

mortgage" which occur in s. 271 of Act VIII of 1859 (the section in that Act analogous to s. 295 of Act X of 1877), have by the High Court of Calcutta been held to mean. It may thence be inferred that a judicial sale subject to a mortgage means a sale made expressly so subject—*i. e.*, by the certificate of sale. The power of the Court, to sell expressly subject to a mortgage or other lien or incumbrance, is one which manifestly ought to be exercised with the greatest caution, and in none except the clearest cases. In the present case, the sale to the auction-purchaser having been, by the certificate of sale, made expressly "subject to the mortgage of Kuber Hargovan for Rs. 49," and there being nothing to show that any portion of that sum consisted of interest, or that less than that sum was due on the mortgage for principal at the time of the sale, we hold that the stamp duty chargeable on the certificate of sale should be upon a consideration in the whole of Rs. 59, *viz.*, Rs. 49, the sum named in respect of the mortgage, and Rs. 10, the amount of the purchase-money payable by the purchaser, Bhagia Golla Sakra.

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[478] APPELLATE CIVIL.—FULL BENCH.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice Kemball and Mr. Justice Pinhey.*

\*REFERENCE FROM THE CHIEF COMMISSIONER OF CENTRAL PROVINCES.† [4th July, 1881].

*Indemnity note, stamp duty on—Stamp Act, I of 1879, sch. I, arts. 5 and 28.*

An indemnity note, passed to a railway company by a consignee and his surety in respect of goods delivered to the consignee, and for which he is unable to produce the railway receipt—by which note they undertake to hold the railway company, its agents, and servants, harmless and indemnified in respect of all claims to the said goods—is not 'an indemnity bond' falling under art. 28, sch. I of the Indian Stamp Act I of 1879, but is an agreement falling under cl. (c) art. 5, sch. I of that Act, and, consequently chargeable only, with a stamp duty of eight annas.

[D., L.B.R. (1893—1900) 119.]

THE Chief Commissioner of Central Provinces submitted, for the opinion of the High Court, the question—what was the proper amount of stamp duty chargeable on an indemnity note? in the following form:—

"I hereby acknowledge to have received from the State Railway valued at Rupees which was despatched to my address from the station of the State Railway on or about the day of , the railway receipt for which has been lost; and for myself, my heirs, executors, and administrators. I undertake, in consideration of such delivery as aforesaid, to hold the State Railway, its agents, and servants harmless and indemnified in respect of all claims to the said goods; and I, the undersigned, signing below consignee of these goods, certify that the first signor is the *bona-fide* owner of the goods, and that I, the undersigned surety, undertake the whole of the said liability equally with the consignee, and for this purpose I affix my signature hereto.

Signature of consignee :

Witness :

Signature of surety :

Witness :"

\* [It is not found in I.L.R.—ED.]

† Civil Reference No. 24 of 1881.

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The letter of reference from the Chief Commissioner stated that the form of indemnity notes used by the Great Indian [479] Peninsula railway was identical with the form of the above note, and that the instructions issued by that Railway Company to their servants were to the effect that such indemnity notes were chargeable with an *eight-anna* stamp, irrespective of the value of the goods to which they might relate. The letter of reference further observed:—

“The State Railway authorities point out that such instructions of the G. I. P. Railway Company are opposed to art. 28, sch. I of Act I of 1879, and ask—(1) with what duty is an indemnity note chargeable, and (2) what description of stamp should be used?

“The G.I.P. Railway Company do not state the grounds for their instructions that indemnity notes are chargeable only with an eight-anna stamp. Apparently, such a note is held to fall under art. 5 of sch. I of Act I of 1879 as being an agreement or memorandum of an agreement not otherwise provided for by that Act.

“The Chief Commissioner is not inclined to this view of the matter. The indemnity note is for all purposes an indemnity bond; for, in consideration of a certain contingency—*viz.*, the delivery of goods—it holds the Railway Company harmless and indemnified in respect of all claims. An indemnity bond is provided for by art. 28 of sch. I of Act I of 1879, and is chargeable with the same stamp duty as a security bond (art. 14). A security bond is again chargeable with the same *ad valorem* duty as an ordinary bond (No. 13); and the definition of bond contained in s. 3 of the Act, cls. 4, (a) and (b), seems to apply to such an engagement as that contracted by the indemnity note.

“The replies which the Chief Commissioner would, then, make to the enquiries of the State Railway authorities are—(1) an indemnity note is an indemnity bond, and falls under art. 28 of sch. I of Act I of 1879; (2) the description of stamp to be used is an impressed stamp. As, however, some of the officers consulted by this Administration have held different views to those set forth above, and as the G. I. P. Railway Company is following a practice different to that prescribed for the State Railway Company, the Chief Commissioner desires to set the matter at rest by obtaining a definite ruling of the learned Judges of the Bombay High Court of Judicature on the point.”

#### JUDGMENT.

[480] The following judgment of the Full Court was delivered by WESTROPP, C.J.—The Chief Commissioner of the Central Provinces has referred to this Court the question as to the proper stamp for an indemnity note, such as that annexed to his letter of reference. His opinion leans in favour of its being an indemnity bond, and, as such, ranging under art. 28 of sch. I of Act I of 1879, in which case it would be liable to the same *ad-valorem* duty as a security bond: (art. 14). The Act, however, by its glossarial s. (3), cl. 4, defines a bond as follows:—  
“Bond” means—

“(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."

In the indemnity note submitted for our opinion, there not being any such condition as mentioned in sub-cl. (a), or any obligation to deliver grain or other agricultural produce as mentioned in sub-cl. (c), it is quite clear that the indemnity note does not fall within either of those definitions. It may, however, be suggested that it comes within sub-cl. (b), as it is attested by a witness; is not payable to order or to bearer; and the executants may, in virtue of the indemnity note, have to pay money to another. Each of these three last allegations is correct; but the last of them falls short of the exigency of the definition, for the executants do not *oblige themselves to pay money to another*. What the executants, by the indemnity note, contract to do is, "to hold the State Railway, its agents, and servants, harmless and indemnified in respect of all claims to the said goods" delivered to the principal executant. This might be done in various ways beside by the payment of money. For instance, if the principal executant were not, in fact, entitled to the delivery of the goods mentioned in the note, and the real owner put forward a claim to [481] them, the executants, by immediately delivering the goods in perfect order to the real owner, would keep the State Railway harmless and indemnified in respect of the claim so made to the goods. Again, if in lieu of the original goods, the subject of the indemnity note, the executants deliver other goods, of a similar or different character, which the real owner accepts in lieu and satisfaction of the original goods, the executants would have kept the State Railway harmless and indemnified in respect of the claim to the original goods. Many other modes might be suggested whereby the executants, without making any direct payment of money to the State Railway might yet keep them harmless and indemnified against claims to the goods. Often, no doubt, the most convenient mode of indemnifying the State Railway, would be by paying in money the value of the goods and all costs incurred by the true claimant in making good his claim, and costs which the State Railway may have incurred in the matter; but the indemnity note contains no contract that the payment of money shall necessarily be the mode of keeping the State Railway harmless and indemnified, and the indemnity note leaves it open to the executants to adopt such other mode, as may at the time be practicable; to keep the State Railway harmless and indemnified in respect of the goods, the subject of the indemnity note. That note appears to us to be an agreement ranging under cl. (c), art. 5, sch. I of Act I of 1879, and, therefore, chargeable with a stamp duty of eight annas. The practice of the Great Indian Peninsula Railway in such matters, as described in the letter of reference from the Chief Commissioner, seems to be correct.

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