1943 *Present :* **Howard C.J., Soertsz, Keuneman, de Kretser and Wijeyewardene JJ.**

MARIKAR Appellant, *and* SUPRAMANIAM CHETTIAR, Respondent.

147—D. C. Puttalam, 4,755.

Money Lending Ordinance (Cap. 67), Sec. 2 (1) (a) (b) (c), Sec. 10 (2) and Sec. 14—Action to reopen money lending transaction and to set aside promissory note—Counterclaim by defendant—Defendant in default under the Business Names Registration Ordinance—Right of defendant to counterclaim—Powers of Court—Where note is unenforceable or fictitious—Right to recover compound interest in Ceylon—Roman-Dutch law—Prescription—Civil Law Ordinance, Cap, 66, Sec. 5.

Where the plaintiff sued the defendant to set aside a promissory note made by the plaintiff in favour of the defendant, the reopening of certain transactions and the taking of an account between himself and the defendant,—

Held (by the whole Court) that the defendant, even if he had made default in furnishing particulars under the Business Names Registration Ordinance, may enforce by way of counterclaim his claim against the plaintiff in virtue of section 9 (1) (c) of the Business Names Registration Ordinance.

Held, further (by the whole Court)—

Where an account was stated six years before the date of the action, the reopening of that transaction is barred by section 3 of the Money Lending Ordinance.

Per HOWARD C.J., SOERTSZ AND DE KRETSER JJ. (KEUNEMAN AND WIJEYEWARDENE JJ. dissentiente).—Compound interest is recoverable under the law of Ceylon, although the question of such a charge may be considered on the reopening of a transaction.

Per KEUNEMAN AND WIJEYEWARDENE JJ.—The principle of the Roman-Dutch Law disallowing compound interest, even where it is expressly stipulated, is in force in the Island and has not been repealed by section 5 of the Civil Law Ordinance.

Per HOWARD C.J.—Where an account is taken with regard to an old loan and a new note is given there is a renewal of a loan and failure to state the amount of the capital sum borrowed renders the note unenforceable by reason of section 10 (2) of the Money Lending Ordinance.

In such a case where there is evidence that, when the note was given, an account was taken, the Court has jurisdiction to adjudge what is fairly due on the note.

Per KEUNEMAN AND WIJEYEWARDENE JJ.—A note in regard to which the capital sum lent has been augmented from time to time with the addition of interest and a fresh note given so as to carry compound interest is a fictitious note within the meaning of section 14 of the Money Lending Ordinance.

In such a case the Court has power to reopen the transaction under section 2 (1) (*a*) (*b*) (*c*) of the Money Lending Ordinance.

Per SOERTSZ AND DE KRETSER JJ.—The note in question created a debt different from a debt due on a loan of money within the meaning of section 10 inasmuch as it was given to secure the amount outstanding on an account stated ; it was not a fictitious note within the meaning of section 14.

It was, however, open to the Court to order the reopening and the taking of an account within the period fixed by section 3 as the notes were given to secure the amount found due on an account stated in respect of money lent and were thus within the purview of section 2 of the Money Lending Ordinance.

THE plaintiff instituted this action for the reopening of certain transactions, the taking of an account between himself and the defendant, the setting aside of a promissory note marked A dated January 13, 1936, made by the plaintiff in favour of the defendant and for judgment in his favour for any excess paid by him to the defendant.

The plaintiff stated that there had been dealings between them for many years and that in 1931 an account had been taken, and that he had transferred property to the defendant to the value of Rs. 133,000 in liquidation of his liability, leaving a balance of Rs. 27,672 for which the plaintiff gave the promissory note P 29 on June 29, 1931. Later he was persuaded to sign promissory note P 30 on June 18, 1933, for Rs. 37,444.69, which included the capital sum of Rs. 27,672 on P 29, a sum of Rs. 2,000 paid to a Proctor for professional services and Rs. 7,772.69 interest. A further promissory note A was taken from plaintiff on January 13, 1936, made up of the amount of P 30 and the interest on it, the total on note A amounting to Rs. 56,833.82. The plaintiff prayed that the Court do reopen the transactions and take an account between plaintiff and defendant under section 2 of the Money Lending Ordinance and set aside the promissory note. The defendant prayed for dismissal of the plaintiff's action and in reconvention claimed judgment on the amount due.

In his replication plaintiff alleged that the promissory note A was fictitious within the meaning of section 14 of the Money Lending Ordinance and further stated that defendant could not maintain his counterclaim because he failed to comply with the provisions of the Business Names Registration Ordinance. The District Judge held that the settlement in 1931 could not be reopened because it took place more than six years before action. He further held that note A offended against the provision of section 10 of the Money Lending Ordinance and that it was unenforceable. He also held that, though note A was unenforceable, he should exercise his discretion in the interests of the defendant and order that the transaction should be reopened and an account taken.

As regards the objection under the Business Names Registration Ordinance the District Judge held that it was competent for the defendant to make a counterclaim under section 9 (1) (c) of the Ordinance.

N. Nadarajah, K.C. (with him *C. E. S Perera, Dodwell Gunawardene* and *E. A. G. de Silva*), for the plaintiff, appellant.—This is an action for accounting under section 2 of the Money Lending Ordinance (Cap. 67). Money lending transactions between the plaintiff and defendant commenced in the year 1920. The plaintiff instituted action on March 10, 1938, asking for the reopening of all the previous transactions and for judgment against the defendant for any excess paid to him. Defendant denied liability and counterclaimed the sum of money due to him on promissory note "A". The plaintiff filed replication stating, *inter alia*, (1) that the promissory note "A" was fictitious and (2) that the defendant had not registered the particulars required by section 4 (1) of the Business Names Ordinance (Cap. 120) and therefore could not sue on note "A".

With regard to the question of registration the evidence is clear and strong that the defendant was, on the date when note "A" was made, carrying on business at Puttalam in partnership with Letchumanan

Chettiar. This fact was not disclosed when the business name was registered. The evidence further establishes that the same firm was carrying on business in Colombo. This particular too, was not disclosed. The provisions, therefore, of section 4 (1) (*d*) of Cap. 120 have not been complied with. In the circumstances section 9 (1) of that Ordinance debars the defendant from suing on note "A"—*Subramaniampillai v. Wickremasekere, et al.*[1]; *David v. de Silva*[2]; *Jamal Mohideen & Co. v. Meera Saibo, et al*[3]. Proviso (*c*) of section 9 (1) cannot help the defendant because the words "any other party" apply only to third parties and not to parties to the contract—*Daniel v. Rogers*[4]; *Daniel v. Rogers*[5]; *Hawkins, et al. v. Duche*[6] which is referred to in *Fernando et al. v. Jayasinghe*[7].

Where it is apparent that in an accounting under section 2 of the Money Lending Ordinance (Cap. 67) the money lender will be entitled to judgment for any sum of money by virtue of a promissory note, no sum will be awarded to the lender where the promissory note is fictitious under section 14 of the Ordinance. Promissory note "A" does not state the truth regarding the rate and nature of the interest charged. It does not set out the capital sum actually borrowed. Although in fact it was a renewal of an old loan the amount of the original loan is not stated. There was a "collateral transaction entered into with a view to disguising the amount". The provisions of sections 10, 13 and 14 of the Cap. 67 are applicable, and the claim on note "A" should be dismissed. The learned District Judge has misapplied the ruling in *Sockalingam Chettiar v. Ramanayake et al*[8]. In the present case there was no claim by the defendant except the one based on the promissory note. There was no issue on a money count. There is a distinction between fictitiousness under section 10 and fictitiousness under sections 13 and 14—*Wickremesuriya v. Silva*[9].

Accounting should have been ordered from 1920 and not merely from June 19, 1931, the date of note P 29. There is no period of limitation for reopening of money lending transactions. The proviso to section 3 of Cap. 67 is not applicable to the facts of this case. The words "allowed in account" should be read in conjunction with the terms of section 2.

H. V. Perera, K.C. (with him *N. K. Choksy* and *R. A. Kannangara*), for the defendant, respondent.—If there was any default regarding the registration of defendant's business name, the burden of proof was on the plaintiff. It cannot be said that at the time of the action the defendant and Letchumanan Chettiar were partners in the Puttalam business. The business carried on in Colombo by the defendant was not some other kind of business, so that it was not necessary to mention about it in the registration at Puttalam—*Arunachalam Chettiar v. Ramanathan Chettiar*[10].

Proviso (*c*) of section 9 of the Business Names Ordinance (Cap. 120) is quite clear. The section prevents a defaulter from bringing an action; but once he is brought into Court a claim in reconvention can be raised by him. "Any other party" means any party other than the defaulter.

[1] *(1941) 42 N. L. R. 573.*
[2] *(1933) 35 N. L. R. 201.*
[3] *(1920) 22 N. L. R. 268.*
[4] *L. R. (1918) 1 K. B. 149.*
[5] *L. R. (1918) 2 K. B. 228.*
[6] *L. R. (1921) 3 K. B. 226 at 232.*
[7] *(1933) 35 N. L. R. 231.*
[8] *(1936) 38 N. L. R. 229.*
[9] *(1935) 37 N. L. R. 274.*
[10] *(1935) 37 N. L. R. 263*

It was contended that the District Judge could not have given judgment to the defendant for any sum found due to him on the transaction represented by promissory note "A". Assuming that the note was fictitious it is submitted that section 2 of the Money Lending Ordinance gives the Court a new and what may be described as a paternal jurisdiction. The lender himself can ask for reopening of accounts. The Court has the same powers whether the action is brought by the debtor or by the creditor. Under section 2 (1) (c) one of the grounds for reopening is that the note was fictitious. See also *Sockalingam Chettiar v. Ramanayake et al.*[1].

Coming now to the objections filed by the defendant, it is submitted that the Court could not have reported transactions previous to note "A". Promissory note "A" is not fictitious under section 14 of the Money Lending Ordinance, nor does it contravene the provisions of section 10. There was no disguise either of the rate of interest or of the principal. The case of *Abeydeera v. Ramanathan Chettiar*[2] is directly applicable to the facts of the present case. There was an extinction of the earlier obligations, and a new debt was created by note "A". The defendant is entitled to claim payment of the principal and interest as on an account stated. As regards the meaning of the expression "renewal of loan" and the applicability of section 10 of Cap. 67 see *Siripina v. Somasunderam Chettiar*[3]; *Barber v. Mackrell*[4]; *Silva v. Somawathie*[5]; *Ramalingam Pillai v. Wimalaratne et al.*[6].

The District Judge should not have disallowed compound interest to the defendant. There is nothing illegal in capitalizing interest. In Ceylon compound interest may be recovered where there is agreement to pay it—*Abeydeera v. Ramanathan Chettiar*[7]; *Ramasamy Pulle v. Thamby Candoe*[8]. The term "interest" in section 5 of Ordinance No. 5 of 1852 (Cap. 66) should not be limited to simple interest only. Decisions stating that compound interest is not permitted in Ceylon do not take into consideration section 5 of Cap. 66. In South Africa an agreement to pay compound interest is not void unless the amount charged can be said to be usurious, and the common law forbidding compound interest has to this extent been abrogated by disuse—*3 Bisset & Smith's Digest of S. African Case Law, p. 560.* Further, section 97 of the Bills of Exchange Ordinance (Cap. 68) introduces the English law as regards promissory notes, and in English law compound interest is allowed where there is express or implied agreement.

There are no circumstances which make the transaction harsh or unconscionable. The rate of interest is not high. The charging of compound interest does not *per se* render a transaction harsh or unconscionable.

N. Nadarajah, K.C., in reply.—Section 5 of Cap. 66 does not make legal what was illegal. It did not abrogate the Roman-Dutch law regarding compound interest. Our courts have always held that compound interest is illegal. Even the case of *Ramasamy Pulle v. Tamby Candoe* (*supra*), when it is closely examined, is authority for this view. See

[1] *(1936) 38 N. L. R. 229 at 234.*
[2] *(1936) 38 N. L. R. 389.*
[3] *(1936) 38 N. L. R. 83.*
[4] *(1892) 68 L. T. 29.*
[5] *(1929) 31 N. L. R. 120.*
[6] *(1935) 35 N. L. R. 379.*
[7] *(1936) 38 N. L. R. 389.*
[8] *(1872-75) ; Ram. 189.*

also *Vanderstraaten's Rep. (1869-71) 57 ; Talpe Appuhami v. Baffamagey de Silva*[1]*; National Bank of India v. Stevenson*[2]*; Mudiyanse v. Vanderpoorten*[3]*; Muttiah v. Podisingho Appuhamy*[4]*; Velupillai v. Marikar*[5]*; Obeyesekere v. Fonseka*[6]. Under The Roman-Dutch law compound interest is illegal and contrary to public policy—*Grotius III. c. 10* (Herbert's translation); *Voet 22.1.5 and 20* (Horwood's translation); *Van der Keesel's Theses* (Lorenz's translation) 172-4 ; *Van der Linden 1.3.1-4* (Henry's translation); *Morice's English and Roman-Dutch Law 118 ; 3 Maasdorp's Institutes 207 (1907 ed.) ; 2 Nathan's Common Law of S. Africa 607 ; Lees' Introduction to Roman-Dutch Law 264 (1915 ed.)*. As regards the interpretation and applicability of section 97 of the Bills of Exchange Ordinance (Cap. 68) see *Hongkong & Shanghai Bank v. Krishnapullai*[7] ; *In re Gillepsie*[8] ; *Ferguson v. Fyffe*[9] ; *Ex parte Beven*[10]. The promissory note in the present case does not expressly provide for or mention the charging of compound interest. The transaction of January 13, 1936, was harsh and unconscionable. *The Negombo Co-operative Society v. Don Manuel Ugo Mello et al*[11]; *Samuel et al. v. Newbold*[12].

Where a transaction is the renewal of an old loan the fact that it is such ought to be set out in the promissory note—*Temperance Loan Fund, Ltd. v. Rose et al.*[13] ; *B. S. Lyle, Ltd. v. Chappell*[14]. The Court was entitled to reopen previous transactions in the present case—*B. S. Lyle, Ltd. v. Pearson & Medlycott*[15] ; *Dunn Trust, Ltd. v. Feetham*[16].

Cur. adv. vult.

August 25, 1943. HOWARD C.J.—

In this case the plaintiff claimed, on the ground that they were harsh and unconscionable and substantially unfair, under section 2 (2) of the Money Lending Ordinance, the reopening of certain transactions, the taking of an account between himself and the defendant the other party to such transactions, the setting aside of a promissory note marked "A" dated January 13, 1936, made by the plaintiff in favour of the defendant and the entering of judgment in his favour for any excess paid by him to the defendant. The defendant in reconvention claimed by virtue of promissory note marked "A" dated January 13, 1936, a sum of Rs. 52,948.70 together with interest thereon at 15 per cent. per annum amounting, less a sum of Rs. 1,050 paid by the plaintiff, to a sum of Rs. 70,541.05.

The District Judge of Puttalam decreed that the transactions between the plaintiff and the defendant be reopened, but that such reopening should, by reason of the proviso to section 3 of the Ordinance, be restricted to those falling within a period of six years prior to the date of the action. The learned Judge further found that a sum of Rs. 29,672 was due to the defendant from the plaintiff on June 19, 1941, and interest thereon and on subsequent loans to be calculated at the rate of 15 per

[1] *(1882) 5 S. C. C. 16.*
[2] *(1913) 16 N. L. R. 496.*
[3] *(1922) 23 N. L. R. 342.*
[4] *(1930) 31 N. L. R. 333.*
[5] *(1933) 2 C. L. W. 314.*
[6] *(1934) 36 N. L. R. 334.*
[7] *(1932) 33 N. L. R. 249 at 253.*
[8] *L. R. 18 Q. B. D. 286 at 292.*
[9] *8 Eng. Rep. 121.*
[10] *32 Eng. Rep. 588.*
[11] *(1934) 13 C. L. Rec. 141.*
[12] *L. R. (1906) A. C. 461 at 466.*
[13] *L. R. (1932) 2 K. B. 522.*
[14] *L. R. (1932) 1 K. B. 691.*
[15] *(1941) 3 A. E. R. 128.*
[16] *L. R. (1936) 1 K. B. 22.*

cent. per annum up to March 9, 1932. Interest was also to be paid from March 10, 1932, up to the date of action, namely, March 10, 1938, at the reduced rate of 10 per cent. per annum and from the date of action till payment in full at the rate of 9 per cent. per annum.

Both parties to this action have appealed against the judgment of the District Judge. The plaintiff bases his appeal on the following grounds :—

(*a*) That the defendant has made default in registering the particulars required by section 4 (1) of the Business Names Ordinance (Cap. 120) and hence his claim in reconvention was not maintainable. In this connection it was contended that section 9 (1) (c) of the Business Names Registration Ordinance does not apply to the parties to the contract.

(*b*) That note "A" was unenforceable inasmuch as (1) it failed to set forth the particulars required by section 10 of the Money Lending Ordinance (Cap. 67), and (2) it was by reason of the provisions of section 14 of the said Ordinance fictitious. Plaintiff's Counsel contended, therefore, that no accounting of the defendant's claim should have been ordered. This claim should have been dismissed.

(*c*) That no account was stated on June 19, 1931, and hence the proviso to section 3 of the Money Lending Ordinance was not applicable thereto.

The defendant, on the other hand, filed objections to the decree entered in the District Court as follows :—

(*a*) That the learned District Judge should not have disallowed compound interest to the defendant ;

(*b*) That on or about January 13, 1936, the accounts between the parties were looked into and the plaintiff's liability ascertained and acknowledged by him at the sum of Rs. 52,948.70 well knowing that compound interest would be charged. Promissory note "A" was given as security for this sum and hence defendant is entitled to claim payment of such sum and interest as on an account stated.

(*c*) That the learned Judge was wrong in holding that the note "A" did not comply with the provisions of the Money Lending Ordinance and was not enforceable.

I will deal first of all with the points raised by the plaintiff's appeal. Document P 1 is a certified copy of the registration of the business name of the defendant as P. R. L. V. It is dated March 7, 1919, and registers the name of the defendant only, the principal place of business being at Puttalam. P 2 is a certified copy of the registration of the business name of the defendant and Letchumanan Chettiar as P.R.L.V. This registration is dated May 18, 1936, and registers both names, the principal place of business being at Colombo. P 3 is a document dated August 24, 1935, in which the defendant and Letchumanan Chettiar describe themselves as carrying on business at Colombo and Puttalam and hold themselves bound in a certain sum to the Mercantile Bank of

India. P 4 is a power of attorney dated July 29, 1935, by which the same two persons similarly described, appoint a certain person as attorney to execute a mortgage in favour of the Mercantile Bank of India. Mr. Nadarajah also referred to documents P 7-P 14 to establish the fact that the defendant was not carrying on business alone as P.R.L.V. at Puttalam, but in partnership with Letchumanan Chettiar. It is contended on behalf of the plaintiff that these documents prove that on January 13, 1936, the date on which the plaintiff signed note "A", the defendant was carrying on business at Puttalam in partnership with Letchumanan Chettiar. This fact not being disclosed by the certificate of registration, P. 1, the defendant has made default in complying with the provisions of section 4 (1) (*d*) of the Business Names Ordinance and being still in default his claim by way of reconvention is by reason of section 9 (1) of the Ordinance unenforceable. In my opinion the plaintiff has not discharged the burden of proof imposed upon him of establishing that on January 13, 1936, Letchumanan Chettiar was a partner with the defendant in carrying on the Puttalam business. It was also contended that there was a further default under section 4 (1) (*d*) inasmuch as the business carried on at Colombo was not disclosed. In view of the decision in *Arunachalam Chettiar v. Ramanathan Chettiar*[1], there is no substance in this contention. The obligation to register is in respect of a different kind of business. The business carried on by the defendant at Colombo was not "another business occupation". Even if the defendant has made default in regard to the furnishing of the particulars required by the Ordinance, I am of opinion that there is another answer to the contention put forward on behalf of the plaintiff. Section 9 of the Ordinance is worded as follows:—

"9. (1) Where any firm or person required by this Ordinance to furnish a statement of particulars or of any change in particulars in respect of any business shall have made default in so doing then the rights of that defaulter under or arising out of any contract in relation to that business made or entered into by or on behalf of such defaulter at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise:—

Provided that—

(*a*) the defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertance or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally, or as respects any particular contracts, on condition of the costs of the application being paid by the defaulter, unless the court otherwise orders, and on such other conditions, if any, as the court may impose; but such relief shall not be granted except on such service and such publication of notice of the application as the court may order, nor shall relief be given in respect of any contract if

[1] *(1935) 37 N. L. R. 263.*

any party to the contract proves to the satisfaction of the court that, if the provisions of this Ordinance had been complied with, he would not have entered into the contract;

(*b*) nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid;

(c) if any action or proceedings shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counterclaim set off or otherwise, such rights as he may have against that party in respect of such contract.

(2) In this section, 'court' means the court in which any action or other legal proceeding to enforce a contract is commenced by a defaulter."

It is contended by Mr. Nadarajah that the words "any other party" in proviso (c) to sub-section (1) means "third parties" and exclude the parties to the contract. I am unable to accept this contention. If it is a correct interpretation of the law, the same interpretation must be given to the expression "any other parties" in proviso (*b*). This would result in a party to a contract who is not a defaulter being denied his legal remedy. In this connection I would refer to the judgment of Pickford L.J. in *Daniel v. Rogers*[1]. At page 232 the learned Judge in referring to the English Act said that he entertained considerable doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it. This passage definitely rules out the limitation of "any other party" to "third parties". I am, therefore, of opinion that the plaintiff, having commenced an action against the defendant, the latter, may, by reason of proviso (*c*), even though a defaulter, enforce by way of reconvention his claim against the plaintiff in respect of note "A".

I will now consider the questions raised by the plaintiff with regard to the effect on his transactions with the defendant of sections 10, 13 and 14 of the Money Lending Ordinance. The learned Judge has found that (1) note "A" failed to comply with the provisions of section 10 of the Money Lending Ordinance and was unenforceable, (2) the amount mentioned therein as capital borrowed was false and fictitious to the knowledge of the defendant. Section 10 of the Money Lending Ordinance is worded as follows:—

"10. (1) In every promissory note given as security for the loan of money after the 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

[1] *(1918) 2 K. B. 228.*

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

(2) Any promissory note not complying with the provisions of this section shall not be enforceable :

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 sub-section on such terms as it may deem just.

(3) The setting forth of the particulars required by sub-section (1) shall not affect the negotiability of any promissory note.

(4) Any promissory note setting forth the said particulars substantially in the form given in the Schedule shall be deemed to be in compliance with this section.

(5) The provisions of this section shall apply to renewals of any loan and in all such cases the amount stated as the capital sum actually borrowed shall be the amount of the original loan."

In the margin of "A" we find that the amount borrowed is set out at Rs. 52,948.70 and the interest is stated to be 15 per cent. per annum. In the body of the note the plaintiff acknowledges the borrowing of Rs. 52,948.70 which sum he promises to pay on demand with interest thereon at $1\frac{1}{4}$ per cent. per mensem. It is contended by Mr. Nadarajah that note "A" was a promissory note within the meaning of section 10 and the particulars prescribed by sub-section (1) should have been set forth upon the document. He further maintains that "A" was a renewal of a previous loan. The sum of Rs. 52,948.70 set forth in "A" was made up of loans, interest on loans and other items, and therefore did not state the capital sum actually borrowed which should have been the amount of the original loan. Moreover the actual transaction was one for the payment of compound interest. The statement "interest at 15 per cent. per annum" did not reveal this. The first point that requires elucidation is whether note "A" was subject to the provisions of section 10 or, in other words, whether it was "a promissory note given as security for the loan of money". It is contended by Mr. Perera that, although "A" is in form a promissory note and purports to be an acknowledgment of money borrowed and received by the plaintiff and also to make compliance with sub-section (*a*), yet in fact it was nothing of the sort. He maintained that accounts were taken, that there was a discharge of items on each side and a real account stated for which "A" was given. In these circumstances the Court had no power to reopen the transactions previous to note "A".

I agree with the finding of the learned Judge that an account was stated between the parties in June, 1931, when P 29, the first of the three notes, was given to secure the payment of the balance after certain adjustments had been made. These adjustments took place more than 6 years before action brought, and, therefore, by virtue of the proviso to section 3, "no readjustment" of the account can be ordered in respect of this sum of Rs. 27,672 which was allowed in account. A promissory note, P 29, was given in respect of this sum. Was this a note given "as security for the loan of money"? It certainly purported to be so inasmuch

as the word "borrowed" was employed. In *Lyle, Ltd. v. Chappell*[1] the facts were as follows:—On April 25, 1930, the appellants lent the respondent £150 at 15 per cent. interest for six months repayable by six monthly instalments of £42 10*s.* each. The loan was secured by a promissory note under which, in default of any instalment, interest ran on the instalment. At the end of six months only two instalments had been paid leaving owing £204 in respect of the unpaid instalments and interest thereon. On October 22, 1930, a settlement was effected by the respondent signing a promissory note for £300, repayable by 60 weekly instalments of £5 each and a memorandum agreeing to borrow £200 with the sum of £100 for interest upon the terms of the promissory note. This memorandum concluded "I hereby authorize and request you to allocate the whole of the above advance of £200 in settlement of my promissory note in your favour dated April 25, 1930". With regard to this transaction, Green L.J. on page 121, states as follows:—

> "There does not seem to me to have been any final agreement before the document was signed as to how the relief from the old debt which had been agreed to by the parties should be effected, and nothing had happened which would in any way prevent the parties from carrying out the suggested arrangement in whatever manner they were both prepared to agree to. In my view, the document signed by the defendant, which appears on page 1 of the correspondence, is an agreement by him to discharge whatever was due on the promissory note of April 25 by borrowing from the plaintiffs a sum of £200 and authorizing them, instead of physically handing over the money to the defendant, to pay themselves the £200. The money lenders seem to have thought it necessary or desirable that they should physically hand over a cheque for £200 to the defendant and get it back again, but there is nothing in the agreement to the effect that this should be done, and, in my judgment, it was not essential that the agreement should be carried out in that way. If the money to be borrowed was intended to be used for the extinction of the debt agreed by the parties at £200, it seems to me unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards. If the contract had provided for the borrowed money to be paid over to the defendant and then repaid to the plaintiffs, it would, according to the authorities, have been unnecessary to go through the form of handing over the money: see *Credit Company v. Pott* (*6 Q.B.D. 295*)."

The following passage on page 122 is also relevant:—

> "In my judgment, the oral agreement made, as found by the learned Judge, that the defendant should be relieved from his liability, could not be carried out by a renewal of the old debt with a grant of further time to pay it, plus additional interest. It could be carried out only by some method whereby the old debt would be extinguished and a new one created. The method of doing this was agreed by the defendant with the plaintiffs when he signed the memorandum of October 22."

[1] *48 Times L. R. 119.*

I would also refer to the following passage from the judgment of Scrutton L.J. on p. 120 :—

> "In my opinion, when the time for payment of the original loan has expired without complete repayment and the time for repayment is extended on altered terms, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of section 6 might be better, but I cannot think that Parliament intended to render renewals impossible.
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> As to the second point, I see no objection to the procedure of wiping off the old loan by treating it as a new loan on the altered terms, when the fact that this is being done is shown on the face of the second memorandum."

The Court held that the trial Judge was wrong in holding that there was no loan on October 22, that therefore there was no memorandum of the real transaction and that the contract was not enforceable. A reference was made to *Lyle, Ltd. v. Chappell* (*supra*) in the local case of *Abeydeera v. Ramanathan Chettiar* [1] in which the defendant gave three cheques to the plaintiff at various times to cover the value of goods sold and certain advances made to him. Thereafter the cheques were returned and the promissory note, which was the subject-matter of the action, was given representing the amount due upon an account stated between the parties. The Court constituted by Abrahams C.J. and Soertsz J. held that the note was given for a money-lending transaction although no money actually passed between the parties at the time the note was given. In his judgment Abrahams C.J. stated that the facts in *Lyle, Ltd. v. Chappell* (*supra*) "bear a substantial resemblance to the facts in this case", and, applying the principle laid down in that case, held that there had been a notional lending and borrowing although no money had passed between the parties. On the authority of these two cases, I have, therefore, come to the conclusion that, although no money was lent by the defendant at the time when P 29 was signed by the plaintiff, there was a notional borrowing and lending and P 29 was a promissory note given as security for the loan of money. Can, however, this principle of a notional conversion be carried still further and, as contended by Mr. Perera, be applied to note "A" of June 13, 1936, which must be treated as a security for a new loan in settlement of the previous loan and so preclude the Court from reopening the transaction in respect of which it was given with a view to discovering whether compliance has been made with the provisions of the Money Lending Ordinance? In this connection the following passage from the headnote of *Lyle, Ltd. v. Chappell* (*supra*) is of interest :—

> "*Quaere*, whether when an old debt purports to be settled by a new loan a statement to that effect must appear on the memorandum."

The decision *Lyle Ltd. v. Chappell* (*supra*) was considered in *Temperance Loan Fund, Ltd. v. Rose & another* [2] *and in Lyle, Ltd. v. Pearson & Medlycott* [3]. In the first of these cases the plaintiffs, who were registered money lenders, lent the defendant Rose the sum of £200 by cheque dated January

[1] *38 N. L. R. 389.*

[2] *(1932) 2 K. B. 522.*

[3] *(1941) A. E. R. Vol. 3, p. 128.*

30, 1929, which was to be repaid, but the plaintiffs agreed to continue it on the terms stated in a memorandum dated July 30, 1929. In this memorandum the borrower acknowledged he was indebted in the sum of £248 and agreed to pay interest at 48 per cent. per annum. Repayment of the said sum of principal and interest was to be by five consecutive monthly instalments of £8 each, the first instalment to be due and payable on August 30, 1929, and the sum of £208 on January 30, 1930. A promissory note for the sum of £248 was given by the borrower on the same day for value received. The promissory note not having been paid on January 30, 1930, the plaintiffs sued the two defendants thereon. The defendant Rose did not defend the action, but the other defendant, the surety, did so on the ground, *inter alia*, that the memorandum of the contract did not show the date on which the loan was made as required by section 6 (2) of the Act and was therefore unenforceable. In his judgment on pp. 528, 529, Scrutton L.J. stated as follows :—

> "On the facts I have stated the note or memorandum should show either the date when the original cheque was given—namely, January 30, 1929, or if the loan is to be treated as made not on that date but on July 30 by the transaction of paying off the old loan and starting a new loan it should show that date. It states neither date. It merely says that the borrower acknowledges 'that the above-mentioned sum of £200 is owing by the borrower', and the reference to the date of the loan is struck off. There is therefore no compliance with the requirement of the Act that the date of the loan must be stated. The memorandum does not, as was suggested in *Lyle v. Chappell*[1] might be done, set out the real facts—namely, that there was a loan of £200 on January 30, 1929, which was to be repaid by a series of instalments by July 30, and a new loan made on different terms as to repayment, which new loan was made on July 30. The memorandum merely says that the borrower is indebted in the sum of £248. That is not a compliance with the statute."

In his judgment Greer L.J. referred to the contention of Counsel who appeared on behalf of the money lenders, that "section 6 has no application to a case which is concerned with the payment of an admitted debt, even though that admitted debt happens to be the balance of a sum due for money lent". The learned Justice stated that, if this contention was right, the plaintiffs would not be affected by the Act and be entitled to succeed. In holding that this contention failed, he further stated that the language of the section is express that every contract which can be described as a contract for the repayment of money lent, and that includes a promise to pay the balance of money previously lent, is brought within the purview of the section. Further on in his judgment the same Judge explained his judgment in *Lyle v. Chappell* (*supra*) and stated as follows :—

> "In this case there was no evidence except the signature of the memorandum form, and we do not know whether it is an agreement in respect of the money which had been borrowed previously or whether it is an agreement for the repayment of money which was

[1] *(1932) 1 K. B. 691.*

notionally deemed to be lent at the time of the signature ; but if there was no loan until the agreement was signed, it is impossible to say that the contract was personally signed before the money was lent, and the statute requires that this shall be done. In my judgment the only way in which this statute can be complied with in dealing with the renewal of the balance of an old loan is for the old loan to be treated as paid off and a new loan granted. The memorandum must be signed before the notional loan of that kind is made, otherwise s. 6 is not complied with."

It is of course clear that in this case the Court of Appeal held that, as the date on which the loan was made did not appear on the memorandum. the promissory note was unenforceable. It was also held that it was not clear there was a new loan and hence the fact that there was a renewal of an old loan should be set out in the memorandum. Although the wording of section 10 of our Ordinance is not the same as section 6 of the English Act, the principle laid down by this case is applicable. I am of opinion that note "A" should have set out the actual sum for which P 29 was given as security.

In the second case, *Lyle, Ltd. v. Pearson & Medlycott* (*supra*), the plaintiffs, registered money lenders, lent a borrower £100 on March 14, 1939, on a joint promissory note of the borrower and a surety, the interest being 150 per cent. per annum. On June 13, 1939, a further £200 on the same terms was borrowed. At some time prior to January 1, 1940, a sum of £75 was repaid. On January 1, 1940, when £490 was owing in respect of principal and interest the plaintiffs took a new promissory note by the same parties, under which the latter agreed to pay £490 with interest at the rate of 25 per cent. per annum. It was contended that the Court had no power to reopen the transaction previous to the last note of January 1, 1940, which, being at a moderate rate of interest, could not be attacked. It was held by the Court of Appeal that the Court had power under the Money Lenders Act, 1900, s. 1 (1) to reopen all the transactions back to the first note of March 24, 1939. The judgment of the Court was delivered by Goddard L.J. who, on pages 129-130, stated as follows :—

"The reason why the money lenders entered into this last transaction, in which the interest was at the seemingly exceedingly moderate rate of 25 per cent., was that they thought that they had found a loophole in the Money Lenders Act, 1900, by reason of the decision of this Court in *B. S. Lyle, Ltd. v. Castle*[1], reported in the form of a footnote to *Re. British Games, Ltd.*[2]. If the plaintiffs and others of their fraternity think that that case affords the loophole, which they seem to think they have found, the sooner they disabuse their minds of it the better. The defendant in this case had put forward a counterclaim to have the whole of the transactions reopened, on the ground that only £300 had in fact been lent, of which, as I say, £75 had been repaid, and that the interest charged on those loans was harsh and unconscionable, thereby making the third transaction harsh and

[1] (*1938*) *158. L. T. 242.*

[2] (*1938*) *Ch. 240.*

unconscionable. The judge took the view, on the authority of *B. S. Lyle, Ltd. v. Castle* (*supra*) and *B. S. Lyle, Ltd. v. Chappell* (*supra*) that he could look at the last transaction only, and, finding it a loan of £490 with interest at 25 per cent., he came to the conclusion that there was nothing at all to show that the transaction was harsh or unconscionable, and, as the rate charged was 48 per cent., if nothing else could be looked at, it was for the defendants to have attacked the rate of interest, and not for the plaintiffs to have supported it, and, therefore, he gave judgment for the whole amount. In the opinion of this Court, this shows an entire misapprehension of the position under the Money Lenders Act, 1900, and we do not think that *B. S. Lyle, Ltd. v. Castle* decides anything of the nature which it is said that it decides. In the first place, the decision in *B. S. Lyle, Ltd. v. Chappell,* is a clear authority in favour of the defendant in this case, showing quite clearly—and, indeed, an inquiry had been ordered in that case—that, in a series of transactions of this sort, the Court can order the reopening of all the transactions which led up to the last transaction."

On page 131 the learned Lord Justice also referring to *Lyle, Ltd. v. Chappell* said as follows:—

> "It is not the least authority for the proposition which the judge seems to have thought it was that the Money Lenders Act, 1900, can be dodged in this patent and almost shameless way, so that, having lent money at a harsh and unconscionable rate of interest, the money lender can get out of any inconvenience and difficulties into which that may put him by entering into a transaction embodying all the previous loans and interest in a new promissory note and charging some low rate of interest on that, and then suing the defendant upon it as soon as he has made default. The result is that this appeal succeeds."

Any doubts about the point at issue that may have arisen from the decisions in *Lyle, Ltd. v. Chappell* (*supra*) and *Temperance Loan Fund, Ltd. v. Rose* (*supra*) are, in my opinion, removed by the judgment in *Lyle, Ltd. v. Pearson & Medlycott* (*supra*). In view of this judgment, the contention put forward by Mr. Perera that, where an account had been taken with regard to an old loan and a new note had been given, the Court had no power to reopen the transaction previous to the last note, is clearly untenable. "A" was a renewal of a loan and hence the amount of the original loan should have been stated. In this connection *Siripina v. Somasunderam Chettiar*[1] has, in my opinion, no bearing on the facts of this case inasmuch as in that case there was a new debtor on the second note who was jointly and severally liable with the debtor on the first note. With regard to what constitutes a renewal of a note I would refer to *Barber v. Mackrell*[2] in which Lindley L.J. stated as follows:—

> "A bill is renewed when another bill is taken in its place, the parties to the bill and amount of it being the same, though perhaps in some cases the interest due on the first bill is added. The bill which is renewed is the old bill."

[1] *38 N. L. R. 83.* [2] *68 L. T. 29.*

"A" was constituted almost entirely by the old loan and interest. I think there was a renewal and compliance not being made with para. (*a*) of sub-section 1, the note by reason of sub-section 2 is not enforceable. The question as to whether it is also "fictitious" within the meaning of section 14 is a matter of some doubt and, in view of the fact that "A" is unenforceable by reason of section 10 (2), does not require an answer. Although "A" is unenforceable by reason of section 10 (2), an action may still be maintained to recover the loan, vide *Sockalingam Chettiar v. Ramanayake* [1] and *Wickremesuriya v. Silva* [2].

Although the defendant's claim in reconvention on "A" fails, I agree with the learned Judge that there was sufficient evidence before him, both oral and documentary, to show that, when P 29 was executed an account was stated. The Court had, therefore, on the authority of the cases I have cited, jurisdiction to order an account to be taken and adjudge what was fairly due to him.

I will now consider the objections raised by the defendant. I have already dealt with objection (*c*) and have come to the conclusion that the learned Judge was correct in holding that "A" was unenforceable. With regard to objection (*b*), I have already held that, although accounts were looked into as between the plaintiff and defendant, "A" was a money lending transaction and hence subject to the provisions of the Money Lending Ordinance. The Court had, therefore, power to reopen the transaction under section 2 of the Ordinance.

The only remaining point for consideration is whether the learned Judge was correct in disallowing the claim of the defendant on such reopening for compound interest. It is contended by Counsel for the plaintiff that according to the law in force in Ceylon compound interest was illegal. Such contention is, however, contrary to the decision in *Abeydeera v. Ramanathan Chettiar* (*supra*). The following passage from the judgment of Abrahams C.J. deals with this point :—

> "I propose to say something presently on what I take to be the true nature of the transaction for which the promissory note was given, but for the moment, dealing with the question of compound interest, I am of the opinion that compound interest may be lawfully charged. The Money Lending Ordinance does not say that compound interest may not be charged. The only section in that Ordinance which has any reference to interest is section 4 which provides that rates above the rates mentioned in it are matters to be considered when a transaction is under review for the purpose of ascertaining whether it is harsh and unconscionable. Under the Roman-Dutch law, although it is not legal to charge compound interest, the South African Courts have allowed compound interest when there has been an undertaking to pay such interest or where there is a recognized custom to charge compound interest, or where the contract between the parties sanctions it, unless the amount charged can be said to be usurious. (See Manfred Nathan, Common Law of South Africa, Vol. II., pp. 667-670.) In *Ramasamy Pulle v. Tamby Candoe* [3], it was held that the Dutch usury

[1] *38 N. L. R. 229.* [2] *37 N. L. R. 274.*

[3] *(1872–75) Ramanathan 189.*

laws were purely local enactments and were not introduced into Ceylon, Section 3 of Ordinance No. 5 of 1852, as amended by section 97 of the Bills of Exchange Ordinance, No. 25 of 1927, enacts that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby, or from recovering interest at the rate of nine per cent. per annum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal'. In *National Bank v. Stevenson*[1] compound interest was allowed by reason of the custom of the banks and the acquiescence of the defendant."

The question of compound interest was also considered in *National Bank v. Stevenson* (*supra*) in which it was held that a charge of compound interest was maintainable as the rights of the parties in connection with the current account were, in terms of Ordinance No. 22 of 1866, which introduced into the Island the English law of banks and banking governed by that law and not the Roman Dutch. It would also appear that the Roman-Dutch law prohibiting compound interest was not introduced into South Africa, *vide National Bank v. Kurunda* (*(1907) T. H. 155*— cited in 3rd Vol. *Bisset & Smith's Digest p. 560*). We are asked to say that the judgment of Abrahams C.J. above cited was not in accordance with the law and were referred to a number of cases in which it was held that the matter was governed by Roman-Dutch law which prohibited the charge of compound interest. The first of these cases is reported in *Vander-Straaten's Reports, 1869-1871, p. 57,* where it is stated as follows :—

> "It is very clearly laid down by the Dutch Law authorities, 'that interest upon interest is not allowed, nor to be turned into principal, so as to increase the original debt' and 'that the amount of interest if in arrears may not exceed the principal'. Vander Linden, 219, Van Leeuwen, 341, Grotius 326. Voet, 22.1.5 and 22.1.20."

We have also been referred to the views of numerous text-book writers on Roman-Dutch law on this point. The same view was taken in *Ramasamy Pulle v. Tamby Candoe* (*supra*), *Mudiyanse v. Vanderpoorten*[2], *Obeyesekere v. Fonseka*[3]. With regard to these cases I would observe that the aspect of Ordinance No. 5 of 1852 was not given consideration by the Judges in the Vander-Straaten case. *Ramasamy Pulle v. Tamby Candoe* (*supra*) purported to follow, and, in my opinion mistakenly followed, the Vander-Straaten case and is therefore not authoritative. I am unable to accept the view held in *Obeyesekere v. Fonseka* (*supra*) which is not binding on us. In *Mudiyanse v. Vanderpoorten,* a claim for repayment of money paid in respect of compound interest failed. The judgment as regards the legality of compound interest is *obiter*. In my opinion the question as to whether the Roman-Dutch law prohibiting compound interest was ever introduced into Ceylon or South Africa is a matter of some doubt. Even if it were, I am of opinion that by reason of the provisions of the Civil Law Ordinance (Cap. 66), section 5, and the

[1] *16 N. L. R. 496.* [2] *23 N. L. R. 342.* [3] *36 N. L. R. 334.*

Bills of Exchange Ordinance (Cap. 68), section 97 (2) it is no longer operative. The first of these provisions is as follows:—

"5. Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby or from recovering interest at the rate of nine per centum per annum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal."

I agree that Abrahams C.J. was right in law in holding that this provision which is a general one applying to interest on all contracts and engagements, including Bills of Exchange and promissory notes, sanctioned the payment of compound interest if agreed upon by the parties. It will be observed that section 5 provides that in no case shall the amount recoverable by way of interest exceed the principal. Bearing this in mind it is impossible to conceive, that, if it had been intended to prohibit compound interest, it would not have been so stated. I am, moreover, of opinion that section 97 (2) of the Bills of Exchange Ordinance applies to the question of interest payable on a promissory note the rules of the common law of England, save in so far as such rules are inconsistent with the provision of the Civil Law Ordinance to which I have referred. English law applied, therefore, to all matters connected with Bills of Exchange, promissory notes and cheques, similarly to all banking matters, *vide* Pereira J. in *National Bank v. Stevenson* (*supra*). The common law of England permitted a charge of compound interest on a contract express, or implied, vide *Ferguson v. Fyffe*[1] and *ex parte Bevan*[2]. The learned Judge was correct in holding that there was an implied agreement to pay compound interest. In these circumstances such charge was not in itself contrary to law. Although, however, the charge of counpound interest was not prohibited by law, the question of such a charge is a matter that demanded consideration on a reopening of the transactions between the plaintiff and defendant under section 2 of the Money Lending Ordinance. In this connection I would refer to the case of *Samuel v. Newbold*[3], the headnote of which is as follows:—

"The relief which the Money Lenders Act, 1900, extends to a borrower is not limited to cases in which before the Act the Court of Chancery would have given relief.

The policy of the Act is to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power."

The following passage from the judgment of Lord Loreburn L.C. at page 467 indicates the manner in which Courts are to interpret the words "the transaction was harsh and unconscionable, or, as between the parties, thereto, substantially unfair":—

"In my opinion this contention cannot be maintained, nor ought a Court of Law to be alert in placing a restricted construction upon the

[1] *5 E. R. 121.* [2] *32 E. R. 588.* [3] *(1906) A.C. 461.*

language of a remedial Act. The section means exactly what it says, namely, that if there is evidence which satisfies the Court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the Court may reopen it, provided, of course, that the case meets the other condition required. A transaction may fall within this description in many ways. It may do so because of the borrower's extreme necessity and helplessness, or because of the relation in which he stands to the lender, or because of his situation in other ways. These are only illustraticns, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no justification be established, the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power."

In the present case taking into consideration the fact that compound interest, that is to say interest upon interest after rests every six months was payable, the rate charged in view of the provisions of section 4 (2) of the Ordinance must be deemed to be unreasonable. The return to be received by the defendant was, therefore, for the purposes of section 2 (1) (*a*) excessive, and the case meets what Lord Loreburn called "the other conditions". In *Samuel v. Newbold* (*supra*) the Court was asked to say that an excessive rate of interest could not of itself be evidence that the transaction was harsh and unconscionable. Lord Loreburn, in the passage I have cited, expressly declined to accept this proposition and said that it was in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power. In this case the learned Judge has adopted this principle and I am not prepared to say that in reopening the transactions of 1936 and 1933 and disallowing the charges of compound interest he has exercised his discretion otherwise than in a legal and judicial manner. He was, however, in my opinion correct in holding that the proviso to section 3 bars the reopening of any account at a date exceeding six years from the date of the application to the Court under section 2 (2). Hence the transaction of June 19, 1931, cannot be reopened. In these circumstances, the counter-objections of the defendant, and what I have referred to as ground (c) of the plaintiffs' appeal, fail.

In the result both the appeal of the plaintiff and the counter-objections of the defendant must be dismissed with costs.

SOERTSZ J.—

The proceedings from which the appeal and the cross-objections before us arise were commenced by the appellant under section 2 (2) of the Money Lending Ordinance (Cap. 67) in order to have certain financial transactions that had taken place between himself and the respondent reopened, and an account taken to enable him to recover such excess payment as he might be found to have made to the defendant. He also prayed that a promissory note granted by him to the defendant on January 13, 1936, be set aside for the reasons stated in his plaint.

The appellant took the transactions back to 1931 in which year, he alleged, the respondent's then agent *represented* to him that a sum of Rs. 160,922 was due from him to the respondent and that he in view of that representation, "acting on the advice of his Proctor . . . . agreed to settle the said sum by transfer of landed property to the defendant to the value of Rs. 133,250 and in fact, did so" (paragraph 3 of the plaint) and "for the alleged balance of Rs. 27,672 . . . . gave a promissory note dated June 19, 1931, on the assurance and advice of his Proctor . . . . who acted for the defendant that the promissory note could be returned to him when the defendant who was out of the Island returned and examined equitably the accounts and the properties transferred and the fresh promissory note taken if anything was found to be due to the defendant" (paragraph 4).

The appellant went on to aver that the respondent not having returned to the Island his attorney "*induced*" him to give him a fresh promissory note for Rs. 37,444.69 which the attorney said was the amount to which the sum of Rs. 27,762 of the first note had arisen as a result of the addition thereto of the amount of interest that had accrued at the rate stipulated, and a sum of Rs. 2,000 given by the respondent at the appellant's request to the Proctor already mentioned. Again, says the appellant, on June 13, 1936, the same attorney "*persuaded*" him to give him a fresh promissory note for Rs. 52,948.70 which he alleged was the sum resulting from the addition to the amount of the second note of the interest that had accumulated in the interval, less several payments made by the appellant aggregating to the sum of Rs. 3,885.12. The appellant also averred that he signed the last note "with the greatest reluctance" and because "he had implicit faith in the defendant . . . . that the note would be discharged . . . . and the accounts equitably looked into and a fresh note taken for the amount actually due if any" (paragraph 8).

The respondent filed answer and alleged that "on or about June 19, 1931, an account was stated, and a balance struck . . . . and a sum of Rs. 160,922 was found to be due and owing from the plaintiff to him" (paragraph (2) (*b*) and that property to the value of Rs. 133,250 having been transferred to him in part payment the promissory note dated June 19, 1931, was given in respect of the balance outstanding (paragraph 2 (*c*) and (*d*). Similarly in regard to the two other notes, the respondent stated in paragraphs 3, 4 and 5 the circumstances in which they were made and he averred that the making of the last note was preceded by an account stated between them.

On those allegations and averments he pleaded that there was no occasion either in law or on the facts for reopening these transactions and he counterclaimed the sum of Rs. 70,541.05 on the last promissory note together with interest.

There was a replication in which the appellant pleaded *inter alia* that the respondent's counterclaim was unenforceable by reason of the respondent's failure to comply with the requirements of the Business Names Registration Ordinance (Cap. 120).

The learned trial Judge found for the convincing reasons he gave in his judgment that the three notes referred to in the plaint were not made in the circumstances alleged by the appellant but that "the parties looked into accounts in June, 1931, that the plaintiff transferrd to the defendant certain properties in part payment of the accumulated balance . . . . and gave the note P 29 (that in the first note of 1931) as security for the payment of the balance Rs. 27,672"; that this amount was "wholly principal" and was due to the defendant. He then examined the transactions after the making of P 29 and reached the conclusion that inasmuch as the sum of Rs. 52,948.70 of the last of the three notes included compound interest not agreed upon between the parties the appellant is entitled to have the transaction to which the last note was related reopened. He also found that the amount of Rs. 52,948.70 including as it did interest that had accrued was incorrectly described in the note as the capital sum borrowed and that for that reason it violated section 10 of the Money Lending Ordinance and was unenforceable. The counterclaim therefore, failed.

But he found that there was sufficient evidence that there were transactions between the parties after the making of P 29 and that this was "a case where despite the fact that note A (the last of the notes) is unenforceable the court should in the exercise of its discretion and in the interest of the defendant order the transaction embodied in that note to be reopened and an account taken."

It will be observed that the trial Judge did not find that an account was stated as alleged in para. 5 of the answer at or about the time the last note was given by the appellant. Indeed there was no evidence whatever to support that allegation. This case must, therefore, be considered by us on the basis that the only account stated took place in June, 1931.

In regard to the objection taken by the appellant under the Business Names Registration Ordinance the learned judge overruled it holding that assuming although not finding that the respondent had a partner whom he failed to disclose when he applied for registration of his business name he was not debarred from making the counterclaim he set up in virtue of the exemption afforded him by section 9 (1) (c) of the Business Names Registration Ordinance.

The appellant has appealed against the judgment and the respondent has filed cross-objections to it and on the submissions made to us by Counsel appearing for the two parties the substantial questions that arise for decision may I think, be formulated thus—

(1) Has the respondent failed to comply with the requirements of the Business Names Registration Ordinance ?

(2) If so, is he precluded from making his counterclaim ?
(3) Is he debarred from enforcing hiis counterclaim by section 10 of the Money Lending Ordinance ?
(4) Is the note on which the counterclaim is based fictitious within the meaning of the section 14 of the Money Lending Ordinance ?
(5) If it is, is the appellant entitled to have the counterclaim dismissed ?
(6) If the note is neither fictitious nor obnoxious to section 10 of the Money Lending Ordinance is the respondent entitled to judgment as prayed for by him ? Or has the Court the power to order a reopening such as has been ordered ?
(7) Is the charging of compound interest in the course of the transactions between the appellant and the respondent illegal ?
(8) If so, what is the consequence in law ?
(9) Is the amount charged as interest and included in the note on which the counterclaim is made excessive and/or is the transaction represented by the note harsh or unconscionable or substantially unfair ?
(10) What order should be made in the result ?

On the first of these questions I am in agreement with the findings of the trial Judge on the facts, and I share his view of the correct interpretation of section 9 (1) (c) of the Business Names Registration Ordinance. Indeed I do not think any other interpretation is reasonably possible. The words "any other party" set in contrast as they are with the word "defaulter" include *both* the other party to the contract and any third party on whom the rights of the other contracting party may have devolved and there does not appear to be any good reason for limiting the words "any other party" to a third party only as Counsel for the appellant sought to do.

The answer to questions 1 and 2 is that assuming a failure to comply with the Ordinance the respondent is exempted from the ordinary consequences of such a failure by section 9 (1) (c) and he is not precluded from making his counterclaim.

In regard to question 3 it must be considered in the light of the finding by the trial judge on the evidence of the appellant himself that an account was stated between him and the respondent in June, 1931, and that the first of the three notes P 29 was given to secure the payment of the balance due by the appellant after certain adjustments had been made.

On the evidence it seems indisputable that the account stated in this instance was not a mere acknowledgment of a debt from which a promise to pay the debt is implied but that it is what Blackburn J. as he then was called "*a real account stated*" in *Laycock v. Pickles*[1] or as known to the old law an "*insimul computassent*". Such an account stated arose when—in the words of Blackburn J. "several items of claim are brought into account on either side and being set against one another a balance is struck and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each and in consideration of that discharge the balance was agreed to be due". "It is not necessary in order to make out a real account stated that the debt should be *in praesenti*

[1] 4 B. & S. 497

or legal debts; the account may contain contingent or equitable debts or debts barred by a statute of limitation or debts unenforceable by action". This was the view adopted by the Privy Council in the opinion delivered in *Siqueira v. Noronha*[1]. A claim on such an account stated may fail either wholly or as to a particular item only on certain grounds, namely, that there was no consideration or an illegal or immoral consideration or if on any other ground the defendant if he had actually paid the amount or the item in question could have recovered back the money paid. See *Laycock v. Pickles* (*supra*) and *Evans & Co. v. Heathcote*[2]. The appellant has not made out a case on any such ground and indeed he was debarred from advancing such a case by the proviso to section 3 of the Money Lending Ordinance which says "that in any case in which any amount claimed at any time to be due has been settled in account no repayment or re-adjustment shall be ordered in respect of any sum paid or allowed in account exceeding six years before the date of application to the Court for relief". Here that period was exceeded. The account stated took place in June, 1931, and the appellant's application was made in March, 1938. In the Indian Case of *Firm Bishum Chand v. Seth Chirdari Lal*[3] Lord Wright in delivering the opinion of the Privy Council pointed out that "a real account stated" "may take place in respect of a money lending transaction even though the borrower was always the debtor of the lender and never able to sue the other for a demand or claim". In this case there is documentary evidence to show that there were in the course of the dealings between the parties a few transactions other than money lending. The account stated in June, 1931, was in respect of all these transactions, and on a correct interpretation of the evidence in the case it is clear that if the promissory note P 29 had been made so as to embody the true facts, it should have read, "I . . . . promise to pay . . . . Rs. 27,672 being the amount found to be due on an account stated between us with interest there on at . . . . and not as it has been drawn up to indicate the sum of Rs. 27,672 as money borrowed. But in my opinion it is immaterial that the parties sought to *aequiparate* the promissory note to one given to secure a loan and, in that view of it, to comply with the requirements of section 10 of the Money Lending Ordinance for I think when we are considering the applicability of section 10 we should be guided by the substance of the transaction not by its form when there is evidence to show what the real transaction was.

Once the character of the promissory note is thus ascertained as that of a note given to secure an amount due on an account stated the theory of a notional loan advanced in the course of the argument is necessarily excluded. 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. The fact that the occasion for the granting of P 29 was that of an account stated renders inapplicable the case of *Abeydeera v. Ramanathan Chettiar* and the English cases referred to in that case and in the course of the argument.

The note P 29 not being a note given to secure a loan of money the second and third notes which were given as security for the amounts to which

[1] *(1934) A. C. 337.* [2] *(1918) I. K. B. 418.* [3] *50 I. L. R. 465.*

the sum covered by P 29 had risen by effluxion of time are not "renewals" of any loan. In this connection it is not without significance that the appellant himself described the later notes as fresh notes.

The conclusion to which I come in this way is that the promissory note upon which the respondent makes his counterclaim is not unenforceable within the the meaning of section 10 of the Money Lending Ordinance.

The next question relates to the fictitiousness of the note counterclaimed upon. The taint of fictitiousness is incurred under section 14 only in the case of "*promissory notes given in respect of a loan*" and only if in regard to them—(*a*) "a reduction was made or a sum paid *at or about the time of the loan* . . . . without such reduction or payment being set forth upon the documents . . . . ." or (*b*) "*at or about the* time of the loan . . . . any collateral transaction was entered into with a view to disguising. . . . the rates of interest payable in respect thereof". The promissory notes with which we are concerned, namely, P 29, P 30 and "A" were not given according to the case put forward by the appellant in respect of *loans* made at the time they were given nor was any sum paid or any reduction made nor any collateral transaction entered into at or about the time the notes were granted with a view to disguising "the actual amount of the sum advanced or the interest payable in respect thereof". The appellant's case simply stated is that a rate of interest other than that stipulated and shown on the notes has, in effect been *subsequently*, debited against him in the books. It is not his case that at the time the notes were made he was told that he would have to bear either compound interest or a higher rate of interest and that the rates appearing on the notes were inserted in order to disguise the real rate.

For these reasons I cannot see how any of these *three notes* could be said to be fictitious.

The next question that arose before us was the much debated question, "Is compound interest illegal in Ceylon? That is a question on which I had already formed a view when I expressed my agreement with the judgment of Sir Sidney Abrahams C.J., in the case of *Abeydeera v. Ramanathan Chettiar*[1] and that view has only been confirmed by what I heard in the course of the argument in this case. This question in my opinion has been answered for us by the legislature in Ordinance No. 5 of 1852 (Cap. 66) and in the Bills of Exchange Ordinance (Cap. 68). Section 5 of the former of these Ordinances says—

> "Provided that no person shall be prevented from recovering on any contract or engagement any amount by way of interest expressly reserved thereby or from recovering interest at the rate of 9 per cent. per annum on any contract or engagement in any . . . . in which interest is payable by law and *no different rate of interest has been specially agreed upon between the parties.*"

This is a general provision and applies to interest on all contracts and engagements including Bills of Exchange and promissory notes. The case now before us relates to a promissory note. In view of the admitted

[1] *38 N. L. R. 389.*

fact that accounts were rendered regularly in writing by the respondent to the appellant showing that from the date interest became payable after P 29 was made compound interest was being consistently charged without any protest or question on the part of the appellant the inference is irresistible that subsequent to the granting of P 29 the parties had specially agreed to it. The words "specially agreed" do not in my opinion require that the agreement should result from written or spoken words. It may result from a clear and unambiguous course of dealings between the parties. The words "specially agreed" are not synonymous with "expressly reserved" or "expressly agreed". The words "specially agreed" are used to contrast a case in which there is expressed or implied agreement in regard to the rate of interest with a case in which there being no agreement whatever in regard to interest the law allows a rate of 9 per cent. per annum. This view is supported by what Walter Pereira J. said in the course of his judgment in *National Bank of India v. Stevenson* [1]:

> "But quite apart from the matter of custom (that is the custom of Banks to charge compound interest of which evidence was tendered in that case) which if proved would of course bind the defendant it seems to me that there is abundant evidence in the case to show that the defendant acquiesced in the charge of compound interest made by the planitiffs and in the system of quarterly rates adopted by them and that hence both these matters were to all intents and purposes involved in the agreement between the parties . . . . the defendant never once raised any objection to it."

It is clear from his judgment that the learned Judge treats that case as one in which the evidence showed that the parties had by their course of business specially agreed that compound interest was chargeable. Facts could not have reproduced themselves with greater coincidence than the facts of that case and of this have done in regard to the course of dealings between the parties. If that interpretation is correct it means that any amount of interest however calculated whether by adding interest to interest or not and at any rate may be charged provided only that if occasion arises to sue for the recovery of the debt the amount recoverable as interest shall in no case, exceed the principal. The rules against compound interest and against arrears of interest not exceeding the capital sum are restrictions imposed by the Roman-Dutch Usury Laws and it is significant that section 5 of Ordinance No. 5 of 1852 states in the clearest possible terms that "the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal but says nothing in regard to compound interest as it surely would have done if the intention of the legislature was to prohibit it." In my view this section sanctioned compound interest when it declared that subject to the limitation just referred to any amount of interest expressly reserved or specially agreed upon may be recovered. I cannot read the words "rate of interest" in the phrase "and no different rate of interest has been specially agreed" as restricting chargeable interest to simple interest and as prohibiting compound interest. As pointed out by Cayley J. in his dissenting judgment holding against compound interest

[1] *16 N. L. R. at p. 499.*

and against an unlimited rate of simple interest in the case of *Ramasamy Pulle v. Tamby Candoe*[1], "the restriction against compound interest would be futile if the same result be obtained by recovering an exorbitant rate of simple interest. For what protection would it be to a debtor to disallow compound interest if he were allowed to stipulate in the first instance to pay simple interest at the rate of cent per cent. ?"

If I may say so with respect, that observation appears to me to be a sufficient refutation of the view taken by the two other Judges in that case that any rate of simple interest may be recovered but not compound interest. It exposes the incongruity of the two parts of that proposition the effect of which is to interpret that section of the Ordinance as giving with one hand and taking away with the other for a money lender confronted with that proposition would hardly be in a dilemma. He would abandon any intention he may have had to charge compound interest, and by a simple arithmetical calculation determine the rate of simple interest that would yield the same result.

But in regard to the question that was directly in issue in the case of *Ramasamy Pulle v. Tamby Candoe* I find myself in respectful agreement with the opinion of the majority that any rate of interest may be recovered by agreement. Section 5 of the Ordinance says so in so many words. The two views in proper combination appears to me to solve the problem and lead to the conclusion that the Legislature by means of this section abolished the Roman-Dutch Usury Laws against compound interest, and excessive rates of simple interest but, in order not to leave the money lender completely untrammelled, imposed a limit by providing that the interest recoverable at law shall not exceed the principal.

The anonymous case cited to us from Vanderstraaten's Reports dealt with the question of compound interest charged on a bond executed in the year 1837 and probably for that reason there was no reference at all to the Ordinance, 1852. The case cannot therefore be regarded as doing more than reaffirming the well established rule of Roman-Dutch law against compound interest. The effect of the Ordinance on that rule was not considered.

The only other case cited to us that bears directly on this question is that of *Obeyesekere v. Fonseka*[2] in which Dalton J. held that on a note given by a debtor to his creditor for the amount of interest then due undertaking to pay a certain rate of interest thereon the creditor could not recover anything more than the principal because he said to allow interest would amount to allowing interest upon interest. With all respect to that learned Judge I am unable to share his view that because the note was given to secure the interest due, the principal amount shown on the note continued to be interest its identity unchanged. It seems to me that if that view is pursued to its logical conclusions, it leads to untenable results for it means, for instance, that if the debtor actually handed to the creditor the interest due and borrowed it back promising to pay interest on it he will nevertheless not be liable to pay interest. In other

[1] *(1875) Ramanathan's Report, p. 197.*

[2] *36 N. L. R. 335.*

words he will be entitled to an interest-free loan. That view is inconsistent with that taken in *Abeydeera v. Ramanathan Chettiar* and in the English cases referred to in that judgment, namely, that when a debtor in the position of the debtor in the case of Dalton J. finding himself unable to pay the interest that had accrued gives his creditor a promissory note for the amount due, the resulting position is, on analysis, no other than a lending by the creditor and a borrowing by the debtor of the amount due—a notional loan as it has been called. Apart, however, from my respectful disagreement with the conclusion to which Dalton J. came in the view he took of the transaction in that case, for the reasons I have stated, I disagree with his ruling in regard to compound interest. The other cases cited to us *Mudiyanse v. Vanderpoorten*[1], *Appuhami v. Theodoris Silva*[2], *Velupillai v. Marikar*[3], deal with different questions and are easily distinguishable. For these reasons, I reach the conclusion that compound interest was legally chargeable in virtue of section 5 of Ordinance No. 2 of 1852.

But, this case involving as it does a promissory note, I am of opinion that compound interest was chargeable on it in virtue of section 97 of the Bills of Exchange Ordinance (Cap. 68) as well. This section or rather its equivalent originally occurred in Ordinance No. 5 of 1852 and in view of it the dissenting Judge himself in the case of *Ramasamy v. Tamby Candoe* held that Bills of Exchange and promissory notes stood on a different footing and were exempted thereby from the English laws of usury (at page 198). Section 97 (2) of Bills of Exchange Ordinance provided that: "The rules of the Common Law of England including the Merchant Law in so far as they are not inconsistent with the express provisions of this Ordinance or any other *Ordinance* for the time being in force shall apply to Bills of Exchange, promissory notes and cheques." What then is the meaning of the phrase "shall apply to"? In regard to that I am in respectful agreement with what Walter Pereira J. said in interpreting section 2 of Ordinance No. 5 of 1852 which, at the date of that judgment, contained what is now enacted in section 97 of the Bills of Exchange Ordinance. He said "section 2 of Ordinance No. 5 of 1852 introduced into this Island the law (that is the English law) relating to bills of exchange, promissory notes and cheques, and in respect of *all matters connected with any such instruments*". The charging of interest is a matter connected with promissory notes. It follows that the English law applies, and the English law allows the charging of compound interest where, *inter alia*, parties have expressly or impliedly agreed thereto. The Roman-Dutch law rule which clearly forbade the charging of compound interest was swept away and was replaced by the English law including the Merchant law so far as that law was not inconsistent with the Bills of Exchange Ordinance itself or with any other Ordinance in force for the time being.

On this answer to question 3, it would follow that, ordinarily, the respondent would have been entitled to Judgment on his counterclaim for twice the amount of note P 29, once on account of principal and once on account of recoverable interest. Similarly in regard to the sum of Rs. 2,000 paid by him at the instance of the appellant to his Proctor.

[1] *23 N. L. R. 342.* [2] *9 S. C. C. 16.* [3] *2 C. L. W. 314.*

But, there is the Money Lending Ordinance to be considered. Under section 2 which is wide in scope, transactions are liable to be reopened both in cases brought for the recovery of money lent and in cases for the enforcement of any agreement of security made or taken after the Money Lending Ordinance in respect of money lent either before or after the Ordinance.

The evidence in the case establishes that from 1920 the dealings between the respondent and the appellant were, for much the greater part, by way of money lent by the former to the latter, and it appears to me, therefore, that although P 29 given after a real account stated—created a debt different from a debt due on a loan of money within the meaning of either section 10 or section 14, the words "for the enforcement of any agreement or security . . . .; in respect of money lent either before or after the commencement of the Ordinance" enable the Court to reopen the transactions in question in this case and take an account under section 2 (1) (*a*) and (*b*) subject, however, to the condition that it may not order a repayment or readjustment of the account in respect of any sum paid or allowed in account at a date exceeding six years before the date of the application to the Court for relief (section 3, Money Lending Ordinance). In this case there is an additional reason debarring an order for repayment or readjustment of anything paid or allowed on account before P 29 was made and that is the fact that P 29 followed in an account stated.

For these reasons, I am of opinion that it was competent for the trial Judge to make the order he has made for a reopening of transactions between the date of P 29 and that of the last note A. It is competent for the Judge to reopen the transactions and to take an account although the charging of compound interest, and the rate of interest charged are not illegal for under the Money Lending Ordinance the question arises whether, in all the circumstances of a case, the interest charged although not illegal, is excessive and whether, otherwise, the transactions are inequitable or harsh and unconscionable. This answer disposes of the other questions I formulated above as the questions arising between the parties.

In the event the appeal and the cross-objections fail. In regard to costs, I believe a fair order would be to direct the appellant to pay half the costs of the appeal and leave the order as to costs of all the proceedings in the Court below in the discretion of the District Judge.

KEUNEMAN J.—

The plaintiff brought this action alleging that he had dealings with the defendant for some years. He stated that defendant lent him moneys, and that in the year 1931 the capital lent amounted to the sum of Rs. 53,000 odd, and the interest on the same to Rs. 107,000 odd, the total being Rs. 160,000 odd. In 1931 the plaintiff in point of fact transferred to the defendant property to the value of Rs. 133,000 odd in liquidation of his liability, leaving a balance of Rs. 27,627, for which plaintiff gave promissory note P 29 of June 19, 1931. Later, plaintiff said he was persuaded by defendant's attorney to sign promissory note P 30 of January 18, 1933, for Rs. 37,444.69 which in fact included the

capital sum of Rs. 27,672 on P 29, together with Rs. 2,000 paid by defendant to Proctor Muttukumaru on behalf of plaintiff for professional services at the 1931 accounting, and Rs. 7,772.69 interest. A further promissory note A was taken from plaintiff on January 13, 1936, made up of the amount of P 30, viz., 37,444.69, and interest on it Rs. 19,389.13. the total of note A, being Rs. 56,833.82, less payment of Rs. 3,885.12 to wit Rs. 52,948.70. The plaintiff alleged *inter alia* that compound interest had been charged on these notes. The plaintiff said that these notes were signed, on the undertaking that they would be duly discharged and returned to him and the accounts equitably looked into and a fresh note taken for the amount actually due, if any. The plaintiff prayed that the Court do reopen the transactions and take an account between the plaintiff and defendants under section 2 of the Money Lending Ordinance (Cap. 67) and set aside the promissory note A of 1936, and for judgment against the defendant for any excess paid to the defendant.

The defendant filed answer praying for the dismissal of plaintiff's action and in reconvention claimed judgment for the amount due on promissory note A of 1936.

In his application, the plaintiff alleged that promissory note A was fictitious within the meaning of section 10 of the Money Lending Ordinance, and further stated that the defendant could not maintain his counterclaim, because he had failed to comply with the provisions of the Registration of Business Names Ordinance (Cap. 120).

Several issues were framed to catch up the various matters arising from the pleadings.

On the evidence the learned District Judge criticized the testimony tendered by the plaintiff, who at the trial stated what was not in accordance with the pleadings. The District Judge rejected the plaintiff's contention that there was an agreement to waive the amounts due on the three promissory notes. Among other things, the plaintiff had taken over into his books the amounts shown in the defendant's accounts which had been sent to him. I think, however, that in view of the absence of any evidence on this matter on the part of the defendant, that it is difficult to avoid the conclusion that some form of protest was made by the plaintiff on each occasion. At the worst, however, the only fact proved as to the circumstances of these transactions after 1931 was that the plaintiff had signed each of the promissory notes. I do not think it has been proved that there was anything in the nature of an account settled or stated, except as the District Judge has rightly held in respect of the 1931 settlement. In that case there was a real looking into accounts, and a settlement entered into with the assistance of the plaintiff's proctor, and I further think that the District Judge was right in holding that in 1931 the whole of the interest then outstanding was paid by the plaintiff to the defendant, and only the principal amount of Rs. 27,000 odd was left unpaid, and was secured by the promissory note P 29. The District Judge held that the 1931 settlement could not be reopened in any event, because it took place more than six years before action brought, and was therefore prescribed under section 3 of the Money Lending Ordinance.

As regards the later promissory notes, the District Judge held that note A, offended against the provisions of section 10 of the Money Lending Ordinance insomuch as the amount shown as capital is incorrect. The note A was accordingly unenforceable. As regards both note P 30, and note A, the District Judge holds that amounts of interest were added to the capital sums due and compound interest was charged. In point of fact although each of these notes provided for simple interest at the rate of 15 per centum per annum, it had been the practice of the defendant, to have half-yearly rests, and after each period of six months, to charge interest on the amount then outstanding both as principal and interest. The District Judge held that there was no agreement at any time for the payment of compound interest. Though the District Judge does not specifically say so, I think it follows from his judgment that he also held that the interest actually charged was harsh and unconscionable, or substantially unfair between the parties.

The District Judge further held that though note A was unenforceable, he should exercise his discretion in the interests of the defendant and order that the transaction embodied in that note should be reopened and an account taken.

As regards the objection based on the Registration of Business Names Ordinance, the District Judge held, that it was competent for the defendant to make a counterclaim under section 9 (1) (*c*).

From this judgment the plaintiff appeals, and the defendant has also filed counter-objections.

The appeal of the plaintiff referred to three matters. First he contended that in view of the fact the defendant was in default under the Registration of Business Names Ordinance he was debarred from making any claim under note A, and that the only question the District Judge could decide was what amount if any had been paid in excess by the plaintiff. The plaintiff also argued that under section 2 of the Money Lending Ordinance, not only the note P 30 and A should be opened up, but also the 1931 arrangement represented by note P 29.

The question relating to registration of business names depends on the construction of section 9 (1) (c) of Cap. 120. (Registration of Business Names Ordinance)—

> viz., "if any action or proceeding shall be commenced by any other party against the defaulter to enforce the rights of such party in respect of such contract, nothing herein contained shall preclude the defaulter from enforcing in that action or proceeding, by way of counterclaim, set off or otherwise, such right as he may have against that party in respect of such contract."

Counsel for the plaintiff argued that the words "any other party," must be read in the sense "any party other than a party to the contract". He referred to the fact that in proviso (*a*) of section 9 (1), the words "party to the contract" appear, and contended that the word "any, other party" appearing in provisos (*b*) and (*c*) should be used as excluding parties to the contract. I do not think this argument is sound. Each of the provisos (*a*), (*b*) and (*c*) are independent of each other, and refer back to section 9 (1), where the word "party" does not occur. Further

if provisos (b) and (c) are read independently, I think it is clear the words "any other party" are used in contradistinction to "the defaulter". If then the meaning is "any party other than the defaulter", it would follow that the words in question refer to a party to the contract. It can of course be argued that they also apply to those who are not parties to the contract, *e.g.*, assignees.

The cases cited by counsel for plaintiff, viz., *Daniel v. Rogers*[1] (obiter of Shearman J.) ; *Daniel v. Rogers*[2]; *Hawkins v. Duche*[3] do not assist him. In fact I think these cases are against him. In my opinion it is clear that where there has been a default, it is the defaulter who is precluded from *commencing* an action or other proceeding. Section 9 (2) seems to add emphasis to this point. But where proceedings are taken against the defaulter, by any other party, the defaulter is entitled to enforce his rights "by counterclaim, set off or otherwise". Further there does not seem to be any reason why an assignee, for example, should be placed in a worse position than the original party to the contract.

As regards the point that the 1931 transaction should also be opened up the matter is governed by section 3 of the Money Lending Ordinance. Clearly in this case the amount of the note P 29 was "settled in account", in 1931, and on that note the sum of Rs. 27,000 odd was "allowed in account". This took place more than 6 years before action brought—viz., before 1938. Therefore "no readjustment of the account" can be ordered in respect of this item. Further this sum of Rs. 27,000 represents principal alone, and is no way obnoxious to the Money Lending Ordinance. I hold that the finding of the District Judge was right on this point.

One other point in plaintiff's appeal may be mentioned. He argued that in view of the fact that note "A" has been held to be fictitious, no claim can be made in respect of the transaction disclosed in the note. The Privy Council in *Sockalingam Chettiar v. Ramanayake*[4] drew a sharp distinction between the effect of sections 10 and 13 on the one hand and that of section 8 on the other (*i.e.*, when the books of the money lender are not kept in accordance with the terms of that section). Under section 8 the money lender is not "entitled to enforce any claim". This would affect the whole transaction. Under section 10 and section 13 the *claim* is not affected. Their Lordships held that there was "no inconsistency between section 2 and section 10", and although the promissory notes in question were admitted in that case to be fictitious, the transaction itself, which was a mortgage, was unaffected. It was held that "the provisions of section 13 do not prevent the Court from reopening the transaction and taking the account under section 2.". The fictitious promissory notes were not however admissible in evidence to prove the loan.

The plaintiff's appeal therefore fails.

The counter-objections of the defendant remain for consideration. At the outset I think it is desirable to determine what attitude the law of Ceylon has adopted towards compound interest, as many matters in appeal depend upon that point.

[1] *(1918) 1 K. B. 149.*
[2] *(1918) 2 K. B. 228.*
[3] *(1921) 3 K. B. 226.*
[4] *38 N. L. R. 229.*

As regards the Roman-Dutch law, the matter seems abundantly clear. As Nathan puts it in the Common Law of South Africa (2nd Edition) Vol. 2., Page 669, "It is clear that, by Roman-Dutch law the interest may not be turned into capital, upon which fresh interest is to be charged. In other words, the charging of compound interest is not legal." It is true that he adds that in South Africa the strict rule has not been applied. In fact the rule as regards compound interest in that country may perhaps be regarded as abrogated by disuse.

The Roman Dutch authorities do not leave us in doubt, see Van Der Linden 1.3.4 (Henry's transaction at 219), "That interest upon interest is not allowed, nor to be turned into principal, so as to increase the original debt." See also Grotius' Introduction to Dutch Jurisprudence (Maasdorp's translation, p. 235), "It is, however, for good reasons forbidden to cumulate unpaid interest with the capital, and thus stipulate for compound interest, for people not seeing the consequences may thereby be entirely ruined." See also Voet 22.1.20 (Horwood's translation, p. 22), "Similarly it is forbidden to claim interest upon interest or to turn interest again into capital (which is called *anatocismus*, compound interest)." Voet explains here how far the rule is carried.

In fact as Maasdorp puts it there were in the Roman-Dutch law, "two main rules . . . . viz., that compound interest is not allowed by our law, and that the amount of accumulated interest will in no case be allowed to exceed the principal." With the second rule we are not immediately concerned. It is to be noted, however, that both these rules are inherent in the law, and are not the creatures of statute.

Have these rules regarding compound interest been adopted in this Colony? I do not think it is possible to have any doubt upon that point. The earliest case which I have been able to trace was in 1870, where three Judges, who then constituted the Full Court, following the authority of Van Der Linden, Van Leeuwen, Grotius and Voet, held that compound interest was prohibited. The case is reported in Vander Straaten's Reports, page 57. This was a case where a father by deed promised to pay to his minor children a sum of money with interest, on their coming of age, and further agreed to renew the bond every eight years, adding the interest then due to the principal. The Supreme Court held that the bond so far as it related to compound interest was invalid, and that it was illegal to have added the interest to the principal, and to make the whole sum so increased bear interest. In 1875 there was also the important case of *Ramasamy Pulle v. Tamby Candoe*, (Ramanathan 1872 and 1875, 6, page 189). The majority of three Judges held that the Dutch usury laws relating to the rate of interest had not been introduced into Ceylon. But as Stewart J. said, "A distinction, ... may legitimately be drawn between the (Vander Straaten) case and the present, the exaction of compound interest involving the infraction of a principle of fixed and general law, whereas the question before us is simply regarding a matter of detail relating merely to the rate chargeable as interest." All three Judges concurred in the view that compound interest was prohibited. As regards the rates of interest, it was further held that Ordinances, including section 3 of Ordinance No. 5 of 1852 (now enacted as section 5 of Cap. 66) had in any event swept

away the Roman-Dutch rules as to rates of interest. In view of the argument addressed to us, that this same section affected the question of compound interest, which will be dealt with later, it is of importance to note that all three Judges were satisfied that the Roman-Dutch rules relating to compound interest had not been abrogated. No doubt this is *obiter*, but it is a weighty *obiter*. It was held that compound interest is illegal and cannot be recovered, even though expressly stipulated for.

These two cases were followed by a number of other cases, the references to which I may give, *16 N. L. R. 96 ; 23 N. L. R. 342 ; 2 C. L. W. 314 ; 31 N. L. R. 333 ; 36 N. L. R. 334.* Of these the case of *National Bank of India v. Stevenson*[1] is interesting. Here the Roman Dutch prohibition against compound interest was reaffirmed, but it was held that by Ordinance No. 22 of 1866 in all questions or issues which arise or which may have to be decided with respect to the law of banks and banking, the law to be administered is the same as would be administered in England in the like case at the corresponding period. It was held that the keeping of a current account between the bank and its customer came within the legitimate business of a banker, and that law governing the rights and liabilities arising in connection therewith was the English law. It is of particular interest to note that section 3 of Ordinance No. 5 of 1852 (now section 5 of Cap. 66) was specifically referred to in the argument, but the only argument advanced was that that section restored the Roman Dutch prohibition against compound interest to transactions otherwise governed by the English law,—an argument very far removed from that which we shall have to deal with later. The Judge did not agree with the argument then advanced.

There is, however, one case in which this current of authority has been broken, viz., *Abeydeera v. Ramanathan Chettiar*[2]. This case appears to hold that the Roman-Dutch rule against compound interest has either not been introduced into Ceylon, or has been superseded by section 3 of Ordinance No. 5 of 1852, as amended by section 97 of the Bills of Exchange Ordinance, No. 25 of 1927. The question of this section will be dealt with later, but at any rate it is clear that the question whether the prohibition against compound interest was in force in Ceylon was decided on the analogy of the South African law, and the Ceylon cases, with the exception of the case in Ramanathan, were apparently not referred to. I may point out that in South Africa, it was found that there were numerous cases in which compound interest had been allowed, and in *Natal Bank v. Kurunda*[3] it was held that the old Roman-Dutch laws had been abrogated by disuse. That case contains a citation from an earlier case, *Seaville v. Colley*[4] as follows :—

"The presumption is that every one of these laws (*i.e.*, the laws in force at the date of the British occupation in 1806) if not repealed by the local Legislature is still in force. The presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usages is furnished by unoverruled judicial decisions."

[1] *16 N. L. R. 496.*
[2] *38 N. L. R. 389.*
[3] *Transvaal L. R. (1907) Vol. 6, p. 155.*
[4] *9 S. C. 39.*

It is clear therefore that the usages in South Africa had taken a different turn, and had consistently allowed compound interest. In Ceylon on the contrary there is a practically unbroken current of judicial authority prohibiting compound interest.

It has been argued before us that the rules of the Roman-Dutch law relating to compound interest have been abrogated by section 5 of Cap. 66 (formerly section 3 of Ordinance No. 5 of 1852), which runs as follows :—

> "Provided that no person shall be prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby or from recovering interest at any rate of nine per centum per annum on any contract or engagement, in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties, but the amount recoverable on account of interest or arrears of interest shall in no case exceed the principal."

The further argument is put forward that this section was not considered in the earlier cases. It is true that this section has not been specially referred to in the case reported in Vander Straaten's Reports, and in a number of cases which followed that case. But I am not prepared to say that it was not considered. In fact this section played a great part in the determination of the case reported in Ramanathan's Reports, and was utilized by the majority of the Court to help in the decision that the Roman-Dutch rules as to the rates of interest had been superseded. But the Judges did not go further and apply the section to the question of compound interest, which they held to be still governed by the Roman-Dutch law. I have referred to this as a weighty *obiter*. In the 16 N. L. R. case the present argument advanced was not put forward. On the contrary it was argued without success that this very section introduced the Roman-Dutch rules of compound interest into matters which would otherwise have been governed by the English law. In that case the present argument would have been very relevant, and I think it is significant that it was not advanced. I do not think the learned Judges who decided the other cases in question were unfamiliar with this section. I do not, however, propose to place too much reliance on the fact that the present argument had not been advanced before the 38 N. L. R. case, although perhaps this does show that the argument is open to doubt. It may be noted in this connection that section 5 is headed "Legal rate of interest". I have myself carefully considered the argument now advanced, and I cannot agree with it, for the following reasons :—

(1) The language of the section is not sufficiently precise and definite to have the effect of repealing the rules against compound interest. Where the Legislature desired to permit the adding together of principal and interest, and to allow interest to be paid on the aggregate, it has used very specific language. Compare, for instance, section 192 of the Civil Procedure Code, which gives to the Court the power to add together the amounts of principal and interest up to the date of decree, and to allow further interest on the "aggregate sum so adjudged". Whether

this will be regarded as compound interest or not under the Roman-Dutch law, it is unnecessary to consider, for the reason that the Ordinance has permitted it in precise language.

(2) The word "interest" in the section must, I think, be interpreted as simple interest, and not as including compound interest. It will be noticed that the word "interest" occurs twice in the same section. On the second occasion, in relation to interest not specially agreed upon, the interest at the rate of nine per cent. per annum indubitably refers to simple interest. Was the word "interest" used in a different sense on the earlier occasion? I think not. Nor do I think the word "*amount* of interest" as compared with "*rate* of interest", makes such a fundamental difference as to necessitate one giving that phrase a different meaning.

(3) The Roman-Dutch rule relating to compound interest has a double aspect. It forbids (*a*) the charging of interest upon interest and (*b*) the turning of interest into principal so that further interest may be levied upon it as principal. There is nothing in the section which we are considering which has any bearing upon this second aspect, and no words in the section can be regarded as permitting the turning of interest into principal. If it had been intended by the Legislature to abrogate the rules relating to compound interest, one would naturally have expected a clear reference to this matter, and in the absence of reference to this matter, I conclude that the Legislature did not intend to deal with the question of compound interest.

In the present case the actual notes only provide for 15 per cent. interest, *i.e.*, simple interest. What is objected to is that at various points of time, interest on these notes has been converted into principal, so as to carry further interest, and in respect of note P 30 and note A, it is clear that accrued interest so calculated, has been converted into principal. The section does not make this legal and it is prohibited under our law. I think that the notes are bad in that respect.

I may in passing here point out that the reaffirmation in the section of the Roman-Dutch rule that the amount of interest recovered should not exceed the principal was necessary, because the language of the section (" . . . . no person shall be prevented from recovering . . . . any amount of interest expressly reserved . . . .") may have been regarded as abrogating that rule in the Roman-Dutch law. It is to be noted, however, that the rule of the Roman-Dutch law against recovering as interest more than the amount of the principal is applied to cases which come under the English law as well. I do not think any argument can be based upon this to the effect that the rule against compound interest was impliedly abrogated. There was no necessity on the words of the section to refer to compound interest, which in my view was untouched by the words of the section.

For these reasons I have come to the conclusion that section 5 of Cap. 66 does not have the effect of repealing the Roman-Dutch law forbidding compound interest.

One further argument has been pressed before us, viz., that section 97 (2) of the Bills of Exchange Ordinance (Cap. 68), has brought in the

English law relating to compound interest, and has superseded the Roman-Dutch law, in the case of Bills of Exchange, Cheques and Promissory notes.

Section 97 (2) runs as follows :

"The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, or any other Ordinance for the time being in force, shall apply to bills of exchange, promissory notes, and cheques."

With regard to the history of this matter, Ordinance No. 5 of 1852, section 2 enacted that,

"The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period . . . . ".

Under this section our law followed all the changes in the English law, in relation to these matters, until 1927. In that year, Ordinance No. 25 of 1927 was passed, whereby the law in Ceylon relating to Bills of Exchange, Cheques and Promissory Notes was codified, and section 2 of Ordinance No. 5 of 1852 was repealed by section 97 (3) of that Ordinance. But in section 98 (2) the section now appearing as section 97 (2) of Cap. 68 was enacted. *It is interesting to note that this last section was taken* directly from section 97 (2) of the Bills of Exchange Act, 1882, the chief difference being that our section refers to the common law of England, and the English section merely to the common law.

Now this section was necessary in England for the purpose of preserving those matters peculiarly relating to Bills of Exchange, Cheques and Promissory Notes, on which the Bills of Exchange Act was silent or not sufficiently explicit. As Lindley L.J. said *in re Gillespie ex parte Robarts*[1] "Section 97 has been added to meet cases not exhaustively dealt with by the other sections of the Act." There was no need in England to import into this section matters which may have affected the legality of the transaction itself, for those would ordinarily apply, whether section 97 (2) was enacted or not. The only danger was that some rule relating to this particular subject would be regarded as repealed or abrogated, because it was not referred to in the Act. I do not think that in Ceylon we should give any extended meaning to those words. I am of opinion that even in Ceylon what was intended was to preserve the rules relating to negotiability and other special matters affecting these classes of instruments, and not to import the whole of the common law of England relating to separate branches of law also, whenever a negotiable instrument of this character is in question. To hold otherwise would result in this curious anomaly, that though the money claim embodied in the transaction was illegal or invalid under our law, the security given for it would be regarded as valid.

[1] *L. R. (1887) 18 Q. B. D. 286 at 293.*

It is interesting to consider that section 2 of Ordinance No. 5 of 1852 was actually wider in its scope than the section we are considering, and in view of its language it has been held, for instance, that the English law relating to *assignments* of promissory notes had also been introduced into this Colony, *vide Mohamado v. Ahamadali*[1]. But even sections of this kind have their limitations. For example, Ordinance No. 22 of 1866. (now section 3 of Cap. 66), introduced into this Colony the law of England in all questions relating to banks and banking, in language somewhat similar to that used in respect of bills of exchange. But it was held that the right of a pledge to sell his security without recourse to a Court of law is peculiar to the English law of pledge and the common law of the land in the matter of the rights of mortgage and pledge does not give place to the English law when the mortgagee or pledgee is a bank." See *Hongkong and Shanghai Bank v. Krishnapillai*[2]. It was perhaps a matter for argument and not free from doubt, if section 2 of Ordinance No. 5 of 1852 was still current, whether the prohibition against compound interest can be said to have been abrogated, or whether the subject of interest did not come within the scope of that section. The matter cannot be said to be concluded by any case, such as the 16 N. L. R. case, which dealt with banks and banking. However there is no need to consider that, because this section has now been repealed. For myself, I do not think that the more restricted language of section 97 (2) of Cap. 68 can be regarded as having put an end to the prohibition inherent in our law against the allowance of compound interest. In my opinion, the question of compound interest is a subject distinct and separate from that of bills of exchange, cheques and promissory notes, and that the language of section 97 (2) does not affect the former question.

The next matter of consideration is what application this finding has to the facts of the present case. The first point is that even if there was any notional conversion of interest into capital (cf. *38 N. L. R. 389*)—I am of opinion in the present case that the evidence is insufficient to enable us to hold that there was a notional conversion—that conversion was illegal and prohibited under our law so far as it related to interest, and that there has been in this case a "collateral transaction entered into with a view to disguising the actual amount of the sum advanced" within the meaning of section 14 of Cap. 67. If this is correct, the promissory note A must be regarded as fictitious to the knowledge of the lender. This would give the Court jurisdiction to reopen the transaction under section 2 (1) (*c*). If there was no notional conversion, then it is clear that this same conclusion must be reached. Further it would be evident that the transaction "is otherwise such that according to any recognized principle of law or equity the Court would give relief", and the right to reopen the transaction would arise under section 2 (1) (*b*).

I do not propose to deal with the question whether there has been a default under sections 10 (1) or 10 (5), because that is not necessary for the decision of this case.

One further question remains, viz., whether the District Judge had power under section 2 (1) (*a*) to reopen the whole transaction, on the ground that it was harsh and unconscionable, or, as between the parties

[1] *17 N. L. R. 504.* [2] *33 N. L. R. 249.*

thereto, substantially unfair. On this point I think there is no possibility of doubt. On each of the notes P 29, P 30, and A simple interest was charged at the rate of 15 per cent. Under section 4 (1) (c) this was the highest rate of interest which can be considered reasonable, and any interest above 15 per cent. was to be deemed unreasonable and excessive. Yet it is clear that in the case of each of the notes P 29 and P 30, the defendant charged compound interest, with half yearly rests, and the total amount of interest so calculated was incorporated as principal into the succeeding notes, viz., P 30 and A. Now even if P 30 and A can be regarded as notional conversions of principal and interest into fresh principal, and, as suggested in *38 N. L. R. 389*, we must take it that there was a new notional loan of the total amount on each of these occasions, it is not possible for the money lender to take refuge behind that plea. It may be noted that on the decision of *Lyle v. Chappel*[1] the money lenders thought that they had found a loophole in the Money Lending Act, but as Goddard L.J. put it in *Lyle, Ltd. v. Pearson and Medlycott*[2], the Act could not "be dodged in this patent and almost shameless way, so that, having lent money at a harsh and unconscionable rate of interest, the money lender can get out of any inconvenience and difficulties into which that may put him by entering into a transaction embodying all the previous loans and interest in a new promissory note and charging some low rate of interest on that, and then suing the defendant upon it as soon as he has made default". The terms of section 2 are wide enough to catch up a transaction of this kind, in spite of the fact that there has been a notional conversion, and a notional loan.

It may be further emphasized here, that the principle of notional conversion adopted by Abrahams C.J. in *38 N. L. R. 389*, is based upon the case of *Lyle v. Chappel (supra)*. In each of those cases it was held that there was evidence of a new notional loan. The mere signing of a promissory note for the aggregate principal and interest does not however provide sufficient proof of such conversion. See the references to *Lyle v. Chappel* in later cases. In *Temperance Loan Fund v. Rose*[3] Greer J. referred to his own judgment in the earlier case, and made this comment, "In this case there was no evidence except the signature of the memorandum form, and we do not know whether it was an agreement in respect of the money which had been borrowed previously or whether it is an agreement for the repayment of money which was notionally deemed to be lent at the time of the signature." *Lyle, Ltd. v. Pearson and Medleycott* also refers to this. On the facts in the present case, I am of opinion that it has not been proved that there was any notional loan—it is not even in evidence that the previous note was returned on the occasion of the making of a new note—and the only evidence available points in a different direction. Further as I have already stated, such notional conversion of interest is obnoxious to our law. This makes the position of the defendant untenable.

I cannot support the arguments of defendant's counsel, and I think that the counter-objections fail.

[1] *L. R. (1932) 1 K. B. 692.*
[2] *(1941) A. E. R. 3, p. 128, at 131.*
[3] *(1932) 2 K. B. 522.*

In the result, both the appeal of the plaintiff and the counter-objections of the defendant must be dismissed with costs.

DE KRETSER J.—I agree with my brother Soertsz.

WIJEYEWARDENE J.—

I have had the advantage of reading the judgment of my brother Keuneman and I agree with him—

(i.) that the words "any other party" in section 9 (1) (c) of the Business Names Ordinance (Chapter 120) are applicable to a party suing upon a contract entered into by him with the defaulter,

(ii.) that, in view of the settlement in 1931, section 3 of the Money Lending Ordinance (Chapter 67) bars the reopening of the transactions at a date exceeding six years before the date of this action.

(iii.) that the promissory note A and P 30 are fictitious within the meaning of section 2 of the Money Lending Ordinance and that the District Judge could have acted under sub-sections (*a*), (*b*) and (*c*) of section 2 (1) and ordered the reopening of the transactions embodied in those notes.

(iv.) that the defendant is entitled to a decree in his favour in respect of any sum that may be found by the Court to be fairly due to him on an account taken under section 2 (1) of the Money Lending Ordinance.

(v.) that the Roman-Dutch law disallowing compound interest, even where it is expressly stipulated for, is in force in this Island and has not been repealed by section 5 of the Civil Law Ordinance (Chapter 66).

I agree that the appeal and the counter-objections should be dismissed with costs.

Appeal and cross-objections dismissed.