*Present :* Lascelles C.J.

*Sep.. 7, 1911*

## LUSHINGTON *v.* CAROLIS *et al.*

290—*C. R. Matara*, 6,240.

*Security bond hypothecating land executed without notarial attestation— Obligor personally liable though hypothecation was invalid— Ordinance No. 7 of 1840, s. 2.*

Where a promise is entire, and is partly within and partly not within section 2 of Ordinance No. 7 of 1840, the whole contract is unenforceable unless the requirements of the section are complied with ; but if the promise is divisible, so that in effect there are two distinct agreements, one of which is, and the other is not, within the section, the portion of the promise which is not within the section may be enforced, though not notarially attested.

Where a security bond hypothecating immovable property was executed without notarial attestation,—

*Held*, the informality did not relieve the obligor of his personal obligation under the bond.

THE facts appear from the judgment.

*Walter Pereira, K.C., S.-G.*, for the appellant.—The security bond is not absolutely void. The bond is good as a money bond, though the hypothecation is not valid. The contract is a severable one ; it consists of a promise to pay money, and also a mortgage of lands. The fact that the bond is not notarially attested does not render the whole bond invalid. See *Halsbury's Laws of England, vol. VII., p.* 682 ; *Sidambaram Chetty v. Jayawardana.*[1]

*Bawa*, for the respondents.—The contract is not a severable contract ; therefore if part of the contract is invalid, the other part also is invalid.

Counsel cited *Mecheden v. Wallace* ;[2] *Vaughan v. Hancock* ;[3] *Thomas v. Williams* ;[4] *Carrington v. Roots* ;[5] *Law Times, July* 2, 1910 (*vol. XCIX., pp.* 209, 223).

*Cur. adv. vult.*

September 7, 1911. LASCELLES C.J.—

This is an action by a Fiscal to recover damages from a Fiscal's Officer and his surety under a security bond, and for a declaration that certain land purported to be hypothecated by the bond should be declared executable in satisfaction of the judgment.

[1] *(1905) 4 Tam. 83.*
[2] *(1837) 7 A. & E. 49.*
[3] *(1846) 3 C. B. 766.*
[4] *(1830) 10 B. & C. 664.*
[5] *(1837) 2 M. & W. 248.*

*Sept. 7, 1911*

LASCELLES C.J.

*Lushington v. Carolis*

At the trial a number of issues were framed, the first of which raised the question whether the bond, not having been executed in conformity with section 2 of Ordinance No. 7 of 1840, as is now admitted to be the case, was void. The learned Commissioner of Requests held that the requirements of the section had not been complied with, and dismissed the action.

On appeal it is admitted that the bond, so far as it purports to hypothecate the first defendant's land, is void, but it is contended that the portions of the bond which impose a personal obligation on the defendants are valid and enforceable.

The law on the point with reference to the English Statute of Frauds is thus stated at page 383 of Lord Halsbury's *Laws of England* 792 : " Where a promise is entire, and is partly within and partly not within the statute, the whole contract is unenforceable unless the requirements of the statute are complied with ; but if the promise is divisible, so that in effect there are two distinct agreements, one of which is, and the other is not, within the statute, the portion of the promise which is not within the statute may be enforced, though there is no evidence in writing."

In illustration of this principle *Mayfield v. Dudsley*[1] may be cited. There the plaintiff, who was the outgoing tenant of a farm, and the incoming tenant agreed orally that the latter should take over some standing wheat at a fixed price and the dead stock at a valuation. It was held that, as the contract for the dead stock was distinct from contract for the sale of the wheat on the giving up of the farm, the plaintiff might recover that amount.

Similarly, a promise to pay for gas that has been furnished to a third person and for all gas to be furnished in future has been held to be severable, and an action may be maintained on the promise not obnoxious to the statute (*Wood v. Benson*[2]).

It is true that this principle has been established with reference to section 4 of the English Statute of Frauds, which differs in form from section 2 of our Ordinance No. 7 of 1840, but the latter section appears to me to admit, if not to require, the application of the same principle.

The contracts which are declared to be of no force or avail in law, if informally made, are precisely defined ; and there is nothing in the section which would render any other contract obnoxious to the section merely because it is embodied in an instrument which contains another separate contract which is void under the section.

The instrument on which the action is brought is not a masterpiece of the conveyancer's art. It consists principally of a printed form, which is in the form usual to bonds guaranteeing the fidelity of clerks or public servants. The obligor and his surety bind themselves jointly and severally to pay to the " Fiscal of the Southern Province" (these words having been substituted in ink for the

[1] *3 B. & C. 357.* [2] *2 C. & J. 95.*

printed words " Our Sovereign Lord the King "), " his heirs and successors (*sic*), the sum of Rs. 500," and purports to be sealed with their seals, though the instrument is not in fact sealed. Then follows a recital of the appointment of the obligor as Fiscal's officer, and of the agreement that he should give security, and then the conditions of the bond are stated, and at the foot of them the signatures of the obligator and his surety are affixed.

So far there is nothing in the bond which indicates the hypothecation of any property. The instrument up to this point is complete, and capable of enforcement personally against the two signatories. But at the foot of the instrument there are written the words " List of property hypothecated by the principal " ; and a description of an allotment of land is appended, at the end of which appears the signature of the principal without a notarial attestation.

There can be no doubt whatever but that the personal obligation of the principal and his surety is not only separable, but is in fact separated from the portion of the bond which purports to hypothecate property. The instrument is in truth an ordinary money bond, to which certain words have been tacked on with the object of hypothecating certain property.

So far as the hypothecation of property is concerned, the instrument, not having been executed in conformity with section 2 of Ordinance No. 7 of 1840, is of no force or avail in law, but on the authorities which I have cited, this informality as regards execution does not extend to invalidate the personal obligation of the obligor and his surety, which is a separate contract. As I have here dealt only with the ground on which the learned Commissioner has dismissed the action, the first issue, " is the bond sued on void in law," must be answered with some qualification, so as not to deprive the defendants of any other ground they may have of objection to the legality of the instrument.

I hold that the learned Commissioner should have ruled on the first issue, that the bond, not having been executed in conformity with Ordinance No. 7 of 1840, is of no force or avail in law so far as it purports to hypothecate the property mentioned therein, but that this informality does not extend to relieve the obligor and his surety of their personal obligations under the bond.

The judgment of the Court of Requests must be set aside, and the case remitted for trial on the other grounds of defence raised by the defendants. The appellant is entitled to his costs of appeal and to the costs of the hearing in the Court of Requests on July 11.

*Appeal allowed ; case sent back.*