1955 *Present :* Gratiaen, J., and Swan, J.

A. RASU CHETTIAR *et al.*, Appellants, *and* S. PONWANDU, Respondent

S. C. 335—D. C. Nuwara Eliya, 3,427

"Account stated"—Money Lending Ordinance (Cap. 67)—Sections 2, 3, 8, 10—Promissory note given partly as security for a renewed loan and partly for repayment of money due on a non-loan transaction—"Capital sum actually borrowed"—"Inadvertence"—"Regular account of each loan".

Plaintiffs were professional money-lenders and general merchants. The defendant carried on a business of his own, and borrowed money from time to time from the plaintiffs on the security of promissory notes. In addition, he purchased textiles from them. He in turn would deposit monies with them and transport their rice in lorries for hire. Details of all these transactions were faithfully recorded in books of account maintained by the plaintiffs. On 13th January, 1952, the plaintiffs and the defendant met for the express purpose of looking into the accounts. They mutually agreed as to the correctness of the cross items of account appearing in the plaintiffs' books of account and, after treating the items so agreed on one side as discharging the items on the other side, went on to agree that the balance only was payable. Four earlier promissory notes given by the defendant as security for loans for sums totalling Rs. 5,000 were discharged and returned to the defendant who in exchange granted in favour of the plaintiffs a fresh promissory note for Rs. 7,000 representing the total amount of his agreed liability after deducting his claims for lorry hire and sums deposited on general account as well as his various payments in settlement or reduction of liability on contracts of loan.

The present action was instituted by the plaintiffs for the recovery of Rs. 7,000 and interest due upon the promissory note dated 13th January 1952. It was contended on behalf of the defendant that the action was not maintainable on the ground of non-compliance with the requirements of sections 10 and 8 of the Money Lending Ordinance. The defendant also asked that the transactions between himself and the plaintiffs be reopened, and an account taken, under section 2. It was submitted that inasmuch as the promissory note was given partly to secure four "renewed" loans amounting to Rs. 5,000 it could not be enforced unless there was entered on the face of the document a statement as to "the capital sum actually borrowed" under the loan transaction; in other words, the promissory note for Rs. 7,000 ought clearly to have indicated that it was partly given to secure four "renewed" loans amounting to Rs. 5,000.

Held, that what took place between the plaintiffs and the defendant on 13th January 1952, immediately before the promissory note for Rs. 7,000 was signed, represented an "account stated" (as opposed to "a mere acknowledgment of a debt"). Therefore, the promissory note was not given, either wholly or in part, "as security for a loan" within the meaning of section 10 of the Money Lending Ordinance. But, although the earlier debts were extinguished by reason of "the account stated", the statutory right to have the loan transactions reopened under section 2 of the Money Lending Ordinance was kept alive for six years commencing from 13th January 1952.

Held further, (i) that, assuming that the transaction of 13th January 1952 could not be regarded in law as an "account stated" and that the promissory note for Rs. 7,000 contravened the requirements of section 10 of the Money Lending Ordinance, the omission to insert the capital sum borrowed in regard to the renewed loans amounting to Rs. 5,000 was due to inadvertence within the meaning of section 10 of the Money Lending Ordinance. "Inadvertence" is wide enough to cover errors of non-compliance made in good faith through a mistaken interpretation of the law.

(ii) that a money lender who enters in his books loan transactions as well as non-loan transactions in such a manner that the transactions are separable from one another keeps " a regular account of each loan " within the meaning of section 8 of the Money Lending Ordinance.

APPEAL from a judgment of the District Court, Nuwara Eliya.

H. V. Perera, Q.C., with *N. Kumarasingham* and *P. Nagulcswaram*, for the plaintiffs-appellants.

S. Nadesan, Q.C., with *T. K. Curtis* and *Frederick W. Obeyesekere*, for the defendant-respondent.

Cur. adv. vult.

November 10, 1955. GRATIAEN, J.—

The plaintiffs, who carry on business in partnership at Udapussellawa, sued the defendant in this action for the recovery of Rs. 7,000 and interest upon his promissory note dated 13th January 1952 in their favour. The defendant, having disputed liability on the merits, pleaded that in any event the action was not maintainable for non-compliance (so he alleged) with the requirements of sections 8 and 10 of the Money Lending Ordinance. He also asked that the transactions between himself and the plaintiffs be reopened, and an account taken, under section 2.

The learned District Judge rejected as entirely false the defendant's version of the circumstances in which the promissory note was granted. He accepted the evidence of the 1st plaintiff and of his witness Nagaratnam Pillai but decided, with regret, that the action must be dismissed because in his opinion (1) the plaintiffs had not kept " a regular account of the loan " as required by section 8 of the Ordinance and (2) the note sued on did not comply with the provisions of section 10.

The plaintiffs are professional money-lenders and general merchants. The defendant carried on a business of his own, and borrowed money from time to time from the plaintiffs on the security of promissory notes. In addition, he purchased textiles either from their shop or from an establishment owned by them called " Kathiresan Cash Stores ". He in turn would deposit monies with them and transport their rice in lorries for hire. Details of all these transactions were faithfully recorded in books of account maintained by the plaintiffs.

The evidence which the learned Judge has accepted proves that the 1st plaintiff (on behalf of his firm) and the defendant met on 13th January 1952 for the express purpose of looking into accounts. Nagaratnam Pillai who was present at the time states that " the interest and other particulars were looked into ", and in due course the defendant signed a document P2 incorporating an agreed statement as to how their accounts stood at that date. According to P2, the defendant owed the plaintiffs (1) Rs. 5,000 being the aggregate principal amount of four earlier promissory notes which he had given them as security

for loans, (2) Rs. 611·40 on another current account and (3) Rs. 1,106·93 due to the "Kathiresan Cash Stores" owned by the plaintiffs. These figures represent the balances struck and mutually agreed upon in respect of the cross items appearing in the plaintiff's books of account marked P3, P4, and P5 respectively. The document P2 also contains a record of the fact that on the date on which these various accounts were looked into a further sum of Rs. 194·17 was advanced to the defendant whose agreed liability thus amounted to Rs. 6,912·50. On this basis, the earlier promissory notes for sums totalling Rs. 5,000 were discharged and returned to the defendant who in exchange granted in favour of the plaintiffs a fresh promissory note for Rs. 7,000 representing the total amount of his agreed liability (together with Rs. 87·50 which was admittedly retained by the plaintiffs as interest in advance for 30 days at 15% interest). This is the promissory note P1 sued on in the present action. It was attested by the witness Nagaratnam Pillai after the defendant had confirmed in his presence that "the amount was correct".

Although the learned Judge accepted this version of the circumstances in which the promissory note P1 was signed, he rejected the argument that it represented security for the amount of the defendant's liability to the plaintiffs upon an "account stated". He decided that, on the contrary, the note was given partly as security for the "renewal of loans" within the meaning of the section 10 (6) of the Money Lending Ordinance. The basis of this decision was that, as Rose C.J. held in *Rodger v. de Silva* [1], there had been "no more than a looking into the accounts between the parties and not an account stated in the technical sense of the term."

With great respect, I think that what took place between the 1st plaintiff and the defendant on 13th January 1952 immediately before the promissory note P1 was signed represented a very clear example of an "account stated" (as opposed to "a mere acknowledgment of a debt"). The true distinction was explained by Lord Atkin in *Siquera v. Noronha* [2], and was clarified by Lord Wright in *Firm Bush Chand v. Seth Girdhari et al.* [3]:

> "The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable: *such a transaction is in truth bilateral, and creates a new debt and a new cause of action.*"

This authoritative decision of the Judicial Committee has finally disposed of the earlier theory that an "account stated" can arise only in transactions where there have been either "cross items of claim" as opposed to mere "cross items of debit and credit." *Annamalai Chetty v. Thornhill* [4]. As it happens, the relevant pages in the Account Book P2 contain items of both kinds, for instance, the defendant's claims for lorry hire

[1] *(1952) 54 N. L. R. 216.*
[2] *(1934) A. C. 332.*
[3] *(1934) 50 T. L. R. 465.*
[4] *(1935) 36 N. L. R. 358.*

and sums deposited on general account as well as his various payments in settlement or reduction of liability on contracts of loan. In respect of all these transactions, a balance was struck and an account stated, so that the earlier items of credit and debit were *pro tanto* extinguished and the balance only was mutually agreed to be due by the defendant. Moreover, the final entries in P2, P3, P4, and P5 make it clear that this was in fact the intention of the parties: the defendant's liability under each head of account was recorded as settled in full, and his earlier promissory notes given "as security for loans" were cancelled and returned to him. The promissory note for Rs. 7,000 which is the subject matter was therefore given as security for the "new debt" created in the place of the earlier liabilities which had been extinguished.

It follows from this analysis of what took place that the promissory note P1 was not given, either wholly or in part, "as security for a loan" within the meaning of section 10 of the Money Lending Ordinance. The circumstance that the amount of the new debt happened to include a sum equivalent to the principal amounts due under earlier money lending transactions does not alter the substance of the later transaction. Per Soertsz J., in *Marikkar v. Supramaniam Chetty* [1]. This does not mean, however, that the defendant thereby lost the remedy which was previously open to him under section 2 of the Money Lending Ordinance if (for instance) he could prove that the earlier loan transactions had been "harsh and unconscionable", or induced by undue influence. Although the earlier debts were extinguished by reason of "the account stated", the statutory right to have the loan transactions reopened was kept alive for six years commencing from 13th January 1952 (vide section 3). But the learned Judge has correctly decided upon the merits that there were no grounds upon which this remedy could be established.

But let it be supposed that no account was "stated" (in the strict sense of the term) on 13th January 1952, and that the promissory note sued on was in truth given partly as security for the original loans aggregating Rs. 5,000, and partly for the repayment of sums due on "non-loan" transactions. Does it follow that section 10 of the Money Lending Ordinance applies to the case?

Section 10 (1) refers to promissory notes given as security for "the loan of money", and section 10 (6) makes these provisions equally applicable to "renewals of any loan". It is clear enough that the singular includes the plural in this context, so that the section also applies to a note given as security for more than one loan, or for the renewal of more than one loan. But the real difficulty arises when a note is given not merely as security for a loan but also for the repayment of money due on some other genuine (as opposed to merely colourable) non-loan transaction. Mr. Nadesan argued that a comprehensive note given in such a situation cannot be enforced unless there is entered on the face of the document a statement as to "the capital sum actually borrowed" under the loan transaction; in other words, the promissory note for Rs. 7,000 ought clearly to have indicated that it was partly given to secure four "renewed" loans amounting to Rs. 5,000.

[1] *(1943) 44 N. L. R. 409 at 430.*

Our combined researches have failed to bring to light any earlier decision of this Court in which this special problem has been discussed. The issue might well have arisen in *Rodger v. de Silva* (supra) where a promissory note for Rs. 13,062·50 had been given partly to secure the plaintiff's loans to the defendant and partly to secure a sum of Rs 5,062·50 due to the plaintiff as commission on other loan transactions negotiated by him for the defendant's benefit. But the Court decided that, on the facts of that particular case, " all the transactions were pure and simple loan transactions between the parties ". For this reason, and because there was no " account stated ", section 10 was held to apply.

I am not at all convinced that the draftsman of the Ordinance had in contemplation transactions other than what Rose C.J. described as " pure and simple loan transactions ". Even section 2 (4) makes it clear that a Court's jurisdiction to reopen a money lending transaction was extended to " any transaction, which, whatever its *form* may be, is *substantially* one of money lending. " This provision protects a borrower who has in truth borrowed money upon a colourable transaction which was designedly clothed in the disguise of a non-loan transaction. But the Ordinance does not provide expressly for promissory notes given in respect of several transactions only some of which can properly be described as contracts of loan.

I see no necessity to decide for the purposes of the present appeal whether Mr. Nadesan's argument is necessarily correct. Suffice it to say that, upon the learned Judge's findings of fact, the plaintiffs were not actuated by any sinister motives when they did not mention in the marginal column of the promissory note for Rs. 7,000 that the total consideration included principal sums aggregating Rs. 5,000 due on the earlier notes. If an honest money lender were to seek legal opinion as to what form a promissory note should take in a situation such as has arisen here, he might well receive conflicting advice. Some lawyers, adopting the view of Abrahams C.J. in *Abeydeera v. Ramanathan Chetty* [1], might consider that there had been "a notional lending and borrowing" of Rs. 7,000 (not merely Rs. 5,000) when the accounts were looked into on 13th January, 1952; others might prefer the view of Soertsz J. in *Marikkar's case* [2] " that a transaction cannot be a non-loan transaction in reality and a loan transaction notionally any more than a thing can both be and not be "; yet another lawyer might think that the solution lies in the interpretation now suggested by Mr. Nadesan. Whichever view be correct, the legislature did not intend that an honest creditor, finding himself in this predicament, must discover the true answer at his peril. It is in just such a situation that the Court is empowered to grant relief under section 10 (1) of the Ordinance :

" Provided that in any case in which the Court shall be satisfied that the default was *due to inadvertence and not to any intention to evade the provisions of this section*, it may give relief against the effect of this subsection on such terms as it may deem just."

[1] *(1936) 38 N. L. R. 389.*

[2] *(1913) 17 N. L. R. 409 at 430.*

The earlier authorities as to the meaning of "inadvertence" in this context are not, perhaps, capable of perfect reconciliation. A professional money lender who deliberately refrains from advising himself as to the requirements of the Ordinance will not obtain relief if he fails to comply with some simple provision which no layman could misunderstand. On the other hand, "inadvertence" is certainly wide enough to cover errors of non-compliance made in good faith (i.e., after due care and attention) through a mistaken interpretation of the law.

I would respectfully adopt the interpretation given to the proviso by Garvin J., in *Fernando v. Fernando* [1]. The word "inadvertence" is sharply contrasted with the words "and not to any intention to evade the provisions of this section", so that "the act which the law intends to penalise was the *intended evasion of the provisions of the section.*"

It is unnecessary to decide whether the promissory note sued on does in fact contravene the requirements of section 10. Even upon the assumption that it does, I am perfectly satisfied that all the circumstances show a complete absence of bad faith on the part of the plaintiffs. The note was taken as security for sums actually due and agreed to be due to them, and any suggested non-compliance with the requirements of section 10 was unintentional and therefore "inadvertent".

Finally, I cannot agree with the learned Judge that the book P2 does not contain "a regular account of each loan" (within the meaning of section 8) in respect of which the earlier promissory notes amounting to Rs. 5,000 had been given. It is true that the various pages in which particulars of these loans were contemporaneously recorded also contain details of other transactions between the parties. But the loan transactions and the non-loan transactions are separable one from the other, and section 8 nowhere prohibits a professional money lender from keeping his books in such a way that they would show at a glance the exact amount of his debtor's liability upon a running account (including, but not confined to, loans). Mr. Nadesan pointed out that P2 does not specifically state how much interest was deducted at the time when each loan was originally granted. That is true, but P2 does contain in each case a cross reference to a relevant page in another account book in which particulars of "interest deducted" have been regularly recorded. The latter book is also "paged and bound in such a manner as not to facilitate the elimination of papers or the interpolation and substitution of other pages."

For all these reasons, I have reached the conclusion that (whether or not the Ordinance applies to the facts of this particular case) the appeal should be allowed. I would enter judgment in favour of the plaintiffs as prayed for with costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.

[1] (1934) 36 N. L. R. 77.