Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

1909.
August 21.

In the Matter of an Appeal under Section 38 of the Stamp Ordinance, No. 3 of 1890.

Debentures—Mortgage bond—"Bond"—Mortgage by corporation in favour of trustees—Stamp duty—Ordinances No. 8 of 1871, No. 22 of 1871, and No. 30 of 1890, s. 38.

Where a corporation issued certain debentures which were stamped as bonds for that amount, and by a trust deed appointed trustees for securing the payment of the money payable in respect of the debentures, and the corporation by a mortgage bond bound itself to the trustees in the penal sum of Rs. 150,000, and as further security mortgaged to them certain property to secure the repayment of the money payable on the debentures,—

Held, that such bond by the corporation in favour of the trustees was only liable to stamp duty of Rs. 10.

Held, also, that the debentures were "bonds" within the meaning of "The Stamp Ordinance, 1890."

The meaning of the term "bond" considered.

Tissera v. Tissera [1] referred to and commented on.

THIS was an appeal under section 38 of the Stamp Ordinance, No. 3 of 1890, from the determination of the Commissioner of Stamps as to the stamp duty leviable on a mortgage bond. The facts sufficiently appear in the judgments.

Sampayo, K.C., for the appellant.

Walter Pereira, K.C., S.-G., for the Crown.

Cur. adv. vult.

[1] *(1896) 2 N. L. R. 238.*

1909. August 21, 1909. HUTCHINSON C.J.—

August 21.

This is an appeal under section 38 of the Stamp Ordinance, No. 3 of 1890, from the determination of the Commissioner of Stamps as to the stamp duty payable on a mortgage.

In January, 1907, the Ceylon Chamber of Commerce (a body incorporated by Ordinance) issued 75 " mortgage debentures " of Rs. 1,000 each. We have one of them before us. It is headed "Debenture" ; the Chamber of Commerce (thereinafter called " Corporation ") thereby acknowledges that it is indebted to the holder in Rs. 1,000, and binds itself to pay the said sum with interest at the time and place therein specified; and it thereby charges with such payments "its undertakings and all the property comprised in or subject to the trust deed referred to in the within conditions " ; and the debenture is to be subject to the conditions endorsed thereon. It is signed by two directors, and bears the seal of the corporation. The conditions endorsed on it declare, amongst other things, that all the debentures are to rank *pari passu* on the property thereby charged, and the charge is to be a floating security; and the holders of the debentures are to be entitled to the benefit of the trust deed bearing the same date (June 29, 1907), whereby Sir William Mitchell and the Hon. Mr. W. H. Figg were appointed trustees for securing the payment of the money payable in respect of the debentures. Each of the debentures bears a stamp of Rs. 2·50, which is the stamp to which a bond or mortgage to secure Rs. 1,000 would be liable.

The mortgage bond, in respect of which the present question arises, is dated January 29, 1907. By it the corporation binds itself to the trustees, Sir. William Mitchell and the Hon. Mr. Figg, in the penal sum of Rs. 150,000, and as further security mortgages to them certain property to secure the repayment of the money payable on the debentures. The bond was stamped with a Rs. 10 stamp. The notary who attested it requested the Commissioner of Stamps to declare his opinion as to the extent to which it was liable to stamp duty. And the Commissioner in reply declared that it was liable to a stamp duty of Rs. 187·50. This is an appeal against that declaration.

Under the schedule to the Ordinance a bond or mortgage to secure Rs. 75,000 is liable to a duty of Rs. 187·50. But a " bond for further securing the repayment of any sum already secured by a bond or mortgage for which an *ad valorem* duty had been already paid " is only liable to a duty of Rs. 10, and the appellant contends that this is the description applicable to this bond ; he contends that each debenture is a " bond or mortgage." The respondent says that it is not a bond, because it is not attested by a notary; and that it is not a mortgage, because it only purports to give a general charge on all the property of the corporation, and Ordinance No. 8 of 1871 enacts that no general mortgage shall be valid or effectual so as to give the mortgagee any charge on the property.

First, as to whether the debenture is a " bond." When technical terms are found in an Ordinance, the presumption is that they are used in their ordinary technical sense. The word " bond " is a technical term of English Law, meaning a deed poll by which the obligor binds himself to do something. Both bond and deed are used in our Ordinance without any definition, so far as I know. The respondent, however, contends that in our Ordinances a " bond " means a written promise to pay, executed before and attested by a notary, and that no instrument is a " bond " unless it is so executed and attested. In *Tissera v. Tissera* [1] the Court held that a writing whereby the defendant promised to pay a sum of money and declared that he bound all his properties, and which was executed before and attested by a notary, was a " bond conditioned for the payment of money " within the meaning of section 6 of Ordinance No. 22 of 1871, although it was not sealed and therefore not a " bond " in the technical English sense of that word. That was a convenient decision, and although it was, perhaps, legislation rather than interpretation, I should not think of questioning it now, even if I had the power to do so. But Bonser C.J. in his judgment went further, and said 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. That was not a ruling necessary for the decision of the case. If it is right, an instrument for establishing a partnership executed in Ceylon by Englishmen in the way in which a deed is executed in England is not a deed for establishing a partnership within the meaning of section 7 of the Prescription Ordinance, and an instrument in the ordinary form of an English bond is not a bond, unless they are attested by a notary, although there is no law requiring either of them to be so attested. The Chief Justice, however, certainly based his decision on the ground that the word " bond " in our Ordinances means an instrument attested by a notary, and Lawrie J., although he gave no reason, held that the instrument then in question was a bond ; so that the decision at least goes as far as this, that the words " bonds " and " deeds " in the Prescription Ordinance are not used in their ordinary technical sense, but include instruments attested by a notary although not sealed. It seems to me that it is going much further and usurping the functions of a Legislature to rule that every bond and deed must be attested by a notary. But I do not think that we are at liberty, as a Court of Co-ordinate Jurisdiction, to hold that the reason on which the Chief Justice founded his decision was wrong.

The other point is whether this debenture is a mortgage. It is not valid as a mortgage. But it purports to be a mortgage. In the case of the instrument which was in question in *Tissera v. Tissera*,[1] Bonser C.J. said that, if it was a general conventional mortgage,

[1] *(1896) 2 N. L. R. 238.*

1909.
August 21.

HUTCHINSON C.J.

"there is no question that it falls under section 6, notwithstanding the provision of Ordinance No. 8 of 1871, which deprives such mortgages of all effect as a charge on the property." I agree with that opinion, and, following it, I am of opinion that this debenture is a mortgage, although it is not valid or effectual so as to give the mortgagee any charge on the property.

The respondent contends that the debt cannot be said to be "secured" by the mortgage contained in the debentures because the mortgage is ineffectual. I think that it would be giving too narrow a meaning to the word to so hold. A debt is "secured" by any mortgage or other security taken for the purpose of securing it, even though the security is worthless. In my opinion, therefore, the mortgage bond in respect of which this appeal is brought is only liable to a duty of Rs. 10.

WOOD RENTON J.—

This is an appeal under section 38 of the Stamp Ordinance, No. 3 of 1890, against a declaration by the Commissioner of Stamps under section 37 that a mortgage bond No. 9,206 dated January 29. 1907, attested by the appellant, Mr. F. J. de Saram, as notary, and bearing a stamp of Rs. 10, is liable to a stamp duty of Rs. 187·50.

The material facts are simple, although it is by no means easy to determine the points of law that they involve. The Ceylon Chamber of Commerce issued on January 29, 1907, certain debentures of the aggregate value of Rs. 75,000, and an *ad valorem* duty of Rs. 187·50 was paid on these debentures in terms of Part I. of Schedule B of the Stamp Ordinance, No. 3 of 1890.

The "mortgage bond," above referred to, was made in favour of Sir William Mitchell and the Hon. Mr. W. H. Figg, as trustees for the debenture-holders. It was granted for the express purpose of further securing the debentures, and the debenture bonds themselves provided that the debenture-holders should be entitled *pari passu* to the benefit of the mortgage bond. The Commissioner of Stamps has given no reasons for his decision that this instrument is liable to the full stamp duty, which has already been paid on the debentures themselves. It would be clearly inequitable if this were, and I am glad to be able to come to the conclusion that it is not, the law. On behalf of the appellant, Mr. de Sampayo argued, in the first place, that the instrument in question was entitled to total exemption under the Ordinance as a "bond or mortgage made in pursuance of covenants or other agreements" contained in "some other instruments (in this case the debenture bonds) on which the proper *ad valorem* stamp duty had been paid"; and, in the second place, that in any event it was liable only to a duty of Rs. 10 as a "bond for further securing repayment" of a sum "already secured" by a "bond or mortgage," for which an *ad valorem* duty had been

previously paid. The former of these arguments is clearly bad, and Mr. de Sampayo did not press it strongly.

The mortgage bond was not made in pursuance of covenants or any agreements of that nature in the debentures. But Mr. de Sampayo's second argument is, I think, sound. The first question that arises for consideration is whether or not the debentures are bonds. According to strict English Law, a bond is an obligation by deed poll, and a deed poll requires sealing and delivery. The term "bond" is not defined in, or for the purposes of, the Stamp Ordinance, and although it would appear from section 3 of the old Prescription Ordinance, No. 8 of 1834, that the use of seals was recognized in the Colony at that date, we were informed by the learned Solicitor-General, who appeared on behalf of the Commissioner of Stamps, that it is now unknown. The Solicitor-General accordingly contended, and supported his contention by reference to a dictum of Bonser C.J. in *Tissera v. Tissera*,[1] that no document can be a bond unless it is notarially attested.

In the present case the debenture bonds are not so attested, but they are issued under the common seal of the Chamber of Commerce, and countersigned by two of the directors, in conformity with section 10 of the Chamber of Commerce Ordinance, No. 10 of 1895. In the case of *Tissera v. Tissera*[1] the only point that the Court had to decide was whether a document, executed in triplicate before a notary and two witnesses, containing an acknowledgment of indebtedness and a promise to pay a certain sum of money, and binding all the obligor's property as security for the debt, was a "bond conditioned for the payment of money" within the meaning of section 6 of Ordinance No. 22 of 1871. The Court—Bonser C.J. and Lawrie J.—held that it was. But Bonser C.J. made use of the following language: "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." This definition, if it is to be regarded as such, of the meaning of the term "bond" for all purposes in Ceylon is merely *obiter dictum*, and, with the greatest respect, I am not prepared to accept it. In the case of *Tissera v. Tissera*[1] Bonser C.J. added: "Now in this Island parties to instruments do not authenticate them by fixing 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." The test seems to me to be a good one, and I think that it is decisive of the present case. We have here an acknowledgment of indebtedness, a promise to pay, and a charge on the debtor's property by way of security solemnly authenticated by the formalities which the Legislature has itself rendered obligatory on the Chamber of Commerce. I hold that the debentures are "bonds" for the purposes of the Stamp Ordinance. Even if they are not

[1] (*1896*) *2 N. L. R. 238.*

1909.
August 21.

WOOD RENTON J.

"bonds," they come within the alternative term in the exemption clause. They are general conventional mortgages, and each debenture is therefore a "mortgage."

The next question is whether, in view of the fact that they contain a general hypothecation of all the "undertakings" of the corporation, which is invalid under section 1 of Ordinance No. 8 of 1871, the debt which they create can be said to be "already secured" within the meaning of the clause in the Stamp Ordinance above cited. I have been unable to find any direct judicial authority interpreting the words "already secured." I am prepared to hold that, for the purposes of the Stamp Ordinance, they would be satisfied by an instrument which "purported to secure" the payment of the debt; and I think that, in any event, they ought to be interpreted as comprising anything that makes the debt more easily recoverable. Section 1 of Ordinance No. 8 of 1871 does not make general conventional mortgages illegal. It merely provides that they shall not be valid and effectual so as to give the mortgagee any lien, charge, claim, or priority over the property comprised in them. It may be that, in spite of section 1 of Ordinance No. 8 of 1871, the debentures might be utilized against the Chamber of Commerce by way of estoppel (see *Kumaravaloe v. Mohideen Bawa*[1]). But apart from that, condition 2 in the debentures makes the debenture-holders in effect parties to the mortgage bond, which contains a special hypothecation of the property of the corporation, in no way obnoxious to the provisions of section 1 of Ordinance No. 8 of 1871. I think that that provision is a securing of the debt within the meaning of "The Stamp Ordinance, 1890." I would set aside the decision of the Commissioner of Stamps, and declare that the mortgage of January 29, 1907, is liable only to a stamp duty of Rs. 10.

Appeal allowed.

[1] *(1883) Wendt 297.*