1940 *Present :* **Howard C.J. and Soertsz J.**

DE SILVA *v.* EDIRISURIYA.

65—D. C. Tangalla, 3,898.

Money Lending Ordinance—What constitutes the business of money-lending—Burden of proof—The bar created by section 8 not applicable to administrator—Money Lending Ordinance. No. 2 of 1918, s. 8 (1) and (2) (Cap. 67).

Where a fisherman lent money on notes to persons who were not his relatives and there was evidence that his money-lending transactions were not limited to occasional loans but were conducted systematically and continuously,—

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

Held, further, that once it is established that a person was carrying on the business of money-lending, the burden is on him to prove that he had complied with the provisions of section 8 (1) of the Money Lending Ordinance.

Held, also, that the bar created by section 8 (2) of the Ordinance does not apply to the administrator of the estate of a deceased money-lender.

THIS was an action on a promissory note to recover a sum of Rs. 877.50 with interest. The original plaintiff, who was the father of the appellant having died, the appellant was substituted as administrator of the estate. There was evidence that the original plaintiff, though he was a fisherman, lent money on notes to persons who were not his relatives, and filed actions to recover them. The learned District Judge held that the original plantiff was a money-lender and that he had failed to keep books of accounts and dismissed his action.

H. V. Perera, K.C. (with him *O. L. de Kretser*), for substituted plaintiff, appellant.—Plaintiff is not a money-lender but a fisherman who occasionally invested his earnings on the security of promissory notes. The form of issue 6, namely, "can this action be maintained without account books?" shows that the court considered that the debt could not be proved unless the account books were produced in Court. There should have been an issue as to whether plaintiff kept proper books of accounts. The District Judge has placed the burden of proof with regard to books wrongly on plaintiff. *Pathmanathan v. Chowla* [1] is not binding in this case inasmuch as plaintiff has not conceded that the business of money-lending has been carried on. The bar in section 8 of the Money Lending Ordinance is a personal bar and only applies to the person subject to the obligations of the section. No local or English authority is directly in point, but see *Daniel v. Rogers* [2] and *Hawkins v. Duché* [3].

N. E. Weerasooria, K.C. (with him *Cyril E. S. Perera*), for defendant, respondent.—Whether a person is a money-lender or not is a question of fact in each case. In this case the evidence shows—

(1) That plaintiff had given up the business of fisherman for some time.
(2) That the plaintiff had lent money to persons who were not relatives on pro-notes.

[1] *13.C. L. Rec. 89.*

[2] *(1918) 2 K. B. 229.*

[3] *(1921) 3 K. B. 227.*

(3) had sued on those notes—

Vide Faggot *v.* Fine (*1911*) *105 Law Times 583.* Edgelow *v.* Mac Elwee (*1918*) *Law Times 177.*

Issue 6 clearly means that having regard to section 8 of the Money Lending Ordinance, plaintiff cannot enforce this action if he has not got proper books of accounts. *Pathmanathan v. Chowla* (*supra*) places the burden on plaintiff to prove that he kept proper books of accounts. The opinion in *Daniel v. Rogers* and *Hawkins v. Duché* (*supra*) relied on by plaintiff are *obiter dicta.*

The operation of such a bar if it exists would apply only to assignee for value of promissory notes given for such loans. See section 11 of the Money Lending Ordinance.

The rights of parties should be regulated by their position at the commencement of the action—*Silva v. Fernando* [1].

H. V. Perera, K.C., in reply.—The wording of section 8 (1) of the Business Names Registration Act is similar to section 8 (2) of the Money Lending Ordinance. The reasoning in these cases was followed in *Fernando v. Jayasinghe* [2] where the interpretation of section 9 of the Business Names Registration Ordinance was considered.

Section 11 of the Money Lending Ordinance is only a special provision to protect a *bona fide* holder for value and does not modify the interpretation to be placed on section 8 (2).

Silva v. Fernando [3] has no application to the facts of this case.

Cur. adv. vult.

August 2, 1940. HOWARD C.J.—

This is an appeal from a judgment of the District Judge of Tangalla, dismissing the plaintiff's action with costs. The original plaintiff who was the father of the appellant sued the defendant on a promissory note dated February 27, 1931, for the recovery of a sum of Rs. 877.50 and interest. The original plaintiff having died, the appellant, after taking out letters of administration, was substituted plaintiff as administrator of his estate. After two witnesses had been called for the plaintiff the following issues were added to those already framed :—

"5. Did the original plaintiff carry on the business of money-lending?

"6. If so, can this action be maintained without account books?"

Issues 3 and 4 were answered in favour of the plaintiff, the learned District Judge finding that at the execution of the note Rs. 500 was paid in cash by the original plaintiff to the defendant. Issues 5 and 6 were answered by the learned Judge in favour of the defendant and in consequence of those answers judgment was entered dismissing the action instituted by the plaintiff. Counsel for the plaintiff has argued that the District Judge was wrong in his findings with regard to both these issues. It is maintained that the original plaintiff was not a money-lender. This contention was not argued with great force. In fact, Counsel could only contend that it was doubtful whether the original plaintiff was a money-lender. There was evidence that though he was a fisherman the original

[1] *15 N. L. R. 499.*

[2] *35 N. L. R. 231.*

[3] *15 N. L. R. 499.*

plaintiff lent money on notes to persons who were not his relations and filed actions to recover on such notes. It was in evidence, moreover, that sometime before his death he had given up fishing. The note in this case was also on a printed form. In the course of his judgment in *Faggot v. Fine*[1] in which it was held that a jeweller who lent money to customers was carrying on the business of money-lending, Bankes J. said :—

> "It is absolutely essential that the tribunal should consider not only the nature but the number of the money-lending transactions. It is from these transactions and from them alone that the inference can be drawn whether or not the person is carrying on the business of money-lending."

In *Edgelow v. Mac Elweè*[2] a Solicitor who habitually lent money on loan transactions in no way confined to clients was held unable to recover as he was not registered. In commenting on the essential attributes of a money-lender McCardie J. said :—

> "A man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. Charity and kindliness are not the basis of usury. Nor does a man become a money-lender because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending and the word business imports the notion of system, repetition and continuity. The line of demarcation cannot be defined with closeness or indicated by any special formula. Each case must depend on its own peculiar features."

The question as to whether the original plaintiff was carrying on a money-lending business is one of fact. There was evidence that the money-lending transactions of the original plaintiff were not limited to occasional loans, but his operations were conducted systematically and continuously. In these circumstances it is impossible to say that the District Judge was wrong in holding on issue 5 that the original plaintiff carried on the business of money-lending.

The correctness of the District Judge's answer to issue 6 depends on the question raised by this issue and the interpretation to be given to section 8 of the Money-Lending Ordinance (Cap. 67). Counsel for the plaintiff has contended that the point raised by this issue is whether the debt can be proved without the production in Court of account books. The wording of the issue is not felicitous and if it had this limited meaning, I am of opinion that the Judge's finding would be incorrect. The issue must, however, be held to raise the question as to whether, having regard to the provisions of section 8 of the Ordinance, the plaintiff can enforce this claim if the original plaintiff did not keep or cause to be kept a regular account of this loan, clearly stating in plain words and numerals the items and transactions incidental to the account and entered in a book paged and bound in such a manner as not to facilitate

[1] *(1911) 105 Law Times 583.*

[2] *(1918) Law Times 177.*

the elimination of pages or the interpolation or substitution of new pages. There should have been an issue as to whether in fact the original plaintiff did keep books as provided by the section. The District Judge has, however, found that no books were kept. In coming to this finding he has in effect placed on the plaintiff the burden of proving that books were kept. Counsel for the plaintiff has contended that this burden of proof rested on the defendant. In support of the District Judge's finding Counsel for the defendant relied on *Pathmanathan v. Chowla*[1].

In his judgment in that case Dalton A.C.J. stated as follows :—

> "It is conceded that, if plaintiffs are held to be carrying on the business of money-lending, the onus is on them to show they have complied with the provisions of section 8 of the Ordinance. They have failed to do so and therefore they are not entitled in the words of the Ordinance to enforce any claim in respect of any transaction in relation to which the default shall have been made."

Mr. Perera has contended that inasmuch as the plaintiff has not "conceded" that the original plaintiff carried on the business of money-lending, this case is not an authority for placing the burden of proof with regard to the books on the plaintiff. I do not consider that this is the meaning of the passage cited from Dalton J's judgment. As I read his dictum, I understand it to mean that, if it is proved that a person carries on the business of money-lending, the onus rests on that person to prove that he complied with the provisions of section 8. This is the position in the present case. *Pathmanathan v. Chowla* (*supra*) is a decision binding on the Court. In this connection I would also refer to the following passage in the judgment of Lush L.J. in *Faggot v. Fine* (*supra*) :—

> "It seems to me clear that in cases brought under the Money Lenders Act or cases which involve questions raised under the Money Lenders Act the defendant has to prove that the plaintiff is a money-lender, in other words that he carries on the business of lending money. But when the defendant has given prima facie evidence of what Walton J. in *Newton v. Pyke*[2] referred to as a certain degree of system and continuity about the plaintiff's transactions, then if the plaintiff seeks to avail himself of any of the exceptions under section 6 of the Act the burden is upon him to show that he comes within them."

On the authority of these two cases, therefore, the District Judge was correct in placing the burden of proof in this matter on the plaintiff.

There now remains for consideration the interpretation of section 8 of the Money Lending Ordinance. It has been contended by Mr. Perera that the bar to enforcing a claim provided by sub-section (2) is a personal bar and only applied to the person subject to the obligations of the section. We are without a decision on the interpretation of this section of the Supreme Court of Ceylon to assist us in coming to a conclusion on the matter. A similar provision is not to be found in the English law. We have, however, been referred to two decisions of the English Courts on

[1] *13 C. L. Rec. 89.*

[2] *25 Times L. R. 127.*

section 8 (1) of the Registration of Business Names Act. These two decisions are *Daniel v. Rogers*[1] and *Hawkins and another v. Duché*[2]. Section 8 (1) of the above-mentioned Act is worded as follows :—

> "Where any firm or person by this Act required to furnish a statement of particulars . . . . shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished 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 always as follows :—
>
> (*a*) The defaulter may apply to the Court for relief against the disability imposed by this section, and the Court . . . . may grant such relief on certain conditions.
>
> (*b*) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid . . . .".

It will be observed that the wording of this sub-section is similar to that of section 8 (2) of the Ceylon Money Lending Ordinance. In *Daniel v. Rogers* (*supra*) Pickford L.J. stated as follows :—

> "I entertain 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. The provisos to section 8, sub-section (1), seem to me to point in this direction, certainly provisos (*a*) and (c) do so; but it is unnecessary to decide this point, and I do not propose to do so."

The judgments of the other Judges, Bankes and Scrutton LL. JJ., were couched in similar language. In *Hawkins and another v. Duché*, McCardie J. stated as follows :—

> "The contention of Mr. Carr is largely founded on the observation of the Court of Appeal in *Daniel v. Rogers*. The facts in that inter-pleader issue were somewhat different to the present facts. Several dicta however are relied on by Mr. Comyns Carr. Pickford L.J. said : 'I entertain 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.' Bankes L.J. expressed a similar view and pointed to the distinction between the Money Lenders Act, 1900, as compared with the Registration of Business Names Act, 1916. And Scrutton L.J. : 'I desire to say, although it is not necessary finally to decide the point that in my view the application of section 8 is limited to proceedings between the parties to the contract.' I respectfully think that the above weighty dicta represent the true interpretation of the Act of 1916. That Act, I think, was meant to punish a defaulter (unless he procured relief) rather than innocent third parties. Unless the dicta I have cited be good law the

[1] (*1918*) *2 K. B. 229.* [2] (*1921*) *3 K. B. 227.*

most serious consequences would follow. Innocent holders for value of negotiable instruments might under section 8 be unable to enforce the rights of a defaulter. The position of innocent assignees of a defaulter's book debts would be equally imperilled. Even purchasers of goods from a trader who was in default under the Act of 1916 might (if the goods were warehoused or held by third persons) be met by a plea of the Act if action was begun against those persons for detention. The position would be still further aggravated if the assignor defaulter in the cases above put either absconded from the country, or refused to make any application for relief. Take morecver the case of a defaulter who executes a deed of assignment for the benefit of his creditors and then leaves the country. Is the trustee of the deed of assignment stricken with inability to collect the assets or enforce the claims of the debtor? I cannot think so. I shall hold that the plaintiff trustees in bankruptcy in the present action are not affected by the disability (if any) of M. and B. Taper. I respectfully adopt and apply the views of Pickford, Bankes and Scrutton LL.JJ. in *Daniel v. Rogers*. I merely add that it is still more necessary to take the view I have ventured to express when it is remembered that an argument has arisen before me as to whether a trustee in bankruptcy can as such apply for relief under section 8 in respect of a bankrupt who was a defaulter under the Act of 1916. The Bankruptcy Act, 1914, does not appear to expressly contemplate such circumstances."

With regard to these two cases it will be observed that, whereas the observations of the learned Judges in *Daniel v. Rogers* were obiter, in *Hawkins v. Duché* McCardie J. adopted those observations and applied them in reaching a conclusion. The reasoning and observations of the Judges in these two cases were also applied in the case of *Fernando v. Jayasinghe*[1] where the interpretation to be placed on section 9 of the Business Names Registration Ordinance was considered. It seems to me that, if the phraseology employed in section 8 (1) of the Registration of Business Names Act indicates that it was only intended to impose a bar on the actual person who was in default in complying with the requirements of the section, the language employed in section 8 (2) of the Money Lending Ordinance would *a fortiori* lead to a similar conclusion. It has been argued by Mr. Weerasooria that the limitation on the operation of the bar would apply only to assignees for value of promissory notes given in respect of any loans. In this connection he has referred us to section 11 of the Money Lending Ordinance which limits the protection thereby granted to such persons. Although this is a special provision inserted to protect *bona fide* holders for value, I cannot think that it can in any way modify the ordinary interpretation to be placed on the language employed in section 8 (2). In *Hawkins v. Duché* McCardie J. held that the bar did not extend to a Trustee in Bankruptcy. The same reasoning and consideration would apply to the administrator of the estate of a deceased person. I am of opinion that such reasoning

[1] *35 N. L. R. 231.*

applied in this case leads inevitably to the conclusion that the bar imposed by section 8 (2) of the Money Lending Ordinance does not apply to claims put forward by the administrator of the estate of a deceased money-lender.

In conclusion I must refer to the final argument of Mr. Weerasooria who contended that even if the bar imposed by section 8 (2) of the Ordinance applied only to the actual person who made the loan, the rights of the parties must be regulated by their position at the time when the action was instituted. In this case the plaint was filed by the deceased money-lender himself and it was only subsequently that the plaintiff was substituted as the administrator of the estate. In support of this decision we have been referred to the decision of the Privy Council in *Silva v. Fernando* [1]. In that case it was decided that no retrospective effect can be given to a letter written by the Crown waiving its rights to plumbago so as to vest in the plaintiff a title at the commencement of the action. In that case the plaintiff when he filed his claim had no cause of action. The decision has no application to the facts of the present case.

For the reasons given in this judgment I am of opinion that the appeal must be allowed and judgment entered for the plaintiff as claimed, together with costs in this Court and the Court below.

SOERTSZ J.—I agree.

Appeal allowed.