1933 *Present :* **Macdonell C.J.**

DEWASURENDRA *v.* DE SILVA.

36—C. R. Galle, 11,737.

Money lender—Business of money lending—Systematic and continuous—Failure to keep books—Money Lending Ordinance, No. 2 of 1918, s. 8.

Where a person supplemented his income by money lending, which was proved to be systematic and continuous,—

Held, that he was carrying on the business of money lending.

Where the failure of a money lender to keep books of account was an act of deliberate omission,—

Held, that such failure cannot be said to be due to inadvertence within the meaning of the proviso to section 8 (2) of the Money Lending Ordinance.

THIS was an action to recover money due on a promissory note. Plaintiff, who was a man of means, supplemented his income by investing in loans. The question was whether plaintiff was carrying on business as a money lender within the meaning of section 8 of Ordinance No. 2 of 1918, and, if so, whether the note was unenforceable in view of his failure to keep books of account. The learned Commissioner of Requests held that the plaintiff was not a money lender within the meaning of the Money Lending Ordinance.

L. A. Rajapakse (with him *S. Alles* and *J. R. Jayewardene*), for defendant-appellant.—Whether plaintiff is a money lender or not is a question of fact. Evidence clearly shows plaintiff has lent money on about twenty occasions within 2 years. Therefore a certain degree of system and continuity can be seen in the transactions. They are not isolated transaction. (*Fagot v. Fine*[1].) Once this onus is discharged by defendant, then plaintiff is a money lender, and action is unenforceable unless he comes under section 8 (2) (*a*) and (*b*) of Ordinance No. 2 of 1918. Onus is then on plaintiff. He must prove both (*a*) and (*b*). These are not alternative provisos. (*218—D. C. Colombo, 29,912; 18.12.129*). See also *Ramen Chetty v. Renganathan Pillai*[2]. The word " inadvertence " was interpreted in those cases. Plaintiff's statement that he was ignorant of the law and did not keep books is so excuse; that is not inadvertence.

Nadarajah (with him *E. B. Wikremanayake*), for plaintiff-respondent.—Money Lending Ordinance is aimed primarily at money lenders like Afghans and Chetties. Whether any other person is a money lender is a question of fact. Plaintiff, a Sinhalese landed proprietor, supplemented his income by occasional loans on mortgage bonds and promissory notes. His chief occupation is not money lending (*Newton v. Pyke*[3]).

[1] *105 Law Times 583.*
[2] *28 N. L. R. 339.*
[3] *(1908) 25 Times Law Reports 12, see extract in 35 Empire Digest, p. 202, s. 282.*

Plaintiff in any case can come under provisos in section 8. *Re* proviso (*a*) plaintiff was not aware of the law and did not keep books; that is inadvertence.

Rajapakse, in reply, cited Edgelow *v. MacElwee* [1].

March 8, 1933. MACDONELL C.J.—

This case was before the Court on a previous occasion but was sent back to the learned Commissioner to ask him to take certain additional evidence so that it might be decided whether the plaintiff was or was not carrying on the business of a money lender at the time of bringing this action.

At the first hearing before the learned Commissioner he was satisfied on the facts that the amount claimed by the plaintiff was really owing by the defendant. That is a finding on fact from evidence before him upon which I do not propose to comment, because I think the case can be decided independently of that finding of fact.

The point taken both at the trial, since it is specially mentioned in the issues, and also in this appeal, is that the plaintiff carries on the business of a money lender within section 8 of Ordinance No. 2 of 1918, but that he has not kept a regular account of his loans entered up in a book such as that section requires. If the plaintiff is carrying on the business of a money lender and has not kept a proper book as required by the section, then under that section he cannot recover unless he can bring himself within the proviso to that section. The case was sent back to obtain evidence on these points.

We now have the evidence of the plaintiff taken in accordance with that direction and it shows that since the beginning of 1929—this case was instituted on September 1, 1933—he has himself instituted twenty-two money cases in the local Courts. He admits himself that he has lent money to teachers, clerks, pensioners, proctors, and others. I do not take into account the case which was sought to be put in evidence (C. R., 11,923), because I am doubtful how far it can be used against the plaintiff. If it was sought to use it against the plaintiff, specific portions of the evidence in that case ought to have been put to him and he ought to have been asked to deny or admit the same. But taking his own evidence and the number of promissory note cases that he instituted in the 2½ years between the beginning of 1929 and September, 1931, I think one is justified in saying that there is evidence of system and continuity which seems to be the test, or at any rate a test, whether a particular business is being carried on or not.

I must respectfully disagree with what the learned Commissioner says that because the plaintiff is one of those well-to-do men who supplement their income by investing in loans, therefore he cannot be a money lender. I doubt the logical cogency of such a position since it is clearly quite possible for a man to be well-to-do in other respects, any yet to supplement his income by very definite money lending.

[1] (*1918*) *1 K. B. 205.*

Then there is the question of his not having kept books. His evidence on that is that he began to keep books about a month before the institution of this action as he came then to know that the law required the keeping of regular books. He says that he now does keep regular books but he did not produce any in Court. He seeks to come under the proviso to section 8. Sub-section (*b*) in that proviso may be held to be covered by the learned Commissioner's finding on the facts, but to win his case the plaintiff must also bring himself within the (*a*) part of that proviso, namely, that his failure to keep books was due to inadvertence and not to any intention to evade the law. He says that he at first did not know that the law required the keeping of regular books. I do not think such a plea can be accepted. Everybody is expected to know the law, and it is not a very unreasonable or unprecedented provision that a person should keep proper books of his business whatever that business may be. If a person carries on the business of money lending, it is his clear duty to find out what the law says as to that business. Two cases have been cited to me on the question of inadvertence—*28 N. L. R. 339* and an unreported case ** 218—D. C. Colombo, 29,912* of December 18, 1929. I would refer particularly to the latter of those two cases which speaks of a deliberate election not to keep books. I would almost be prepared to say that this seems to be a similar case. But I would also point out that there is such a thing as a deliberate omission as well as a deliberate act of commission, and when you find a person carrying on such a business as is evidenced by the number of cases that he brought and that he yet fails to keep any books, I think it is impossible to plead that there was in his case inadvertence. Anyway, the balance of probability is that the omission was rather of the deliberate nature. If that is so, then I cannot hold that he was covered by the provisions in section 8 and if that is so, then by the provisions of that section he cannot recover.

The appeal must be allowed with costs, and judgment entered for the defendant with costs in the Court below.

Appeal allowed.

* SAMINATHAN CHETTY *v.* WIDIYARATNA

S. C. 218—D. C. (Inty.) Colombo, 29,912.

December 18, 1929. DALTON J.—

The plaintiff who was successful in the lower Court sued the defendant on a promissory note which was alleged to have been made by the defendant dated May 12, 1928. The defence to the claim was that there was no consideration on the note although it had been signed by the defendant. There was a further defence under the provisions of section 8 of the Money Lending Ordinance of 1918, the defendant pleading that the plaintiff was a money lender and kept no books as required by the provisions of that section and that therefore the plaintiff's claim was not enforceable. The learned District Judge has given judgment for the plaintiff under the latter part of the section.

The plaintiff admits that he did not keep books of account from 1926 until the end of 1928. In the course of his evidence he says he is a registered money lender having registered his business in 1918, and that that registration has continued until the action was brought. He also says he has been carrying on business continously from 1918, that he kept books up to 1926, that these books were lost in India, and that during the interval from 1926 to December, 1928, he kept no books as he did not carry on business, after he lost his books in India, on a large scale.

In another place in his evidence he says he did not do much business after he lost his books in India. It is therefore conceded by the plaintiff that at the time this note was given he kept no books of account at all. The Advocate appearing for him therefore sought relief for him under the provisions of section 8 of the Money Lending Ordinance. That section provides that any person who carries on the business of money lending shall keep or cause to be kept—and in this case the plaintiff admits he had a kanakapulle in his employment—a regular account of each loan, clearly stating in plain words the transaction and enter it in a proper book as dscribed in the section. If he fails to do that he shall not be entitled to enforce any claim in respect of any transaction in respect of which default shall have been made. It is admitted in respect of this transaction that default has been made. The section, however, goes on to provide that the Court may give relief against any such default (*a*) if the default was due to inadvertence and not any intention to evade the provisions of the section, and (b) that other material be produced whence the transaction may be satisfactorily proved. In this case the learned District Judge in the lower Court has apparently read these two sub-sections as alternative. He has found that a certain document produced by the plaintiff, document P3, entitled the plaintiff to the relief he claims inasmuch as that document, he says, sets out the transaction of this particular loan. The learned District Judge, however, has not dealt with the question of any default being due to inadvertence as provided by sub-section (*a*).

Mr. Rajapakse, for the plaintiff-respondent, has urged that although the learned District Judge has not dealt with any question of the default being due to inadvertence the evidence does disclose that the act of the plaintiff in failing to keep books was due to inadvertence. He has failed to convince me that there is any evidence whence one might conclude that the failure of the plaintiff to keep books was due to anything that could possibly come under the term "inadvertence". He says that there has been no deliberate choice not to keep books but that during this interval of time during 1926 and December, 1928, a friend came to the plaintiff, that friend being the defendant, and asked him for a loan. In other words, he argues that he was not at that time carrying on the business of money lending at all but that this is an isolated loan by a friend to friend which could not possibly come within the words "carrying on the business of money lending". The evidence of the plaintiff himself clearly shows that this is not an isolated transaction during this interval of time. He says he was not carrying on business during this interval on a large scale and that he was not doing a large business. He admits he was carrying on the business of money lending.

The meaning of the word "inadvertence" has already been dealt with by this Court in the case of *Ramen Chetty v. Renganathan Pillai*[1] when a question arose under section 10 of the same Ordinance. I do not propose to set out what the Court held to be inadvertence, but taking the words used in the judgment and taking the word "inadvertence" to mean exactly the opposite of deliberate election, it seems to me the evidence in this case discloses that the plaintiff so far from inadvertently not keeping books deliberately elected not to keep books because he was not carrying on a large business. He is therefore not entitled to the relief which the law says people who fail to comply with the provisions of this section are entitled to. Whether or not the defendant is an honest man or a dishonest man does not enter into the matter at all. The Legislature has provided that in certain cases certain things shall be done by persons carrying on the business of money lending. If they do not do those things, they can get relief on certain conditions. If they cannot show to the Court that they are entitled to that relief—and here it seems to me the plaintiff has not shown to the Court that he is entitled to that relief—then the law that we have to administer says he shall not be entitled to enforce his claim in respect of the transaction in which default shall have been made. Under the circumstances here I think the defence must succeed, having regard to the plain admissions of the plaintiff.

Under those circumstances the appeal must be allowed and the plaintiff's action dismissed with costs in this Court and in the Court below.

LYALL GRANT J.—I agree.

[1] *28 N. L. R. 339.*