

1930

Present : Garvin A.C.J., Dalton and  
Lyll Grant JJ.

THE HON. THE ATTORNEY-  
GENERAL v. MOUNT.

66—D. C. (Inty.) Colombo, 4,265.

Stamp—Bond given by administrator—Duty  
leviable—Ordinance No. 22 of 1909,  
Schedule B, Part I., 15 (i).

A bond given by an administrator for the due administration of an estate is chargeable with duty under item 15 (i) of Part I. of Schedule B of the Stamp Ordinance.

CASE referred to a Bench of three Judges on the question whether a bond given by an administrator is chargeable with duty under item 15 (b) or 15 (i) of Schedule B, Part I., of the Stamp Ordinance. The learned District Judge held that such a bond was liable to duty under item 15 (i). The Crown appealed from the order.

*M. W. H. de Silva, C.C. (with J. E. M. Obeyesekere, C.C.), for the Crown.*—The bond given by the administrator was for a sum of Rs. 490,000. The Crown claims that the bond is liable to duty under Schedule B, item 15 (b). Before the amending Ordinance of 1927, Part III. provided for testamentary duties, included bonds. The amending Ordinance re-enacted Part III. omitting “bonds.” The question was raised in *Commissioner of Stamps v. Banda*<sup>1</sup> whether it was intended by the omission to exempt bonds altogether. It was held that the bond should be stamped under item 15 (b). In this case the District Court has held that the bond fell under item 15 (i). An administrator’s bond is one for a definite sum of money as stated in item 15 (b). It falls under 15 (b) or under Part II., “bail bond, or other bond or recognizance.” The bond is given as security for the payment of a certain sum. The certainty applies to the amount and not to the contingency when it is payable (*Sweetmeet*

*Automatic Delivery Company v. Commissioners of Inland Revenue*<sup>1</sup>). What is assured by the bond is the payment of the money, if he fails in his duty.

The word “bond” is defined as an instrument to pay a sum of money. In India the definition is enlarged (*Donough’s Stamp Duty, p. 54*).

Where a party to an instrument bound himself, in the event of a breach on his part of any of the conditions of the instrument, to pay the other party a penalty of Rs. 5,000, the instrument was chargeable with the stamp duty leviable on a bond for Rs. 5,000. *In reference by Board of Revenue, N. W. P. under Act I. of 1879*<sup>2</sup>.

There are two kinds of bond—one conditioned for payment of money, the other for performance of an act.<sup>3</sup> In the former case the amount is recoverable, in the latter case the full penalty. (*Strickland v. Williams*,<sup>4</sup> *Baban Appuhamy v. Don Davit*<sup>5</sup>).

Common money bonds which provide for the discharge of the bond in the payment of a smaller sum and interest should be distinguished from bonds which provide for the performance of an act as the condition on which the bond is discharged. The former are governed by Statute 4 & 5 Anne c. 16 and the latter by Statute 8 & 9 Will. III. c. 2.

In the case of the latter, a breach of the condition makes the full amount of the bond a debt and, though only the damages incurred may be recovered, the full sum provided for in the bond remains as a security for any further damages which may be incurred. The Stamp on the bond should be sufficient to cover the full amount which may be recoverable on a bond. The amount of an administrator’s bond is determined by Court after consideration (section 541, C. P. C.), and the full amount on the bond may be recovered. It is therefore not a bond providing for a penal sum.

<sup>1</sup> (1895) 1 K. B. 484.

<sup>2</sup> 2 All. 655.

<sup>3</sup> 3 Halsbury 164.

<sup>4</sup> (1889) 1 Q. B. 382.

<sup>5</sup> 31 N. L. R. 80.

<sup>6</sup> 24 N. L. R. 444.

*Hayley, K. C.* (with *Garvin*), for defendants, respondents.—The object of the bond is to administer the estate, to pay debts under accounts and give the residue to the heirs. Although a sum of money is expressed to be payable, it is for the Court to determine how much is recoverable. It is clearly a penalty that is recoverable.

In the English Statute, 55 Geo. III. c. 184, the words are identical. It has been held that a bond given for the purpose of securing certain conditions for performance by the vendor of a house did not require an *ad valorem* stamp (*Hughes v. King*<sup>1</sup>). Counsel cited *Lopez v. de Tastel*,<sup>2</sup> *Freeman v. Jayes*,<sup>3</sup> *Com. Exchange v. Gillingham*,<sup>4</sup> *Anandale v. Patterson*,<sup>5</sup> *Brownes v. Marsh*.<sup>6</sup>

The duty is regulated by the amount of money secured and not by the penalty.

A bond for the performance of an act is not conditioned for the payment of money.

In India there is a special definition of the word "bond". In the case cited by the other side from the Allahabad Courts, the Chief Justice disagreed. The decision has not been followed in Calcutta High Court. There the dissenting judgment of Stewart C.J. was followed with approval by Garth C.J. in *Gisborne Co. v. Subai Bowri*.<sup>7</sup>

September 2, 1930. GARVIN A.C.J.—

This is an appeal from a judgment of the District Court of Colombo holding that the bond given by the administrator in this case is chargeable with duty under item 15 (i) of Part I. of Schedule B of the Stamp Ordinance, No. 22 of 1909. The amount in which the administrator bound himself is Rs. 492,640, which is the full value of the estate, and stamp duty to the amount of Rs. 116 has been paid on the assumption that bonds given as security for the administration of an estate are chargeable under Part III. of Schedule B.

<sup>1</sup> 1 *Starkie Rep.* 119.

<sup>2</sup> 8 *Taunton* 712.

<sup>3</sup> 5 *Carrington* 419.

<sup>4</sup> 4 *Q. B.* 475.

<sup>5</sup> 9 *Barwell* and

<sup>6</sup> *Creswell* 919.

<sup>7</sup> 10 *Q. B.* 787.

<sup>8</sup> 8 *Cal.* 286.

It was apparently not noticed when this bond was executed that an amending Ordinance, No. 19 of 1927, had come into operation whereby a new Part III. had been substituted in place of the old Part III. of Schedule B which had till then contained the duties chargeable in testamentary proceedings, and that the word "Bond" no longer appears in the list of documents enumerated in Part III.

At the first hearing of this appeal which took place before my brother Lyall Grant and myself, Counsel for the Attorney-General submitted that the effect of the amending Ordinance, No. 19 of 1927, had been considered by this Court in *The Commissioner of Stamps v. Banda*<sup>1</sup> and that the judgments of Driberg J. and Akbar J. who constituted the Court must be taken to have concluded the matter in the sense for which he contends, viz., that a bond given by an administrator for the due administration of an estate is chargeable with duty under item 15 (b) of Part I. of Schedule B.

It was said at the Bar that there were several other similar matters awaiting the decision of this appeal. The question is manifestly one of great practical importance and not one which should be left in the unsatisfactory condition in which it would have been left had we found ourselves unable to take the same view as the Judges who decided the case of *The Commissioner of Stamps v. Banda* (*supra*).

After the appeal had been partly heard we resolved to take the course of reserving the matter before a Bench of Three Judges. Having heard the further argument I find myself in entire accord with Driberg J. and Akbar J. on the main point submitted for their decision, viz., that the amending Ordinance, No. 19 of 1927, did not free administrator's bonds from all liability to pay duty and that its effect is to render such bonds liable to duty under Part I. of Schedule B. I am unable however to take the view that they are chargeable

<sup>1</sup> 31 *N. L. R.* 80

under item 15 (b) of that Schedule. The point now raised does not appear to have been specifically submitted for the decision by those learned Judges and they had not the advantage of hearing a full argument on the point ; indeed there is every indication that it was assumed that if such a bond was chargeable at all it was chargeable under item 15 (b).

The arguments addressed to us and the cases referred to in the course of arguments have been so fully considered in the judgments of my brothers Dalton and Lyall Grant with which I am in agreement that it is sufficient briefly to state my own conclusions.

Item 15 which prescribes the duties payable on bonds classifies them under 9 heads. Of these we are primarily concerned with the following :—

15 (b) Bond or mortgage not affecting land, given as security for the payment of any definite and certain sum of money, where the sum shall be

The duties prescribed as indicated are *ad valorem*.

15 (i) Bond of any kind whatsoever not otherwise charged in the Schedule nor expressly exempted from all stamp duty . . . . Rs. 10.

If the bond under consideration is not chargeable under item 15 (b) there is no other sub-head of item 15 other than 15 (i) under which it can be charged. An examination of the various heads of item 15 under which bonds are classified for the purpose of chargeability with duty would seem to indicate that *ad valorem* duty is only charged where the money secured and to be ultimately paid is definite but that where there is uncertainty a fixed duty is prescribed. The language of item 15 (b) identifies the bonds contemplated as bonds to secure the payment of definite and certain sums of money. It is clear from section 538 and the form 90, referred to therein, that the bond which an administrator may be required to enter into is to secure the due administration of the property of the deceased. The bond under

consideration is substantially in form 90 and is intended to secure the due performance of his duties by the administrator. If regard be paid to the various duties which an administrator undertakes it will be seen that many of them are such that in the event of non-performance no Court will permit the recovery of anything more than a small fraction of the sum specified in the bond. The sum of money in which the administrator binds himself is a penalty. This, therefore, is a bond by which the administrator has bound himself in a penal sum of Rs. 492,640 to secure the due administration of the estate of the deceased and not, as for instance, in the case of a common money bond to secure the payment of a smaller sum the condition being that on the payment of such smaller sum the bond shall be void.

Bonds of the latter class would clearly be chargeable under item 15 (b) as “ Bonds . . . . given as security for the payment of any definite and certain sum of money . . . . ”

I must not be understood to express the view that under no circumstances will a bond conditioned for the performance of some act or duty be chargeable under item 15 (b) nor is it necessary for the decision of the matter before us that I should do so. It is sufficient for the purposes of this case and for the reasons given to hold that the bond of an administrator is not a bond given as security for the payment of any definite and certain sum within the contemplation of item 15 (b).

I cannot assent to the argument that inasmuch as the administrator has bound himself in a specified sum this is a bond given as security for the payment of a definite and certain sum.—Since a bond is an instrument by which one person binds himself to another in a specified sum if the argument is to prevail every bond would fall within item 15 (b) and be chargeable accordingly except in a case in which the bond is specially provided for under one or other of the remaining sub-heads, and there would be no necessity for item 15 (i).

I agree that the judgment of the learned District Judge should be affirmed and this appeal dismissed with costs.

DALTON J.—

The order of the learned Judge that is appealed from in my opinion must be affirmed and the bond declared liable to duty under item 15 (i) of Part I., Schedule B, of the Stamp Ordinance No. 2 of 1909. I agree that the decision in *Commissioner of Stamps v. Banda*<sup>1</sup> does not conclude the matter, inasmuch as the only question before the Court in that case was as to whether a security bond by an administrator was liable to stamp duty at all under the Stamp Ordinance. It had been contended there that, inasmuch as that Ordinance had been amended by Ordinance No. 19 of 1927, the word "bond" being deleted from Part III. of the schedule containing the duties in testamentary matters, thereafter bonds executed for the purpose of testamentary proceedings were free from duty. I do not agree with the opinion expressed that before that amendment such a bond was liable under both Parts I. and III., and that the Crown had any option to choose under which it should be charged. Inasmuch however as bonds are not now provided for under Part III., and inasmuch as Part I. provides for various instruments and matters including bonds "not falling under any of the following heads," *i.e.*, Parts II. to V., the Court held that the administrator's security bond was liable to duty and did not go free. Akbar J. went further and expressed a strong opinion, which is *obiter*, that the bond was liable to duty under item 15 (b). The Crown in the appeal now before this Court asks us to confirm that opinion and come to the same conclusion.

It is not necessary for the purposes of this case to ascertain what a "bond" is, since both sides are agreed that whatever the form of execution, which appears to have been most informal, this document

must be accepted as being a bond. I understand also that the amount of the bond, Rs. 492,640, is the value of the estate and not twice the value of the estate. There is nothing in the Civil Procedure Code requiring that latter sum, although it is difficult to understand why sureties were dispensed with.

We have had the benefit of a full and lengthy argument on both sides, and I would add that the difficulty which was present to my mind during part of the argument has been removed on an examination and consideration of the authorities that appear applicable.

It is contended for the appellant that the bond is a security for the payment of a definite and certain sum, inasmuch as on any breach of one or more of the conditions of the bond the whole sum can be claimed and becomes payable. In support of that we were referred to the case of *Babun Appuhamy v. Don Davith*.<sup>1</sup> That however only decides that when application is made for the forfeiture of a bond, the Court cannot go beyond the penal sum of the bond and order a surety to pay anything further. No local case on an administration bond has been cited to us, but there are numerous English decisions which are directly opposed to the argument put forward on this point for the Crown. The bond prescribed under the Civil Procedure Code and Schedule would appear to have been adopted from that in use in England now and also before the Probate Act, 1857.

*Blake v. Bayne*<sup>2</sup> is a case that came before the Privy Council from Australia. In an estate valued at £10,000 the administratrix was required to find sureties to the usual bond in twice the value of the estate. In the course of his judgment in stating the facts Lord Macnaughten states that the guarantee company that had been approached to act as surety required a commission of £100, being 2 per cent. "on the penalty of the bond," together with an indemnity by the next of kin.

<sup>1</sup> 31 N. L. R. 80.

<sup>2</sup> 24 N. L. R. 444.   <sup>3</sup> (1908) A. C. 371.

In *Dobbs v. Brain*<sup>1</sup> the administratrix to whom a grant of probate with the will annexed had been made, entered into the usual bond with sureties for due administration. A legacy of £50 was bequeathed to one Probert but was not paid to her although sufficient monies were available to pay it. The bond was duly assigned and the plaintiff brought an action on the bond to recover the sum of £150, on the ground that there had been a breach of the conditions of the bond. The Court of Appeal held that there had been a breach of the obligations of the bond, that it had been rightly put in force and the plaintiff was entitled to judgment in the amount claimed.

*Bolton v. Powell*<sup>2</sup> is an action by a plaintiff upon an administrator's bond, alleging that there had been breaches, or at least one breach, of the conditions of the bond, and claiming not the amount of the bond, but execution for substantial damages. In *Thomas v. Archbishop of Canterbury*,<sup>3</sup> also an action on the bond by a judgment-creditor of the estate for the sum of £54. 18s. 6d., the bond being in exactly the same terms as regards conditions as the one we have before us, except for the necessary changes of courts and persons and the addition of sureties, the amount of the bond is set out as "the penal sum of £2,500." In *Archbishop of Canterbury v. Robertson*<sup>4</sup> the bond entered into by the administrator was in "the penal sum of £50,000." In an action on the bond for breaches of the conditions by the administrator the question before the Court was whether breaches had been committed, and if so whether real or nominal damages ought to be assessed.

The matter is considered at great length in the course of the case.

Apart from these authorities, applying other principles applicable in analogous cases, we have it that the bond binds the obligor in a lump sum to be paid to the Secretary of the Court, upon the non-performance of any one of the various

obligations undertaken by the administrator, which clearly differ very considerably in importance. It would seem that on any failure by the administrator to carry out most of his undertakings, the loss to the estate would be readily ascertainable. If he failed to pay one single debt, say, for the purpose of argument, Rs. 500 or even less, having the means to do so, he would have failed in one of his undertakings. Could it reasonably be argued that the sum of Rs. 492,640 bore any proportion to the extent to which that obligation was left unfulfilled (*Elphinstone v. Monkland Iron and Coal Co.*)<sup>1</sup>. That a very large sum should become immediately payable in the event of his omission to render a complete inventory or in consequence of the non-payment of a very small sum and that the former sum should not be considered as a penalty is a contradiction in terms (*Kemble v. Farren*)<sup>2</sup>.

In *Astley v. Weldon*<sup>3</sup> Heath J. said: "where articles of agreement contain certain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty." Esher M.R. in *Law v. Local Board of Redditch*<sup>4</sup> says that as a general rule where on an agreement one has to pay and another to be paid a sum of money in respect of the doing or failure to do a number of different things of very different degrees of importance, that sum must be regarded as a penalty, and he goes on to point out that the general rule of construction has been recognized in all the cases from the judgment of Heath J. in *Astley v. Weldon* (*supra*) down to that of Lord Herschell in *Elphinstone v. Monkland Iron and Coal Co.* (*supra*).

The only possible conclusion therefore it seems to me is that the sum mentioned in the bond is a penalty, that is, not a specific sum to be recovered as such, but merely provision for the due performance

<sup>1</sup> (1882) 2 Q. 207.

<sup>3</sup> 1 Cox 399.

<sup>1</sup> (1886) 11 A. C. 332.

<sup>2</sup> 2 B. & P. 346.

<sup>2</sup> 2 Do G. M. & G. 1.

<sup>4</sup> 1 C. & M. 690.

<sup>3</sup> 6 Bing 141.

<sup>4</sup> (1892) 1 Q. B. 129.

of the terms of the bond. If it is a penalty it is argued for the respondent that it is no definite or certain sum that has to be paid, as those terms would appear to be used in the Ordinance, inasmuch as on a failure to perform any of the acts provided for in the bond, the Court has still to decide the extent of the penalty to be exacted, and the amount payable, if any sum does become payable, is subject to modification and is quite indefinite. For the appellant however it is urged that even if the sum mentioned in the bond is only a penalty, it is nevertheless a definite and certain sum upon which the stamp duty must be estimated on an *ad valorem* basis under item 15 (b) of the tariff.

Counsel has only been able to refer us to one authority which would seem to support his contention, namely, *Reference by Board of Revenue, N. W. P.*<sup>1</sup> In that case an agreement was entered into whereby the parties on the one side bound themselves to the Collector of Allahabad, on the other to pay to the Collector a penalty of Rs. 5,000 in the event of any breach on their part of the conditions of the agreement. The question to be decided was whether the instrument was required to be stamped as a bond for Rs. 5,000, or with 8 annas only as an agreement "not otherwise provided for". The majority of the Court held that stamp duty was leviable as on a bond for Rs. 5,000, but the Chief Justice dissented. The majority of the Court held that the undertaking to pay met the requirements of the definition of "bond" and the undertaking was to pay a penalty of Rs. 5,000. The Chief Justice citing *Kemble v. Farren* (*supra*) to which I have referred, dissented, holding that the amount payable on any breach of the agreement remained to be ascertained on that breach taking place, the sum of Rs. 5,000 being a mere penalty contingent on non-performance. The penalty therefore be held was not such a unit or entity to which a precise stamp duty can *a priori* be applied, since it afforded no measure for a present calculation of duty. His

<sup>1</sup> 2 Allahabad 654.

opinion on this point, as opposed to that expressed by other members of the Court, is accepted in *Donough's Indian Stamp Law* as the correct view of the law (*vide* 7th ed., p. 58). The High Court, Calcutta, declined to follow the opinion of the majority in the reference reported in 8 *Calcutta Reports* 284, whilst one of the learned Judges (Straight J.) forming the majority in a latter case doubted the correctness of his decision (*In re Gajraj Sing*<sup>1</sup>). This authority relied upon by the Crown is therefore a very doubtful one. It is also directly opposed to the English authorities cited to us. *Anandale v. Patterson*<sup>2</sup> is an action of debt on a bond whereby defendant was bound to the plaintiff in the penal sum of £6,000. Plaintiff obtained a judgment in the sum of £928. In the course of the proceedings it was urged for the defendant that the bond was not sufficiently stamped. It had been impressed with a stamp of £1.15s. but it was urged for defendant that it should bear an *ad valorem* stamp. The Court held that the bond was not given for any certain sum of money so as to require an *ad valorem* stamp, and that it came under none of the provisions of the Act applicable (*55 Geo. III. c. 184*) except the general one, "bonds not otherwise charged". The stamp therefore impressed upon the bond was sufficient in amount.

In *Dickson and another v. Cass*<sup>3</sup> a bond was given in the penal sum of £2,000, to secure the sum of £1,000 and bankers' charges. It had been stamped with £5 as a bond given to secure a sum exceeding £500 and not exceeding £1,000, and objection was taken that it was not sufficiently stamped as it was to secure not only £1,000 but also a further sum for bankers' charges. In upholding this objection Bayley J. stated counsel had conceded, and rightly, that the condition and not the penalty was to be looked at in ascertaining the amount of the stamp. Littledale J. pointed out the charges incidental to the amount advanced by the

<sup>1</sup> 9 Allahabad 585.

<sup>2</sup> 9 B. & C. 919.

<sup>3</sup> 1 B. & Ad. 343.

bank carried the undertaking on the part of the surety to an indefinite amount, and that although the bond was in the penal sum of £2,000.

*Frith v. Rotherham*<sup>1</sup> is a case of a bond conditioned for the payment to bankers of sums of money up to £1,000 together with interest and commission, the sum of £2,000 being the amount of the penalty. The Court has to decide whether the bond was for the payment of a definite and certain sum of money. It bore a stamp of £6 being the *ad valorem* duty on £1,000. It was never suggested that the amount of the penalty in any way decided the amount of the stamp duty payable, the argument being that inasmuch as interest and commission were payable the amount was not ascertained or certain, and that therefore the bond was not properly stamped but came under another provision of the Act.

In *Bownes and others v. Marsh*<sup>2</sup> an indemnity bond in the sum of £100 was held to be properly stamped as a bond not otherwise provided for. It was urged that it was not properly stamped inasmuch as it was a bond for the repayment of sums to be thereafter lent or advanced or paid. It was not urged here that it was a bond given as security for the payment of any definite sum of money, within the meaning of the statute.

Neither of the English cases, *Sweetmeat Automatic Delivery Company v. Commissioner of Inland Revenue*<sup>3</sup> and *Underground Electric Railways Co. of London, Ltd. and another v. The Commissioners of Inland Revenue*<sup>4</sup> cited by Crown Counsel seem to me to afford any assistance in deciding the case before us, since they can both be clearly distinguished on the facts. The question for decision in the latter case, it is true, was whether the deed before the Court was or was not liable to an *ad valorem* stamp duty, but the amount involved was interest on guaranteed stock, and in no way in the nature of a penalty. There is also considerable difference in the

wording of the item of the English tariff under which the deed was assessed, and item 15 (b) of our tariff. The facts in that case are as follows :—The Underground Company undertook, provided a sufficient number of the holders of ordinary stock of the Central London Railways Co. would take guaranteed stock in exchange for their ordinary stock, to guarantee interest at 4 per cent. per annum on such guaranteed stock if and to the extent that the profits of the Central London Railways Co. were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would consent to the arrangement, but if they all consented, and if the Central London Railways Co. made no profits in any year, the Underground Company undertook to pay £120,000 in that year, being 4 per cent. on £3,000,000 stock. The deed was assessed to stamp duty in the sum of 10s. to which no objection was taken and also to a duty of £3,000 as a “bond . . . being the only or principal security for any annuity or for any sum or sums of money at stated periods . . . for an indefinite period.” The Company appealed against this latter assessment. It was urged that though money payable on a contingency might be held chargeable with an *ad valorem* duty, a definite sum must be ascertained at the date of the instrument that might become payable thereunder. It was further urged that the payment being a half-yearly payment the duty should be assessed on £60,000, the half-yearly payment. Swinfen Eady L.J. pointed out, in interpreting the words “any definite and certain sum of money”, that all the authorities are to the effect that the words “definite and certain” relate to the amount secured, and not to the certainty of payment becoming due, that the deed was security for a sum of £120,000 a year, payable periodically and therefore the assessment at £3,000 duty was correct. This amount of interest is a sum of money definite and certain, secured by the instrument, and payable upon a

<sup>1</sup> 15 M. & W. 39.

<sup>3</sup> (1895) 1 Q. B. 484.

<sup>2</sup> 10 Q. B. 787.

<sup>4</sup> (1916) 1 K. B. 306.

certain contingency. The penal amount of the bond before us is from the very nature of the instrument as the authorities cited show in an entirely different position, and the undertaking is in respect of an indefinite and uncertain amount.

For these reasons in my opinion the conclusion of the learned Judge in the Court below, that the bond is liable to duty under item 15 (i) of the tariff, is correct. The appeal must therefore be dismissed with costs.

LYALL GRANT J.—

The question to be decided is the amount of stamp duty to be charged upon an administration bond. It was contended on behalf of the Crown that such a bond is chargeable under item 15 (b) of Part I. of Schedule B of the Stamp Ordinance, No. 22 of 1909, as being "a bond or mortgage not affecting land given as security for the payment of any definite and certain sum of money". The administrator on the other hand contends that the bond falls under item 15 (i), "a bond of any other kind whatever not otherwise charged in this schedule or expressly exempted from all stamp duty".

The bond in question was given under the provisions of section 538 of the Civil Procedure Code. That section provides that where a Court requires it, an administrator shall enter into a bond with two good and sufficient sureties in the form 90 given in the schedule for the due administration of the deceased person's property, and the section continues "the bond so entered into renders the sureties responsible in any suit brought for the administration of the deceased person's property for all deficiencies, depreciation, or loss of the property attributable to the default of their principal, and liable to make good the same to the same extent and in like manner as if the said default were their own, subject, however, to the conditions of the bond in that behalf". The bond in the present case is in the form prescribed by the Civil Procedure Code except that there are no sureties. It is agreed however that for the purposes of the present case the

omission of the sureties is immaterial. The form of the bond is that the administrator is held and firmly bound to the Secretary of the District Court of Colombo in a sum of Rs. 492,640 to be paid to the said Secretary, for which payment the administrator hereby binds himself, his heirs, executors, &c. The condition of the obligation is set out to be that "if the said Oscar Percy Mount renders to the Court a true and perfect inventory of all the property and estate, &c., of the deceased which comes to his possession or knowledge and well and truly administers the same, that is to say, pays all and singular the debts of the deceased so far as the property will extend, &c., and further shall render to the Court a true and just account of the administration before 'a given date' and so deliver and pay over the residue of the property, &c., to the persons lawfully entitled to the same, then the obligation will be void".

Administration bonds were by Ordinance of 1909 chargeable under Part III. of the schedule. Part III. contains a long list of documents connected with testamentary proceedings, all of which are charged at a moderate rate, which in the case of large estates amount to Rs. 12 with an addition of Re. 1.20 for every additional Rs. 5,000. In 1927, an amending Ordinance was passed which substituted a different schedule for duties in testamentary proceedings. That schedule consists of the same long list and provides that in cases over Rs. 10,000 a duty of Rs. 10 is payable on each instrument with an additional Re. 1 in respect of every additional Rs. 5,000 of the estate. The effect of the schedule is slightly to reduce the amount of duty payable in testamentary proceedings.

From the list of documents, however, the word "bond" has been omitted, and the contention of the Crown is that the legislature by omitting the word "bond" in this schedule intended to provide that *ad valorem* duty should be charged upon administration bonds. In the case of *The Commissioner of Stamps v. Banda*<sup>1</sup> the

<sup>1</sup> 31 N. L. R. 80.



effect of the omission of the word "bond" in the amending Ordinance was discussed. It was there urged on behalf of the administrator that the effect of the omission was to exempt such bonds from stamp duty altogether. This argument was rejected by the Court which held that the effect of the omission of the word "bond" in Part III. was to render such bonds chargeable under Part I. of the Ordinance. So far the judgment is accepted by the administrator in the present case. Both appeal Judges however intimated that *ad valorem* duty would be chargeable in consequence of this decision, and Akbar J. expressly held that the bond would be liable to be stamped under item 15 (b). This case was cited to the learned District Judge but he has declined to follow it, apparently on the ground that there the question whether duty was chargeable under 15 (b) or under 15 (i) was not argued, the Court's attention being directed solely to the question whether any duty was chargeable or not. The learned District Judge has come to the conclusion that duty is chargeable under 15 (i) and not under 15 (b) and it is from this decision that the Attorney-General has appealed.

On appeal the question came before my Lord the Acting Chief Justice and myself but owing to the importance of the question and also owing to the fact that there is a judgment of this Court on the matter, we thought it desirable that it should be argued before a Bench of Three Judges.

The argument of the Crown, as I understand it, is that inasmuch as the administrator binds himself to pay to the Court a definite sum of money, the bond is given as security for the payment of that definite and certain sum. If this argument is correct it would seem that every bond must be given as security for the payment of a definite and certain sum of money, because the essence of a bond is that the person giving it pledges himself to pay a definite and certain sum. The definition of a bond given in *Halsbury's Laws of England*, vol. III., para. 158, is that a bond is an instrument under seal, usually

a deed poll, whereby one person binds himself to another for the payment of a specific sum of money either immediately or at a fixed future date.

I think however that it is an incorrect use of terms to describe a bond which is given to secure the performance of certain duties as one given as security for the payment of any definite and certain sum of money. It seems to me that the law draws a sharp distinction between bonds conditioned to guarantee the payment of money and bonds conditioned to guarantee the performance of a duty. This distinction appears on the face of item 15 (g) of the schedule which imposes a fixed duty on a bond for indemnifying any person who shall have become bound as surety for the payment of any sum of money or the performance of any act. There the distinction is drawn between a bond for the payment of money and a bond for the performance of an act. There can I think be no doubt as to the class into which the present bond falls. The act to secure the performance of which the bond was entered into is not payment of money but is the proper carrying out of the administrator's duties. Payment of money will only be required if those duties are not carried out, that is to say, the money specified in the bond will become payable as a penalty or as liquidated damages for the failure of the obligee to fulfil the conditions of the bond. It seems to me clear that this bond is in quite a different class from bonds given as security for the payment of a definite and certain sum of money.

An examination of the various stamp duties chargeable in England and of the English cases shows to my mind that this principle runs through the English Stamp law. Under that law administration bonds are chargeable with a small fixed duty and, generally speaking, bonds conditioned for the performance of an act are subject to fixed duty, bonds on the other hand which are given as security for the payment of money are chargeable with *ad valorem* duty.

I think the point to be noted in connection with this question is that if a bond is given as security for the payment of a certain sum, no question about penalty or liquidated damages arises. Duty is chargeable on the sum conditioned to be paid. Questions of penalty or liquidated damages arise only on breach of the conditions of the bond. If instead of using the words "given as security for payment of" the section had used the words "conditioned for the performance of an act other than the payment of money" the meaning of the item would have been beyond dispute. It is however I think substantially plain that the phrases are equivalent.

There was a certain amount of discussion before us as to the meaning of the words "any definite and certain sum of money" based upon the English Act which defines "mortgage" as meaning "a security by way of mortgage for the payment of any definite and certain sum of money, &c." A number of English cases were referred to which showed that in certain cases the Court would for the purpose of stamp duty fix a sum where the deed itself had not apparently completely defined or specified the amount. A typical case of this sort is the *The Underground Electric Railways Co. of London Ltd. and another v. Commissioner of Inland Revenue*<sup>1</sup>.

It seems to me however that this class of case has little or no bearing on the question which we have to decide. The definition of "mortgage" in the English Act makes it quite clear that it is a security for the payment of a definite and certain sum either advanced or lent, at the time or previously due or owing, or forborne to be paid or for the repayment of the money to be advanced or paid. In all these cases the primary obligation is the payment of a certain sum of money, and it is only upon failure to pay that sum that the bond becomes enforceable.

Some English cases have been quoted which seem to me to bear more directly on the point before us. In *Lopez v. De*

*Tastet*<sup>1</sup> a bond was given to secure to a plaintiff who had secured a verdict for £37,000, the damages to be recovered and costs in the event of the result of a second action proving similar to that of the first action. The argument that this was a bond for £37,000 was rejected and it was held to be a mere indemnity bond. Dallas C.J. said "This cannot be considered as a bond for a sum certain, neither is it a bond for securing money to be lent, advanced, or paid, nor does it come within the clause as to the bonds for the performance of covenants for payment of money. It is a mere indemnity bond".

In *Frith v. Rotherham*<sup>2</sup> it was clearly laid down that in the case of a money bond, duty is leviable not on the amount of the penalty but on the money secured by the bond.

In *Winchester v. Gillingham*<sup>3</sup> a bond conditioned for the due periodical payment of rent reserved by a lease for one year payable quarterly was held not liable to stamp duty "as a bond for securing payment of any sum or sums of money at stated periods so that the total amount can be previously ascertained", but was properly stamped as "a bond not otherwise charged". The other English cases cited were to the same effect.

The Crown relied on a decision of a Full Bench of the High Court of Allahabad which is undoubtedly in its favour. In the Matter of a *Reference by the Board of Revenue, N. W. P.*<sup>4</sup> it was held (Stuart C.J. dissenting) that the sum mentioned in the penal clause can be held to be decisive of the amount of stamp duty to be charged. In his dissenting judgment Stuart C.J. said: "The presumption according to all recognized legal principles is that the contract will be performed, and that the circumstances under which this penalty may be sought to be enforced will never arise".

<sup>1</sup> (1819) 8 Taunton 712.

<sup>2</sup> (1846) 15 M. & N. 39.

<sup>3</sup> (1843) 4 Q. B. 475.

<sup>4</sup> (1880) 1 L. R. 2 All. 654.

<sup>1</sup> (1916) 1 K. B. 306.

In 1881 the same question came before the High Court of Calcutta in *Gisborne & Co. v. Subal Bowri*<sup>1</sup>. There it was held that an instrument containing a covenant to do a particular act, the breach of which is to be compensated in damages, was not a bond. Garth C.J. said : " The plaintiff in the case of a simple money-bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants, he recovers the actual damage which he can prove he has sustained ". He approved of the dissenting judgment of Stuart C.J. in the Allahabad case.

In *In re Gajraj Singh*<sup>2</sup> Stuart C.J. and Straight J. held that in estimating stamp duty the amount stipulated by way of penalty in case of breach of covenant to deliver must not be taken into account. Straight J. there said : " In regard to the provision in it for a penalty, I have present to my mind the Full Bench ruling reported in *I. L. R. 2 All. 654* in respect of which Garth C.J. has made some remarks in *8 Cal. 286*. Upon further consideration I am disposed to doubt the correctness of the ruling of this Court to which I was a party and to concur in the views expressed by Garth C.J. upon the subject of a penalty clause. The sum to be paid in case of breach is not necessarily recoverable *in toto*. On the contrary, it only fixes the extreme amount beyond which compensation cannot be assessed. I do not think that it was ever intended to impose stamp duty upon an item of this fluctuating character."

The view taken in India is therefore that to ascertain the nature of the document and the duty chargeable, only the conditional clause is to be looked to and not the penalty or damages stipulated.

I think that the Crown has failed to show that this document is chargeable under item 15 (b) and that the learned District Judge has rightly decided that it falls under item 15 (i). I would dismiss the appeal with costs.

<sup>1</sup> *I. L. R. 8 Cal. 286*.

<sup>2</sup> *I. L. R. 9 All. 585*.