1976 *Present :* **Deheragoda, J., Ismail, J., and Wanasundera, J.**

K. G. W. PERERA, Appellant, *and* T. H. D. K. PEIRIS and another, Respondents

S. C. 20/74 (F)—D. C. Chilaw 18896

Money Lending Ordinance—Sections 2, 8 and 10—Promissory note—Whether money lending transaction—Distinction between 'discount' and 'interest'.

Contract—Novation—Cashing of post-dated cheques—Promissory note obtained for accumulated cheques dishonoured by Bank—Nature of such transaction—Defence taken under Money Lending Ordinance—Whether action thereon maintainable.

The plaintiff, a pawn broker instituted action against the 1st defendant and his wife the 2nd defendant for the recovery of Rs. 66,000 upon a promissory note made out by the defendants in the plantiff's favour for Rs. 33,000 and interest thereon at 18 per cent per annum. The plaintiff in his evidence stated that the 1st defendant was engaged in the business of selling copra and that the 1st defendant brought the cheques he obtained from such sales to him (the plaintiff) for encashment. These cheques were post-dated chaques and the plaintiff charged the 1st defendant a 'commission' of Rs. 10 per Rs. 1,000 per week in cashing the cheques. The plaintiff had such dealings with the 1st defendant for about one year.

By June 1965 the plaintiff had with him a number of these cheques which had been given by the 1st defendant and had been dishonoured by the Bank. On the accumulated cheques an amount of Rs. 31,000 was due to be paid to the plaintiff by the 1st defendant and when the interest was added the amount came to Rs. 33,400 odd. The 1st defendant gave the plaintiff the promissory note, P2, signed by the 1st and 2nd defendants, for Rs. 33,000 omitting the Rs. 400 odd out of the interest. The plaintiff admitted inter alia that he had lent money on two mortgages and that people used to leave cheques with him as security and that he used to lend money on them. He further admitted that he did not keep any books of account relating to the interest he charged on the post-dated cheques. The defendants however, did not lead any independent evidence of the nature or extent of the money-lending transactions of the plaintiff.

The defendants raised the plea that the action was not maintainable in view of Section 8 of the Money Lending Ordinance, which required proper accounts to be kept by persons carrying on the business of money lending.

Held : (Ismail, J., *dissenting*)

(1) That the transactions relating to the post-dated cheques were not money lending transactions.

(2) That the promissory note, P2, was not a novation but only security given for the fulfilment of the quasi-contractual obligation arising from the post-dated cheque transactions, which were not loans. Thus P2, itself acquired the character of a non-money lending transaction.

Cases referred to :

Chow Yoong Hong v. Choong Fah Rubber Manufactory, (1961) 2 *All E. R.* 1163 ; (1962) *A. C.* 209.

Silva v. Somawathie, 31 *N.L.R.* 120 ; 10 C. L. Rec. 120.

Rex v. Goedhals and de Wet, 26 *S.C.* 545.

Ramen Chetty v. Renganathan Pillai, 28 *N.L.R.* 339 ; 8 C. L Rec. 118.

John Rodger v. De Silva, 54 N.L.R. 246 ; 49 C. L. W. 18.

APPEAL from a judgment of the District Court, Chilaw.

H. W. Jayawardene, Q. C. with *H. Rodrigo* and *Miss P. Seneviratne,* for the plaintiff-appellant.

A. C. Gooneratne, Q.C., with *R. C. Gooneratne,* for the 1st and 2nd defendants-respondents.

Cur. adv. vult.

December 14, 1976. DEHERAGODA, J.

The plaintiff-appellant who described himself as a pawn broker instituted this action against the defendant and his wife, the 1st and 2nd respondents, for the recovery of Rs. 66,000 upon a promissory note said to have been made out by the defendants in his favour for Rs. 33,000 and interest thereon at 18 percent per annum. The defendants filed answer denying the execution of the promissory note and stating that no cause of action had accrued to the plaintiff to sue them.

The case went to trial on two issues, namely :—

(1) Whether the promissory note was signed by the defendants and,

(2) If so, what amount is payable to the plaintiff jointly and severally by them ?

The plaintiff giving evidence said that prior to June, 1965, he had dealings with the 1st defendant who was engaged in the business of selling copra. During this period, the 1st defendant used to sell his copra to the dealers in Colombo and bring the cheques he obtained from them to him for cashing. He used to charge him " a commission " of Rs. 10 per Rs. 1,000 per week in cashing these cheques. He explained that these cheques were post-dated, and that if they were post-dated by a month he used to deduct Rs. 40 as " commission " per Rs. 1,000 from the amount for which the cheque had been drawn and pay only the balance. In his own words, " If a Rs. 1,000 cheque is cashed on 1st June, 1965, I keep Rs. 10 as commission (for one week) and give Rs. 990. " He continued such dealings with the 1st defendant for about one year. By June, 1965, he had several of these cheques which had been given by the 1st defendant and returned by the Bank. On the accumulated cheques an amount of Rs. 31,000 was due to be paid to him by the 1st defendant and when the interest was added the amount came to Rs. 33,400 odd.

He went to meet the 1st defendant several times. He put him off saying he would be taking a loan from the Bank and that he would pay the amount thereafter. Finally, the 1st defendant agreed to give him a promissory note signed by him and by his wife, the 2nd defendant, who happened to own some immovable properties, for Rs. 33,000 omitting the Rs. 400 odd out of the interest ; and the promissory note P2 was executed. He also said in evidence that whenever anyone asked for a loan, he used to lend money out of the profits he derived from his businesses which included a boutique, a bakery, a hotel and a textile shop. When he was asked the question what he did with the Rs. 25,000 or Rs. 30,000 per year which he derived as profits from these businesses, his reply was that he put it into his business, took articles on pawn and cashed cheques. He admitted he cashed cheques out of the money in the pawnbroker's shop charging what he called a " commission." He admitted that he did not keep any books of account relating to the interest he charged on the delayed cheques. He admitted that he had lent money on two mortgages and added that he had not lent any money otherwise. He, however, admitted that sometimes people used to leave cheques with him as security and he used to lend money on them and that if they failed to repay the money in time, he used to get them to give another cheque with the interest added, and that in the case of the 1st defendant he had business with him for a number of years in this manner on 20 or 30 occasions. Then, speaking of the promissory note P2, he said that the amount due at the time of the execution of the promissory note was Rs. 31,000 and that together with interest it amounted to Rs. 33,000 odd and he obtained a promissory note for Rs. 33,000.

After the plaintiff's case was closed, the defendants moved to add two further issues, namely :—

" (3) Does the evidence led so far prove that the plaintiff carries on the buiness of a money lender ?

(4) If so, can the plaintiff have and maintain this action under section 8 of the Money Lending Ordinance ? "

The 1st and 2nd defendants, giving evidence, denied the execution of the promissory note P2 but the learned District Judge has disbelieved their evidence and held that the defendants have signed P2. In the light of the expert evidence led in the case, we see no reason to disagree with the learned trial Judge's finding of fact. He has, however, answered the additional issues 3 and 4 in favour of the defendants, namely, that the plaintiff carried on the business of money lending and that he cannot

maintain this action as he had failed to maintain proper accounts in relation to the loans as required by Section 8 of the Money Lending Ordinance (Chap. 80, Volume 3 of the Legislative Enactments). Answering issue 2, he held that no sum was payable by the defendants to the plaintiff, following upon his answers to issues 3 and4, and dismissed the plaintiff's action but without costs, as the plaintiff had succeeded on the facts.

The defendants did not adduce any independent evidence of the nature or extent of the money lending transactions of the plaintiff and relied solely on the plaintiff's evidence to support these two issues and in appeal, learned Counsel for the plaintiff-appellant contends that the burden of proving that P2 is a money lending transaction and that the plaintiff is a professional money lender is on the defendants and that they have not discharged that burden. His position is that the defendants relied only on the evidence of the plaintiff to prove both these matters and that the transactions referred to in the plaintiff's evidence are not sufficient to prove either that P2 is a loan transaction or that the plaintiff is a person who carries on the business of money lending. He cites in support of his contention a passage from the judgment of Lord Devlin in *Chow Yoong Hong vs. Choong Fah Rubber Manufactory* (1961) 3 A.E.R. 1163 at 1166, where he says :—

> "The only feature of these transactions of the second group that makes it possible even to argue that they are money lending transactions is the post-dated cheques given by the defendants. These are represented in the argument for the defendants as promises of repayment and the cash paid for the customer's cheque is said to be a loan. Their Lordships are satisfied that the post-dated cheques do not affect the nature of the transaction.
>
> "Even if the post-dated cheque did produce an excess that is not "interest" within the definition unless there is a loan. As in the case of the second group of transactions, their Lordships have looked in vain in this first group for anything that can fairly be represented as lending of money by the plaintiff and the promise to repay. The fundamental error that underlies the defendants' case on both groups of cheques is that because they were, so they say, in need of ready cash, and because the plaintiff supplied them with it and made, if he did, a profit out of doing so, therefore, there was a loan and a contract for its repayment."

There is, however, another passage at page 1167 which runs as follows :—

> " If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the Court comes to the conclusion that the form of the transaction is only a sham and that what the form of the transaction is a loan which they disguised, for example, as a discounting operation, then the Court will call it by its real name and act accordingly. "

As to what is discounting and what is interest he says :—

> " When a payment is made before due date at a discount, the amount of discount is no doubt often calculated by reference to the amount of interest which the payer calculates his money would have earned, if he had deferred payment to the due date. But that does not mean that discount is the same as interest. Interest postulates the making of a loan and then it runs from day to day until repayment of the loan its total depending on the length of the loan. A discount is a deduction from the price once and for all at the time of payment. "

Now, let us consider in the light of these dicta as to whether on the evidence of the plaintiff there is an element of a loan in the transaction referred to. It is the plaintiff's evidence that he received post-dated cheques from the defendant and that he chased these cheques on the basis of a discount of Rs. 10 " as commission " (as he called it) per thousand rupees per week and he continued to do so in relation to the 1st defendant for about one year. He paid the plaintiff less than the amount represented in the cheques depending on the period resulting from the post-dating. It is possible, therefore, to take the view that this is a deduction from the price fixed once and for all at the time of payment and, therefore, not a loan at that stage, the mode of determining " the once and for all " payment being irrelevant for this purpose. If then the transaction was not a loan or a money lending transaction at that stage, does it become a money lending transaction by the subsequent execution of the promissory note P2 ? P2 no doubt, on the face of it, states that the two defendants " borrowed and received " the sum of Rs. 33,000 but it is the evidence of the plaintiff that the amount of the promissory note represents the amount due on the dishonoured cheques with interest added for the period between the date of dishonour and the date of the promissory note.

Learned Counsel for the plaintiff-appellant cites the judgment of Dalton, J. in the case of *Silva vs. Somawathie,* 31 N.L.R. 120 at 123 where following the South African case of *Rex vs. Goedhals and de Wet,* 26 S.C., 545 he holds that where a promissory note was given on an account stated, and not as security for a money lending transaction, the provisions of the Money Lending Ordinance do not apply.

In the South African case, Maasdorp, J. (at page 549) says this :—

> " To change as indebtedness for work, and in respect of agency into a loan, a contract effecting a novation must intervene. "

And later on—

> " Now, the mere fact that a debtor has given his own promissory note to his creditor for the amount of the debt certainly does not lead to the necessary inferance that the parties intended to substitute the note for the debt. What they really intended was that the creditor should have a liquid proof of his debt, which he can negotiate, if he sees fit, and upon which he can sue the debtor at maturity and that until maturity the creditor's claim should be suspended, but upon the dishonour of the note, after maturity, the creditor's claim should revive in respect of the original debt. The circumstances here held as not necessarily proving novation are the only ones proved in the present case. Time was given to the debtor, interest was charged, and a promissory note delivered. There being no novation constituting a loan, the bulk of the promissory note must be taken to have been given not for a loan, but for an indebtedness for work done and moneys paid as agent. "

Section 2 (1) of our Money Lending Ordinance (Chap. 80) refers to the " money lent " and " security made or taken in respect of money lent " and in subsection (4) says that the provisions of that section will apply to " any transaction, which whatever its form, may be substantially one of money-lending. "

Having arrived at a finding that the transactions relating to the post-dated cheques in this case are not money-lending transactions, the next question that arises is whether the promissory note P2 is a novation or has been merely given as security for the quasi-contractual obligation arising from the dishonour of the post-dated cheques. If it is a novation it will lose its character as a non-money lending transaction which it would have had otherwise acquired from the post-dated cheques transactions, and might be construed as a loan where money was " borrowed and received ", as set out in P2, in which event the defendants should

succeed. If, however, there is no novation, then P2 will be only security for the fulfilment of the quasi-contractual obligation arising from the post-dated cheque transactions, which are not loans, and P2 itself will be a non-money-lending transaction and the plaintiff should succeed.

Now, what is a novation ? Introduction to Roman-Dutch Law by Professor R. W. Lee, (5th Edition) at page 272 describes three kinds of novation, and I need consider only the first, namely, " an agreement to extinguish an existing debt and to substitute a new debt in its place " and " the effect of a novation is to discharge the old liabilities with all their incidents such as interest, real and personal securities and to purge any previous mora. "

Pothier on Obligations (Evan's Translation) Volume I, Part III Chapter 2 at page 380 describes a novation of this type as " a substitution of a new debt for an old. The old debt is extinguished by the new one contracted in its stead, for which reason, a novation is included amongst the different modes in which obligations are extinguished. " He describes it as one in which " a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former. "

The promissory note P2 nowhere says that the 1st defendant's quasi-contractual obligation arising from the cheque transactions is extinguished or that it was being entered into in consideration of being liberated from such obligations. Indeed, notwithstanding the promissory note P2, it is open to the plaintiff still to sue the 1st defendant on the quasi-contractual obligation arising from the cheque transactions. It is, therefore, clear that there is no novation and that P2 is merely security given for the fulfilment of that obligation and therefore acquires the non-money lending character of those transactions. It follows that P2 is not a money lending transaction.

As a result of the conclusion I have arrived at that the promissory note P2 is not a money-lending transaction, issue 3 as to whether the plaintiff carried on the business of money-lending and issue 4 based on it do not arise, although if that issue, too, arose for decision I would have been inclined to the view that the mere description by the plaintiff of himself as a person who takes articles on pawn and lends money on interest, which may be construed as one and the same transaction, and the general evidence of his lending money out of the profits without specific reference to the nature and number of transactions is not sufficient to establish system, repetition, and continuity, which is required for the purpose of bringing this highly penal provision into operation.

Accordingly, I set aside the judgment and decree in this case and give judgment for the plaintiff as prayed for with costs both here and in the Court below.

WANASUNDERA, J.—I agree.

ISMAIL, J.

I have had the benefit of having read the judgment of my brother Deheragoda, J. with whose views Wanasundera, J. has agreed. I regret that my views on the matters in issue in this case and the conclusions which I have arrived are not in accord with their findings. Re-capitulation of facts is not necessary as the facts that are material are sufficiently clear from the judgment of my brother. The appellants in this case place great reliance in support of their contentions that the promissory note in question did not represent a money lending transaction on the judgment of Lord Devlin in *Chow Yoong Hong vs. Choong Fah Rubber Manufactory* (1961) 3 A.E.R. 1163.

It is necessary therefore to refer to the facts of that reported case in order to appreciate the principles enunciated in that case. The plaintiff and the defendants who carried on business at Kuala Lumpur as a wholesale dealer in textiles and as a manufacturer of rubber shoes respectively, had out-station customers from whom they received out-station cheques for goods supplied. These cheques took from seven to ten days to clear, according to the station from which they came and could not be drawn on until they were cleared. The defendants, however, had an arrangement with their bank whereby for a special charge they were allowed to draw on the credit of their out-station cheques at once. On February 17th, 1958, the defendants then being in need of ready cash, the plaintiff gave them a number of his out-station cheques totalling $6,964.33 (which the defendants were able to draw on immediately under the arrangement with their bank subject to paying the special charge), the plaintiff receiving in exchange from the defendants their cheque for the same amount post-dated to February 24th, 1958. Seven similar transactions took place in February, 1958, and in each case the plaintiff in exchange for his out-station cheques received a cheque from the defendants post-dated by about a week. In March, 1958, a second group of transactions took place between the parties, this time relating to the defendants out-station cheques which usually were post-dated. Again the defendants needed immediate cash and in this second group of transactions they arranged that the plaintiff should purchase their out-station cheques at a discount calculated at the rate of 8 cents per $100 per day of the period between the date of the transaction and the maturity of the out-station cheque. Where

the plaintiff was doubtful about the credit-worthiness of the defendants out-station customer he required the defendants to give as collateral security their own post-dated cheque maturing the same day as the out-station cheque. In the course of the second group of transactions the defendants issued eight such post-dated cheques as collateral security. The sixteen post-dated cheques drawn by the defendants in favour of the plaintiff in the course of the two groups of transactions, in February and in March, 1958, were all dishonoured on presentation. In an action by the plaintiff suing on the sixteen dishonoured cheques the defendants contended that the contracts pursuant to which the cheques were issued were contracts for the repayment of money lent by the plaintiff so as to fall within the Malayan Money-lenders Ordinance, 1951, and that as the plaintiff was not a licensed money-lender and there was no written memorandum of the contracts the contracts were, under the Ordinance, unenforceable.

It was held that none of the transactions amounted to a contract for the repayment of money lent, and there was therefore no defence to the plaintiff's claim, since, with regard to the second group of transactions, their true nature was the purchase of bills at a discount which business was quite distinct from money-lending and the fact, as here, that the buyer was neither a bank nor a discount house did not alter the nature of the transaction ; and with regard to the first group of transactions, there was nothing which could be represented as a lending of money and the promise to repay it, though the plaintiff may have made a profit out of the transactions.

I have reproduced the facts in the reported case in order to illustrate the facts which determined the findings in that case. On the two groups of transactions in that case it will be seen that when payments were made on the respective post-dated cheques discount was made at the rate of eight cents per $100 per day for the period between the date of the transaction and the date of the maturity of the out-station cheques. This was the only deduction that have been made in respect of the cheques which the plaintiff transacted in that business.

In this judgment commenting on the distinction between a discount and interest Lord Devlin at page 1167 states " When payment is made before due date at a discount, the amount of the discount is no doubt often calculated by reference to the amount of interest which the payer calculates his money would have earned if he had deferred payment to the due date. But that does not mean that discount is the same as interest. Interest postulates the making of a loan and then it runs from day

to day until re-payment of the loan, its total depending on the length of the loan. Discount is a deduction from the price fixed once and for all at the time of payment." His Lordship thereafter set out the principles he had enunciated in defining the distinction between loan and interest in the following passage. "It appears to their Lordships to be very improbable that if the plaintiff was truly a money-lender and there were truly loans for which the post-dated cheques were only a form of security, he would have been content that the rate of discount which he considered remunerative should apply only until the maturity of the cheques (never in any of the 16 cases longer than the month) and thereafter, if the security proved valueless, to take until re payment only such rate of interest as the court awarded."

So that it will be seen from the conclusions of his Lordship that discount on cheques, which is completely distinct from interest, is a once and for all deduction from the capital sum for a fixed period and if the re-payment had to take place after the period of the original discount whatever the length of time that might be, it is left to the courts to award any interest for that extra period and it was not left to the lender to calculate at any specified rate of interest for that extra period.

The evidence in the instant case indicates, as is apparent from the plaintiff's evidence, that the first defendant was in the habit of selling copra to dealers in Colombo for which he got cheques from those dealers and he used to bring those cheques which were invariably post-dated by about a month. Then he would give those cheques to plaintiff who used to charge him a commission of Rs. 10 per Rs. 1,000 per week. After calculating the commission at this rate for the fixed period at which the cheques would reach maturity he would deduct that amount and pay the balance on each cheque to the first defendant. This type of dealings between the plaintiff and the first defendant went on for well over one year. By June, 1965 the plaintiff had in his hand a number of cheques which had been given by the first defendant and which have been dishonoured by the bank.

The accumulated amount due on all those cheques was Rs. 31,000 being apparently their face value. At the execution of the promissory note in question interest due on this Rs. 31,000 from first June up to date of execution of promissory note was according to the evidence Rs. 2,400. The note was thereafter drawn up on the basis that the capital sum was Rs. 33,000, the plaintiff had apparently foregone Rs. 400 odd, and was made payable on demand with interest at 18 per cent. per annum. It also appears that the face value of Rs. 31,000 due on the cheques at the time the note was drawn up apparently did not represent

the capital sums given by the plaintiff to the defendant on the post-dated cheques, but the amount advanced on those cheques, which totals to Rs. 31,000, must necessarily have been the total value of those cheques less what have been deducted as discount for a period of about one year prior to first June, 1965. It will therefore be seen that the capital sum advanced by the plaintiff on the cheques the total value of which was Rs. 31,000 was in fact a sum less than Rs. 31,000. Apparently the promissory note must have been drawn up on the basis that Rs. 31,000 was a capital sum due one those cheques and adding on to it a further Rs. 2,000 by way of accumulated interest. It is on that basis that the capital sum of Rs. 33,000 has been shown on the promissory note which has been put in suit.

In addition to the series of transactions that the plaintiff had with the first defendant for well over an year prior to first June, 1965 the plaintiff admitted that certain profits he derived from his various businesses including a bakery, hotel, textile shop, pawn-broker's establishment he used to invest those monies on taking articles which had been pawned and cashing of cheques, and when he cashed cheques he charged what he described as a commission. In addition to cashing such post-dated cheques on commission he also admitted that he loaned money on two mortgages ; he further admitted that some people (ostensibly persons other than the first plaintiff) used to leave cheques with him as security. He used to lend money on them and if they failed to re-pay the money in time he used to get them to give him other cheques with interest added to them. He also added that he had done business with the first defendant in this manner also for a number of years. He admitted that he did not keep any books of account either in respect of his transactions with the first defendant or in respect of his transactions with those other people. It is therefore clear when one considers the plaintiff's evidence in this case that he has been carrying on a business of money-lending for a considerable length of time and he had not maintained any books of account.

As I have already pointed out the sum of Rs. 33,000 which is indicated in the promissory note as the capital comprises of the face value of the several post-dated cheques given by the first defendant totalling to Rs. 31,000 and the balance Rs. 2,000 has been added on to this Rs. 31,000 by way of interest. It is also obvious that the capital Rs. 31,000 face value of the post-dated cheques given by the first defendant since the evidence clearly indicates that sums advanced on those cheques by the plaintiff to the first defendant were sums indicated on those cheques less deduction on the sums in those cheques calculated at a commission of Rs. 10 per Rs. 1,000 per week, and sums advanced on

those cheques therefore had been after deducting those sums as commission on the respective cheques for a period of one month in the first instance. Clearly therefore sums indicated as Rs. 33,000 capital sum borrowed on the promissory note is a fictitious amount. In addition the plaintiff has come into court asking for interest on those sums at 18 per cent. per annum and the accumulated interest on the promissory note exceeded the amount of the capital indicated therein and the plaintiff has restricted this claim to Rs. 66,000. These facts therefore show in no uncertain terms that the facts are completely different to the facts in the case reported in (1961) 3 A.E.R. 1163.

Applying the principles enunciated in that reported case it appears to me fairly obvious that what the plaintiff has charged in respect of each of the cheques was not a discount i.e., a once and for all deduction on the cheques but a running rate of interest depending upon the duration before payment is made on each individual cheque. The plaintiff's evidence as to how he came to arrive at the figure of Rs. 33,000 capital on the promissory note clearly demonstrates that he has never cashed those cheques at a discount but had always charged interest at a fixed rate per week till the amount on the cheques was liquidated by the first defendant. It is therefore my view that the plaintiff had entered into money lending transactions with the first defendant over a period of over an year during which period he had carried on the business of money lending in respect of each of those cheques and had charged and recovered interest on cheques which had been paid off and has now come into court claiming interest on those cheques which had not been paid off calculating interest right up to the time the promissory note was executed.

This group of transactions with the first defendant coupled with plaintiff's admission that he used to lend money to other people who used to leave cheques with him as security, and if they failed to re-pay the money advanced in time, he used to get them to give fresh cheques with interest added and his admission that he had carried on business in this manner with the first defendant on 20 or 30 occasions, clearly indicates that the plaintiff had been carrying on the business of money lending. It is common ground that the plaintiff is not a registered money lender and that he had not kept books of account reflecting those transactions.

I may add that in the reported case the plaintiff sued on the dishonoured cheques whereas in the present instance the plaintiff had not sued on those dishonoured cheques but had a promissory note executed for a sum representing the actual sum advanced on those several cheques plus whatever sum he

deducted on each of those cheques when he paid cash at a discounted rate plus a further sum of Rs. 2,000 by way of added interest. Resulting position appears to be that neither the sum of Rs. 33,000, the capital sum on the promissory note, nor the sum of Rs. 31,000 which the plaintiff admits was the face value of the cheques but not the actual amount lent by him on those cheques, represents the actual sum paid by the plaintiff to the first defendant.

The case reported in 54 N. L. R. page 246 has several features in common with the facts of the present case. In that case the promissory note in suit indicated that the capital sum borrowed was Rs. 13,062.50. This figure was made up as follows : an advance of Rs. 3,000 from the appellant personally to the respondent another advance of Rs. 5,000 from the appellant personally to the respondent, the balance Rs. 5,062.50 being commission payable on other sums advanced by the appellant or an independent company to the respondent. Considering the facts it was held that it was apparent that on the face of it the note did not comply with the provisions of section 10 of the Money Lending Ordinance, in that the capital sum actually borrowed was inaccurately stated.

Section 10 of the Money Lending Ordinance, Chapter 80, subsection 1 reads : "In every promissory note given as security for the loan of money after commencement of this Ordinance, there shall be separately and distinctly set forth upon the document—

(*a*) The capital sum actually borrowed ;

(*b*) The amount of any sum deducted or paid at or about the time of the loan as interest, premium, or charges paid in advance ; and

(c) The rate of interest per centum per annum payable in respect of such loan.

Sub-section (2) : "Any promissory note not complying with provisions of this section shall not be enforceable." The proviso to sub-section (2) indicates what relief can be given if default in compliance with this section was due to inadvertence and not to any intention to evade the provisions of this section. I shall refer to this aspect of the matter shortly.

Dealing with the facts of that reported case Rose C. J., proceeded to hold that the transactions in question were a pure and simple loan transaction and there was no account stated between the parties and that section 10 was applicable to that case and there had been a clear non-compliance with it. In the present case there is another factor which renders this note fictitious namely that the 2nd defendant, wife of the first defendant was no party to any of the transactions between the plaintiff and the first defendant. She had neither advanced nor received any monies from the plaintiff. Nevertheless she had been made

a party to the promissory note in suit for no apparent reason except that she was the wife of the first defendant and was apparently possessed of property.

In the case reported in 28 N. L. R. page 339 a promissory note had been given as security for future loans and contained a false statement in regard to the capital sum actually borrowed. It was held such a note was not enforceable. Where such false statement was the result of a deliberate act and was not due to inadvertence the court was not empowered to grant relief in terms of section 10 sub section (2) of the Money Lending Ordinance.

In the course of the judgment the Lyall Grant, J. held "It seems to me quite clear that the intention of the Legislature in enacting section 10 was to prevent a lender suing upon a note where the required particulars were falsely set out. Were it otherwise it would be easy for unscrupulous persons to avoid the effect of the section."

When one considers the facts in this case the plaintiff himself admitted in the course of his evidence that he did not enter all these transactions because he wanted to evade Income Tax (vide page 51). This admission on the part of the plaintiff that he did not enter these transactions in his Income Tax returns deliberately in order to avoid payment of Income Tax would clearly take it out of the proviso to sub-section (2) of section 10 of the Money Lending Ordinance and no relief would there be available for him under this proviso.

On summing up the evidence in this case there is no doubt no issue has been raised on the basis that the promissory note in question is a fictitious note within the meaning of section 10 of the Money Lending Ordinance. Nevertheless the evidence in this case clearly demonstrates this fact. On the facts summarised by me it is apparent that the plaintiff has been carrying on the business of money lending as a side business of his and he has systematically carried on this business of money lending on the profits he had derived from his other business ventures. There is also ample evidence in this case including the admission by the plaintiff I have referred to at page 51 that he did not enter these transactions in his books of accounts, in order to evade payment of Income Tax. This had been done deliberately by the plaintiff and was not therefore due to any inadvertence or ignorance on his part. There is also nothing in his evidence to show that he is a registered money lender within the meaning of the provisions of Chapter 80 of the New Legislative Enactments. I am therefore of the view that the learned District Judge had correctly answered the issues 3 and 4 raised by the defendant in this case. I would accordingly dismiss this appeal with costs.

Appeal allowed.