

Civil

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. NO30 of 1977

BETWEEN NORTH AMERICAN LIFE ASSURANCE COMPANY LIMITED PLAINTIFF
A N D THE ATTORNEY GENERAL DEFENDANT

Mrs. Hudson-Phillips instructed by C. Alexander of Myers Fletcher and Gordon, Manton & Hart for Plaintiff.

Messrs. Langrin and Oniss instructed by Director of States Proceedings for Defendant.

Heard on July 16, 17; December 3 and 20, 1979.

JUDGMENT

CAMPBELL J.

The herein suit involves the construction of the Stamp Duty Act and in particular two paragraphs of the schedule thereto headed "Conveyances" and "Mortgage" respectively.

The plaintiff is a Life Assurance Company incorporated in Canada. It had prior to January 1, 1974, transacted life assurance business in Jamaica.

On January 1, 1974, it ceased doing business here and agreed to transfer some of its assets to Life of Jamaica Limited. Part of these assets consisted of Loan Stocks in various companies in Jamaica variously described as "convertible unsecured loan stock", "first mortgage debenture stock", "first mortgage sinking fund registered debenture stock", "series A and series B debentures", "guaranteed first mortgage debentures" and "debenture stock". These all had varying maturity or redemption dates.

Consequent on the transfer of these loan or debenture stocks, stamp duty totalling \$103,411.59 was raised and levied by the Stamp Commissioner on the basis that the transfers constituted "conveyances on sale" of property.

The plaintiff concedes that the assets transferred are marketable securities but contends that their transfers do not amount to "conveyances on sale" but rather to transfers of securities analogous to transfer of mortgage which are chargeable under the head of charge captioned "mortgage".

In support of this submission Learned Attorney for the plaintiff has strenuously argued that since the debenture stocks are really debentures and in fact are securities for debts just like mortgage, both their creation and their transfer are regulated insofar as stamp duty is concerned by the charging provision captioned "mortgage".

Learned Attorney for the defendant maintains that the "debenture stocks" are personal property. They are marketable securities as conceded by the plaintiff. There is, he concedes, no distinct head of charge covering "marketable securities" in our Act as there is in the United Kingdom legislation but they are covered within the amplitude of the word "property" as used in the head of charge captioned "conveyances".

Learned Attorney for the plaintiff developed her argument thus:-

- (a) Under the charging head captioned "mortgage" in the schedule to the Stamp Act there is included debenture which is defined as including a debenture creating a debt or one acknowledging a debt whether the debenture in addition in either case, creates a charge or security on real or personal property. In other words whether the debenture is a naked one that is to say merely creates or acknowledges a debt or in addition incorporates a charge or security on real or personal property for the due repayment of the debt it is a security analogous to a mortgage. There is no dispute that on its creation it is chargeable under the caption "mortgage".
- (b) The transfer of any such debenture is equally chargeable at the appropriate rate under the caption "mortgage" because the words in the schedule covering these matters are sufficiently expansive to cover such transactions provided the word "of" appearing immediately after the word "mortgage" is read as "or".

The words referred to are as hereunder:

"Transfer, assignment, disposition or assignation of any mortgage of any such security as aforesaid, or of the benefit thereof, or or any money or stock secured thereby or by any instrument or judgment".

- (c) The above quoted words, she submits, represent the consolidation in 1903 of words to a similar effect in the Stamp Duty Law, 1868 (No. 33 of 1868), and the Stamp Duty Laws Amendment Law, 1901 [ch. 25] which read as follows:-

"Stamp Duty Law 1868 -

Any transfer or assignment of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured".

"Stamp Duty Laws Amendment Law 1901 -

Transfer, assignment, disposition or assignation of any mortgage, or of any money or stock secured by any instrument or mortgage, or by any judgment".

- (d) In the process of consolidating the 1868 and 1901 Laws in the Stamp Duty Law 1903 [ch. 40] a drafting and or legislative error crept in with the juxta-position of the word "mortgage" with the words "of any such security as aforesaid" without the insection after the word "mortgage" of the word "or", or alternatively by not substituting "or" for "of" which if done would effect the clear legislative intent carried through from 1868 to 1903 namely that what was intended was the transfer not only of mortgage but also the transfer of other securities.

been The words in the Stamp Duty Law 1903 [ch. 40] which words have/incorporated "ipsissima verba" in the schedule to the present Act are as hereunder:

"Transfer, assignment disposition, or assignation of any mortgage of any such security as aforesaid or of the benefit thereof, or any money or stock secured thereby or by any instrument or judgment".

- (e) The substitution of the word "or" after the word "mortgage" in line 2 of the above words or alternatively the insertion of the word "or" between the words "mortgage" and the word "of" in the same line would have the effect of unambiguously including the transfer of debentures since these are securities.

Traditionally, courts are very reluctant to substitute words in a statue or to add words to it since their function is to interpret and not to legislate. Accordingly words will be substituted and or added only in exceptional circumstances to avoid some repugnancy, some inconvenience or some absurdity which the legislature could hardly

have intended. In the instant case, no repugnancy inconvenience or absurdity arises from reading and interpreting the words as they are. The words mean what they say, namely the transfer, assignment, disposition or assignation of mortgages as well as the transfer assignment, disposition or assignation "of any such security as aforesaid" among other things referred to therein. The real issue however, is the ascertainment of the securities contemplated by the use of the words "of any such security as aforesaid". It is clear that the words refer to some securities previously referred to. Do the words "of any such security as aforesaid" include "debenture stocks" or even debenture for that matter?

The words "of any such security as aforesaid" first appear in the Stamp Duty Law 1868. Under the heading "mortgage" there were included among other items, mortgage, further charge or security on real and personal property, conveyances, decrees or instruments whereby property is transferred to trustees by way of security. Also enumerated were collateral, substituted or additional security. Debentures were not included.

In the Stamp Duty Laws Amendment Law 1901, the heading "mortgage" included items substantially the same as those mentioned under "mortgage" in the Stamp Duty Law 1868. Again debentures were not included. There was a provision in the Stamp Duty Laws Amendment Law of 1901, namely Section 2, which expressly dealt with the duty payable on the purchase or transfer on sale of island debentures, inscribed stocks and debenture or stock guaranteed by the government. These were issued under certain local statutes.

The Stamp Duty Law, 1903, contained no express provision dealing with debenture like in the Law of 1901. At the same time debentures were equally not included under the heading "mortgage".

When therefore the Stamp Duty Law, 1868, and the Stamp Duty Law, 1903, mention the transfer, assignment, disposition or assignation "of any such security as aforesaid", it meant such securities which were expressly individually described as "security"

under the heading "mortgage" as for example conveyance or instrument whereby property is transferred to trustees by way of security or decrees or judgment operating as security.

The words certainly did not include transfers of debenture, since these were never mentioned at all under the heading "mortgage". The Stamp Duty Amendment Law 1908, (Law 15 of 1908) for the first time by amendment of the 1903 Law included debentures under the heading of "mortgage" in the paragraph dealing with duty on creation of mortgages, debentures and the other securities therein mentioned.

There was no consequential amendment by the Stamp Duty Amendment Law of 1908 of the words relating to transfer, assignment, disposition or assignation of mortgages to include "debenture". The words "of any such security as aforesaid" were and are still capable of being given a meaning which do not include debenture.

Subsequent to the Stamp Duty Amendment Law, 1908, there were further amendments of the Stamp Duty Law 1903. The word debenture was severed from its juxta-position with mortgage and included as an independent item under the heading "mortgage".

There was again no consequential amendment to include debentures among the things in relation to the transfer of which the duty is payable under the head of mortgage.

In the United Kingdom, the Stamp Act, 1891, in creating the charge of duty under the heading "mortgage or other security" include thereunder the following items namely mortgage, bond, debenture or covenant (not being marketable security otherwise charged).

The term mortgage was defined, and in a paraphrased form included:

- (a) A further charge or disposition of any property real or personal by way of security;
- (b) A conveyance on trust for sale of any land or property whatsoever intended only as a security;
- (c) Any defeasance or other deed or writing making redeemable any conveyance apparently absolute but intended only as a security;

- (d) Any agreement accompanied by a deposit of title deeds for making a mortgage or other security of any land or property comprised in the title deeds and charging the same as a security.

In our Stamp Duty Act the term mortgage is not defined. However items substantially the same as in "a" to "d" above are set out as specified securities in addition to mortgage and debentures. It thus became necessary unlike in the United Kingdom, to gather up these specified securities in the expression "of any such security as aforesaid" when dealing with transfer, assignment, disposition or assignation of mortgage and any such security. The words "of any such security as aforesaid" clearly do not include debentures but only those instruments expressly mentioned which though "en face" appear to be absolute transfers are in fact only intended to operate by way of security and are in the schedule specifically so stated. It is not without significance that in the United Kingdom where the Stamp Act, 1891, expressly mentioned debenture under the charge to duty headed "mortgage or other security", it also expressly mentions "debenture" among the items in respect to the transfer of which the duty is payable as on a transfer of a mortgage.

There may well be a 'casus omissus' in not including some types of debentures at least among the items whose transfer should be chargeable to duty under the heading "mortgage". If such there is, it is for Parliament to correct the situation.

I must here pay strict attention to the actual words used by the legislature and since no ambiguity arises in construing the words used in relation to transfers under the head of "mortgage", I hold that the words used do not include the transfer of debentures. Having concluded that the instruments in question even if they be transfer of debenture, are not included in the charge to duty under the heading of "mortgage", I must now consider whether the Stamp Commissioner was right in assessing the duty as on a conveyance on sale.

The plaintiff concedes that the instruments are in fact

instruments operating as transfer of marketable securities. These constitute property. Any doubt as to this is dispelled when regard is had to Section 76 of the Act which in imposing liability to pay duty on certain contracts for the sale of property, expressly mention marketable securities as property albeit property excepted from the scope of the section.

The transfer are for money consideration specified in the instruments and they effectively vest the property in the debenture stocks in the purchasers who are also mentioned therein. They manifest all the attributes of conveyances on sale and fall to be assessed for duty under the heading of "conveyances on sale" unless they are shown to be assessable to duty under some other head or are exempted from duty. They are not exempted, no such claim is made. They are not assessable to duty as transfers of mortgages. They are not assessable to duty as securities such as are mentioned in the paragraph of the schedule dealing with transfers. I have so held. They are accordingly liable to duty under the heading of conveyances on sale and under no other heading. The basis of assessment by the Stamp Commissioner is therefore correct.

There will accordingly be judgment for the defendant dismissing the plaintiff's claim with costs to be agreed or taxed.