1952 *Present :* **Rose C.J. and Gunasekara J.**

JOHN RODGER, Appellant, *and* L. C. DE SILVA, Respondent

S. C. 494—D. C. Colombo, 8,374

Promissory Note—" Account stated "—Meaning of term—Money Lending Ordinance (Cap. 67), s. 10.

A promissory note given in respect of pure and simple loan transactions and not in consequence of an account stated between the parties is governed by section 10 of the Money Lending Ordinance. If it does not set forth the capital sum actually borrowed it is unenforceable.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiff appellant.

H. V. Perera, Q.C., with *N. M. de Silva*, for the defendant respondent.

Cur. adv. vult.

October 28, 1952. ROSE C.J.—

The plaintiff-appellant sued the defendant-respondent on a promissory note which was in the following terms :—

" Colombo. 1.4.46.

1. Capital sum borrowed. Rs. 13,062·50. Rs. 13,062·50

On Demand I the undersigned L. C. de Silva of Pinnaduwa, Ambalangoda,

[1] *(1927) 28 N. L. R. 502.*

2. Interest premium or charges deducted or paid in advance. Rs. Nil.

3. Rate of interest per centum per annum. Rs. nine.

Intd. L. C. de S.

promise to pay J. Rodger, of 26/3, Rosmead Place, Colombo, or order, the sum of rupees thirteen thousand and sixty-two and cents fifty only. Currency for value received, with interest thereon at the rate of nine per centum per annum from the date hereof.

Sgd. L. C. de Silva.

Witnesses.
Sgd. B. M. Peiris."

The learned District Judge held that the note was unenforceable in view of its non-compliance with section 10 of the Money Lending Ordinance, Chapter 67.

It appears that the appellant had from time to time advanced monies to the respondent for the purpose of his (respondent's) business. Some of these monies were advanced by the appellant himself and some by an independent Company at the instance of the appellant. It is common ground that the figure Rs. 13,062·50 is made up as follows : An advance of Rs. 3,000 from the appellant personally to the respondent ; another advance of Rs. 5,000 from the appellant personally to the respondent ; the balance Rs. 5,062·50 being commission payable on the other sums advanced by the appellant or the independent Company to the respondent. It is thus apparent that on the face of it the note does not comply with section 10 of the Money Lending Ordinance, in that the capital sum actually borrowed is inaccurately stated. The appellant contends, however, that the Money Lending Ordinance does not apply to the transaction in question in that an account had been stated between the parties and a new obligation created by the note.

On the question as to the nature of the transactions between the parties, the learned District Judge has stated (at page 185 of the record) that " whatever language the plaintiff may have used to describe these payments by him to the defendant—in point of fact in P7 he refers to them as a loan—there is no doubt that they must be regarded as and were in point of fact nothing more or less than pure and simple loans ". Moreover, (at pages 174–175) the learned District Judge says, " The first contract for Rs. 29,000 was one entered into between the plaintiff and the defendant personally, and moneys had to be advanced by the plaintiff out of his personal funds. In respect of the subsequent contracts, the defendant was advanced money by the plaintiff out of funds belonging to the Gampaha Stores Ltd., but the arrangement was that the commission should be paid to the plaintiff, for it was through his services that the money was obtained from the Company. In point of fact, although the Company money was used, the course of dealing between the parties was personal. "

I see no reason to disagree with this assessment of the position by the learned District Judge. With regard to the allegation that there was an account stated, it is to be noted that there were no cross-transactions between the parties and no transaction of any kind which could be said

to be "foreign" to the "pure and simple" loan transactions. In *Siqueira v. Noronha*—1934 A. C. 332—Lord Atkin in discussing the nature of an account stated refers to what Blackburn J. calls a "real account stated", which is the only kind of account stated which extinguishes the old debt and creates a new and which could avail the appellant in this case. At page 337 Lord Atkin says :

> "Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid ; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described. Probably the best authority for that definition on an account stated is that which was selected by Viscount Cave in the case of *Camillo Tank Steamship Co., Ltd. v. Alexandria Engineering Works* [1], which was in the year 1921, although the account in that case was not an account of the nature described, because it was merely a repairer's account with the items probably only on one side. Viscount Cave, in dealing with the various descriptions in law of an account stated said : "There is a second kind of account stated where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance struck. This is called by Blackburn J. in *Laycock v. Pickles* [2], a 'real account stated', and he describes it as follows : 'There is a real account stated, called in old law an *insimul computassent*, that is to say, when 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."

I consider, therefore, that in the present case there was, to use a colloquialism, no more than a looking-into the accounts between the parties and not an account stated in the technical sense of that term.

Alternatively, it was urged on behalf of the appellant, who did not contend that the proviso to section 10 was applicable, that there was no intention to evade the provisions of the Ordinance on his part and that the point taken by the respondent is highly technical and without merit.

[1] *(1921) 38 Times L. R. 134, 143.* [2] *(1863) 4 B. & S. 497.*

Moreover, that there was no evidence of " moral turpitude " on behalf of the appellant ; and that, in any event, any doubt should be resolved in favour of the validity of the note.

All these submissions may be true—I express no opinion one way or the other—but it seems to me that they cannot avail the appellant for the reason that if, as I consider to be the case, the transactions in question were pure and simple loan transactions and there was no account stated between the parties, Section 10 is applicable to this case and there has been a clear non-compliance with it.

For these reasons the appeal must be dismissed with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.