1913.

Present: De Sampayo A.J.

SENDIRIGAPITIYA *v.* DEMALAMANE.

428—C. R. Kurunegala, 21,376.

Promissory note—Option to pay money or transfer lands—Collateral security—Promise to pay—"Borrow."

The following document was held not to be a promissory note :—

I, W, in a pecuniary need, have borrowed and received the sum of Rs. 150 from K, and promised to pay interest at 12½ cents for Rs. 10 per mensem ..... on demand unto the said creditor ..... on the said sum.

That further, in default of payment as such, it is hereby sincerely promised ..... to sell and transfer all the shares of lands belonging to ..... me unto the said creditor only for the estimated value.

Signed on two stamps (10 cents).

THIS was an action to recover a sum of Rs. 150 and interest on the document set out in the headnote. The learned Commissioner of Requests (G. W. Woodhouse, Esq.) held that the document was invalid as a promissory note and dismissed plaintiff's action. He appealed.

Balasingham, for the plaintiff, appellant.—After the plaintiff had obtained judgment against the executor, *de son tort* of the deceased maker of the document sued upon, another person who claims to be an heir of the deceased moved that the decree entered be vacated. The order of the Judge vacating the decree and setting the case for trial on the merits is wrong. [V. Grenier.—There is no appeal against that order. This is a case for the recovery of money, and only points set out in the appeal petition could be considered in appeal.] Objection was taken to the vacating of the decree at the proper time, but the Commissioner over-ruled the objection.

The Commissioner was wrong in holding that the document sued upon was not a promissory note. There is an " unconditional promise to pay a sum certain in money." [De Sampayo A.J.—There is no promise to pay the principal. The document appears to be only a receipt.] The word " borrow " clearly shows that the money has to be repaid. The document is in Sinhalese, and we should find out the intention of the parties. If the document was merely intended to be a receipt, the words used would have been " have received Rs. 150," and not " borrowed and received Rs. 150."

The first part of the document satisfies all the requirements of the definition of a promissory note.

The addition of the second portion does not vitiate the note. Sub-section (3) of section 83 of the Bills of Exchange Act enacts that " a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof." The second portion is nothing more than a collateral security. It has been held that a promissory note is not the less a note because it contains a recital that the maker has deposited title deeds with the payee as a collateral security, or a pledge of collateral security with power to sell. See *Byles on Bills 13 (17th edition)* citing *Wise v. Charlton*,[1] *Fancourt v. Thorne*.[2] [De Sampayo A.J. —The words used in the document are not words used for creating a mortgage.] It is a paraphrase of the word " mortgage." Instead of saying " I mortgage," the maker says " I give you the right to sell my lands in case I make default." [De Sampayo A.J.—The words indicate an alternative obligation—to pay money or to sell land.] That may be said in a sense of every mortgage. The mortgagor says, in effect, " I promise to pay the sum borrowed, or in default I authorize you to sell my lands."

The second portion of the document must be treated as a surplusage, as the document has not been notarially executed. It does not affect the validity of the first portion.

V. Grenier, for the substituted defendant, respondent, not called upon.

Cur adv. vult.

[1] *(1836) 4 A. & E. 786.*

[2] *(1846) 9 Q. B. 312.*

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November 28, 1913. DE SAMPAYO A.J.—

Sendiriga-pitiya v. Demalamane

The question on this appeal is whether the document on which the action is brought is a promissory note. It acknowledges that the party to it borrowed a sum of Rs. 150, on which interest is agreed to be paid at 12½ cents per Rs. 10 per mensem on demand to the creditor, his heirs, executors, administrators, and assigns, and it then proceeds to provide that in default of payment the party should transfer to the creditor all the shares of land belonging to and possessed by him, for the estimated value. The document contains no express promise to pay the principal sum of Rs. 150. But it is argued that there is a necessary implication to that effect in the use of the word "borrow." I cannot hold that this word necessarily implies a promise to pay, or that the language of the document satisfies the requirements of the law relating to promissory notes in that respect. Even if there were an implied promise to pay, it is not an absolute promise to pay money. It seems to me that the promise at all events is in the alternative, and that the party has the option to pay money or to transfer the lands at a valuation. Mr. Balasingham for the plaintiff referred me to the cases in which it has been held that an instrument which is otherwise good as a promissory note is not vitiated by reason of its containing a collateral security. In my opinion these cases are in no way applicable to the present case, where the agreement to transfer lands is not collateral but goes to the substance of the whole transaction and indicates the main object of the instrument. Then it was contended that, as the agreement to transfer land was inoperative under our Ordinance No. 7 of 1840, it should be treated as mere surplusage. That cannot be done. The agreement may be invalid, but it must be looked at in construing the instrument as a whole. It is true that no particular form of words is essential to the validity of a promissory note, but the form must be such as to show the intention to make a note. It is far from clear that the document was intended, even by the parties, to be a promissory note, and I think that the alternative agreement which gives to the debtor an election vitiates the entire instrument as a promissory note (*Follet v. Moore* [1]). See also *Chalmers' Bills of Exchange (7th edition) 10*, where the author refers to the old case of *ex parte Imeson*,[2] in which an order to pay "in cash or Bank of England note" was held invalid. This kind of negotiable instrument appears to be allowable in the United States, but we must follow the English law on the subject.

In my opinion the Commissioner rightly decided against the plaintiff, and I dismiss the appeal with costs.

Affirmed.

[1] *(1849) 4 Exch. 416.*

[2] *(1814) Rose 223.*