean that a suggestion[2] made by an Association of the Insurance Companies should not be accepted, if it is in the general interest.

Compensation for loss—position regarding

44.59. At this stage, we would like to elaborate the proposition that the policy does not bring profit[3]. Accident insurance may not be "indemnity" in the strict sense[4]. But the amount recoverable under the policy is regulated.

As has been stated by Halsbury,[5] the policy usually provides for payment of a lump sum in the event of the assured's death by accident, and of other sums, varying in amount according to the nature and extent of the injury. The specified amount is payable in the event of the assured sustaining certain specified injuries, such as the loss of sight in one eye or total loss of sight.[6]

Sometimes, the policy provides for increased compensation for certain forms of accident. Thus, in one case[7], a double benefit was payable if the assured, at the time of the accident, was a passenger on a public conveyance.

Halsbury observes[8], "Where the policy provides for payment of compensation in the event of non-fatal injury, but makes no special provision for its amount, the assured is entitled to receive compensation for his pain and suffering of and expenses incurred to an amount not exceeding the amount payable in case of death.[9]

Recommendation regarding duty on original policy.

44.60. (a) Having regard to the considerations summarised above[10], and also to the fact that the premium in respect of policies of accident insurance is low[11], we think that there is a case for reduction of the stamp duty as follows. Under article 47, Division C, pargarph (b),[12] in respect of an original policy, (of insurance against accident and sickness), when the maximum amount which becomes payable in a case of any single accident or sickness does not exceed Rs. 5,000, the duty should be 10 paise for every Rs. 1,000 or a part thereof, and when the maximum amount which may become payable in the case of any single accident or sickness exceeds Rs. 5,000 the duty should be Re. 1 irrespective of the amount which may become payable. If this change is made, then the existing proviso to article 47, Division C, paragraph (b), added by Act 18 of 1928, will become superfluous, and may be omitted.

(b) We have considered the suggestion[13] regarding bus journeys. We think that policies of insurance against accidents in course of journey by bus, if valid for a single journey, should be exempt, where the amount does not exceed Rs. 5,000. We are, further, of the view that this exemption should extend to journeys by all conveyances including rail or air.

We are of the view that policies for single journey or voyage above Rs. 5,000 should bear duty of only 10 paise whatever be the mode of conveyance.

We are further of the opinion that aircraft should be treated in the same category as railway, since the article is dealing with accidents.

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1. See *supra*.
2. See *supra*.
3. See supra.
4. See supra.
5. Halsbury, 3rd Edn., Vol. 22, page 299, para 597.
6. *Bawden* v. *London Edinburgh & Glassgow Assurance Co.*, (1892) 2 Q.B. 534 (C.A.).
7. *Fidelity and Casuality Co. of New Tork* v. *Mitchell*, (1917) A.C. 592, 594 (P.C.).
8. Halsbury, 3rd Edn., Vol. 22, page 299.
9. *Theobald* v. *Railway Passengers Assurance Co.*, (1854) 10 Exch. 45.
10. Paragraphs 36, 37, 40 to 47, supra.
11. See *supra*.
12. See Appendix 1 (Draft Amendment to article 47, Division C).
13. See *supra*.

We should mention that in the Questionnaire, in putting forth a re-draft, we ad made[1] a limited suggestion for amendment of the article. But, after fuller consideration, we are of the view that certain other changes are required, for reasons already stated.

Duty on renewal.

44.61. The next point to be considered relates to stamp duty on renewal. The existing provision (it is stated) is not specific on the point and the suggestion[2] is that it should be clarified by inserting a specific provision, as in the case of fire insurance.

44.62. Now, in theory[3], renewal is a fresh contract, at least where the policy expressly stipulates that it is not to continue beyond the period of insurance unless renewed by mutual consent. But, in practice, a fresh proposal for renewal is not used in accident insurance[4], and the original proposal is treated as repeated.[5] It seems, that the usual practice in England is to get an accident insurance policy for one year[6-7], with a provision for renewal.

44.63. In this connection, we may refer to the observations of Sir James Westland while presenting the Report of the Select Committee on 21st March, 1898[8]—

> "A difficult question arises in connection with insurance policies. It arises from the fact that the system of transaction of business in Bombay is different from the system of transaction of business in Calcutta. The duty upon insurance is by law levied upon the issue of the original policy. We levy no duty upon renewals. The consequence is, when an insurance policy is renewed, that is to say, if the original insurance policy is extended, then it bears no new duty, but if a person cancels his policy, and takes another policy in the same terms from another Company, he has to pay the additional duty."

He stated, that in Calcutta, the insurer transacted their business directly with the offices, so that the policy was renewed year by year with the same Company and bore no duty. But, in Bombay, the business was done through brokers, who might take policies with a *new* Company, so that it was a new policy.

44.64. It should, further be noted, that stamp duty under article 47 is chargeable only if there is a 'policy'[9]. A "receipt" for renewal premium cannot, as such, be charged as "policy"[10], in case of insurance accident[11]. It is necessary to consider whether it is chargeable as a "receipt"[12].

44.65. As regards stamp duty on renewal, therefore, the correct position (under the existing law) is uncertain[13]. Perhaps, it can be stated that if a *policy* is issued, it would be chargeable with full duty[14]. If a receipt only is issued, article 47 does not apply[15-16]. The position needs clarification We *recommend,* that in respect of each *receipt* for any payment of a premium or *renewal* of an accident policy, one half of the duty chargeable on the original should be chargeable, (in addition to the duty, if any chargeable, under article 53). This is on the analogy[17] of article 47, division B

1. Question 98.
2. Paragraph 5, *supra*
3. See Halsbury, 3rd Edn., Vol. 22, pages 248, 249.
4. *Stokell* v. *Heywood,* (1897) 1 Ch. 459.
5. Halsbury, 3rd Edn. Vol. 22, page 249, para 484.
6. See Stone & Cox, Accident Insurance Year Book (1963), Form of Policy at page 66.
7. Halsbury, 3rd Edn., Vol. 22, page 206, Footnote (h).
8. Donogh's Indian Stamp Law, Edited by Rustomji (1935), page 17 and page 19.
9. Indian Stamp Act, 1899, Article 47, speaks of "Policy of Insurance".
10. As to the meaning of "policy", see paragraphs 26-28, *supra.*
11. Contrast Indian Stamp Act, 1899, Article 47, Division "B', which mentions both an "original policy" and a "receipt" for renewal.
12. Indian Stamp Act, 1899, Article 53, "Receipt".
13. See *supra.*
14. See *supra.*
15. See paragraph 52, *supra.*
16. Article 53, Indian Stamp Act, 1899, may apply if a receipt is issued.
17. As to article 47, Division B, see para 4, *supra.*

(Fire Insurance). This will clarify the position. It will also make *receipts* chargeable under article 47; and to that extent, it is a new burden. But a *policy*, at present, appears to be chargeable with the full rate, and to that extent, the proposed change will reduce the burden.

Article 47—Division CC—Employers liability.

44.66. Article 47, Division CC, inserted[1] in 1925 deals with stamp duty on "insurance by way of indemnity against liability to *pay damages* on account of accidents to workmen employed by or under the insured or against liability to pay compensation under the Workmen's Compensation Act, 1923."

Two kinds of liability covered.

44.67. Article 47, Division CC thus deals with insurance against two kinds of liability, namely :—

(a) liability to *pay damages* on account of accident, to workmen, and

(b) liability to pay *compensation* under the Workmen's Compensation Act, 1923.

Liability under the first head would be mainly at common law[2]. This ordinarily depends on the proof of negligence. It may be either due to the employer's personal fault (for example, a dangerous machine), or to the fault of a fellow-workmen[3].

(The liability may even be under statute,—e.g., under factories legislation,—and may be absolute liability in some cases).

Liability under the second head is statutory. In both cases, the insurance is by way of "indemnity".

In both cases again the rate of stamp duty is Ten naya paise for every Rs. 100 or part thereof payable as premium.

Recommendation regarding Article 47CC.

44.68. Although the suggestion[4] which we are considering mentions article 47, Division CC, it does not suggest *any change* in that article, except that the position regarding renewal may be clarified. We recommend[5] that in article 47, Division CC, so far as renewal is concerned, a provision similar to that which we have recommended[6] for renewal under article 47, Division C, may be inserted.

44.69. In the light of the above discussion, we recommend the following re-draft of the relevant portions of article 47. We may add that the suggested amendments were included in our Questionnaire[7] and have been generally favoured by the replies on this particular question.

Re-draft of Article 47, Division C

"C. ACCIDENT AND SICKNESS INSURANCE

(1) **In respect of an original Policy**

(a) against accident on *any conveyance* valid for a single journey or voyage only, when the maximum amount which may become payable *under the policy exceeds Rs. 5,000, if the policy is issued to any passenger travelling on such conveyance.*	Ten paise
Exemption	
When issued to a passenger travelling by the *second*[8] class in any railway.	
(b) against accident valid for more than a single journey or voyage or against sickness, where the maximum amount which may become payable under the policy in the case of any single accident or sickness does not exceed Rs. 5,000.	Ten naya paise *for every Rs.* 1,000 *or part thereof such maximum amount.*
(c) against accident valid for more than a single journey or voyage or against sickness, where the maximum amount which may become payable under the policy in the case of any single accident or sickness exceeds Rs.5,000.	One rupee.

1. See Act 15 of 1925.
2. As to liability at common law, see Halsbury, 3rd Edn., Vol.22, pages 344-345, paragraphs 104-105.
3. Munkman, Employers' Liability, (1952), page 1.
4. Paragraph 5, *supra*.
5. See Appendix 1, Article 47, Division CC.
6. Para 53, *supra*.
7. Q. 97 to 99.
8. For "intermediate" and third, the word "second" has been substituted, in view of the changed nomenclature adopted by railways.

(2) *in respect of each receipt for any payment of a premium on any renewal of an original policy.*	*One half of the duty payable in respect of the original policy, in addition to the amount, if any, chargeable under No. 53."*

Revised Article 47, Division CC

"CC. INSURANCE BY WAY OF INDEMNITY.

against liability to pay damages on account of accidents to workmen employed by or under the insurer or against liability to pay compensation under the Workmen's Compensation Act, 1923.

(1) **In respect of an original policy.**	Ten naya paise.
for every Rs. 100 or part thereof payable as premium.	
(2) *in respect of each receipt for any payment of a premium on any renewal of an original policy.*	*One-half of the duty payable in respect of the original policy, in addition to amount, if any, chargeable under No. 53."*

The changes recommended are summarised below.

Article 47-C.

(i) **for original policy.**

(a) in respect of insurance against accidents on any conveyance, including aircraft, complete exemption upto Rs. 5,000 (for single journey policies).

(b) in other cases—

(i) where the maximum amount payable does not exceed Rs. 1,000;	*Duty reduced from* 15 *n.p. to* 10 *n.p.*
(ii) where the maximum amount exceeds Rs. 1,000 but does not exceed Rs. 5,000 ;	*Duty reduced from* 15 *n.p. per* 1,000 *Rupees to* 10 *n.p. per* 1,000 *Rupees.*
(iii) where the maximum amount exceed Rs. 5,000 ;	*Duty reduced from* 15 *n.p. per* 1,000 *Rupees to fixed* 1 *Rupee* (*irrespective of the amount*).

(2) **In respect of the duty on renewal-**
the position is clarified.

Article 47-CC

Position as to duty on renewal is clarified.

CHAPTER 45

ARTICLES 48 to 50

Article 48—Introductory.

45.1. Article 48, which deals with powers of attorney[1], is divided into seven clauses, which prescribe a stamp duty ranging from 50 P. to Rs. 10 and over. The material difference between some of the categories of instruments provided for in these clauses, and the actual range of duty,—for example, between clauses (a) and (c)—is so small (50 P.) that it would be convenient if some of these clauses could be combined. A suggestion for such re-grouping will be made at the proper place.

General and special powers.

45.2. To some extent, the differences in stamp duty as prescribed in the various clauses of the article are based on the difference[2] between general powers of attorney, and special powers of attorney. In Halsbury, the following explanation of these powers is given under "agents". A special agent is one who has authority to act for some special occasion or purpose which is not within the ordinary course of his business or profession. A general agent is one who has authority arising out of, and in the ordinary course of, his business or profession to do some act or acts on behalf of his principal in relation thereto or one who is authorised to act on behalf of the principal generally in transactions of a particular kind or incidental to a particular business. In Bouvier's Law Dictionary[4], it is stated that "a general power authorises an agent to act generally on behalf of the principal, a special power is one limited to a particular act."

Clauses (a) and (c)—"Single transaction".

45.3. Some of the various clauses, if examined minutely, reveal a few common features. The common feature in clauses (a) and (c) is that of "single transaction". Clause (a) relates to an authority for procuring the registration of a document or documents in relation to a single transaction or admitting the execution of one or more of such documents (for registration). Clause (c) relates to acting "in a single transaction" otherwise than under clause (a).

The expression "a single transaction", according to the Madras High Court[5], applies "either to a single act or to acts so related to each other as to form one juridical transaction, such as, all the acts necessary to perfect a mortgage or a sale of a particular property." This interpretation would be in accordance with the distinction between a special agent and a general agent, as set forth in the authorities already referred to[6].

In view of the common features mentioned above, it may be convenient to merge clause (a) and clause (c).

Clause (b).

45.4. Clause (b) of the article charges duty on instruments which are required for proceedings under the Presidency Small Cause Courts Act, 1882 Under that Act, such Courts are set up in Calcutta, Madras and Bombay.[7]

Under section 2(21) of the Stamp Act, such powers of attorney as are chargeable with court-fees, such as, Vakalatnamas under the Court Fees Act, 1870, are exempted from stamp duty. But the Court Fees Act[8] did not apply to Presidency Small Cause Courts, and therefore such instruments relating to these particular courts are chargeable under the Stamp Act.[9]

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1. For definition, see section 2(21).
2. See *Venkataramana Iyer* v. *Narsinga Rao*, (1915) I.L.R. 38 Mad. 134, 136.
3. Halsbury, 3rd Edn., Vol. I, pages 150-151.
4. Bouvier's Law Dictionary, Vol. 2, page 714, quoted in *Venkataramana Iyer* v. *Narsinga Rao*, (1915) I.L.R. 38 Mad. 134, 136.
5. *Venkataramana Iyer* v. *Narasinga Rao*, (1915) I.L.R. 38 Mad. 134, 137.
6. Halsbury, 3rd Edn., Vol. I, pages 150-151.
7. Section 5, Presidency Small Cause Courts Act, 1882.
8. Section 3(3). Court Fees Act.
9. *Hormusji K. Bhabha* v. *Nana Appa*, A.I.R. 1934 Bom. 299.

But, in the State of Maharashtra, under the Bombay Court Fees Act, 1959, Court fee has been imposed on these instruments; and hence the instruments would not be chargeable under the Stamp Act.

Since clause (b) appears to be of a special character, and the individual States can (by State Acts) levy duty on such instruments covered by the Presidency Small Cause Courts Act.[1] there is no need to have this clause separately in the Central Stamp Act. Clause (b) should, therefore, be omitted, leaving the States concerned to deal with the matter in the Court Fees Act in the manner they think proper. This will simplify article 48.

Clause (d) and clause (e).

45.5. Clause (d) speaks of an authority given to not more than five persons "to act jointly or severally in more than one transaction or generally". Clause (e) relates to a similar authority to more than five but not more than ten persons. Both the clauses relate to general powers of attorney. Taking advantage of this common feature, one could conveniently combine the two clauses.

It may be noted that these clauses take no account of the number of persons *executing* a power of attorney.[2]

The Explanation to clause (e) provides that more than one person belonging to a firm will be deemed to be one person.

45.6. Clause (f) deals with a power of attorney given for consideration, authorising the Attorney to sell immovable property. We shall later make a recommendation[3] concerning the duty to be charged on the sale deed which may be executed in pursuance of the power of attorney.

Clause (g).

45.7. Clause (g) deals with powers of attorney in other cases. This clause has to be read with clause (e). When so read, it means that if there are more than ten persons authorised to act jointly or severally in more than one transaction or generally, then the stamp duty payable is according to the number of persons. (The duty is, at present, one rupee for each person authorised). This clause needs no change, in substance.

Recommendation for regrouping of clauses.

45.8. On the basis of the above discussion, we recommend the following changes in the grouping of the clauses of article 48.

(i) Clauses (a) and (c) should be combined into one clause, which will apply when one or more persons are authorised to act in a single transaction,—whether the transaction consists of a single act or of acts so related to each other so as to form one jural transaction.[4] Clause (b) should be omitted[5].

(ii) Clauses (d) and (e), which relate to a general power of attorney, should be combined.[6] The difference in duty imposed under each of the two clauses at present depends on the number of persons appointed, i.e., Rs. 5 for five persons and Rs. 10 for ten persons. The duty should be revised, so that one duty is imposed for a general power of attorney given to not more than, say, ten persons, (the rate being one rupee per person).

(iii) Clauses (f) and (g) may be retained.[7] Clause (f) may be modified, on the lines indicated below[8]. Clause (g) needs no modification of substance.[9]

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1. Constitution, 7th Schedule, State List, item 63.
2. *Jogi Ram* v. *Mohammed Rafi*, A.I.R. 1925 Oudh 172.
3. Para 45.12, *infra*.
4. Para 45.3, *supra*.
5. Para 45.4, *supra*.
6. Para 45.5, *supra*.
7. Para 45.6, *supra*.
8. Para 45.9 to 45.12, *infra*.
9. Para 45.7, *supra*.

45.9. A few points of detail relating to individual clauses may now be discussed.

Points of detail—(i) Meaning of "consideration" in clause (f).

Clause (f) contemplates a power of attorney which is given for the purpose of sale of any immovable property and for consideration. The duty on a conveyance 'under Article 23' for the amount of the consideration charged is the same. The Allahabad High Court has held[1] : " .....a consideration in relation to power of attorney can only mean a valuable consideration and not good consideration". In that case, the executants of the power of attorney were indebted to a certain Bank on account of two equitable mortgages. The Bank filed suits for the recovery of the amount by sale of the property mortgaged. After the filing of the suit, there was a compromise between the parties, and a power of attorney was executed in favour of the Bank in compliance therewith. Under the instrument, the Bank was authorised to sell the property covered by the mortgage decrees, for the purposes of appropriation of the sale proceeds towards the decretal amount. The balance (after such appropriation) was to be paid to the executants. The question before the court was whether this instrument was a power of attorney given for consideration. It was held that the compromise was for a good consideration so far as the contract of agency or attorney was concerned. But it was not a valuable consideration. It was held that "consideration" in relation to clause (f) of Article 48, means a valuable consideration, and not a good consideration as it may mean in relation to any other contract. In these circumstances, it was held that the power given was for the appointment of an agent, and not for any valuable consideration. Therefore, the instrument was not chargeable under Article 48(f). It was also held that there was no transfer of any property in consideration of any debt under section 24, and, therefore, there was no stamp duty chargeable on the amount of the consideration on account of the two equitable mortgages.

45.10. It would appear, however, that there was valuable consideration in this case, constituted by the compromise of litigation which raised triable issues. In any case, the instrument would fall under Article 48, clause (c), as the Bank was authorised to sell the immovable property by public auction for payment of the amount due, to grant a receipt for the purchase money paid by the auction purchase, to appropriate from the sale proceedings so received a sum representing the total decretal amount and to pay the balance to the executants. All this could be considered as belonging to one jural transaction, namely, the appropriation of sale proceeds towards the decretal amount ; and on this basis, Re. 1 ought to have been charged as stamp duty.

45.11. With reference to article 48(f), the following explanation was given in the Statement of Objects and Reasons[2] :—

"It has been found that sales and mortgages were sometimes effected through the medium of power of attorney and thus the stamp duty, payable as a conveyance was evaded. A provision is, therefore, introduced in this article to charge such powers as a conveyance."

The Select Committee limited the clause to cases of powers authorising sales *of immovable property*[3].

Sir James Westland, in his speech presenting the report of the Select Committee to be Legislative Council in 1898, explained the object of his clause as follows :—

> ".....The reason of this was that it was found as a fact that what amounted to a conveyance was sometimes effected by means of a power of attorney. A, in selling B property, instead of conveying it to him by a regular deed of conveyance, simply transferred it to him without any conveyance at all, but gave him a power of attorney authorising him to sell the property. This, so far as B is concerned, enabled him to dispose of the property to the same extent as if he were the owner of it. We, therefore, provided that if a power-of-attorney was

1. *Chief Inspector of Stamps* v. *Murlidhar*, A.I.R. 1970 All. 599, 603, Para 9.
2. Statement of Objects and Reasons of the Bill(1897), Article 48.
3. Report of the Select Committee (1898), Article 48.

given for a consideration and gave authority for the sale of the property affected, the duty should be levied in the same way as upon a conveyance. In the objections that have been made to this provision, apparently some persons have thought that we levy this duty upon a power-of-attorney given for affecting a sale, and they fail to observe that it was levied purely upon a power-of-attorney given for a consideration."

Recommendation as to article 48(f).

45.12. We are of the view that the conveyance subsequently executed in pursuance of the power of attorney referred to in clause (f) should not be chargeable, except for the excess consideration that is received. We recommend an amendment of the article accordingly.

Further Conveyance.

45.12A. Accepting a suggestion made by a Law Society[1], we recommend that there should be no duty on a further conveyance after the levy of duty under article 48(f) except where extra consideration is received by the person as the seller.

It is our intention that the proposed exemption should cover all sales in pursuance of the power, as also a sale between the parties to the power, i.e.,

(i) sale deed between the principal and the agent, and also

(ii) sale deed between the agent and third persons.

In our opinion, the principle ought to be that the transfer having been subjected once to tax, should not be taxed again, except insofar as further monetary gain accrues after the execution of the power of attorney. We regard the power of attorney as, in substance, though not in form, a transfer of the property. That in fact, is the rationale underlying the *ad valorem* duty.

(ii) Proxies.

45.13. The next point concerns proxies. In a Madras case,[2] it was held that a proxy which empowered a person to vote at a particular meeting of a company "or at any other meeting" fell within Article 48(g). Assuming that a proxy is a general power of attorney, the Court considered the question whether clauses (d), (e) and (g) of Article 48 would apply. First, it was said that clause (g) had to be read with clause (e). Then, clause (d) applies when the authority is given to not more than five persons, and relates to "more than one transaction or generally". Following an unreported judgment,[3] the Court held a proxy which empowered a person to vote at a particular meeting and then at any other meeting during that year would fall under clause (g) of Article 48. It was stated that if such a construction were not adopted, "a power of attorney in favour of one person, in respect of more than one transaction, would escape stamp duty altogether."

It is suggested that it is possible to take the view that the instrument would fall under clause (d), and not under clause (g). The opposite view is based, perhaps, on the words "jointly and severally" in clause (d), which are not quite *appropriate for one person*. This misunderstanding could be removed by a slight verbal change in clause (d).

(iii) Revocation.

45.14. There seems to be no specific entry in the Schedule as to the revocation of a power of attorney. The revocation would, if attested, apparently, fall under the entry relating to Instrument of cancellation.[4]

Re-draft.

45.15. In order to simplify and amend the provisions of article 48 on the lines discussed above, we recommend the following re-draft of the article :

[Existing clauses (a) and (c)] [Existing clause (b) omitted,] one more

"48. Power of attorney [as defined by section 2(21), not being a proxy (No.52)]—

"(a) When authorising one person or more to act in a single transaction, including[5] a power of attorney executed for the sole purpose of procuring the registration of one or more documents in relation to a single transaction or for admitting execution of one or more such documents ....

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1. Incorporated Law Society, Calcutta.

2. *Narayan* v. *Kamaleswar Mills Ltd.*, I.L.R. (1952) Mad. 218, 256.

3. Referred case No. 15 of 1905, cited in the Madras Stamp Manual.

4. Article 17.

5. The specific mention of power of attorney in relation to registration etc. contained in the present Act may be desirable, since more than one document is involved.

(b) when authorising *one person to act in more than one transaction or generally*,[1] or not more than ten persons to act jointly and severally in more than one transaction or generally;	One rupee for each person authorised but not less than five rupees.	[Existing clause (d)]
(c) when given for consideration and authorising the attorney to sell any immovable property;	The same duty as a conveyance (No.23) for the amount of the consideration.	[Existing clause (f)]
(d) in any other case, ...	One rupee for each person authorised.	[Existing clause(g)]

Explanation 1.—For the purpose of this Article, more persons than one when belonging to the same firm shall be deemed to be one person.

Explanation 2.—The term 'registration' includes every operation incidental to registration under the Indian Registration Act, 1908.

Explanation 3.—*Where, under clause (c), duty has been paid on a power of attorney relating to any property, no duty shall be chargeable on a conveyance of that property executed in pursuance of the power of attorney or between the granter of the power and the grantees, except in so far as the consideration for the conveyance exceeds the consideration for the power of attorney.*"

Difference in duty under existing section and revised section.

45.16. It may be convenient to summarise the salient points affecting the rate of duty with reference to the re-draft; recommended by us :

(i) Under the re-draft, there will be an increase of duty from 50 NP to one rupee, in cases covered by article 48(a), i.e., power of attorney executed for the sole purpose of procuring registration, etc. Though arithmetically the duty will be doubted, the burden will not, it is hoped, be resented by the class of persons who have to bear it.

(ii) In the case of a general power of attorney in favour of *six, seven, eight or nine persons*, the stamp duty, at present, is, under article 48(e), ten rupees, while, under the proposed re-draft, it will be six, seven, eight and nine rupees respectively. But such cases will be rare, and the reduction in duty is not likely to affect the revenue substantially.

(iii) A special provision will govern conveyances executed in pursuance of, or after the power to sell, referred to in article 48(f).

Article 49—Promissory Notes.

45.17. This takes us to article 49. Under article 49, the stamp duty on a promissory note is regulated by two sets of provisions. If the note is payable on demand, then, under sub-article (a) fixed rates (as given in the sub-article) apply, depending on amount of value (entered in the promissory note). This part of the article presents no difficulty.

Recommendation as to article 13.

45.18. But, if the note is payable *otherwise than on demand*, the duty is the same as the duty for a Bill of Exchange for the same amount payable otherwise than on demand. Now, the duty for such Bills is to be calculated according to a very complicated scale[2]. If the duty on Bill of Exchange can be simplified—as we have recommended[3], than it would indirectly result in a simplification of the application of article 49 also.

It may be noted that in England, now, the duty on an inland bill of exchange or a promissory note has been simplified[4], as follows :—

> "BILL OF EXCHANGE OR PROMISSORY NOTE of any kind whatsover (except a bank note)—drawn, or expressed to be payable, or actually paid of endorsed, or in any manner negotiated in the United Kingdom."
> The duty is two pence.

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1. This case is even now regarded as falling within article 48(d); but the words "jointly and severally" are not appropriate. Hence a specific provision.
2. Article 13(b).
3. See discussion relating to article 13, *supra*.
4. Section 33, Finance Act, 1961 (Eng.).

45.19. Even if our recommendation to simplify the duty on a bill of exchange is not accepted, we would emphasise the fact that the present figures of duty as mentioned in the Act, in Article 49(b), do not reflect the real position. This is for the reason that there have been important reductions.

Recommendation to make the article self-contained.

45.20. In our view, it is desirable that article 49 should, in the interests of simplicity, be revised and made self-contained. We, therefore, recommend that the substance of the relevant notifications should, in a suitable form, be incorporated in the article. This recommendation is in addition to our recommendation for simplifying article 13.

Article 50.

45.21. Article 50 levies duty on a protest of a bill or note. This is a notarial act[1], but has been excluded from the general article[2]—article 42—dealing with notarial acts. The duty charged under article 42 (notarial act) and article 50 (protest of bill or note) is, however, the same, viz., Re. 1.

Under the Negotiable Instruments Act[3], where a promissory note or bill of exchange has been dishonoured by non-acceptance of non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest.

Such noting and protest is not made compulsory but is left to the option of the holder, except in the case of foreign bills[4].

No difficulty appears to have been caused by article 50, which needs no change.

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1. Section 8(d), Notaries Act, 1952.
2. The articles in the Stamp Acts of 1879 and 1860, corresponding to the present article 42, included protests falling under persent article 50.
3. Section 100, Negotiable Instruments Act, 1881.
4. Section 104, Negotiable Instruments Act.

CHAPTER 46

ARTICLES 51 TO 57

Article 51.

46.1. Article 51 levies a duty of one rupee on protest by the master of a ship, attested or certified by a notary public or other person lawfully acting as such. We have, while discussing an earlier article[1], dealt with the circumstances in which a protest can be filed. We have no further comments on this article.

Article 52—Proxy—Introductory.

46.2. Article 52 levies a duty of 15 naye paise on a proxy in certain cases. The duty is chargeable on a proxy empowering any person to vote at any one election of the members of a district or local board or of a body of municipal commissioners, or at any one meeting of—(a) members of an incorporated company or other body corporate whose stock or funds is or are divided into shares and transferable, (b) a local authority, or (c) proprietors, members or contributors to the funds of any institution.

Meaning of "Proxy".

46.3. In legal parlance, the expression "proxy" is used in two senses. It may (i) denote the person appointed by the share-holder (or other person) to appear at a meeting and cast the share-holder's vote, or (ii) it may denote the form (usually a printed copy), in which such an appointment is made[2].

The word "proxy" is a contracted form of the word 'procuracy', procurator[3].

A proxy is defined by Lord Hanworth M. R. in *Cousins* v. *International Brick* Co.[4], as—

> "a person representative of the shareholder who may be described as his agent to carry out a course which the share-holder himself has decided upon."

This is the first meaning of the expression "proxy".

In article 52, however, the word "proxy" is used in the second sense, that is, the instrument by which a person is appointed so to act.

In the Companies Act[5], the Form of Proxy is thus prescribed—
[See Article 62 of the Table A and also section 176(6)].

"General Form

.....Name of Company, I/We..... ..of.....
in the district of.....being a member/members of the above-named Company hereby appoint.....of.....
in the district of.....or failing him,.....of .....
.....as my/our proxy to vote for me/us on my/our behalf at the annual general meeting/general meeting (not being an annual general meeting) of the Company to be held on the .....day of ..... and at any adjournment thereof.

Importance of proxies.

46.4. It is well-known that proxy voting has become the dominant mode of share-holders' decision-making in public companies. There are a number of reasons for this[6]. Share-holders in such corporations are often geographically dispersed, so that a given share-holder may not

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1. See discussion as to article 44—Note of protest.
2. Bisenberg, "Access to Proxy Machinery (May, 1970), 83 Harv. Law Review 1489, 1490.
3. Bouvier, Law Dictionary, (1914), page 2762.
4. *Cousins* v. *International Brick Co.*, (1931) 2 Ch. 90.
5. Companies Act, 1956, Schedule IX.
6. Bisenberg, "Access to proxy Machinery," (May 1970) 83 Harv. L.R. 1489, 1490.

be living near the place where the meeting is held. Again, share-holders often have some principal business other than investing. Physical attendance at a share-holders' meeting is, for many reason, uneconomic use of time when they can vote by proxy.

Four kinds of proxies.

46.5. Coming, now, to the text of the article, we may note that it really deals with four kinds of proxies. In the first place, it charges duty on a proxy which empowers any person to vote at any one election of the members of a district local board or a body of municipal commissioners. Secondly, it charges duty on a proxy empowering any person to vote at any one meeting of members of an incorporated company or other body corporate whose stock or funds is or are divided into shares and are transferrable.

Thirdly, it charges duty on a proxy empowering any person to vote at any one meeting of a local authority. Finally, it charges duty on a proxy empowering any person to vote at any one meeting of proprietors, members or contributors to the funds of any institution.

Recommendation to extend the article to elections of all local authorities.

46.6 So far as the first portion is concerned, the question may be raised why it should mention only certain local authorities and leave out others. The reason for this appears to be primarily historical. The Stamp Act of 1879 did not contain the words "any one election of the members of a district or local board or of a body of municipal Commissioners". By a notification of the Government, a proxy executed by a female empowering any person to vote at any one election of the members of a local board held under the provisions of the Bombay Local Boards Act, was made chargeable with a one-anna stamp duty—a reduced duty compared with the duty on a power of attorney. The present Act has gone a step forward, and had made the article applicable to proxies executed even by males, in respect of the election of the authorities mentioned therein. In doing so, however, the question of extending this part of the article to the election of every local authority does not appear to have been considered. Such proxies might, perhaps, be taken as chargeable under the article relating to power-of-attorney[2]. It should be noted, however, that the duty under that article is much higher than the duty on a proxy, and moreover, that article is expressed in somewhat complicated terms[3]. We are of the view that proxies in respect of elections of all local authorities should be brought within the scope of article 52. No doubt, a person to whom a member gives a proxy is that member's agent for the purpose of voting[4]. However, since the legislature has, in this article, already dealt with a proxy in respect of elections of local bodies specifically, there is no reason why all proxies in respect of local bodies should not be brought within its scope. We, therefore, recommend that this part of article 52 should be extended to a proxy empowering any person to vote at any one election of the members of a local authority. It may be noted, that that portion of the article which refers to a proxy in respect of meetings, specifically mentions "a local authority", words which were substituted by the present Act in place of the words "municipal commissioners" which occurred in the Act of 1879.

Recommendation to extend the article to proxies for meetings of creditors.

46.7. The article does not mention proxies to be used at a meeting of creditors, and such instruments would apparently fall under article 48—power of attorney. However, it should be stated that by a notification[5] issued by the Government of India, the duty on such proxies has been reduced to the duty chargeable under article 52. In view of this, and in order to make the article self-contained, we recommend that such proxies should also be brought within article 52.

Proxies which do not fall under the article, as amended, will continue to be governed by the article applicable to a power of attorney.

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1. Emerson and Latcham, Share-holders', Democracy (1954) pages 14-15, cited by Bisenberg, "Access to Proxy Machinery", (May, 1970) 83 Harv. Law Review, 1489, 1490.
2. Article 48.
3. See discussion as to article 48, *supra*.
4. In re *Tata Iron and Steel Company*, A.I.R. 1928 Bom. 80, 86 (Crump J.).
5. Government of India, Notification No. 6, dated 14th August, 1937.
6. *Cf. Narain Chettair* v. *Ramleswar Mills*, A.I.R. 1952 Mad. 515, 528.

Position in England.

46.8. It may be noted that in England, no duty is chargeable on an instrument of proxy for use at one meeting at which votes may be given by proxy, whether the number of persons named in the instrument be one more[1]. The Finance Act, 1949, so provided, by amending the Schedule to the Stamp Act, 1891, entry relating to letter or power of attorney, by inserting exemption (5). The Exemption is in these terms :

> "(5) Letter of power of attorney for the sole purpose of appointing or authorising a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more."

We are not, of course, suggesting adoption of this English provision.

Article 53—Introductory.

46.9. We now come to a very important article, levying duty on receipts. Article 53 levies a duty of 20 naye paise on receipt as defined by section 2(23), for any money or other property, the amount or value of which exceeds 20 rupees. There are 8 exemptions to the article, to be found in clauses (a) to (h) of the Exemption.

Increase to Rs.100 recommended.

46.10. Before we proceed to discuss matters of detail, we may record our view that the amount should be increased from Rs. 20 to Rs. 100. We may mention that some States have, in their replies to our Questionnaire[2], agreed to the proposed increase to Rs. 100. In this particular matter, we would have been glad to have comments from the Ministry of Finance, which we have not received[3]. However, we may add that we are making this recommendation after a careful consideration of all aspects and we think that there is a strong justification for it, having regard to the purchasing power of the rupee at the present day in contrast with what it was in 1899.

It appears to us that in the present Act, the amount of Rs. 20 must have been fixed on some logical basis. That basis, as we conceive it, seems to be that for amounts less than Rs. 20, the aspect of revenue is over-ridden by the aspect of convenience and the aspect of poverty.

Although we have no material for calculating the present amount corresponding to what was Rs. 20 in 1899, Rs. 100 would seem to be proper on a rough calculation. In any case, Rs. 20 appears at the present day to be too low an amount in a provision for taxing receipts.

Article 58—Receipt—Exemption (a).

46.11. So much as regards the main article. We now deal with the exemptions. Exemption (a) to the article relates to a receipt endorsed on, or contained in, (i) any instrument duly stamped, or (ii) any instrument, exempt under the proviso to section 3 (instruments executed by the Government etc.), or (iii) any cheque or bill of exchange payable on demand, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest or annuity or other periodical payment thereby secured. The principle on which this exemption is based is that, (a) the receipt is incidental to the main transaction, and the instrument is not executed with the primary object of acknowledging the receipt of money, and (b) the primary instrument is itself duly stamped or exempt from duty. The exemption does not, however, mention instruments exempt from stamp duty by virtue of the exemptions contained *below other articles in the Schedule to the Act, or instruments exempt by virtue of a notification under section 9, or by virtue of any other law.* We are of the opinion that a receipt endorsed or contained in any such instrument, if it acknowledges the receipt of the consideration money there expressed, or the receipt of any principal money, interest or annuity, or other periodical payment thereby secured, should also be exempt from the duty under article 53.

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1. Finance Act, 1949, 8th Schedule, Part I, item 18.
2. Q. 106.
3. The Questionnaire was sent to the Ministry of Finance.

Most replies[1] to our Questionnaire have favoured such amendment, which we recommend.

Article 53 — Exemption (a).

46.12. Exemption[2] (a) to Article 53 should, therefore, be revised as above. Loss of revenue—a point made in one reply—cannot be a valid argument, when the main instrument is itself exempt. The principle on which this exemption is based is that, (a) the receipt is incidental to the main transaction, and the instrument is not executed with the primary object of acknowleding the receipt of money, and (b) the primary instrument is itself duly stamped of exempt from duty.

Exemption (b).

46.13. Exemption (b) exempts a receipt for "[3]any payment of money without consideration". There is no such exemption in English law. In general, the exemption is meant for voluntary payments, or payments made in consideration of natural love or affection, of mere gifts. Internal payments within an office, or payments by book transfer, are also treated as falling within this exemption[4-5]. It appears however, that a payment of house-tax to the municipality does not fall[6] within the exemption; it is not treated as a payment "without consideration". This view receives support from the fact that exemption (g) was considered necessary to provide for one specific case of receipt of tax. The exemption needs no change.

Exemption (c).

46.14. Exemption (c) relates to a receipt for payment of rent by a cultivator on account of rent assessed to Government revenue, or in the States of Andhra Pradesh, Bombay and Madras, as they existed before 1st November, 1956, of Inam lands. It is obvious that the exemption is not confined to receipts by the Government—these will be exempt even under the proviso to section 3—but also covers receipts given to raiyats by the holders of revenue paying land. The exemption, however, ceases to operate where a decree for such rent is passed and payment is made out of court, under such decree[7]. The exemption needs no change.

Exemptions (d), (e) and (f)—Recommendation.

46.15. Exemptions (d), (e) and (f) relate to receipts given by armed forces in respect of certain payments. In this connection, our discussion relating to the definition of "soldier[8]" may be seen. In these exemptions, "soldier"[9] should be substituted. We may state that such an amendment has been generally favoured by the replies to our Questionnaire.

Exemption (g).

46.16. Exemption (g) relates to a receipt given by a headman or lumberdar for land revenue or taxes collected by him. This needs no comment.

Exemption (h).

46.17. Exemption (h) exempts receipts given for money or securities for money deposited in the hands of any banker, to be accounted for. The exemption needs no change.

46.18 There are two provisos to the exemption, which are not material for our purpose. The principle of this exemption seems to be that the money received is to be accounted for; and, unlike other receipts the receipt is not issued for something to be retained permanently by the person receiving. In other words, it does not discharge any liability, but merely evidences a transaction of deposit. *The factum of deposit* itself may create a liability to return the money or securities. But the deposit receipt is merely a receipt, and nothing more.

Recommendation to revise the amount in Article 53.

46.19. As regards the figure Rs. 20, we repeat our recommendation that it should be increased to Rs. 100, having regard to the fall in the purchasing power of the rupee.

Article 54.

46.20. Article 54 levies duty on a reconveyance of mortgage

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1. Question 104.
2. Point raised by S. No. 11 (Delhi Administration).
3. *General Council of the Bar* v. *Inland Revenue Commissioners*, (1907) 1 K.B. 462, 478.
4. (1910) I.L.R. 37 Cal. 634, 640.
5. *In re Secretary to the Commissioner of Salt*, Madras, (1911) 9 Indian Cases 342 (F.B.), Madras.
6. *In re Karachi Municipality*, (1888) I.L.R. 12 Bom. 103, 104.
7. *Emp.* v. *Doongar Singh*, (1909) I.L.R. 31 All. 36, 37.
8. See recommendation as to section 2—"soldier".
9. Q. 105.

If the consideration for which the property was mortgaged does not exceed Rs. 1,000 the duty is the same as on a Conveyance (No. 23) for the amount of such consideration as set forth in the Reconveyance.

In any other case, it is ten rupees.

It needs no change.

Article 55. Analogous

46.21. Article 55 levies duty on a release, that is to say, any instrument (not being such a release as is provided for by section 23A) whereby a person renounces a claim upon another person or against any specified property. The duty is as follows :—

(a) if the amount or value of the claim does not exceed Rs. 1,000;	The same duty as a Bond (No. 15) for such amount or value as set forth in the Release.
(b) in any other case	Five rupees.

It needs no change.

Article 56.

46.22. Article 56 levies duty on respondentia bond, that is to say, any instrument securing a loan on the cargo laden or to be laden on board a ship and making repayment contingent on the arrival of the cargo at the port of destination.

In maritime law, this represents a loan of money, on maritime interest, on goods laden on board of a ship, upon the condition that if the goods be wholly lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon[1].

The loan is not recoverable if the ship is lost.

The contract is called *respondentia*, because the money is lent mainly, or most frequently, *on the personal responsibility of the borrower*. It differs principally from bottomry, which is a loan on the ship, while respondential is a loan upon the goods[2].

The Article needs no change.

Introductory.

46.23. Article 57 charges duty on a security bond or mortgage deed "executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract."

When the amount secured does not exceed Rs. 1,000, the duty is the same as on a Bond (No. 15) for the amount secured. In any other case, it is five rupees.

There are certain exemptions, which exempt bond or other instrument, when executed—

(a) by a headman nominated under rules framed in accordance with the Bengal Irrigation Act, 1876, section 99, for the due performance of their duties under that Act ;

(b) by any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem;

(c) under No. 3A of the rules made by the State Government under section 70 of the Bombay Irrigation Act, 1879 ;

(d) executed by persons taking advances under the Land Improvement Loans Act, 1883, or the Agriculturists' Loans Act, 1884, or by their sureties, as security for the repayment of such advances; and

(e) executed by officers of the Government or their sureties to secure the due execution of an office or the due accounting for money or other property received by virtue thereof.

1. Bouvier, Law Dictionary (1914), page 22.
2. *Conard* v. *Ins. Co.*, 1 Pet. (U.S.) 386, 7 L. Ed. 189.

46.24. The article, thus, levies duty on two types of documents—(a) security bonds, or (b) mortgage deeds, provided, in their case, that they are executed by way of security for the specified purpose. There is another article—article 40 dealing with mortgage deeds[1], but that article expressly excludes from its scope a security bond governed by article 57. Then, there is another article[2]—article 15—which levies duty on a bond; that article also expressly excludes, from its scope, a bond which is otherwise provided for by the Stamp Act or by the Court Fees Act. It may be noted that the exclusion in article 15 in respect of a bond provided for in the Court Fees Act[3] was added[4] in the Stamp Act of 1879 by a later amendment[5].

First question Chargeability under Court Foe and Stamp Act.

46.25. It may be pointed out that a similar exclusion—i.e., in respect of documents provided for by the Court Fees Act—has not been made in article 40 or in article 57.

This creates certain problems. A document which falls under article 40 or article 57 would, in certain cases, be chargeable both under the Stamp Act and under the Court Fees Act. This leads to double taxation.

Second question —sevoral articles in the Stamp Act applicable to security bonds and mortgage deeds.

46.26. Secondly, a problem is created by the co-existence, in the Stamp Act, of several articles, conceivably applicable to security bonds and mortgage deeds[6]. These articles do contain words excluding each other; but what falls within one or the other remains undefined. In our view, it is desirable that the scope of each article should be indicated as precisely as possible.

Security bonds executed under order of Court.

46.27. It should, in this connection, be pointed out that the want of a precise definition of the scope of the relevant articles raises problems of great practical importance in relation to security bonds executed under an order of the Court. Hundreds of such bonds are executed daily on behalf of litigants,—particularly, security bonds executed by a surety when a stay of execution of a decree is granted. The crucial question that has usually arisen is—

(i) whether such bonds are executed "to secure the due performance of a contract", so as to fall within article 57, or

(ii) whether they within article 15 (unsecured bonds) or article 40 (mortgage deeds) on the view that they do not fall within article 57.

46.28. This controversy has arisen because, while one view taken on the subject is that an undertaking in compliance with the orders of a court imposes a *contractual obligation*, some courts have taken a contrary view. It is not necessary to refer here to all the cases. Some of them are conveniently reviewed in the Madras case of *In re Kuppuswamy*[7].

Meaning of "Contract" in Article 57.

46.29. There appears to be some uncertainty on the question whether the word "contract" in article 57 is appropriate for being applied to security bonds executed in the course of judicial proceedings in compliance with a statutory requirement. Generally speaking, there cannot be a contract between the court and a party to the suit, and this is the view taken by most High Courts with reference to this article[8]-[11]. On this view, a bond given by a surety under Order 41, rule 5 or Order 41, rule 6 of the Code of Civil Procedure, 1908, does not fall under article 57. It is not a bond for the "due performance of a contract".

These decisions would regard such bonds as falling under article 40.

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1. Article 40.
2. Article 15.
3. Court Fees Act, Second Schedule, Article 6.
4. Amendment in the Stamp Act of 1879 (Article 13), by section 18(4) of Act 6 of 1889.
5. For previous law, see *Kulwant* v. *Mahavir Parsad*, (1888) I.L.R. 11 All. 16, 17
6. In *re. Kuppuswamy*, A.I.R. 1949 Mad. 567, 568 (reviews case law).
7. In *re. Kuppuswamy*, A.I.R. 1949 Mad. 567, 568 (reviews case law).
8. *Reference*, A.I.R. 1931 All. 189 (F.B.).
9. *Abubacker* v. *Chinnathambi*, A.I.R. 1938 Mad. 262; (1938) 1 Mad. Law Journal 159.
10. *Dadve Balaji* v. *Kanhailal*, A.I.R. 1947 Nag. 26.
11. *Akshay Zamindari* v. *Ram Nath Burman*, I.L.R. (1937) 1 Cal. 375, 380.

The view taken in some case, however, is that a security bond given under Order 41, rule 5 or 6 of the Code of Civil Procedure, 1908, falls under article 57. This view was taken by the Oudh Chief Court[1], the Lahore High Court[2], and by the Sind Chief Court[3].

U.P. Amend ment.

46.30. Presumably to settle the position on the above subject, there has been in the U.P. an amendment of article 57[4], adding the words "or the due discharge of a liability" after the words "the due performance of a contract". Such an amendment, however, seems to go beyond what is needed, and might even cover bonds not executed in the course of civil and criminal proceedings. A similar amendment was made in Bengal in 1939.

Basic principles.

46.31. It appears to us that the position could be simplified if more attention is devoted to basic principles. Two basic principles should in this context be borne in mind. First, as far as possible, the articles should be mutually exclusive—(this is a question of drafting),—and secondly, a document which bears court fees should not also be liable to stamp duty—(this is a matter of policy). The second principle has been accepted when the legislature amended the 1879 Act[5]. There is no reason why the same principle should not be followed incharging duty under other articles which are possibly applicable. We are, moreover, of the view that bonds executed in pursuance of an order of a court cannot be regarded as creating a contractual obligation. They should be dealt with specifically, if considered necessary.

Recommendation to amend article 30 and article 57.

46.32. On the above principles, we recommend the following amendments in the various articles :—

(i) In article 40 (mortgage-deed), the words "not being . . SECURITY BOND" should be amplified by revising them as "not being. . . .such SECURITY BOND OR MORTGAGE DEED as is referred to in article 57."

(ii) In article 57, the words "or in pursuance of an order of a court or public officer" should be added after the words "due performance of a contract".

(iii) In article 57, the words "not being otherwise provided for by the Court Fees Act, 1870 should also be added, after adding the above words.

(iv) In article 57, after the words "security bond or mortgage" (which occur in the title), the words "where such security bond or mortgage deed is" should be added.

Object of the suggested amendment.

46.33. The object of the first amendment is to demarcate the scope of article 40 more clearly, by indicating that not only a security bond but also a mortgage deed (if governed by article 57[7]) would be excluded from article 40.

The object of the second amendment[8] is to put an end to the controversy as to the scope of the words "due performance of a contract" in article 57.

The object of the third amendment[9] is to remove the liability to stamp duty under article 57 where the Court Fees Act is applicable. The object of the fourth amendment[10] is to make it clear that in article 57, the words "executed by way of security. . . . . contract" govern the words "security bond" as well as the words "mortgage deed".

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1. *Board of Revenue* v. *Lalta Bakshi Singh*, A.I.R. 1931 Oudh 91. See, However, *Hunter* v. *Emp.*, A.I.R. 1942 Oudh 371,373
2. *Tullah Shah* v. *Gulam Hassan*, A.I.R. 1933 Lab. 1004
3. Reference A.I.R. 1936 Sind. 41
4. Stamp Act Schedule 1A, Article 57, as inserted in the U.P.
5. See *Supra*.
6. To be carried out undre article 40
7. See *Supra*.
8. See *Akshay Zamindari Ltd.* v. *Ram Nath Verman*, I.L.R. (1937) 1 Cal. 375, 380.
9. Compare Article 15.
10. See *Akshay Zamindari* v, *Ram Nath Burman*, I.L.R. (1937) 1 Cal. 375, 380.

46. 34. The material part of article 57 should, accordingly, be revised so as to read as under :—

"57. SECURITY BOND OR MORTGAGE DEED Where such security bond or mortgage deed—

(a) is executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof, or

(b) is executed by a surety to secure the due performance of a contract or in pursuance of an order of a court or public officer, not being otherwise provided for by the Court Fees Act, 1870, —

—902 to 911—	
(a) when the amount secured does not exceed Rs. 1,000;	The same duty as a bond (No. 15) for the amount secured.
(b) in any other case..... (Exemptions as at present).	Five Rupees.

CHAPTER 47

ARTICLES 58 TO 60

Article 58.

47.1. Article 58 levies duty on an instrument of settlement. The definition of "settlement" as given in the Act [1] emphasises the occasion or purpose of the gift, that being the feature distinguishing it from other transfers. Having regard to this special purpose, the legislature has fixed a lower rate of duty on settlements. But for this specific article, the instrument would have been taxable as a gift, thereby attracting the rate of duty leviable on a conveyance. Certain questions relating to settlements and trusts will be considered when we come to article 64. (Trusts).

Exemption for dower.

47.2. There is, in article 58, an exemption in respect of a deed of dower executed on the occasion of a marriage between Muhammadans. This requires discussion.

The exemption was previously notified by Notification No. 855 dated 19th February 1886. The principle of the exemption appears to be that in the case of a Muslim marriage, dower is obligatory and is not a matter of bounty. Dower is a *legal right of the wife* and hence ought not to be taxed.

As Mahammood J. observed in *Abdul Kadir's case*[2] "Dower is not the exchange or consideration given by the man to the woman for entering into the contract ; but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman."

Dower in other countries.

47.3. This aspect of the concept of dower is brought out more clearly in the systems of Islamic law in certain other countries which have codified the law on the subject of personal status. According to the law as enacted in the Ottoman Law of Family Rights[3], dower and maintenance of the wife become *binding on the husband* on the conclusion of the contract of a valid marriage.

A similar provision is contained in the law Iraq[4-5], according to which a woman is "entitled" to the dower specified in the contract ; if it has not been specified, she shall get the proper dower.

Essential nature of dower.

47.4. The essential nature of dower came up for consideration in an English case in the rather unfamilar setting of a libel action[6]. The Muslim plaintiff in that case complained that he had been held up to ridicule and contempt by an article that appeared in the defendant's newspaper under the heading "Child Wife bought for £800." The article had gone on describing the marriage of the plaintiff with a Moroccan girl in Casablanca in terms of a purchase. The defendants put forth the plea of "Justification" (truth of the libel). It was their plea that they were justified in describing the marriage as a sale, because the negotiations for marriage had been concluded between the plaintiff and the girl's uncle and because a sum of money was involved. This plea was rejected, and it was held that the defendants had grossly misrepresented the nature of the proceedings involved in a Muslim marriage. The marriage guardian was in no sense acting as a vendor. It was the bride herself who received the dower. The bride's uncle had concluded the contract as a representative of the bride and acting upon her wishes, because the Maliki law required him to do so. The plaintiff was awarded £750 as damages.

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1. Section 2(24).
2. *Abdul Kadir* v. *Salima*, (1886) I.L.R. 8 All. 149, 157.
3. Ottoman Law of Family Rights (1917), section 69.
4. Iraqi Law of Personal Status (1959), section 19(1).
5. J.N.D. Anderson, Changes in the Law of Personal Status in Iraq (1963) 12 I.C.L.Q. 1026.
6. *Saloy* v. *Odhams Press*, London Times (27th June, 1963); Coulson, Conflicts and Tensions in Islamic Jurisprudence. (University of Chicago Press) (1965), page 27; Current Law Year Book (1963), item 2006 (Stevenson J.).

The points discussed above would seem to show that dower is (i) a right of the wife, and (ii) it is obligatory by law to provide for it in the case of a Muslim marriage.

Minimum dower.

47.5. It is, presumably, for this reason that under the Hanafi law, the wife is entitled to claim as her dower a minimum amount[1], notwithtsanding any express agreement not to claim dower[2] or an agreement to accept a smaller sum. This is fairly clear from the original texts cited by Karamat Husain J. in *Asma Bibi's* case[3].

47.6. Dower is often fixed at a high amount in order to prevent the husband from divorcing the wife[4]. Payment of a portion of the dower could be postponed by agreement until termination of the marriage, and if the amount stipulated were high enough, it would obviously provide an effective brake upon the capricious exercise of the right of repudiation by the husband[5].

No maximum.

47.7. The matter has been considered at length in a very learned judgment of the Punjab Chief Court[6]. It may be noted, that apart from cases where specific statutory provisions of local application restrict the amount of dower[7], there is no legal limit of maximum regarding the amount of dower under Muslim Law. This has been specifically held by the Privy Council[8]. In an unreported case of the Bombay High Court[9], a decree for dower amounting to Rs. 18 lakhs was upheld.

47.8. This being the principle underlying the exemption regarding deeds of dower, no modification of substance is suggested in the exemption. We have, however, a point of phraseology to consider, which will be discussed later.

Words "as set forth".

47.9. Reverting to the main article, the words "as set forth in such settlement" are to be construed with 'value', and not with the word 'property'. Turner C.J. had these observations to make —'If the terms as set forth in such settlement' refer to the property settled, the duty is chargeable not on the value of the property which may be mentioned in the settlement, but on the value of the interest or interests created by the instrument which may not be co-equal to the value of the property. *But if this was intended, the intention might have been less clumsily expressed*[10].

"We are, however, of opinion that the terms apply not to the interests created by the instrument, but to the value set forth in the settlement, and the law suggests that the settlor should insert the value. It is obvious that it must often be difficult and sometimes impossible, to value the interests created by a settlement, and the legislature has, we imagine, on this ground amended by law by the introduction of the words we are considering"

It is to be pointed out that the Madras view has been followed in Allahabad[12], and also in a later case of the Madras High Court[13].

Meaning of the words "occasion of the marriage".

47.10. In the exemption, the words "executed on the occasion of a marriage" have been constructed by the Bombay High Court to mean "at the time of a marriage". According to this construction, a deed of dower executed a week before the marriage would not fall within the exemption[14].

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1. 10 Dirhams (Hanafi Law).
2. The agreement is called a tafweez.
3. *Asma Bibi* v. *Abdul Samad*, (1909) I.L.R. 32 All. 167, 168.
4. *Zakeri Begum* v. *Sakina Begum*, (1892) I.L.R. 10 Ind. App. 157, 165.
5. Coulson, A History of Islamic Law (1964), pages 207, 208.
6. *Sahebzadi* v. *Saidulnissa*, (1880) 15 Punjab Record 297 (No. 123).
7. Section 5, Oudh Laws Act.
8. *Zakeri* v. *Sakina*. (1892) I.L.R. 19 Cal. 689, 698 (P.C.).
9. *Aun ali* v. *Banoo Begum*, (OOCJ Appeal No. 1472), decided in September 1907; Tyabjin, Mohammedan Law (1968) page 111.
10. Emphasis added.
11. Reference, 8 Mad. 453 (Turner C.J.).
12. *In the matter of Mohammad Muzafar Ali*, 1922 I.L.R. 44 All. 339.
13. *Board of Revenue, Venkataraman Aiyar*, A.I.R. 1950 Mad. 738.
14. *Bai Ameena* v. *Arab Abdul Talib*, 60 Bom. L.R. 1206; A.I.R. 1959 Bom. 108 (D.V. Vyas, J.).

To us, with due respect, this interpretation appears to be one which might require reconsideration. In its judgment, the High-Court made a distinction between a deed of dower which is, purely and simply, a deed in consideration of marriage and a deed of dower "executed on the occasion of the marriage". The assumption seems to be that the latter phraseology is narrower than the former. It was held that the words "on the occasion" mean "at the time".

47.11. We are of the opinion that this is not a reasonable construction. In our view, the legislature did not use the words "on the occasion" with any intention of emphasising the exact identity in point of time; the primary object may have been to indicate that the marriage must be between the Muslims and that there must be a connection between the marriage and the deed. Apart from this question of construction, we may also state that the Bombay view would cause a lot of practical inconvenience since, in practice, parties do not necessarily execute the deed of dower on the very day of marriage or at the very time of marriage. The deed might precede the marriage or, if convenience so requires it might be executed even after the marriage.

47.12. Should it, as a matter of policy, matter whether the deed is or is not simultaneous with the marriage? We do not think so. Since the exemption in question incorporates a remission granted previously by a Notification of the Government of India,[1] the available historical material does not throw light on the precise scope which was intended for the exemption. But, viewing the matter from the angle of principle, we do not see any reason why the fact that the deed preceded the marriage or followed it should deprive it of exemption under the Stamp Law. If, as we have pointed out above,[2] the principle underlying the exemption is that in the case of a Muslim marriage, dower is a matter of obligation and not one of bounty, then the distance in point of time should not be material, provided, of course, it is established that the deed is one of dower and that it has a connection with the marriage. Of course, it may be difficult to draw a line but no one would say that one week is too long an interval. To avoid recurrence of controversies and to put in the statute what we consider to be the proper policy, we recommend that the words *"whether the deed was executed before or after the* marriage" should be added in the exemption at the end, and that the words "on the occasion of the marriage" be replaced by the words "in connection with the marriage", so as to eliminate the construction that the marriage and the deed must be simultaneous.

Article 59—Introductory.

47.13. Article 59 levies duty on share warrants to bearer, issued under the "Indian Companies Act, 1882".

A share warrant is a negotiable instrument. A company limited by shares may, if authorised by its articles, issue share warrants under its common seal in respect of fully paid shares,[3] or stock.[4] A share warrant certifies that the bearer of it is entitled to the share represented by the warrant.

The legal title to the shares is transferred by mere delivery of the warrant from one person to another with the intention of passing that title. Where a share warrant is outstanding, the register of members bears a note of its issue. The bearer of the warrant may surrender it back to the company at any time and be registered on the register of members, and receive a share certificate instead.[5-6]

Recommendation

47.14. We have no amendment of substance to recommend in the article. But the reference to the provision of the Companies Act should now be to "section 114 of the Companies Act, 1956". This is only a verbal amendment. We recommend that the article should be amended so as to substitute those words.

Article 60.

47.15. Article 60 levies duty on a shipping order, for or relating to the conveyance of goods on board of any vessel. It needs no change.

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1. Para 47.2, *supra.*
2. Para 47.6, *supra.*
3. *Webb. Hale and Company* v. *Alexandria Water Co.* (1905) 21 Times Law Reports 572.
4. Section 114, Companies Act, 1956
5. Halsbury, 3rd Edn. Vol. 6, page 249.
6. *Pilkinston* v. *United Railway*, (1930) 2 Chancery 108; (1930) All E.R. Reprint 649.

CHAPTER 48

ARTICLES 61—63

Article 61—Introductory.

48.1. Proprietary rights may be transferred directly, e.g., by conveyance or gift,—or may be enlarged indirectly. One mode of such enlargement is the surrender of a lesser interest in favour of a larger one. The surrender of a lease falls in this category. In the Stamp Act, it is dealt with in article 61. The distinction between a pure transfer and a surrender appears to be that a transfer could be to a third person and creates in the transfers an absolutely new right, while a surrender is in favour of a person who already holds some interest in the property, though that interest is not the same as that now surrendered.

Article 61 applies to express surrenders by an agreement,[1] and would not apply to implied surrenders.[2] An implied surrender arises *without any specific instrument for that purpose.*[3]

There is an exemption as regards a surrender in cases where the lease itself is xempted[4] from duty.

Sometimes, a document may embody two transactions. Thus, a document by which the lessee surrendered the lease, but in which the lessee also transferred certain moveable and business assets which were not subject to the lease, was considered chargeable both as a surrender of lease and as a conveyance of moveables.[5]

Case law as to partial surrender.

48.2. The article does not tell us whether the surrender should be total or partial. It has been held in Madras[6] that it is immaterial that the surrender is only as regards the unexpired part of the term, or is with regard to only a portion of the property. While the article needs no change of substance, it appears to us that it would be useful to codify what has been held in the Madras case, as such questions are likely to arise elsewhere also.

Recommendation to add an Explanation.

48.3. Accordingly, we recommended that the following Explanation should be inserted below Article 61 :

> *"Explanation.—For the purposes of this article it is immaterial that the surrender of the lease is only as regards the unexpired part of the term, or is with regard to only a portion of* the *property."*

Article 62—Introductory.

48.4. Article 62 levies duty on certain transfers with or without consideration. The various kinds of transfers listed in the article seem to constitute a heterogeneous collection. Clauses (a), (b) and (c) can, however, be grouped together broadly as transfers of "actionable claims", such as, shares, debentures and interests created by bonds, mortgage deeds and policies. Clause (d) deals with the transfer of property under a particular provision of the Administrator General's Act, dealing with transfer by an executor. Clause (e) deals with the transfer of a trust property *witout 'consideration'*[7] from one trustee to anoter trustee or from a trustee to a beneficiary. There is one feature common to clauses (d) and (e)—the transferor has no beneficial interest.

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1. Section 111(e), Transfer of Property Act, 1882.
2. Section 111(f), Transfer of Property Act, 1882.
3. See section 111, Transfer of Property Act.
4. For example, article 35, Exemption (a).
5. *The Chief Controlling Revenue Authority* v. *Bhagya Lakshmi*, A.I.R. 1958 Mad. 535 (F.B.).
6. Madras Board of Revenue, ruling, cited in Krishnamurthi, Stamp Act (1968), page 551.
7. The anomaly created by clause (e) is discussed, *infra*.

It should be noted that all these transfers would, but for this specific article, have been chargeable either as "conveyance" in view of the wide definition of that expression as given in the Act,[1] or as gifts or under some other entry appropriate to the nature of the right transferred. The duty under article 62 is lower than that on a conveyance or on a gift,—which shows the significance of the article. A lower duty seems to have been chosen either because what is transferred is an actionable claim and not property in possession, or because the beneficial interest remains unaffected. There are certain aspects of business convenience also, relevant to some instruments.

Clause (a)—Transfer of shares.

48.5. Taking up the clauses themselves, clause (a) deals with the transfer of shares in an incorporated company or other body corporate. The duty is 75 p. for every 100 rupees of the value of the share. A few reported cases on this clause may be referred to. In an early Bombay case,[2] the question was raised how an instrument executed in the following circumstances was to be stamped.

A Hindu joint family consisting of three brothers owned shares in a limited company, which stood in the name of the eldest brother. The three brothers came to be divided in interest. The shares remained in the name of the eldest brother, though dividends on the shares were divided amongst the three brothers. This fact was subsequently recorded in a deed of partition. The eldest brother then executed two deeds under which he transferred to his brothers the number of shares that fell to their shares. It was held that the deeds in question were chargeable as instruments of partition under article 45, and did not fall either under Article 62(a) or under article 62(e).

Mulla, who was one of the three Judges who decided the case, later seems to have revised his opinion.[3] He has expressed the opinion that in such a case, after an oral partition, whereby property continues in the name of the one brother and is subsequently transferred to the others entitled to it under the partition, the instrument would fall under article 62(e)—(transfer of trust property). The reasoning seems to be that the partition has already been effected, and the persons in whose names the shares continue to remain are not the beneficial owners.

In the same Bombay case,[4] it was remarked that the possession of the one co-owner of joint property in his own name is not that of a trustee for the other co-owerns. But, as pointed out by one author.[5] the title of the co-owner who is registered holder, can be regarded as that of a trustee in regard to the shares of the other co-owners, and the instrument of transfer would, on that view, be chargeable under clause (e).

48.5A. In another case[6] decided under article 62(a), it was held that if a company registers an instrument of transfer of shares which is not properly stamped, it would be doing something which is not lawful. But there was no provision in the Companies Act, 1913 (which was then in force), or in the Stamp Act, which would make the *company liable* for payment of the proper stamp duty. If the document is brought before the revenue authority, the revenue authorities will impound it, but the only right given to them to proceed for the recovery of the duty is against the person who was liable to pay the duty, i.e., the executant.[7]

Use of singular "share".

48.6. The case-law so far discussed calls for no amendment of the clause, but we may note that the singular word "share" in clause (a) (in the column relating to the amount) may

1. Section 2 (10).
2. *The Superintendent of Stamps, Bombay* v. *Chimanlal*, (1923) I.L.R. 47 Bom. 321; A.I.R. 1923 Bom. 237 (Shah Ag. C.J., Crump & Mulla JJ.).
3. See Mulla & Pratt, The Indian Stamp Act (6th Ed., page 359), 1st Ed. was published in 1924.
4. *Superintendent of Stamps* v. *Chimanlal*, (1923) I.L.R. 47 Bom. 321, 326; A.I.R. 1923 Bom. 237, 239 (Shah Ag. C.J., Crump and Mulla JJ.).
5. Krishnamurthy, Indian Stamp Act, 1972, page 569.
6. *In Re Jagdish Mills Ltd.*, A.I.R. 1955 Bom. 79.
7. See also *Mrs. Parry* v. *Union of India*, A.I.R. 1961 Punj. 123.

give rise to some problems. Here, we may refer to an Allahabad case[1] which, though falling under clause (c) of the article, discusses clause (a) also. In that case, a person was the obligee of each of 29 bonds and mortgage deeds executed by different persons in his favour. He transferred his interest in all these bonds and mortgage deeds to another person, by executing one document comprising them all. The consideration for the transfer was one lump sum. On the question of the proper stamp duty payable, it was held by the majority, that section 5 of the Act, dealing with instruments comprising or relating to several distinct matters, did not apply to the case, and that under article 62(c) *read with section* 13 *of the General Clauses Act,* the stamp duty chargeable on the deed in question was rupees five [under article 62(c)(ii)].

Niamatullah, J. (dissenting) held that while section 5 of the Stamp Act did not apply, under article 62(c) itself and without recourse to section 13, General Clauses Act, the proper stamp duty payable was the sum of all the duties paid on the bonds and mortgage deeds, *subject to the maximum of Rs.* 5 *for any one bond or mortgage deed.*

Bennet J. (dissenting) was of the view that section 5 and article 62(c) each applied to the case, though with the same result, namely, that the proper duty on the instrument in question was the aggregate of the amounts of duty payable on each of the 29 transfers contained in the instrument. Both the dissenting Judges (Niamatullah and Bennet JJ.) expressed the opinion that the rule that the singular includes the plural (contained in section 13 of the General Clauses Act) did not apply to the case.

Singular "Share" in clause (a).

48.7. We are not, at the moment, concerned with the decision on clause (c). But the majority of the Judges in the Allahabad case discussed clause (a), which is of interest. They referred to the language of article 62(a), by way of example. They said : "This lays down that the proper stamp duty on a transfer of *shares* (plural) shall be one half of the duty payable on a conveyance (No. 23) for a consideration equal to the value of the share (singular). ***Now, in this case, it is beyond controversy that the word 'share' in the second column, must be construed as including the plural, because that plural 'shares' is used in the first column."***[2]

The majority has treated the use of the singular 'shares' in item 62(a) in the second column as a grammatical error.

Verbal change in clause (a) recommended to substitute the plural "shares".

48.7A. The majority view as to clause (a), with respect, appears to be correct. We recommended that that view should be adopted and in article 62(a), for the singular "share", the plural "shares" should be substituted, so as to bring out the correct position.

Clause (b)—transfer of debentures—No change.

48.8. Clause (b) of article 62 deals with the transfer of debentures, being marketable securities,[3] whether the debenture is liable to duty or not,[4] except debentures provided for by section 8. Section 8 deals with debentures issued by local authorities raising a loan. Debentures payable to bearer would be transferable by delivery, and not by assignment. This clause needs no change.

Clause (c)—transfer of interest secured by a bond etc.—No hange.

48.9. Clause (c) levies duty on the transfer of any interest secured by a bond, mortgage deed or policy of insurance. This clause also takes out of "conveyance" a case which could possibly fall under it. Thus, the sale of a bond, *by endorsement* on the back of it was held, in an Oudh case[5], to fall under this article, and not under article 23 (conveyance). The duty under article 62(c) for the bond in question was Re. 0-8-0 and if it had been regarded as falling under article 23, the duty would have been Re. 1/-. The endorsement on the back of the bond read, "sold to.....", and the lower court held that this amounted to a sale deed. The Chief Court did not give any reasons for holding that the document in question was

1. *Ram Sarup* v. *Jyoti Teti*, (1933) I.L.R. 55 All. 468, 473; A.I.R. 1933 All. 321.
2. Emphasis supplied.
3. See section 2(16A).
4. As to the duty on debentures, see article 27.
5. *Jang Bahadur* v. *Bhaggoo*, A.I.R. 1934 Oudh 344.

chargeable under article 62 and not under article 23. But, since article 23 is a residuary article, and the document in question can be regarded as a "transfer", the Chief Court was, with respect, right in its conclusion.

Other cases.

48.10. There are a few cases on the transfer of a mortgage,[1] and one case[2] of transfer of the interest secured by an equitable mortgage which were held to be chargeable under article 62(c).

It may be noted that if a policy of insurance is transferred by a separate instrument, it must be stamped under article 62(c); if the transfer is by endorsement, it is exempt under Exemption (c) to the article. It would, thus, appear, that the transfer of a policy of insurance by endorsement would be cheaper method, involving no stamp duty.

The case law and points referred to above do not call for any change in clause (c).

Clause (d)—transfer under the Administrator General's Act—verbal change recommended.

48.11. Clause (d) levies duty on a transfer under the Administrator General's Act, 1874, section 31. This Act was replaced by the Administrator General's Act, 1913. The corresponding section in that Act was section 25. In 1963, a revised Act was passed, and the corresponding section in that Act is section 22. This section refers to the transfer, by a private executor or administrator, of interest under a probate or letters of administration to the Administrator-General, by an instrument in writing.[3] This section is quoted below :

> "22. (1) Any private executor or administrator may, with the previous consent of the Administrator-General of the State in which any of the assets of the estate, in respect of which such executor or administrator has obtained probate or letters of administration, are situate, by an instrument in writing under his hand notified in the Official Gazette, transfer the assets of the estate, vested in him by virtue of such probate or letters to the Administrator-General by that name or any other sufficient description.
>
> (2) As from the date of such transfer, the transferor shall be exempt from all liability as such executor or administrator, as the case may be, except in respect of acts done before the date of such transfer, and the Administrator-General shall have the rights which he would have had, and be subject to the liabilities to which he would have been subject, if the probate or letters of administration, as the case may be, had been granted to him by that name at the date of such transfer."

48.12. We recommend that article 62, clause (d), should be revised so as to substitute a reference to the Administrator-General's Act, 1963, section 22, in place of the reference to the earlier section.

Clause (e)—Transfer of trust property—Amendment recommended.

48.13. Clause (e) levies duty on the transfer of any trust property *without consideration* from one trustee to another trustee or from a trustee to a beneficiary. In this clause, the words "without consideration" are inconsistent with the words "with or without consideration" occurring at the beginning of the article. If these words are regarded as *limiting* the opening words, then a transfer of property *for consideration would be* outside this clause, and would be chargeable as a conveyance under article 23 or as a transfer under article 62, clauses (a) to (d). This was the old law.[4] But, under the present article, there is now some uncertainly, in view of the wide opening words of the article.

Recommendation as to clause (e).

48.14. We recommend that this matter should be clarified, by removing the words "without consideration" from clause (e). A transfer for consideration by a trustee to a beneficiary

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1. (a) *Mc Dowell & Co.* v. *Ragave Chetty*, (1904) I.L.R. 27 Mad. 71.
   (b) *Hitwardhak Cotton Mills* v. *Sorabji*, (1909) I.L.R. 33 Bom. 426.
2. *In re Kamla Ranjan Ray*, I.L.R. (1937) Cal. 486.
3. Section 22, Administrator-General's Act, 1963 (46 of 1963).
4. *Stamp reference*, (1884) I.L.R. 7 Mad. 350, 351 (Article 60, Stamp Act, 1879).

or to another trustee would then clearly fall within article (e). Since the beneficial interest is not transferred, this is justifiable also.

Exemption analysed.

48.15. This disposes of the clauses of the principal article. Under the Exemption to the article, transfers by endorsement of certain documents are exempt. The documents listed are certain commercial documents—as in Exemptions (a) and (b), or policies of insurance—exemption (c), or securities of the Central Government—exemption (d).

Doubt as to chargeability.

48.16. It should be pointed out as regards some of the transfers provided for in the *Exemption*, that their chargeability under *the main article*—as it now stands—is not very clear. Of the various transfers dealt with in the Exemption, the transfer of only one type of document (policy of insurance)—mentioned in Exemption (c),—is specifically taxable under the main article. Transfers of other instruments mentioned in the exemption—(a) transfer of bill of exchange etc., (b) and transfer of securities of the Central Government,—are not *specifically* taxable under the main article, though they can become taxable under *general* provisions of the main article, clauses (d) and (e). For all practical purposes, clauses (d) and (e) would hardly be invoked in relation to transfers of pro-notes etc. The better course, therefore, would be to make transfers of these instruments taxable, by adding them in main[1] article 62, and to retain the present exemption for their *transfer by an endorsement.*

Recommendation to add certain documents in the main article.

48.17. In the light of the above discussion, we recommend that the following clauses[2] should be added in article 62 :—

"(f) *of a bill of exchange, cheque or promissory note;*

(g) *of a bill of lading, delivery order, warrant for goods, or other mercantile document of title to goods;*

(h) *of securities of the Central Government.*"

The duty should—on the analogy of clause 62(a)—be 75 paises for every hundred rupees or part thereof of the value of the property transferred.[3]

Article 63—Transfer of lease.

48.18. Article 63 levies duty on a transfer of a lease by way of assignment. Article 35 governs under-leases or sub-leases. Where the lease is itself exempt from duty, the transfer thereof is also exempt from duty, as also transfers of leases on which duty has been remitted by the Government under section 9. This article does not present any difficulties requiring any change.

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1. To be carried out under article 62, main paragraph.
2. For other suggested amendments, see *supra*, under article 62, clauses (a), (d) and (e).
3. Compare article 62(a)—Transfer of shares.

CHAPTER 49

ARTICLES 64-65

Article 64—Introductory.

49.1. Article 64 levies duty on a declaration of trust. The duty is a fixed one, which is much less than the duty on a conveyance or on a bond. There is considerable overlapping between the entries taxing settlements and trusts. This nautrally raises a few questions of importance. What is the precise scope of "declaration of trust" and "settlement"? Is a "settlement" to be taken as confined to a direct transfer? These and other connected questions arise.

There is also considerable obscurity as to what is to be regarded as a "declaration of trust". Does it cover dispositive documents? If so, can a person adopt the device of trust and thereby avoid the duty that would otherwise be lawfully leviable as on "conveyance" or on "settlement"?

The definition of "conveyance" excludes instruments otherwise expressly provided for. But this would, if taken literally, mean that every declaration of trust is chargeable with fixed duty even if it amounts to a conveyance.

Definition of settlement.

49.2. "Settlement" is defined in section 2(24) in these terms :—

> "'Settlement' means any non-testamentary disposition, in writing, of movable or immovable property made—
>
> (a) in consideration of marriage.
>
> (b) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
>
> (c) for any religious or charitable purpose; and includes an agreement in writing to make such a disposition and, where any such disposition has not been made in writing, any instrument recording, *whether by way of declaration of trust or otherwise, the* terms of any such disposition."

There are four ingredients of this definition which are material for our purpose—(i) there must be a disposition, (ii) it must be non-testamentary, (iii) it must be of property, and (iv) it must be made on the specified occasion or for the specified purpose. But no particular machinery is required for effecting the disposition.

The definition, for example, seems to be wide enough to cover a disposition by way of trust. The last paragraph is, in fact, specific on the point.

Meaning of "settlement" and similarity with trust.

49.3. It may be noted that the definition of settlement in the Act is not identical with the concept of settlement in conveyancing. A writer[1] on conveyancing has said—

> "A settlement is an instrument whereby property or the enjoyment of it is limited to several persons. Unlike the assurance dealt in the earlier chapters which have for their object alienation of property either absolutely or temporarily, a settlement, as also a trust, seeks to prevent alienation of property to the extent the law will allow. Family settlement are very common in India and are freely made by deeds *inter vivos* as well as by wills. Marriage settlements and post-

1. B. Chatterji, Handbook of Conveyancing (1960).

nuptial settlements, which latter variety is mostly voluntary, both so common in England, are known to Indian Law. *Every settlement is effected by means of trusts, and there is practically no difference in form and in substance between a* .....trust and a settlement that we have."[1]

We have quoted the above passage in order to show the similarity between a settlement and a trust.

Settlements and other documents.

49.4. Coming to the definition of settlement in the Stamp Act, we may note that clause (a) will include deeds of dower as well as marriage settlements. An English case[2] illustrates this aspect. Where an instrument, after reciting a previous settlement and a revocation, went on to declare certain specific trusts upon which the property was to be held after the death of the intended husband, there being a power of appointment given to the husband and wife, or the survivor of them, in favour of children or remoter issue of the marriage, and in default of appointment trusts in favour of children declared, it was held to be a "marriage settlement", being clearly an instrument by which property was settled or agreed to be settled.

Clause (b) of the definition suggests the creation of separate interests in favour of persons who may have a legal or moral claim on the settlor, or for whom he may desire to make a provision. It need not embrace the whole property of the settlor.[3]

In a Madras case[4] before the Board of Revenue A assigned to daughter B a certain land, a house and some trees, to be enjoyed by her during her life-time. The question was whether this document was a settlement, a deed of gift or an assignment. The Board of Revenue, Madras, held, that it was a settlement It would appear from these and other decisions that the *object* is the paramount consideration. In this case, the object was to provide for a dependant of the executant of the deed.

A Bombay case[5] relates to clause (c). A deed of settlement *disposed of two distinct funds,* one composed of the subscriptions raised by one of the settlors for a charitable object, and the other of a fund bequeathed to the other settlors with an absolute discretion for disposal in a like manner. It was held that the instrument in question was chargeable as a 'settlement' (Article 58) in respect of the first disposition, and as a power of appointment (Article 7) in respect of the second. The High Court described the first disposition "as an instrument recording, by way of declaration of trust, the terms of the disposition."

Settlement and gifts.

49.5. It may be noted that a document may be both a settlement and a gift. Gifts[6] are chargeable with a higher duty than settlement.[7] The article relating to gift,[8] however, expressly excludes a settlement from its scope. It would appear that the primary consideration in deciding whether a document is a settlement, is the *occasion* mentioned in clause (a), or the object of the person giving as mentioned in clause (b) or clause (c) of the definition of 'settlement'.

While this test is, in general, enough to distinguish between a gift and a settlement, the position is not so simple when one comes to defining the relative scope of settlement and trust.

Artificial meaning given to "settlements"—Settlements and trusts.

49.6. The definition of 'settlement' departs from the ordinary meaning of a 'settlement'[9], and gives it a wider scope. For the present, we shall assume that there is justification for giving it such a wide scope. on considerations of revenue.

1. Emphasis supplied.
2. *Russell* v. *Commissioners*, (1902) I.N.B. 142.
3. *Reference*, I.L.R. 7 Mad. 349.
4. Madras Revenue Board's Proceedings No. 16, 6th January, 1880 (Madras Stamp Manual, p. 163). (Object is important).
5. *In re Abdulla Haji*, (1911) I.L.R. 35 Bom. 444, 447 (Scott C.J. Russell and Rao JJ.).
6. Article 33 (Gifts).
7. Article 53 (Settlement).
8. Article 33 (Gifts).
9. See Madras Board Case, *supra*.

But, in practice, nice questions arise whether a document is a trust or a settlement. This difficulty is primarily due to the fact that the definition of settlement is so wide that one and the same instrument can be a gift, a trust and a settlement. No doubt, where a document falls under two or more articles, it should bear the higher duty.[1] That general provision in the Act will take care of the duty, and the object of levying the duty is achieved. But occasions for the application of this general rule should, in the interest of the common man, be as few as possible,—even if they cannot be totally eliminated. If something can be done to reduce the occasions for such controversies, by an amendment of the law, the amendment would be worth the trouble.

Practical importance as illustrated by case law.

49.7. It would appear that the case law shows some uncertainty and obscurity.[2] For example, the Calcutta High Court held in one case[3] that a document styled "settlement deed", by which all the executant's properties were given to certain deities, could not be regarded as a settlement or deed of trust, but only as a deed of gift. Mitter J. observed as follows :—

> "The word 'settlement', as it is generally understood, refers to a disposition of successive interests in immovable property,[4] and is generally couched in the *form of a trust;* and it is such a settlement which is in the nature of disposition of movable and immovable property either in consideration of marriage or for one or more of the objects specified, namely, religion, charity, or provision for family, dependants or others, that is contemplated by clause (24) of section 2..... Underlying the idea of settlement, there is the *notion or conception of trust.* It is difficult to say that when a gift is made to a deity, the deity is to be regarded as a trustee. This is also the view taken by a full Bench of the Nagpur High Court.[5]

But this view was dissented from in a later Calcutta case,[6] where it was held that a similar document by which the executant' property was given to certain deities is a settlement deed for the purposes of the Stamp Act, notwithstanding that there *was no trust and no disposition of successive interests in the property.* It was there remarked that the express meaning given to the word 'settlement' in the Act cannot be controlled by reference to the meaning given to the word by the Specific Relief Act (which had been relied on in the earlier Calcutta case) where a statute gives a definition for an instrument, that definition cannot be controlled by the meaning commonly attributed to the instrument."

Mis-conception.

49.8. On the specific question as to the meaning of "settlement", what is more important to note is that some misconception appears to prevail on the question of inter-relationship of the two taxing entries. The following extract from an Allahabad case[7] will show how the High Court had to take pains to explain the true position.

> "We may at the outset mention that it appears to us that in framing the questions for our opinion the Chief Controlling Revenue Authority *appears to have proceeded on the incorrect basis that the instrument under the Stamp Act can be either a deed of trust or a deed of settlement only and not both.*[8] The word 'Settlement" is defined in section 2(24) of the Act as follows :
>
> (The definition is quoted).
>
> "This *definition of the word "settlement" itself makes it clear that even instruments which are executed containing a declaration of trust can be settlements, provided*

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1. Section 6.
2. See Allahabad case, *infra.*
3. ***Bhupati Nath Chakravarthy*** v. *Basanta Kumara Devi,* A.I.R. 1936 Cal. 556 (D.B.).
4. Definition of "settlement" in section 3 of the Specific Relief Act, 1877 was referred to.
5. ***Chief Controlling Revenue Authority*** v. *Sarju Bai,* I.L.R. 1944 Nag. 81; A.I.R. 1944 Nag. 33 (F.B.).
6. ***Upendra Nath Podder*** v. *Anat Chandra Lodh,* I.L.R. (1951) 1 Cal. 665, 669, 670 (Bachawat J.).
7. A.I.R. 1964 All. 538.
8. Emphasis supplied.

the conditions laid down earlier in that definition are satisfied.[1] The question in these circumstances that falls for our opinion is whether this particular instrument, to which this Reference relates, is a "settlement" or not, even though it may, on the face of it, be a deed of Trust. Under section 6 of the S amp Act, if a deed of Trust also amounts to a settlement, the stamp duty will be chargeable on it as an instrument of settlement under Article 58 of the Sch. I.B. of the Act, and not as an instrument of Trust under Article 64 of Sch. I.B. of the Act."

Dispositive and non-dispositive trusts.

49.9. Even disregarding the case law, an important query that suggests itself in this context is, how does one distinguish a settlement[2] from a trust[3] (for the purpose of the stamp Act) ? The definition of "settlement" in the Act stresses the element of disposition of property. The Act contains no definition of "trust", but article 64 speaks of a "declaration of trust" without requiring a dispositive clause. It is, then, the intention that an instrument should fall under "declaration of trust", only where it contains no dispositive clause ? A trust can arise without a disposition in praesenti where the trust is by will or whether the author of the trust is the trustee ; in such cases, atransfer in praesenti of the property is not required. In other cases, a disposition is necessary to create a valid trust[4]. This may be a possible distinction between a bare declaration of trust and a settlement. If so, it is desirable that the relevant article should express the position more clearly. It may be noted that Indian Law does not recognise distinction between legal and equitable ownership.

49.10. It should be noted that the provisions of the Indian Trusts Act, 1882, do not deal with the distinction between a settlment and a trust. In fact, the Act is primarily concerned with how a trust can be created and what are the legal consequences of its creation. It does not deal with the various descriptions of instruments that can or cannot fall under the head of trust. In any case, that Act contains nothing inconsistent with the approach adopted in the present discussion. namely, that an instrument of trust can also amount to a settlement as defined in the Act, if the principal object or occasion is one specified in the definition of settlement.

Ordinarily, a trust is created by transferring the property to the trustee, but this is not necessary if the trustee is none other than the author. In that case, it is enough if the author of the trust declares himself to be the trustee.

Where, however, the owner transfers the property to the trustee, there is a "disposition" of his interest and this disposition could amount to a settlement, if the purpose or occasion is one specified in section 2(24). Should it make a difference that the machinery employed is that of trust rather than of a direct transfer ? We have, while analysing the definition of settlement in this Chapter[5], pointed out that the definition does not require the employment of a particular machinery for effecting the disposition.

Conveyance and trust.

49.11. The same query arises in relation to a conveyance and a trust. A dispositive instrument, not for a purpose or on an occasion specified in section 2(24), would amount to a conveyance. Should it make a difference that the instrument employs the machinery of trust, and not a direct transfer ?

Scheme proposed.

49.12. It is to resolve all these queries that we propose a scheme, of which the salient features are—

(1) A trust amounting to settlement should be made so chargeable, by an express amendment of article 64 (An Explanation could be added). At present, there is a misconception on the subject.[6]

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1. Emphasis supplied.
2. Article 58.
3. Article 64.
4. Section 6, Trusts Act.
5. Para 49.2, *supra.*
6. *Board of Revenue* v. *Sreedhar*, A.I.R. 1964 All. 537.

(2) A trust amounting to conveyance should be made so chargeable, by an express amendment of article 64. (Another Explanation could be added). Reasons for this amendment may be listed as under :—

(a) Ambiguity of the expression "declaration of trust".

(b) Words "not otherwise provided for" occurring in the definition of "conveyance".

(c) The anomaly that arises if a contrary view is taken.

A trust for a single person not in need (i.e., who is not to be "provided for"), and who is not dependant, would (on the contrary view), be chargeable only with a fixed duty (article 64), while a trust for a minor son would be chargeable with duty as on a bond as it would amount to a settlement. (Article 58). Really, the first-mentioned trust should be chargeable as a conveyance.

(3) Trusts not falling under (1) and (2) above, fall under article 64.

Our recommendation is that the scope of article 64 should be defined as above, and the meaning of "Declaration of Trust" indicated more clearly, in view of the ambiguity of the expression "declaration of trust" and the overlapping with settlement and conveyance.

49.13. The scheme recommended is based on the following propositions :— Propositions.

(i) The article relating to 'trust'[1] is confined to non-dispositive trusts (non-testamentary); (i.e. where the author is himself to be the trustee and there is no dispositive clause). The duty is as on a bond, subject to a maximum of fifteen rupees.

(ii) That article (Trust) seems to apply also in relation to public trusts, where the author is the trustee and there is no dispositive clause. This can be deduced from the fact that the definition of "settlement" does not apply where there is no "disposition".

(iii) Private dispositive trusts bear duty as on a conveyance[2], unless they are settlements.

Private dispositive trusts which are for religious purposes, or are in consideration of marriage or for the members of the family, etc., i.e., those falling under section 2(24)—bear duty as on a bond.[3] Formally, these are charged as settlements, but the duty on a settlement is the same as that on a bond.

(iv) Public dispositive trusts also bear duty as on a bond[4] if the trust is for religious or charitable purposes, because they fall within section 2(24), (Definition of "settlement").

This is the scheme recommended by us, as put in the form of propositions. For ease of understanding the propositions as set out disregard minor points of detail and also employ rough descriptions of instruments.

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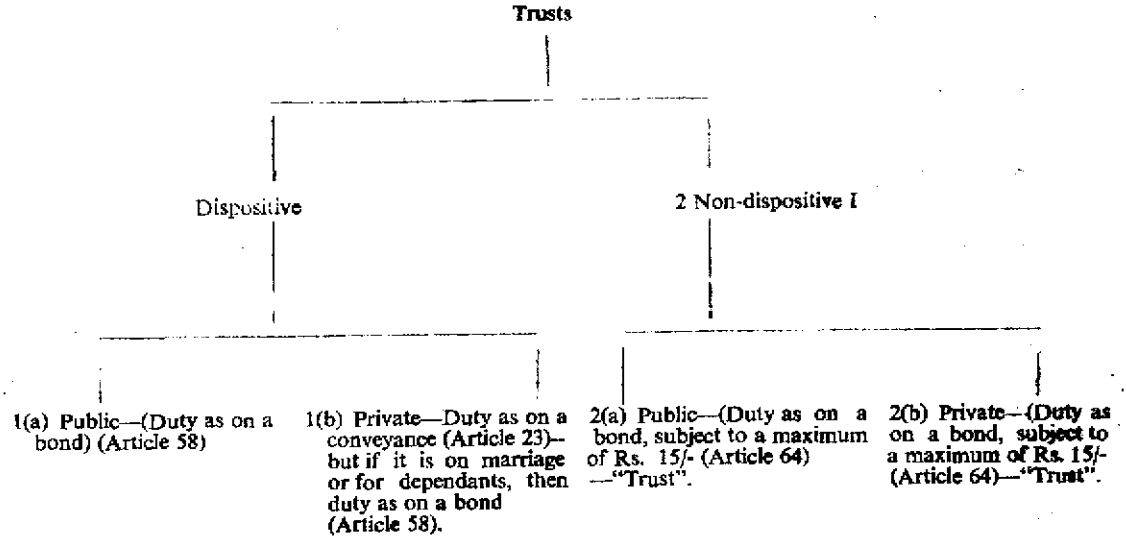
1. Article 64.

2. See article 23, regarding conveyance.

3. See section 2(24), (a) & (b) and article 58 (Settlements in consideration of marriage or for the benefit of dependants, etc.).

4. See section 2(24)(c) and article 58 (Settlements for religious or charitable purposes).

49.14. To put the matter in the form of a chart showing how trusts will be taxed.



We may state that such a restructuring has been favoured by most replies to our Questionaire.[2]

Recommendation.

49.15. We recommend that article 64 should be amended to implement the above scheme.

Article 65—Warrant for goods

49.15. Article 65 relates to warrant for goods. A Warrant for goods is given by the bailee of goods, and acknowledge the title of the transferee to the goods as between the transferee and the bailee, who is the warehouseman.[3]

There is no difficulty caused by this Article, and it requires no change.

1. The categories 2(a) and 2(b) bear the same duty but are shown as separate categories for maintenance of symmetry with 1(a) and 1(b).
2. Question relating to section 2(24),—"Settlement".
3. See Stroud's Judicial Dictionary, 3rd Ed. Vol. 4, p. 3258.

CHAPTER 50

CONCLUSION

Introductory.

50.1. We have concluded our consideration of the Act, and would now like to say a few words about the recommendations made in this Report.

Object of recommendations.

50.2. It would be apparent from the contents of the preceding chapters that we have not confined outselves to tidying up a few technical anomalies in the Act. Our recommendations are aimed at improving the substance, form and working of the Act, within the limitation that we set out in the first Chapter.[1]

Broadly speaking, the changes which we have recommended seek to achieve the following objects :—

(a) improvement in the tax structure—though to a very limited extent[2] (e.g. our recommendation as to powers of attorney).

(b) improvement in the practical working of the Act, by amending provisions that cause difficulty, delay or inconvenience (e.g. our recommendation as to the mode of cancellation of stamps.).

(c) improvement in the drafting of the provisions—in particular, removing uncertainty caused by conflicting views.

(d) securing consistency with juristic principles (e.g. our recommendation as to the inclusive portion of the charging article on lease and our recommendation as to liability to bear the duty.

(e) giving proper recognition to sociological considerations relevant to the subject (e.g. our recommendations as to assignment of copyright and insurance policies for accident).

(f) providing for uniform interpretation of the Act within a State by strengthening the procedure for reference (sections 56-57).

(g) avoidance of injustice, hardship or inconvenience to the citizens, in court as well as elsewhere (e.g. our recommendation as to the definition of promissory note, and as to section 35), where the requisite amendment could be made without a serious effect on the revenue.

International character of instruments.

50.3. As to the question of hardship and convenience we would like to point out that many of the instruments with which the Act is concerned are of an international character. Bills of lading, Bills of Exchange, promissory notes and other documents relating to maritime law or the law merchant are examples. Modern conditions of trade render it desirable that in regard to such instruments, the law should be simple and easily ascertainable.

For the purpose of academic treatment and other purposes, of course, the corpus of the law is divided into compartments. But the businessman does not, when he enters into a particular transaction, view the matter as such.

The international character of maritime law is of peculiar interest. It has been said that[3] English maritime law is one part of English law upon which Roman law has had a direct

1. Chapter 1.
2. See Chapter 1.
3. Friedmann, Legal Theory (1967), page 526.

24 M of Law/77—38.

impact. Lord Mansfield took many of the principles of maritime law from the Roman Law. Again, negotiable instruments are essentially international institutions—which also renders it desirable that, as far as possible, the law relating thereto should be simple rather than complex.

The international character of some instruments has a long history. Bottomry bonds seem to have been in vogue in Rome at least as early as 530 A.D. because in that year an edict of Justinian restricted the interest on money advanced on such bonds to 12 per cent.[1]

In the Narratives of Demosthenes, it is stated that about the year 400 B.C. Grecian merchants practised the negotiation of large loans to finance commercial maritime ventures—a statement for which support is to be found in the writings of Plutarch.[2].

In India, there are cases of advances similar to bottomry being made for financing trade as early as 600 B.C.[3]

It is, therefore, appropriate that in the preamble to the first English enactment relating marine insurance,[4] it was stated that "it has been time out of mind a usuage among merchants, both of this nation and of foreign nations, when they make any great adventures (specially into remote parts) to give some consideration of money to other persons (which commonly are in no small numbers) to have from them assurance made of their goods merchandise ships and things adventured. . . . . ."

International trade and India.

50.4 India is no stranger to international trade. Pre-historic remains discovered at several places in India in archaeological excavations show that trade on rivers and oceans was carried on by boats. The Rig Veda refers to the ship wreck of Bhujyu and the subsequent rescue by the Ashwins ; these incidents give a definite indication of maritime trade. Later, in the pre-Maurayan and Maurayan periods, such commercial activities seem to have become quite common.[5] In fact, when the Roman Empire was as its height, Indo-Roman trade also seen to have attained its climax. This is evident from the historical accounts available in regard to Gupta period, when India's internal and foreign trade reached great heights.

In the first century after Christ, India had a favourable balance of trade with Rome.[6]

The Manu Smriti has an interesting verse which makes boatmen collectively responsible for loss caused by their negligence.[7-8]

With such a volume and richness of international trade, it is axiomatic that contracts must have been entered into and recorded in writing, even though the writings themselves may not be traceable at the present day.

Various aspects.

50.4A. We have said enough to indicate that even a taxing statute like the Act with which we are concerned involves the consideration of a number of theoretical and practical aspects. The rate structure could bear improvement, the practical working should be remedied where difficulty is caused by the defect in the content of the statute ; avoidable uncertainty ought to be attended to ; fundamental juristic principles should not be overlooked ; sociological considerations may not be totally irrelevant ; interpretation of the law ought to be uniform ; the kind

1. Dover, Handbook to Marine Insurance (1957), page 2.
2. Dover, Handbook to Marine Insurance (1957), page 3.
3. Dover, Handbook to Marine Insurance (1957), page 3.
4. An Act touching the policies of assurances used amongst merchants (1601), (43 Elizabeth Chapter 12).
5. See in general R.K. Mookerjee "Indian Shipping" Bombay [2nd Ed. (1957) page 37-54]
6. See—
   (a) R.K. Mookerji, Indian Shipping (Bombay) (2nd Ed. 1957), pages 37-54, 57, 62, 70.
   (b) M.C. Bandophadhya, Economic Life and Progress in Ancient India (Calcutta 1945), Vol. I.
   (c) K.A.N. Shastri, A History of South India from pre-historic Times to the fall of Vijayanagar (Madras, 1966).
7. Manu 8 : 408-409.
8. R.K. Mookerji, Indian Shipping (Bombay), (1957), page 86, citing Pliny, Natural History, Vol. 2.18

of audience to which the law is addressed, and the class of citizens who will primarily be called upon to comply with it, as well as the nature of the transactions which will normally fall within its purview, are matters legitimately to be taken into account ; above all, a well drafted law, easy of application and not too difficult to understand, would ultimately result in benefit to the State as well as to the citizens.

Importance not appreciated.

50.5. Unfortunately, some of the aspects which we have outlined above are not properly appreciated. Taxation law is often regarded as a technical branch of the law, not worthy of academic study of capable of being subjected to juristic discussion. The Stamp Act, if we may say so, is the Cinderlla of the law. One hardly finds, except in judicial decisions relating to particular controversies or in official documents dealing with particular problems, studies discussing or exploring the basic principles underlying the taxing provisions of this particular Act. It is appropriate to make this observation in order to explain why, at some places, we have found it necessary to consider the fundamentals of a particular provision and have not limited our discussion to the contours of the relevant problem as they appear on the surface.

Spirit of the recommendations.

50.6. It is this broad perspective from which we have approached the subject. We would like to record our hope that the Government will view our recommendations in the spirit in which we have made them.

At the cost of repetition, we would say that we have approached the task of revising the Act not in a narrow pedantic manner, but from a broader perspective embracing a variety of considerations. Unlike many other taxing measures, the Stamp Act is a self-executing Act, in the sense that it is left to the party chargeable with tax to calculate the duty and then to put the proper stamp according to that calculation. The fact that there is no machinery to oversee the operation of the Act, or to watch how far the citizens have complied with the Act may, to a certain extent, justify stringent provisions. But it must, at the same time, be remembered that the very fact that the duty is to be calculated by the 'assessee' throws a very heavy and onerous burden on the Legislature, inasmuch as this part of the task of the citizen is often difficult. If the legislative scheme is not indicated in clear and precise term in the Act, it becomes still more difficult. It is only occasionally that the citizen faces the authorities entrusted with the enforcement of the Act—the Courts, public officers, the Collector, the Board of Revenue and others. Cases of compliance or non-compliance with the provisions of the Act also come up before the authorities only occasionally.

However, whether or not a particular case comes up before the authorities mentioned above, the law always operates and the citizen must decide for himself what, if any, is the amount payable as stamp duty. This renders it desirable that the substance and form of the law and the manner of its implementation should maintain a certain quality.

Notifications.

50.7. In this context, we attach the greatest importance to the easy accessibility of the statutory material. In the course of our study of the Act, we have found that a plethora of notifications has been issued under the Act, particularly under section 9 which confers upon the appropriate Government power to issue reductions and remissions of duty. We are not suggesting any radical change in this power, except the insertion of certain criteria[1] in order to preserve the validity of the section against an attack on the ground of excessive delegation of the legislative power. But we wish to bring it to the notice of the Government that the ordinary citizen must be finding it difficult, and sometimes impossible, to acquire accurate information about the notifications issued from time to time under this section. To some extent we are recommending the incorporation of the substance of certain notifications in the concerned articles, but even then a large mass of material contained in the notifications will survive and retain its validity. To us, it appears desirable that some machinery must be devised of making these notifications easily available to the public. No doubt, there is a practice in the Central Government of bringing out various statutory rules and orders in volumes arranged

1. See recommendation as to section 9, *supra*.

subject-wise, but the difficulty is that those volumes deal with a large number of subjects in all of which a particular citizen may not be interested. It will, in our view, be better if a handy volume containing the upto date text of the notifications is also brought out at regular intervals—say, every three years. The fact that the Stamp Act affects a large number of citizens and not merely those whose cases come up before the courts or whose controversies happen to be reported in the published law reports, becomes material in this context. The inconvenience actually experienced in practice by reason of ambiguity in the statutory materials or their inaccessibility, is very inadequately reflected in the case law that comes to the notice of those whose business it is to advise the Government on the revision of the laws. We are, therefore, attaching the greatest importance to the need for re-publication, in a suitable form, of the notifications and rules made under the Act. Of course, this problem is not peculiar to the Stamp Act. But, at the moment, we are concerned only with that Act.

Constitutional position.

50.8. We are conscious that many of the recommendations which we have made relate to documents other than those mentioned in the Union List. Some of the recommendations touch *the rates of stamp duty* in regard to documents mentioned in the State List—e.g., our recommendations as to article 64 (trust). However, we would like to make it clear that we desire that our recommendations should be carried out even where subject-matter of a particular recommendation may, in some respects, fall within the State List. Our intention is that the change recommended will still be useful in regard to Union Territories, as improving and reforming the law in relation to those territories. We are making this observation here, as we have not discussed, under each provision, the constitutional position as to the precise legislative entry applicable to the particular provision under consideration.

Meaning of "rates".

50.9. At this stage, a discussion of the constitutional position would not be inappropriate. So far as is material, and without entering into details, we may say that under the Constitution one must consult all the three legislative lists in the seventh Schedule for ascertaining the legislative power on the subject. The topic "stamp duties" falls in the concurrent list,—but with the very important exception that "rates of stamp duty" do not fall within that entry. As regards rates, the legislative power is partitioned between the Union and the States—it is, again unnecessary to enumerate the documents placed in each list. But the broad scheme is as indicated above. This brings to the forefront the precise scope of the expression "**rates of stamp duty**".

Although the expression "rates" would, at first sight, seem to be confined to the *arithmetical* figures of duty, the ensuing discussion will show that a different view would be better in the particular circumstance of this case.

50.9A. In the first place, the case law[1] *shows that the article regarding duty on entry* as Advocate is regarded as within State List, entry 63.

Allahabad case as to enrolment of Advocates.

It was, for example, held in *State* v. *Bar Council, Allahabad*[2], that section 3(iii) of the U.P. Taxation Laws Amendment Act, amending Article 30 of Schedule IB of the Stamp Act, was *prima-facie, intra vires* the State Legislature, *for the subject-matter of this particular enactment falls within Entry 63 of the State List.* It so happened that the Act in that case had received the assent of the President. But that does not affect the position that the subject-matter of the Act was held to fall within the State List. That the Act received Presidential assent was an aspect that was discussed presumably to repel the objection of repugnance to the Advocates Act, 1961.

50.10. Similarly, in a Mysore Case[3], the High Court uphold the of validity of Mysore Act No. 29 of 1962[4]. From the Gazette, it appears that the Act received the assent of the Governor on the twenty-fifth day of September, 1962 and it had not been submitted for the assent of the President.

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1. See *infra.*
2. *State* v. *Bar Council, Allahabad,* A.I.R. 1971 All. 186 (S.N. Dwivedi and C.D. Parekh , JJ.).
3. *B.K. Vittal* v. *State of Mysore,* A.I.R. 1966 Mysore 138, paras 17-18.
4. The Act was first published in the Mysore Gazette on the twenty-fifth day of September, 1962.

It was held that amended Article 17 of the Mysore Stamp Act was not repugnent to the provisions of section 24 of the Advocates Act, 1961. There was no conflict between the two provisions. The Mysore Act prescribed rate of stamp duty in respcet of any entry on the roll of Advocates, the Advocate Act deals with the admission of Advocates on the roll of the State Bar Council. *The former was enacted by the State Legislature in pursuance of the legislative power conferred on it under entry 63 of the State List.* That field is exclusively reserved for the state Legislature.

The power exercised by Parliament is general legislative power. The power exercised by the State Legislature is a taxing power. The two powers are independent powers and do not collide with each other. Parliament is incompetent to encroach on that field, directly or indirectly. The question of repugnance can only arise in matters where both Parliament and the State Legislatures have legislative competence to pass laws. If any repugnancy arises as a result of encroachment by one legislature over the field reserved for the other, then the rule of *ultra vires* steps in, and the law enacted by the legislature having no competence becomes void. In such matters there is no question of superior and inferior legislature.

Mysore case.

50.11. It may be noted that the Mysore Stamp (Amendment) Act, 1962 (Mysore Act 29 of 1962) amended the Mysore Stamp Act, 1957, in detail, and one of the amendments was concerning what is article 30 in the Central Act, namely, stamp duty on enrolment of Advocates. In the Mysore Stamp Act, 1957, by virtue of the 1962 amendment, the duty is levied " on a certificate of enrolment in the roll of an advocate, prepared and maintained by the State Bar Council under the Advocates Act, 1961," *the amount of the duty being 250 rupees. The Act of* 1962 was not submitted to the President for his assent. And yet, the validity of the Act of 1962 was upheld by Hedge J. as he then was) and Honniah J[1]. Several points were in issue,—some have been stated above. But we are concerned with only one of the propositions laid down in the judgment, namely, that the High Court held specifically that the law in question fell within State List, entry 63. The argument that the Concurrent List, entry 44, would be attracted, and that Parliament having evinced interest in the field, the 'state legislature had no competence to enact the *impugned provision, was not pressed, and the Court also specifically* held that there was no substance in that argument.

Adaptations.

50.12 Secondly, apart from the case law mentioned above,some support is also lent to the above approach by the fact that adaptations of section 9 of the Act have all been based on a similar assumption, namely, that a modification of the text of the *charging* article even a modification not affecting the arithmetic of stamp duties—is for the states.

Effect of exemptions.

50.13. Thirdly, it should also be pointed out that the creation of new exemptions under an article, or substantial modifications in the description of the instrument in the article, would, in effect, modify the rate of stamp duty, because if a new exemption is created under an article then the rate on the exempted instrument becomes nil. At least, the old rate disappears when a new exemption is created. Conversely, when an existing exemption is taken away, the rate applicable under the main article becomes applicable to the instrument now made taxable by removing the exemption. In this sense, a change i nthe left hand column of the Schedule of duties—textually in the main article or in the exemption—affects the right hand column (which denotes the rate).

Legislative practice.

50.14. Fourthly, it may also be noted that the legislative practice (in the centre) so far has been to avoid amendment of exemptions, where the exemptions are contained below an article concerning documents in the State List.

Entry in the Concurrent List not to be given wide scope.

50.15. It is also not to be overlooked that if a wider view is taken of the entry in the Concurrent List, then the result would be that Parliament would be competent to reduce the duty on the document mentioned in the State List to a zero, but it cannot partially reduce the rate

1. *B.K. Mittal* v. *State of Mysore*, A.I.R. 1966 Mys. 138, 141, 142, Paragraphs 17 and 18 (Hegde and Honniah, JJ.).

of duty on the document. It can adopt the first mentioned course (total abolition of the duty either by textually deleting from the schedule the entry in the left hand column (description of the instrument) or by providing that no tax shall be levied on the particular instrument.

If a wider construction of the entry in the Concurrent List, is taken, then, from a strict legal point of view, it would be open to Parliament to freeze the taxing power of the States on Stamp duties—

(i) by not mentioning in the stamp Act any other instruments other than those mentioned in the Union entry, and

(ii) by providing further that no other instrument shall be subject to stamp duty.

Such a system does not seem to have been adopted in the case of any other tax. A perusal of the taxing entries in the Constitution shows no such bifurcation in relation to the power to tax on a given subject-matter.

In the very nature of things, the legislative arrangement regarding stamp duties presents complex problems. As every aspect relating to stamp duties, *except the rate of stamp duties,* falls under the Concurrent List, the concurrent power assumes importance, if taken literally. The mode and manner of collection of stamp duties, the punishment for the violation of the Stamp Act and evasion of the stamp duties and other consequences flowing from non-stamping etc. can, without much controversy, be regarded as flowing from it. But does it extend to such a vital matter as the selection of the instrument for charging tax ?

Rates incomplete without charge.

50.16. Sixthly, it would be incomplete, if not meaningless, to speak of rates without the charge of tax, just as it would be incomplete to speak of rates without the tax charged. Such a position is rather unusual in taxation legislation in India, to put it at the mildest.

50.17. It is for these reasons that there is, in our view justification for reading the entry in the Concurrent List more narrowly than a literal construction would suggest, and for reading the Entry as to rate more widely than literal construction would suggest. No doubt, some of the anomalies indicated above can be answered by arguing that when the Union or a State levies tax on a particular document by way of stamp duty, it does so by a combined and simultaneous exercise of its power in the Concurrent List read with its power in the Union List or the State List, as the case may be. But what requires to be pointed out is that such simultaneous and combined recourse to both the Lists is rather unusual in the general scheme of the Constitution, in regard to the power to tax.

Therefore, so far as the constitutional position is concerned, we are of the view that it may not be within the competence of the Parliament to implement some of the recommendations made by us in this Report in so far as their application to the States is concerned. We do not, in this context, pause to consider how far article 252 of the Constitution can be utilised.

50.18. Notwithstanding what we have stated above, it is our intention, as already stated[1], that those recommendation should be implemented, so that at least in regard to the Union Territories the law would be reformed. Further, as regards States, we hope that the Union Government will be able to persuade the States to make similar amendments in regard to the areas of the States.

50.19. Finally, we may state that we are aware that no-tax can be perfect. As a poet has said[2] :

"Whoever hopes a faultless tax to see; Hopes, what never was, or is, or e'er shall be."

But it should not be difficult to introduce a certain element of rationality and equity in the provisions of the taxing law.

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1. Para 50.3, *supra.*
2. M. Cullock, Adaptation of Pope, quoted by Mathrubhutham and Srinivasan, Law of Sales Tax in India (1954), page 3.

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We would like to place on record our warm appreciation of the valuable assistance we have received from Shri Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P.B. Gajendragadkar .....Chairman.

P.K. Tripathi .....Member.

S.S.Dhavan. .....Member.

S.P.Sen-Verma .....Member.

B.C.Mitra .....Member.

P.M.Bakshi .....Member-Secretary.

Dated New Delhi.
the 1st March, 1977.

MGIPRRND—Sec. D-I—24M of Law/77—19-12-78-2200