

1896.
November 23
Case 24.

TISSERA v. TISSERA.

D. C., Chilaw, 918.

Bond conditioned for the payment of money—Prescription—Ordinance No. 22 of 1871, s. 6—General conventional mortgage—Deed—Bond, meaning of.

A document executed in triplicate before a notary and two witnesses, whereby the person executing it acknowledges to have borrowed and received from the person in whose favour it is executed a certain sum of money, and promises to pay the latter the same with interest on demand, and binds all his property generally as security for the debt, is a bond conditioned for the payment of money such as is referred to in section 6 of Ordinance No. 22 of 1871, and the period within which an action can be maintained on it is ten years.

Per BONSER, C.J.—(1) The document may be considered as a general conventional mortgage, in which case it falls under section 6 of the Ordinance, notwithstanding the provisions of Ordinance No. 8 of 1871.

(2) The attestation of an instrument by a notary in this Island may be regarded as a solemn act equivalent to the formality of the affixing of their seals by the parties to an English deed. So that, in this Island, a deed may be defined as a writing attested by a notary; and a bond as the acknowledgment of a promise to pay a debt in an instrument attested by a notary.

IN this case the question was whether the instrument on which the plaintiff sued was to be considered a promissory note or a document falling under section 6 of Ordinance No. 22 of 1871. The instrument, according to the translation filed with the plaint, ran thus :—

“ Debt bond. Amount, Rs. 120. Know all men by these presents
“ I, Warnakulasuriya Simon Tissera, of Waikkal in Kammel pattu,

“ Pitigal koralé, Chilaw District, have borrowed and received from
 “ Warnakulasuriya Thomis Tissera, of Nangundankare, of the above-
 “ said pattu, the sum of rupees one hundred and twenty this day
 “ in full and satisfactorily, therefore for this sum of money shall
 “ compute interest at the rate of twenty per cent. per annum from
 “ this date hereof till payment in full, together with the principal
 “ and the accumulated interest, shall pay on demand to the creditor
 “ Thomis Tissera, or to his heirs, executors, administrators, and
 “ assigns by me, the debtor Simon Tissera, my heirs, executors,
 “ administrators, and assigns, and get discharged from this debt
 “ (renouncing the benefit of contesting not received this amount),
 “ binding firmly by these presents unto this I, my heirs, executors,
 “ and all my properties inclusive. In proof of this I have set my
 “ signature unto three copies of the same tenor on the 8th day of
 “ July, 1884, at Tamberawila.”

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In appeal *Dornhorst*, for plaintiff, appellant; *Morgan*, for defendant, respondent.

24th November, 1896. BONSER, C.J.—

I have no doubt in my mind that, whatever this instrument may be, it is not a promissory note. It is an instrument whereby the defendant promises to pay a certain sum of money with interest, and binds all his property to secure the debt.

It is executed before, and attested by, a notary in the form required by law for the execution of deeds which are intended to bind land. The question is whether this instrument falls under section 6 of Ordinance No. 22 of 1871. Several cases have been referred to in which observations have been made on the meaning of the word “bond” in that section. In my opinion this document may be considered as a general conventional mortgage, that is to say, a mortgage of the whole of the property of the promissor, in which case there is no question that it falls under section 6, notwithstanding the provisions of Ordinance No. 8 of 1871, which deprives such mortgages of all effect as a charge on the property. But whether this document is rightly regarded as a conventional general mortgage or not, I am of opinion that it is a “bond conditioned for the payment of money.” In English Law a bond means a deed poll, whereby the obligor binds himself to pay money or do some act. Being a deed, it must be under seal. Now, in this Island, the parties to instruments do not authenticate them by affixing their seals. But we have here a solemn form of execution, which appears to me to be equivalent to the formality of a seal according to English Law. I refer to the execution of instruments before a notary.

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BONSEE, C.J.

It seems to me that the attestation of an instrument by a notary may be regarded as a solemn act equivalent to the formality of the affixing of their seals by the parties to an English deed. So that in this Island a deed may be defined as a writing attested by a notary, and a bond as the acknowledgment of or promise to pay a debt in an instrument attested by a notary.

The District Judge laid some stress on the word "conditioned," and seemed to be of opinion that inasmuch as this bond contained no express condition it was not a bond "conditioned for the payment of money," but in my opinion this is too strict and literal an interpretation of the Ordinance. What it means, in my opinion, is that the bond is to be given for the securing the payment of money, and it seems to me that what is technically called a single bond, *i.e.*, a bond without any defeasance or condition annexed, is as much within section 6 as a double or conditional bond. For these reasons I am of opinion that this document is one falling under section 6 of our Prescription Ordinance, and the action on it is not prescribed.

The attention of the District Judge is called to what purports to be a translation of the document filed at page 10. Such a translation is most discreditable to the translator, who, if this is a fair specimen of his work, is quite incompetent for such a task.

LAWRIE, J.—

I agree with the Chief Justice that this notarially attested instrument is not a promissory note.

It contains an acknowledgment of indebtedness and a promise to pay the principal and interest, and the debtor professed to bind his property as security.

It is in my opinion a bond conditioned for the payment of money.

This case materially differs from the one reported in *1 C. L. R.*
40.