Present: Ennis J. and De Sampayo J. 1915.

SEMAN *v.* SILVA.

95—D. C. Matara, 6,656.

Prescription—Notarial lease—Rent due prescribed in six years under section 7 of Ordinance No. 22 of 1871—Meaning of the term "bond"—Stamp duty—Debt not inventoried in testamentary proceedings—Case struck off the roll to enable plaintiff to regularize his position.

A notarial lease is a written contract or agreement within the meaning of section 7 of Ordinance No. 22 of 1871, and the period of limitation in regard to an action for the recovery of rent due thereon is six years.

DE SAMPAYO J.—The word "bond" is used in Ordinance No. 22 of 1871 exactly in the same sense as in the earlier enactments, and an instrument should be construed as a bond or not according to its substance and real characteristics, and not according to its form of execution.

Where plaintiff had not inventoried the debt for the recovery of which he was suing in the testamentary proceedings, and paid stamp duty thereon, the case was struck off the roll to give him an opportunity to regularize the proceedings.

THE facts are stated by De Sampayo J. as follows:—

By a notarially-executed lease dated October 3, 1902, one Balasuriyage Laisahamy demised to the defendant a certain land for a term of eight years commencing from January 1, 1903, at a

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rental of Rs. 50 a year. The rent for three years was received in advance, and it was stipulated in the lease that the defendant should pay the annual rent for the remaining five years on January 1 each year, and in default of due payment should pay the same with interest at nine per cent. The lessor, Laisahamy, died leaving a last will by which she appointed the plaintiff as executor and sole legatee. In that capacity the plaintiff has sued the defendant for the recovery of the sum of Rs. 422.50, being the amount of rent for the five years commencing from January 1, 1906, with interest thereon up to date of action. The defendant pleaded payment of the whole rent to Laisahamy during her lifetime, and he also raised two legal defences, namely, (1) that the claim was barred by prescription, and (2) that this alleged asset of Laisahamy's estate not having been inventoried in the testamentary case, and no stamp duty thereon having been paid, the plaintiff could not maintain this action. The District Judge held on the issue of prescription that the instrument of lease was a " bond " within the meaning of section 6 of the Ordinance No. 22 of 1871, and the claim was therefore not prescribed, and that the second objection was well founded, but he allowed the plaintiff time to move in the testamentary suit for the purpose of including the debt among the assets of the estate and paying the extra stamp duty; and he further ordered the defendant to pay the plaintiff the costs of the day. The defendant has appealed.

Bawa, K.C. (with him *Keuneman*), for appellant.

A. St. V. Jayewardene, for respondent.

Cur. adv. vult.

August 31, 1915. ENNIS J.—

The plaintiff, as legatee under the will of one Laisahamy, sued the defendant for the rent of certain lands.

The defendant pleaded payment, and that the claim was prescribed. He also asserted that the plaintiff could not maintain the action, as the sum had not been inventoried in the testamentary suit.

Issues were framed, and the parties heard on all except the issue as to payment. The learned District Judge found, on the issue of prescription, that the claim for rent came within section 6 of the Ordinance No. 22 of 1871, holding the rent due on a notarially executed bond conditioned for the payment of money. He then found that the plaintiff could not maintain the action until the debt was inventoried in the testamentary suit and the duty paid thereon; he struck the case off the roll, to give the plaintiff an opportunity to regularize the proceedings, and ordered the plaintiff to pay the defendant the costs of the day (June 30, 1915).

The defendant appeals, and objection has been taken that the appeal is premature, as there is no final order. The counsel for

the appellant, however, abandoned the issue as to payment, in order that the dispute between the parties might be finally settled on the appeal.

In the Full Court case, *De Silva v. Don Louis*[1] the question for decision was whether claims for rent on notarially-executed instruments fell within section 7 or section 8 of the Prescription Ordinance, No. 22 of 1871, and it was decided that they fell within section 7. It was not suggested in that case that such claims might come within the terms of section 6; so, strictly speaking, that point has not been decided; but, as the Court was then dealing generally with prescription in claims for rent, the case is, in my opinion, a sufficient authority for the proposition that such claims when based on a notarially-executed instrument fall only within section 7 of the Ordinance.

Counsel for the respondent argued, however, that such a claim comes within section 6, and he cited the cases of *Tissera v. Tissera*,[2] *Suppramaniapillai v. Kalikutty*,[3] *Suthukkummah v. Vachchiravagee and another*,[4] and an unreported case (191—D. C. Negombo, 9,375 [5]) in support of his argument. In my opinion none of these cases is a sufficient authority for the proposition, as in all of them the document sued upon contained some provision for securing the re-payment of money or a penalty for non-payment in due time, and on that account only these cases might be said to come within the terms of section 6. In *Tissera v. Tissera* [2] Bonser C.J., discussing the meaning of "bond conditioned for the payment of money," found in section 6, said: "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 . . . 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."

Chief Justice Bonser then proceeded to hold that the expression meant a bond "given for securing the payment of money."

I am unable to agree with the contention that this case is an authority for the proposition that a document notarially executed, containing merely a promise to pay money, is a bond "conditioned for the payment of money." In my opinion the expression refers only to documents in which there is a condition that money is to be paid by way of security. Again, as pointed out in *Chinnatamby v. Changugam*,[6] Chief Justice Bonser's definition of the word "deed"

[1] *4 S. C. C. 89.*
[2] *(1896) 2 N. L. R. 238.*
[3] *(1908) 11 N. L. R. 71.*
[4] *(1909) 12 N. L. R. 289.*
[5] *S. C. Mins., July 16, 1914.*
[6] *1 Cur. L. R. 136.*

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as applicable to Ceylon was merely a *dictum*, and was inadequate to interpret the expression " deed of partnership " found in section 7, as there is no law in Ceylon which requires agreements for partnership to be notarially executed. Moreover, as pointed out by Mr. Bawa, the formality of " notarial execution " was not always required between 1834 and 1871 in cases in which it would now be required. In my opinion the lease under which rent is claimed in this case is not a " bond conditioned for the payment of money, " and that it falls under section 7, and not section 6 of the Ordinance No. 22 of 1871. The claim is therefore prescribed, except as to the last instalment of rent, Rs. 50, which was due within six years of the institution of the suit.

The question as to whether the action can be maintained till the debt is inventoried is covered by the authority of *Silva v. Weerasuriya* [1], and the learned District Judge was right in allowing the plaintiff an opportunity of getting the grant duly stamped.

I would not interfere with the order made, but as the appellant has partly succeeded, I would order each party to bear its own costs on appeal and for the day, June 30, in the Court below.

DE SAMPAYO J.—

[His Lordship set out the facts, and continued]:—

Dealing with the latter point first, I think the District Judge was right in giving the plaintiff an opportunity to have the probate duly stamped, and so satisfy the requirements of section 547 of the Civil Procedure Code. It has been frequently laid down that, where a plaintiff found himself unable to proceed with an action for want of letters of administration to a deceased person's estate or probate of his will, the proper course was to suspend the action in order to enable the plaintiff to obtain letters or probate, and I cannot see why where probate has actually been taken out, any defect as to stamps may not be rectified in the same way.

The more substantial ground of appeal is that relating to the question of prescription, and I think that here the holding of the District Judge is erroneous. The vexed question as to what is a " bond " was again argued in this case, but I am not inclined to revive the old controversy, except so far as it may be necessary to notice an argument of Mr. A. St. V. Jayewardene for the defendant, to the effect that every written agreement to pay money, provided it is notarially executed, is a " bond " within the meaning of section 6 of Ordinance No. 22 of 1871. This argument is founded on the judgment of Bonser C.J. in *Tissera v. Tissera*,[2] where the learned Chief Justice said that as a bond in English law was a deed poll, whereby the obligor bound himself to pay money, and as notarial attestation in Ceylon might be regarded as a solemn act equivalent

[1] *11 N. L. R. 73.*

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

to the formality of affixing of seals to an English deed, a "bond" in this Island might be defined as "the acknowledgment of or promise to pay a debt in an instrument attested by a notary." This opinion, however, cannot be taken as the *ratio decidendi* of the case. The question was whether the document there construed was a promissory note or a bond, and it was quite clear from the nature of the document itself, apart from the form of its execution, that it was not a promissory note, but was in the nature of a bond; and this, I think, was the ground of the judgment of Lawrie J., who took part in the decision. The fact of notarial execution, if I may say so with respect, has nothing to do with the character of a document as a bond in Ceylon, as may be seen from the history of the legislation on the subject of prescription. The earliest enactment is the Regulation No. 13 of 1822, which by section 4 provided that "no action shall be maintainable upon any instrument of hypothecation or mortgage, or upon any *bond or other deed* under seal, unless such action shall be brought within ten years from the date thereof or of the last payment of interest." The words I have italicized appear to be indicative of the fact that, in the early days of British administration, English legal language and ideas prevailed to a large extent, and so the Regulation No. 5 of 1825, after reciting that doubts had arisen "whether bonds not being sealed by the obligor (of which nature are in general all bonds passed in this Island) come under the description of bonds specified in the 4th clause of Regulation No. 13 of 1822," proceeded to declare and enact that "all and every instrument of hypothecation, or mortgage, or bond, conditioned for the future payment of money or the performance of any agreement or trust, or payment of any penalty . . . whether notarial or not notarial, and whether under the seal of the obligor or not, provided the same be otherwise executed according to law, shall be considered as an instrument of hypothecation, or mortgage, or bond of the class of instruments specified in the 4th clause of Regulation No. 13 of 1822." Then came the Ordinance No. 8 of 1834, which amended and consolidated the law in force regulating the prescription of actions. Section 3 of this Ordinance adopted the language of the above Regulation as to instruments of hypothecation, mortgage, or bond, "whether notarial or not, and whether under the seal of the obligor or not." These words, it is true, are not repeated in the existing Ordinance No. 22 of 1871; but it must be remembered that in the interval the Ordinance No. 7 of 1840 had been enacted, by which the instruments which required notarial execution were defined and fixed. The effect of this latter Ordinance as regards bonds was to require notarial execution only in the case of bonds which created an interest in immovable property, so that it was no longer necessary or proper to repeat in the Ordinance No. 22 of 1871 the words "whether notarial or not." As regards the omission of reference to sealing, I take it that by the year 1871

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it was well understood that the formality of sealing was not applicable to Ceylon, and to provide that a document might be a bond without being under seal was perceived to be a useless precaution. What reason is there now to assume fetters against which the Legislature had taken so much care and trouble to give special warning? In my opinion the word "bond" is used in the existing Ordinance exactly in the same sense as in the earlier enactments, and an instrument should be construed as a bond or the contrary according to its substance and real characteristics, and not according to its form of execution. Of course, in the case of bonds affecting an interest in land, the want of notarial execution will make it invalid to that extent under the Ordinance No. 7 of 1840, but in other cases I think notarial execution or the absence of it is of no consequence. If the Ordinance No. 22 of 1871 intended to depart radically from the previous enactments and to define all bonds to be notarial instruments, nothing was easier than to say so. Assuming, however, that *Tissera v. Tissera* [1] decided that every bond was an obligation to pay money or do some act contained in a notarial instrument, it is no authority for saying that every notarial instrument containing an obligation to pay money or to do some act is a bond. Whatever a bond may be, I am quite sure that a lease is not a bond. Its main purpose is not to secure the payment of money, but to vest the right of possession of a land for a certain period in the lessee. A lease also usually contains many subsidiary covenants, and simply because one of these covenants relates to the payment of rent, the instrument is not thereby constituted a bond. If the rent is paid wholly in advance there will be no such covenant in the lease at all, and in such a case there will be no shadow of reason for calling it a bond. A lease belongs to the specific class of contracts which the civil law calls *locatio conductio*, and in no way partakes of the nature of a bond. As the stipulation in this lease was to pay the rent with interest in the case of default, Mr. Jayewardene further argued that it came within section 6 of the Ordinance, as a "bond conditioned for the payment of a penalty." But interest in the ordinary sense is not a penalty. It is the profit payable to the person, who is entitled to the principal sum, as compensation for the delay. In my opinion the rent payable under a notarial lease is not governed by the period of limitation provided in section 6 of the Ordinance. A notarial lease, in my opinion, is a written contract or agreement within the meaning of section 7, and the period of limitation in regard to an action for the recovery of rent due thereon is six years. Moreover, this matter is not wholly *res integra;* it is, I think, covered by the authority of the Full Court decision in *Silva v. Don Louis.*[2] No doubt the principal point in that case was as to the effect of the word "rent" in section 8, but it was definitely decided that a notarial lease was a written contract

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

[2] *(1881) 4 S. C. C. 89.*

or agreement in the contemplation of section 7; and that the period of limitation for an action for rent due under such a lease was six years. No doubt, also, section 6 was not discussed there at all; but it is inconceivable that if section 6 had any bearing on the question, the eminent Judges who took part in the decision would not have considered it. It seems to me that the whole question of prescription was fully before the Court, and I think the decision is a binding authority in the present case. I may add that the matter has always been considered in the sense determined in that decision, and that, so far as I know, this is the first time that rent due on a written lease is sought to be brought within section 6 of the Ordinance.

In my opinion the plaintiff's claim is, under section 7 of the Ordinance No. 22 of 1871, prescribed, except as to Rs. 50 which became due on January 1, 1910. I would send the case back to be proceeded with on that footing, and I agree to the order as to costs proposed by my brother Ennis.

Appeal dismissed.