1933 *Present* : **Dalton A.C.J. and Koch A.J.**

SOCKALINGAM CHETTIAR *et al. v.* RAMANAYAKE *et al.*

59 (*Inty.*)—*D. C. Colombo, 43,649.*

Promissory note—Mortgage bond to secure future advances of money—Money lent on promissory notes—Notes fictitious and unenforceable—Bond unenforceable—Money Lending Ordinance, No. 2 of 1918, ss. 10, 13, and 14.

Plaintiffs sued on a mortgage bond, which was entered into by the defendant to secure loans given to him by the plaintiffs from time to time on promissory notes, which did not comply with the requirements of section 10 of the Money Lending Ordinance.

Held, that the bond was unenforceable to the extent of the money lent on the promissory notes.

THE plaintiffs brought this action on a mortgage bond No. 515 of July 28, 1928, to recover from the first defendant the sum of Rs. 129,415.87 alleged to be due to them on money lent on promissory notes and an I. O. U. The second plaintiff is an assignee of one of the original lenders. The second and third defendants were joined as puisne encumbrancers. The bond sets out that the first defendant had applied for loans from plaintiffs and that they agreed to make such loans up to such amount as they thought fit, upon his entering into the bond and giving the security. The plaint set out that, in pursuance of the agreement in the bond, the first plaintiff lent and advanced to the first defendant various sums of money, which were still owing and due to him on sixteen promissory notes. The second plaintiff lent similar sums of money on eight promissory notes and an I. O. U. The first defendant pleaded that only a sum of Rs. 11,600 was due to the plaintiffs and alternatively that as the notes did not comply with the provisions of the Money Lending Ordinance, the plaintiffs were not entitled to claim any sum. The learned District Judge held that in an action to recover any money due on the bond, the plaintiffs are entitled to use the notes as evidence of the loans made by them to the first defendant and gave judgment for the plaintiffs.

Hayley, K.C. (with him *Rajapakse, Yogaratnam,* and *Wijeratne*), for first and second defendants, appellants.—Where a penalty is attached to the making of a contract, if the contract is contrary to public policy it is illegal (1910 *A. C.* 514). Apart from the question of security on the bond, plaintiff can sue on a verbal promise as well as a written one. So that a money lender who incurs a penalty under the Ordinance can always tear up the note and sue on a verbal statement that the money is due. If the notes are illegal he cannot sue on the notes. He cannot also sue on the transaction on which the note was given. The whole transaction is one act and any illegal act in it makes the whole transaction void. See English Money Lenders' Ordinance; *Sterling v. Johnson* [1]; *Mertsz v. The South Wales Equitable Money Society* [2]; *Victorian Daylesford Syndicate, Ltd. v. Dott* [3]; *Cannan v. Bryse* [4]. There is no reported case in which

[1] (1923) 1 *K. B.* 557.
[2] (1927) 2 *K. B.* 366.
[3] (1905) 2 *Ch.* 624.
[4] 3 *Russell and Aldorson* 179.

a plaintiff suing in this way has been allowed to sue alternately on the money count. Where a note is invalid under the Bills of Exchange Act. *e.g.*, if it has been altered, there is some authority that plaintiff can sue on the money count. But where the note is illegal and invalid he cannot (*Ashling v. Boon*[1]. The note cannot even be used as evidence.

H. V. Perera, for plaintiff, respondent.—Even if the notes are unenforceable that would affect only the action on the notes. This is an action on the bond on money lent. Unless section 10 avoids the note altogether, the debt on the note will still exist. Section 10 only makes the note unenforceable. The action on the bond must be distinguished from a joinder of a number of causes of action on the various sums lent.

[DALTON A.C.J.—Is not this another method of enforcing the notes?]

This is not an action to enforce the various contracts of loan but the one promise to pay on the bond. There is a valid promise to pay and a legal obligation. It is not a case of money illegally due as, for instance, on a betting transaction. There are English cases on the Sale of Goods Act where similarly certain contracts are made unenforceable (*Maddison v. Alderson*[2]; *Taylor v. The Great Eastern Railway*[3]). Although a contract may be unenforceable all the legal incidents of a contract may exist (*Morris v. Baron & Co.*[4]). A contract in writing complying with all the terms of section 4 of the Sale of Goods Act can be rescinded by a later parol contract although the latter may be unenforceable by reason of non-compliance with the terms of the statute. There is a great difference between enactments which say that a contract is unenforceable and those that say that a contract is void. A contract may be made unenforceable by law for several purposes, *e.g.*, under the Registration of Business Names Ordinance (*22 N. L. R. 168*). An act might be penalized but not prohibited (*Smith v. Mawhood*[5]). This is particularly so in the case of contracts collateral to a promissory note. The adequacy of the consideration does not enter into the validity of the obligation. If a penalty is attached to the contract itself then it may be presumed that the contract itself is void.

In *Kadiresan Chetty v. Arnolis*[6] Bertram C.J. gives the reasons underlying section 10 of the Money Lending Ordinance. The object of the Ordinance is to make the borrower pay only the sum and the interest on the sum actually borrowed.

The obligation on the mortgage bond is distinct from the various obligations arising from the several promissory notes. Even if the notes are void that makes no substantial difference. It may make a difference to the burden of proof. Even if the notes are void one must recognize the obligation on the money advanced, provided such advance can be proved (*4 C. W. R. 193; Sutton v. Toomer*[7]).

Hayley, K.C., in reply.

[1] (*1891*) *1 Ch. 568.*
[2] (*1883*) *8 A. C. at 474.*
[3] (*1901*) *1 K. B. 744.*
[4] (*1918*) *A. C. 1.*
[5] *14 M. and W. 452.*
[6] *23 N. L. R. 162.*
[7] *7 Barn. and Cress. 416.*

August 1, 1933. DALTON A.C.J.—

These two appeals by the defendants have been taken together. The interlocutory appeal is from an order of December 19, 1932, directing the plaintiffs to file a statement of accounts on certain lines, and the second appeal from a final order of December 21, entering judgment for the plaintiffs, for the sum of Rs. 111,518.78, interest, and costs.

The plaintiffs, who are money lenders, brought this action on April 1, 1931, on a mortgage bond No. 515 of July 28, 1928, to recover from the first defendant the sum of Rs. 129,415.87 alleged to be due to them for money lent, on promissory notes and one I. O. U. Of this sum Rs. 129,198.50 is alleged to be principal and interest due on promissory notes, Rs. 201.87 principal and interest due on an I. O. U., and Rs. 15.50 due for noting fees. The second plaintiff is the assignee of one of the original lenders under an assignment dated the day the action was instituted. The second and third defendants were joined as puisne encumbrancers. The first defendant in his answer pleaded that only the sum of Rs. 11,600 was due to the plaintiffs at the end of 1930, with interest thereon, and alternatively that the notes did not comply with the provisions of the Money Lending Ordinance and that plaintiffs were not entitled to claim any sum.

It was further pleaded by the defendant that there was mis-joinder of plaintiffs and causes of action, which plea was upheld by the learned trial Judge when the matter came up originally for trial. The plaintiffs appealed from that decision and their appeal was allowed by this Court on January 25, 1932 (reported at 33 *N. L. R.* 319), the Court of Appeal holding, that the action being on the bond, the obligees were entitled to sue in one action to recover the aggregate amount due to them. The case thereupon went back to the District Court for trial, and was decided on December 21, 1932, whence these two appeals now are taken.

The action is brought on the bond, which is dated July 28, 1928. Up to that date there had been no transactions between the first defendant on the one side and the first plaintiff and the second plaintiff's assignor. The bond sets out that first defendant had applied for loans and that they agreed to make such loans up to such amount as they thought fit upon his entering into the bond and giving the security mentioned therein. He bound himself thereby to pay to the obligees all such sums of money as they might from time to time advance to him in respect of any promissory notes or cheques made or endorsed by him, or upon chits, tundus, or other writings made by him and given by him to them. He further bound himself not to take any plea or objection whatever against the said promissory notes, cheques, or other writings, or against the accounts of the obligees.

The plaint sets out that in pursuance of the agreement in the bond the first plaintiff lent and advanced to the first defendant various sums of money, which were still due and owing to him, at different dates on sixteen promissory notes which were set out in detail, all amounting to the sum of Rs. 72,317. To the second plaintiff was said to be due the sum of Rs. 57,083.37 said to be due on eight promissory notes and one I. O. U. of different dates. The I. O. U. for Rs. 200, although

referred to in the plaint as being marked Y, does not appear to have been produced at any time as were the promissory notes, and hence it is not necessary to say anything more about that item, since it has not been proved, and one does not know its contents.

In order to prove the amount that was alleged to be due on the bond the plaintiffs led evidence in respect of the various loans alleged to have been made, producing the promissory notes detailed in the plaint, which were taken in the ordinary course of the transactions between the parties. An issue has been framed as to whether these notes were enforceable by reason of a failure to give details required by section 10 of the Money Lending Ordinance (No. 2 of 1918), and the learned trial Judge has held that none of them are enforceable. From that conclusion no appeal has been taken. The contention of the defendants on this point does not appear to have ever been seriously contested during the trial. The learned Judge has held however that in the action to recover a sum of money due on the bond the plaintiffs are entitled to use the notes as evidence of the loans made by them to the first defendant, the fact that the notes are themselves unenforceable not preventing their use as evidence to prove the amount due on the bond. The principal point arising on this appeal is whether the learned Judge was correct in this conclusion.

Section 10 of the Money Lending Ordinance requires certain particulars to be set out in every promissory note given as security for the loan of money. The notes in question have failed to comply with the provisions of this section because some of them fail to show the amount of money deducted as interest paid in advance, and because the others that are renewal notes fail to show the capital sum actually borrowed. Under sub-section (2) the notes are therefore not enforceable, subject to the provision that relief may be given if the Court is satisfied the default is due to inadvertence.

In addition to these notes being unenforceable, section 13 of the Ordinance provides a heavy penalty for any person who takes a fictitious or blank promissory note as security for any loan. For the first offence he is liable to a fine not exceeding Rs. 500, and for a second or subsequent offence either to a fine not exceeding Rs. 1,000 or to simple imprisonment not exceeding six months. The offence is therefore one for which a heavy punishment is provided. Section 14 sets out what is a fictitious note. A note which fails to comply with the provisions of section 10, in respect of money deducted as interest paid at the time of the loan, or in respect of the actual amount of the sum advanced is a fictitious note within the meaning of section 13. Not only are these notes therefore unenforceable under the provisions of section 10, but they are notes taken as security for a loan, the taking of which is prohibited by section 13. Is it open to the plaintiffs, in their action on the bond to recover loans secured by the bond, to prove those loans made by the production of notes, the taking of which is prohibited by law ?

The learned trial Judge, in support of his conclusion that the notes are admissible for this purpose has relied on a dictum of Bertram C.J. in *Valiappa Chetty v. Silva.*[1] That case had reference to a promissory note

[1] *20 N. L. R. 340.*

in which it was alleged, on appeal, a material alteration had been made in the rate of interest after the note had been signed. No issue had been raised on this point in the lower Court and under the circumstances the Court refused to let the appellant take it for the first time in appeal. Bertram C.J. in the course of his judgment states—

> "if the point as to the effect of the alleged alteration had been then raised, there is no question that the plaintiff would have asked leave to amend his pleadings by claiming the money due apart from the promissory note, and there is no question on the English decisions that, if he had been given the opportunity, even though the note was void by the alteration, he could have used the note as evidence on what used to be called the 'money count'."

In the course of his judgment the learned Chief Justice refers to *Master v. Miller*[1] and the cases there cited. I will come back to these cases later.

That the Money Lending Ordinance prohibits the taking of these notes as fictitious notes is clear. I have no doubt also that section 13 and other provisions of the Ordinance also are for the protection of the public. In this respect there is no difference between the local Ordinance and the English Money Lenders' Act, 1900 (*63 & 64 Vict. c. 51*). In this event therefore in the words of Buckley J. (*Victorian Daylesford Syndicate, Ltd. v. Dott*[2]), the purpose of the act being a public one, the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute and is consequently illegal. The established rule of law, as stated by Bowen L.J. in *Mellis v. Shirley Local Board*[3], is and always has been that no action can be maintained on a contract which is prohibited either by the common law or by statute. Esher M.R. sets out the following rule of interpretation. Although a statute contains no express words making void a contract which it prohibits, yet when it inflicts a penalty for the breach of the prohibition, one must consider the whole act as well as the particular enactment, and come to a decision either from the context or subject-matter whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purpose of revenue, or whether it is intended that the contract shall not be entered into so as to be valid in law.

The principle is very clearly stated by Parke B. in *Cope v. Rowlands*[4]. Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. He adds that it is equally clear that a contract is void if prohibited by a statute, though the statue inflicts a penalty only, because such a penalty implies a prohibition. He continues that it may be safely laid down that if the contract be rendered illegal it can make no difference in point of law whether the statute that makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute means to prohibit the contract. This statement of the law is cited with approval by Lord Dunedin in *Whiteman v. Sadler*[5] and *Cornelius v. Phillips*[6].

[1] *Smith's Leading Cases, Vol. I., 808.*
[2] *(1905) 2 Ch. at p. 630.*
[3] *16 Q. B. D. 446.*
[4] *2 M. and W. 149.*
[5] *10 A. C. at p. 526.*
[6] *(1918) A. C. at p. 213.*

It is not suggested of course that the contract on the bond in the case before us is, as a contract, in any way illegal. What is urged for the defendants is that if any loan transaction for which the bond purports to give security is itself illegal, the bond in so far as it is security for that illegal transaction is also illegal and no obligations can flow from it. In the last case I have cited above, Lord Finlay L.C. puts the rule of law in the following way. He states that it is admitted on all hands and could not be disputed that a statutory prohibition avoids any transaction in contravention of the prohibition, as the transaction is unlawful and any transaction which forms part of it is void and can confer no rights. Lindley L.J. refers to the same principle in *Scott v. Brown, Doering, McNab & Co.*[1]. He says that no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and Smith L.J. adds that if a plaintiff cannot maintain his cause of action without showing as part of that cause of action that he has been guilty of illegality, then the Courts wll not assist him in his cause of action.

Mr. Perera for the plaintiffs argued that the obligation on the bond must be distinguished from the obligations in respect of the separate loans made from time to time. But he has to concede that to prove what is due on the bond plaintiffs have to prove each individual transaction for which the bond has been given as security, each transaction in respect of these notes being an illegal one. In the case of *Cannan & another v. Bryce*[2], one A entered into an illegal stock jobbing transaction by which he sustained a heavy loss. The defendant, who was not a partner in the transaction, lent him money to pay for that loss and in consideration of the money so lent A and another executed a bond in favour of the defendant. It was urged on behalf of the defendant that he was not a party to the illegal transaction, the loan by him was not illegal, and the securities were therefore available in law. In the course of his judgment Abbott C.J. states that if the defendant acted unlawfully in lending his money he could not have sued for recovery of payment; if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract, the bond being not less void than the contract.

Another case of the same nature is *Fisher v. Bridges*[3]. Defendant entered into an agreement to purchase land from plaintiff for an illegal object and the land was conveyed to him accordingly. He then executed a deed to secure to plaintiff the payment of the purchase price. It was not denied that the original agreement was tainted with illegality, and no action could be brought to recover the purchase price of the lands the subject of the illegal agreement. In an action on the covenant to pay, however, it was urged that the covenant was good and could be enforced at law, being under seal and no consideration being necessary. Jervis C.J. pointed out however that on the authorities, in such a case where the bond or other instrument is connected with the illegal agreement, it cannot be enforced. It was clear that the covenant was given for payment of the

[1] *(1892) 2 Q. B. 724.*

[2] *3 Barnewall and Alderson 179.*

[3] *3 El. and Bl. 643.*

purchase price, and sprang from the illegal agreement; as the law would not enforce the original illegal contract, so neither would it allow the parties to enforce a security for the purchase money which by the original bargain was tainted with illegality. The bond before us in no way springs from any illegal agreement. It was in fact executed before the illegal transactions were entered into, although the covenant therein not to take any plea or objection to any promissory note or other document is certainly under the circumstances suspicious. Even however if that suspicion be not justified, just as the law will not enforce those subsequent illegal transactions, so it seems to me will it refuse to enforce the security for those illegal transactions, the bond so far as it secures the illegal transactions being tainted with the same illegality.

By way of analogy, in support of the argument that although the notes may not be enforceable, the contract is nevertheless not void, we have been referred to several cases arising under the English Sale of Goods Act and the Statute of Frauds. Section 4 (1) of the Sale of Goods Act, 1893, requires some note or memorandum in writing of the contract of sale, otherwise, the contract shall not be enforceable. It is pointed out, however, by Bigham J. (*Taylor v. Great Eastern Railway Co.* (*supra*)) that the only effect of the non-fulfilment of the statutory conditions is that the contract is unenforceable. It is not void, and the contract being still good all the legal consequences of a contract follow, including the passing of the property in the goods to the buyer. The statute merely provides that the contract shall be proved in a certain way, otherwise it shall not be enforceable. Cases arising under sections 4 and 17 of the Statute of Frauds are in the same position. In *Lucas v. Dixon*[1] Bowen L. J. refers to the view expressed by Lord Blackburn in *Maddison v. Alderson*[2]. He states there that, although this view had not been universally accepted, it was then (1889) finally settled that the true construction of both section 4 and 17 of the Statute of Frauds was not to render the contracts under them void, but to render the kind of evidence required indispensable when it was sought to enforce the contract.

Another class of case referred is that dealing with revenue matters such as *Smith v. Mawhood* (*supra*). That was a case arising under an Excise Licence Act, which subjected to penalties any manufacturers of or dealer in or seller of tobacco who did not have his name painted on his premises as required by the Act. It was held this did not avoid a contract of sale of tobacco made by a dealer who had not complied with the terms of the law; Parke B. in the course of his judgment states that looking at the Act he thought the object of the legislature was not to prohibit a contract of sale by dealers who had not taken out a licence in accordance with the Act. The object was not to vitiate the contract itself, but only to impose a penalty on the party offending for the purpose of the revenue.

The cases relied upon by the learned trial Judge in support of his conclusion that the notes were admissible in evidence in an action on the bond, such as *Valiappa Chetty v. Silva* (*supra*), and those referred to in the notes to *Master v. Miller* (*supra*), of which *Sutton v. Toomer* (*supra*) is one, deal with promissory notes that have been materially altered. In the latter case Lord Tenterden held that although the plaintiff could not recover on the

[1] *22 Q. B. D. 357.* [2] *8 App. Cases 467 at 488.*

note itself he could recover on the count for money lent. Although the instrument had, as a result of the alteration, become void as a security, yet the original loan was not destroyed, nor were the terms on which the loan was made rendered void. It was therefore competent for the plaintiff to produce the instrument in evidence to prove the terms on which the money was deposited. Under the provisions of the law relating to bills of exchange in certain cases where a bill or acceptance is materially altered without the assent of all parties liable on the bill, it is avoided except as against a party who has made or assented to the alteration and subsequent endorsers, the alteration not however extinguishing the debt (*Byles on Bills, pp. 285, 290*). These cases are however of no assistance in the case of transactions which are prohibited by law.

To return to the facts of the case before us, if the notes that are penalized under section 13 of the Ordinance could be produced in evidence in support of a loan on what is called the money count, the provisions of the law would be evaded, and the Money Lending Ordinance would be of no force or effect. The same result would follow if the notes were allowed to be produced in evidence to prove what sums were secured by the bond now sued on. There would be no need at any time for any money lender to ask for relief in any case under any of the provisions of the Ordinance, and run the risk of his application being refused, since all he need do, if the learned Judge is correct, is to sue for a return of the money in any ordinary action for money lent, and produce the unenforceable notes as evidence of the loan.

The fact that money lending transactions in which fictitious or blank promissory notes are taken as security for a loan may be reopened under section 2 of the Ordinance does not, in my opinion, alter the effect of section 13 which prohibits and penalizes such transactions. It is possible that a borrower may have made payments in respect of such transactions which he may desire to reopen, or the lender may have parted with the security to third parties. The provisions of section 10 also in so far as it provides that notes not complying with the provisions of that section (some of which at any rate will be fictitious within the meaning of section 14) shall not be enforceable, do not alter or lessen the effect of section 13. Having held that issue 8 must be answered in the affirmative, and that the notes are unenforceable for the reasons given, thereby contravening the provisions of section 13 of the Ordinance, the learned Judge should have held that plaintiffs could not rely on them in support of their claim on the bond, since they are fictitious notes and illegal.

There is some suggestion, but no definite finding, in the judgment of the learned trial Judge that the default of the plaintiffs was due to inadvertence which, in so far as the notes failed to comply with the provision of section 10 of the Ordinance, might entitle them to be given relief under that section. He states also, in spite of his conclusion that the transactions were harsh and unconscionable and unfair between the parties, he would be inclined to give the plaintiffs relief also in respect of their failure to keep proper books of account as required by section 8 of the Ordinance. On this point I can only say that in my opinion the plaintiffs have entirely failed to show that their defaults were due to

inadvertence, or that they are entitled to any relief at all under these sections. The lenders are professional money lenders. The first plaintiff stated he had been doing business as a money lender in Ceylon for thirty years. At one time he admitted he did not know the requirements of the law in regard to the filling up of notes when a loan is made, but he had to withdraw that statement. His books admittedly do not comply with the requirements of the law so as to state clearly the items and transactions incidental to the account. The defaults, so far as the transactions with first defendant are concerned, would appear to continue throughout the time the transactions went on, and would seem to be systematic. What is the inadvertence as a result of which the defaults occurred plaintiffs do not state. I am unable to see that they are entitled to any relief on that ground.

For the above reasons, in my opinion, the appeal must be allowed. The plaintiffs having sought to prove the amount due to them on the bond, apart from the I. O. U. which has not been produced, by means of promissory notes which are illegal, their action must fail. The fact that first defendant admitted a sum of Rs. 11,600 remained due to them in respect of the illegal transactions and prayed that plaintiffs' action in excess of Rs. 12,000 be dismissed, does not in the circumstances entitle them to judgment for that sum. This action must be dismissed, with costs to the first and second defendants in both Courts.

KOCH A.J.—

The facts of this case have been very clearly and fully set out by My Lord the Acting Chief Justice, and it is needless therefore for me to recapitulate them.

The learned counsel for the appellants has raised a point of law which, although novel so far as practitioners and the Courts of this Island are concerned, is nevertheless one of utmost importance with far-reaching consequences. In brief, the position he took up was that the accumulative effect of sections 8, 10, and 13 of our Ordinance relating to money lending, viz., Ordinance No. 2 of 1918, is that any money lending transaction, which has been secured by the issue of a promissory note which fails to strictly comply with the requirements of section 10, or by a note which bears the infirmity that is set out in section 13, or if unsecured is not recorded as a loan in the manner prescribed in section 8, will not be regarded as a transaction in a Court of law, however inconspicuous may be the merits of the defence.

There can be very little doubt that Courts of law in this Island, having for a considerable time acted under decisions of English Courts such as *Sutton v. Tomer* [1], permitted a promissory note although rendered wholly invalid as a security by reason of a material alteration, &c., to be given in evidence to prove the terms on which the money secured by the note was lent. Vide *Valiappa Chetty v. Silva* [2] *Silva v. Goonewardena Hamine* [3], *Meeyan v. Salsa Bhai* [4], *Palaniappa v. Saminathan* [5], *Mohamadu Bhai v. Jmes* [6], *Kadiresan Chetty v. Arnolis* [7]. A practice in consequence gradually

[1] *(1827) 7 Barn. and Cres. 416.*
[2] *20 N. L. R. 340.*
[3] *3 Law Rec. 171.*
[4] *3 Law Rec. 76.*
[5] *17 N. L. R. 56.*
[6] *21 N. L. R. 234.*
[7] *23 N. L. R. 162.*

grew up of adding in the alternative a money count in an action, in which the primary claim was based on the promissory note sued upon. If this was not done in the first instance, very frequently the plaint was amended by the insertion of this additional count when objection was taken to the validity of the note. The practice became rooted and established to such a degree that the passing of the Money Lending Ordinance of 1918 and its introduction into the Statute Book was not considered as making any difference in the law, and the full legal effect and implications of the section now relied on by the appellants were never seriously appreciated. The argument is now strenuously pressed upon us and has to be carefully considered.

A leading case, *Cope v. Rowlands* [1], was relied on by appellants' counsel as furnishing, so far back as in the year 1836, the guiding principle that should influence the validity and legal effect of contracts entered into in connection with transactions regulated by statute. The facts briefly were that a broker, not being licensed by the Mayor and Aldermen of the City of London pursuant to *6 Anne*, c. *16*, sued for his brokerage charges. Section 4 of this Act provided that all brokers shall from time to time be admitted by the Court of Mayor and Aldermen with a proviso which imposed a fine on anyone who acted without being so admitted. Baron Parke in this case succinctly sets out the law. He laid down as perfectly settled law that where the contract the plaintiff seeks to enforce, be it express or implied, is expressly or *by implication* forbidden by common or statute law, no Court will lend its assistance to give it effect, and that the contract is equally void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition, and that it makes no difference in point of law whether the statute which makes it so has in view the protection of the revenue or ony other object. The sole question is whether the statute means to prohibit the contract.

In a case which later arose under the Pawn Brokers Act, *Fergusson v. Norman* [2] Tindal C.J. in adopting and approving the dicta of Baron Parke advanced an instance, illustrative of not intending even by implication to invalidate the contract. The case he gave was one in respect of duties imposed on pawnbrokers which are entirely collateral to the contract, *e.g.*, the instance in which his name is required to be put over the door and a penalty is given for not doing so. The pawnbroker puts up his name but spells it incorrectly, it will not follow that the contract entered into between the pawnbroker and the individual is therefore void.

In 1910 the House of Lords delivered a judgment of extreme importance on the point in the case of *Whiteman v. Saddler* [3]. Lord Dunedin cited with approval the views of Baron Parke and, in adopting the illustration given by Tindal C.J. in *Fergusson v. Norman* (*supra*), added another that may come up under the Coal Mines Act, and observes that it could hardly seriously be argued that if a mine owner had contravened one of the numerous and minute requirements of the Act, he would be disabled from recovering from his customers the price of coals which he had sold to them. He adopted the principle already referred to as laid down by

[1] *2 M. and W. 157.* [2] *5 Bing N. C. 76, 84.*

[3] *(1910) Appeal Cases 514.*

Baron Parke and Tindal C.J. and later by Buckley J. in *Victorian Daylesford Syndicate, Ltd. v. Dott* [1] and by Collins, Master of the Rolls, in *Bonnard v. Dott* [2] with the distinction that though Farwell L.J. applied the principle in the case of a contract which was expressly forbidden and made criminal by Act of Parliament, Lord Dunedin applied it by extending the principle to cases where the contract was impliedly forbidden. He drew attention to the difficulty of applying the principle in cases where nothing is said about the contract as such, but certain duties or prohibitions are imposed on certain classes of persons, and came to the conclusion that the upshot of the matter lay in each statute being judged of by itself.

In the case above referred to of *Victorian Daylesford Syndicate, Ltd. v. Dott* (*supra*), Buckley J. was of opinion that a contract which is prohibited expressly or impliedly by a statute is illegal. If expressly, it is a simple matter, but when may one say that the contract is impliedly prohibited ? If the implication depends on a penalty being imposed for doing or not doing an act, it is necessary to consider whether the penalty is imposed for the purpose not only of protection of the revenue but also for the protection of the public. The learned Judge was of opinion that the whole purpose of the Money Lenders' Act was the protection of the public. The finding in *Victorian Daylesford Syndicate, Ltd. v. Dott* (*supra*) was approved in *Bonnard v. Dott* (*supra*), Collins M.R. holding that the Money Lenders' Act of 1900 prohibited a money lender who had not registered himself as such from making any agreement with respect to the advance and repayment of money and from taking any security for money as a money lender. Any such agreement was illegal and void, and the prohibition was intended for the protection of the borrower.

I might mention that in an earlier case, *Smith v. Mawhood* [3], Baron Parke was of opinion that if the object of the legislature was to prohibit a contract, the contract would be vitiated although the prohibition was merely for the purpose of revenue. It may be noted that the distinction between this case and the one previously referred to, viz., *Victorian Daylesford Syndicate, Ltd. v. Dott* (*supra*), is that in the latter case the contract itself was prohibited for the purpose of the revenue, whereas in the former case the penalty was imposed with this object.

Atkin L.J. in a recent case, *Merxz v. South Wales Equitable Society, Ltd.* [4], was clearly of opinion that the object of the legislature in passing the Money Lenders' Act was to see that the dealings of money lenders should be open and above ground, and Bankes L.J. and Scrutton L.J. joined with them in holding that a money lender who did not comply with the Money Lenders' Act by taking the security in the registered name of the money lender as provided for by section 2, sub-section (1) (*c*) of the Act could not sue as the security was illegal and void.

The weighty decision of the House of Lords in *Whiteman v. Saddler* (*supra*) was upheld, so far as the principle laid down was concerned, in a fairly recent judgment of that Board in the case of *Cornelius v. Phillips* [5], but

[1] (*1905*) *2 Chancery 624.*
[2] (*1906*) *1 Ch. 740.*
[3] *14 M. and W. 452.*
[4] (*1927*) *L. R. 2 K. B. 366.*
[5] (*1918*) *A. C. 199.*

their Lordships drew this distinction, that where there was registration of the money lender's name but such registration was an improper one, they did not agree with Lord Dunedin that it was no registration at all, and therefore were of opinion that the plaintiff had a registered name, and as the statute sought only to prohibit dealings in a name that was not registered at all, the money lender could sue.

The legal deductions from this mass of cases, in my opinion, are as follows:—

(1) If the contract or transaction is expressly prohibited by common or statute law, it does not matter that the law which made it so had in view the protection of the revenue or any other object. The contract cannot be enforced.

(2) If the contract or transaction is forbidden by implication, *e.g.*, by the infliction of a penalty, whatever the object may be for entering into the contract, the contract is void and cannot be enforced.

(3) If the penalty is imposed for doing or not doing an act which should not be done or done at the time the contract is entered into, it is necessary to consider whether the penalty has been imposed for the purpose of the protection of the revenue or for the protection of the public. If for the former purpose, the contract may be enforced ; if for the latter, the contract is unenforceable.

(4) But if the act required to be performed is one of marked triviality and merely collateral and purely ancillary to the contract such as would come under the instances previously given, it will not follow that the contract is void and cannot be enforced.

In these circumstances it is necessary to find whether our Money Lending Ordinance, No. 2 of 1918, intended to prohibit the contract of money lending expressly or impliedly, unless the contract conformed to the requirements of the terms set out in sections 8, 10, and 13. The preamble of the English Money Lenders' Act of 1900 says that it was an Act to amend the law with respect to persons carrying on business as money lenders. Our Ordinance sets out that "it is necessary that provision should be made for the better regulation of money lending transactions". It will be seen that the formula adopted in our Ordinance is in regard to the controlling of the transaction itself and not for the purpose of revenue ; in the English Act the purpose is not set out, but nevertheless in the decisions I have quoted the English Courts were of opinion that the English Act was passed for the sole purpose of protecting the public. I think I am justified therefore in holding that the purpose of our Ordinance was also for the protection of the public.

Now although our Ordinance does not expressly prohibit a money lending transaction, it imposes penalties on the money lender for not complying with the formalities set out in sections 8 and 10. If the loan was secured by a promissory note, the note had to separately and distinctly set forth the particulars enumerated in section 10, sub-section (1). If the note failed in these respects, then under sub-section (2) the note

was not enforceable, and if the particulars required to be supplied on the note were such as are contemplated in sections 13 and 14 the money lender was guilty of an offence and liable on conviction to payment of a fine not exceeding Rs. 500, and in the event of a second or subsequent offence to a fine not exceeding Rs. 1,000 or simple imprisonment not exceeding six months.

If the transaction was not accompanied by the taking of a security such as a promissory note or other obligation, the transaction would be a simple loan and regulated by the provisions of section 8.

This section in sub-section (1) requires a regular account to be kept of each loan in the manner set out in a book paged and bound as required. If this is not done, sub-section (2) prevents the enforcement of any claim on the loan transaction. Section 9 requires the money lender to furnish the particulars in (*a*) and (*b*) to the borrower if wanted, and sub-section (2) prescribes a penalty of a fine for failure thereof. These sections in our Ordinance make it manifestly clear that the intention of the legislature was the protection of the public and made both the note and the claim on the loan unenforceable in case the money lender was guilty of breaches of the requirements I have just referred to.

Had the legislature not expressly provided for the unenforceability of claims under a loan or promissory note transaction as it has done in section 8 (2) and section 10 (2), I should still, on the strength of the decisions in the English cases enumerated by me, have arrived at the conclusion that the intention of the Ordinance by reason of its preamble, purpose, and the penalties prescribed for breaches of formalities, is to render illegal and void the contract between the parties.

The learned counsel for the respondent relied on a number of English cases, which I fear do not carry him far enough to overcome the principles set out in the decisions I have dealt with in considering the position of the appellant. He cited the cases of *Maddison v. Alderson* [1] and *Morris v. Baron & Co.* [2]. The former was considered by their Lordships in the latter case, who were of opinion that the point raised was in respect of sections 4 and 17 of the Statute of Frauds and section 4 of the Sale of Goods Act, and that the contract therefore was not void but only unenforceable. Lord Dunedin on page 24 stated that he agreed with Lord Blackburn and Brett L.J. that the contract was neither void nor illegal but the effect was to render the kind of evidence required indispensable.

The case of *Mellis v. Shirley* [3] was on a different statute, viz., the Public Health Act of 1875. This statute required "that no officer or servant of the Health Department shall be concerned or interested in any contract outside the Department, and if so he shall be incapable of holding office thereafter, and a forfeit of £50 was prescribed". It might have been supposed that there can be a penalty without a prohibition of the contract and that this was a case of only a personal prohibition enforced by a personal penalty and an outside contract was not necessarily void, but it was held however that the outside contract was void.

[1] *(1883) 8 A. C. 467.*

[2] *(1918) A. C. 1.*

[3] *16 Q. B. D. 446.*

Smith v. Mawhood (*supra*) was another case cited by him. Here a penalty was attached for a tobacconist not putting up his name over his door. It was held that the omission did not invalidate a contract of sale by him. This is one of the cases that I would bring under head 4 of my category of legal deductions, but the learned Judges also held in this case that if the intention of the legislature was to prohibit the contract although for revenue purposes, the contract would be illegal. This would come under head 1.

The case of *Taylor v. Great Eastern Railway Co.*[1] was also cited. Here the point taken was again under the Sale of Goods Act, and the case will not therefore apply.

The remaning case relied on by respondent was *Sutton v. Toomer* (*supra*) I have dealt with this case at the commencement of my judgment.

It has to be noted that both sections 8 (2) and 10 (2) empower the Court to give relief against the effect of these sections, if the Court is satisfied that the default was due to inadvertence and not to any intention to evade the provisions thereof. Can we be justifiably requested to give this relief? The plaintiffs belong to the community of Nattukotta Chetties, which has for over half a century established itself in a particular quarter of Colombo and has during this period chiefly concerned itself with money lending. To imagine that these keen business men who have their offices (kitangis) in this quarter with clerks and accountants (kanakapulles) who record the day's transactions in a very businesslike way in ledgers, journals, and cash books, have not still made themselves conversant with and appreciative of the obligations prescribed under the Ordinance, is to do injustice to their intelligence. The first plaintiff himself admits that he has been doing business in Colombo for about thirty years, and presumably the second plaintiff has also for some length of time been engaged in business here. In these circumstances I cannot bring myself to believe that their default was due to inadvertence and not to any intention to evade the provisions of the law, and am not disposed therefore to give this relief.

A further argument was advanced by counsel for the respondents and that was that a distinction should be drawn between the effect of the cases relied on by the appellants' counsel and the legal position of the respondents who were actually suing not on the promissory notes or the I. O. U. but on the covering mortgage bond that preceded the loans. It is true that two or three loans were effected on the same day as the bond, but for legal purposes these can be considered as having been made in consequence of the bond, as the security provided in the bond was to cover these transactions as well.

I must confess that I cannot appreciate such a distinction. The bond sued upon was a covering bond for future advances, on which it depended for its consideration. If the loan transactions were illegal and void, the bond would be bereft of consideration and therefore itself unenforceable. In 1918 it was argued with success before this Court

[1] (*1901*) *1 K. B. 774.*

that in the case of a bond of the description set out above the validity of the bond under the Roman-Dutch law, which is the law affecting mortgages and hypothecations in Ceylon, depended on the consideration it received by reason of actual loans made under it, and that the bond would be clothed with validity for legal effect as only from the actual date of the receipt of consideration—*Sithamperam Chetty v. Fernando*[1] This finding resulted in Ordinance No. 8 of 1918, having been passed to meet the new legal situation that had arisen, and in section 2 it enacted that where a mortgage of immovable property is given to secure future advances, such mortgages shall be effective to the full extent of the charge intended to be created thereby as against any person claiming under any subsequent mortgage or transfer, notwithstanding that no money may have been actually due at the date of such subsequent mortgage or transfer. The effect of this legislation was to protect the mortgagee and those whose rights flowed from him under the mortgage bond against the rights of others who acquired them from the mortgagor at a date subsequent to the date of execution of the covering bond, although no consideration under this bond had passed till after the acquisition of such rights in others. Both the decision referred to as well as the Ordinance left untouched the rights of the mortgagee and mortgagor to the bond as between themselves, and the mortgagor can therefore avail himself as against the mortgagee under our common law of the defence of no consideration when sued on the bond. If this plea succeeds, the bond is valueless, and if contemporaneous or subsequent loans made in the terms of the bond are invalidated, whatever the reason may be the bond cannot be sued upon owing to failure of consideration.

I am of opinion that for the reasons I have mentioned, as well as those given by My Lord the Acting Chief Justice arising from the facts set out by him that every single loan transaction made or purported to have been made by the plaintiffs is illegal and void and cannot be enforced either by itself or under cover of the bond.

This view is supported by the decision in *Bourne v. Chief Commissioner of Police*[2] where it was held on page 1098 that a plaintiff who cannot establish his cause of action without relying upon an illegal transaction must fail.

The case of *Cannon v. Bryce*[3] is even more in point. It was held in this case that if the loan was unrecoverable, the claim could not be recovered on the bond.

In view of the above considerations, I am of opinion that the appeal must be allowed, and I agree with My Lord that the plaintiffs' action must be dismissed. The appellants are entitled to costs both here and in the Court below.

Appeal allowed.

[1] *5 C. W. R. 117.*

[2] *(1910) 2 K. B. 1081.*

[3] *3 Barnewall and Alderson 179.*