6th February, 1963

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JAMAICA

COURT OF APPEAL

R. M. CIVIL APPEAL No. 53/62

BEFORE: The Hon. Mr. Justice Duffus - Presiding
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Waddington (Ag.)

Mr. Carl Rattray appeared for the Plaintiff/Appellant
Mr. David Muirhead appeared for the Defendant/Respondent.

M.E. REID v. GERALD BIRCH

JUDGMENT DELIVERED BY THE HON. MR. JUSTICE DUFFUS:

This appeal concerns a money lending transaction. The appeal has been brought by the Plaintiff/Appellant in respect of a judgment given to the Defendant in the Resident Magistrate Court (Civil Division) Kingston, [redacted] by one of the learned Resident Magistrates of that Court on the 25th of May last year. The evidence placed before the Resident Magistrate by the Plaintiff was to the effect that the Defendant, whom he knew before, came to his home at Friendship Park Road on or about the 18th or 19th of May, 1961, and spoke to him about obtaining a loan. He wanted to borrow Sixty Pounds (£60); the Plaintiff says that he told him to come and see him at his office. He says that on the 20th of May the Defendant came to his office at Oxford Street in Kingston, requested a loan from him, and he agreed to lend him the sum of £60. He says "I loaned him Sixty Pounds; it was a cheque I gave him for Sixty Pounds", and he produced a cheque (marked Exhibit 1). This cheque was for the sum of Sixty Pounds. He says that at the same time he got the Defendant to write a Demand Note. The demand note is in evidence; it is on a printed form with certain blank spaces filled in in ink.

The Plaintiff's evidence is that the Defendant himself filled in these blank spaces. The document was tendered in evidence (marked Exhibit 2). The document, as I said before, was on a printed form and it gives the appearance of being a form that might be in general use by a person engaged in the business of money-lending and as Counsel for the Plaintiff/Appellant intimated to us - it is not in dispute that the Plaintiff does carry on a money-lending business. The operative part of the

/document reads

document reads -

"On demand I the above and undersigned do hereby promise to pay to Mr. H. E. Reid, his agent, order or successors, the sum of Sixty Pounds, with interest added at the rate of 20% per annum, ~~and~~ in repayment of moneys loaned. I hereby acknowledge receipt of a copy of this instrument."

" Signed/ Gerald T. Birch "

It is interesting to note that the original document has something written into the blank spaces where the word 'sixty' now appears, ~~which~~ It is quite impossible to say at this stage what it was; it shows signs of erasure and signs of having been scraped out or scratched out, and it bears two initials presumably the initials of Birch and Reid - looks like "G.B." and "H.E.R." . There also appears some alteration in ink with regard to the figures "£60" at the end of the document.

Plaintiff in his evidence said that the Defendant came to his office again some three or four days later, informed him that he had not cashed the cheque and that there was some irregularity on it which he was asking him to rectify, which he did; and he says that the Defendant then had a conversation with him about having this cheque cashed; that the Defendant told him "there was a ghost at BOLAM'S" - BOLAM being the short name for the Bank of London and Montreal on which the cheque was drawn - and apparently the Defendant did not want to see this ghost. We are informed that the 'ghost' referred to ~~therein~~ was not some supernatural being, but was an actual person whom the Defendant did not want to see - it seems to be some expression which I, personally, have not come across before. The Defendant asked the Plaintiff, according to the Plaintiff's evidence, if he would permit a man named Graham, who was present, to cash the cheque for him and enquired whether Graham was "a safe person." The Plaintiff said 'yes', he told him Graham would be all right. Graham and the Defendant left his office.

It is the Plaintiff's case that the Defendant has paid nothing whatsoever to him towards this loan of Sixty Pounds. He said that he made no claim for interest although the demand note which had been signed permitted him to charge interest at the rate of 20% per annum, and that in short was the case for the Plaintiff.

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Now, the case for the Defendant was that he had not been loaned the sum of Sixty Pounds by Reid, but that the amount of the loan was Twenty Pounds and that the agreed rate of interest was One Shilling and Six Pence (1/6d.) in the pound per week. The Defendant's case was that he was in urgent need of this money - the Twenty Pounds - to release a levy that had been made on certain articles of furniture at his home and that he was in dire straits and required the money with great urgency. The Defendant says that the Plaintiff informed him that he must sign the demand note for three times the amount of the actual loan as some form of security to the Plaintiff ~~and~~ as it was his usual practice to have borrowers give demand notes for three times the amount of the loan. The Defendant further says that after the Plaintiff had written out the cheque for the sum of Twenty Pounds, made payable to 'cash', that he then asked him to endorse a cheque in his, the Plaintiff's, cheque book; that he thought this was rather unusual procedure and he remarked on it to the Plaintiff but was given an answer to the same effect, that that was the way the Plaintiff did his business and he thereupon endorsed this cheque.

The Defendant said that he got a bit worried about this transaction and he called in his wife. Incidentally, the defendant says that this transaction took place in his home and not at the office of the plaintiff. The Defendant says he ~~cheshed~~ cashed this cheque at the Bank and he received Twenty Pounds and he redeemed his furniture. The Defendant says that he then started to repay the loan with the interest thereon; and that he made ten payments in all aggregating Thirty-Four Pounds Ten Shillings (£34.10/-). When he made the fourth payment, which was on the 15th of July, 1961, at the Railway Station in Kingston, he pointed out to the Plaintiff that he had then paid a total of Fifteen Pounds (£15.) for interest and that represented 75% of the loan. The Plaintiff then told him that he would give him a concession in that whatever he paid thereafter would be accepted by him for principal, not for interest.

The Defendant's case is that he thereafter, between the 9th of September, 1961 and the 11th of November, 1961, paid the Plaintiff a further sum of Nineteen Pounds ~~(£19)~~ Ten Shillings (£19.10/-) which he assumed was credited to the principal of the loan, leaving a balance of Ten Shillings. The Defendant says that in the third week of November

/ the Plaintiff

The Plaintiff asked him what had happened to him and he told the Plaintiff that he had only ten shillings left for him and enquired why was he running him down for that small amount. Well, they had an argument. The Plaintiff told him something about compound interest and they parted. He said shortly after that he received the summons for this action.

The record shows that the Plaint was filed on the 27th of November, 1961, which if the defendant's story is true, would have been in a matter of days after this meeting in the third week of November, 1961. The action was brought under what is commonly known as the "Pink Summons" section of the Resident Magistrate's ~~section of the~~ Judicature Law under which the Plaintiff ~~signed by~~ obtains judgment by default if notice of intention to defend ~~was~~ is not given. Well notice of intention to defend was given and the Solicitor for the defendant filed a notice of special defence dated the 27th of February, 1962, informing the Plaintiff that he intended to set up and rely on the provisions of section 2, ~~sub-section~~ (1) of Cap.254 of the Money Lending Law -

"The Court may re-open the transaction and take an account between the parties on the ground that it was harsh and unconscionable."

At the trial the defence was stated by the defendant's solicitors ~~Formally~~ Specially, under section 2, ~~sub-section~~ (1), to the effect that the transaction was harsh and unconscionable; ~~Formally~~ (2); the defendant had paid so much interest that he would have been entitled to a refund and "two further legs of defence" were added according to the transcript of the notes of evidence - one being, "the defendant denied the loan of Sixty Pounds and admitted a loan of Twenty Pounds," the other being "interest was charged at the rate of One Shilling and Sixpence in the Pound per week which was in excess of the interest charged allowed under the Money Lending Law."

At the conclusion of the taking of the evidence by the Resident Magistrate and after hearing the submissions by the legal representatives on both sides, the Resident Magistrate reserved judgment and on the 25th of May he gave judgment to the Defendant with costs and Solicitor's costs.

On the hearing of this appeal before us there were four grounds - ~~one was~~ 1. that the evidence was so preponderantly against the judgment that the judgment can not be regarded as otherwise than as unreasonable; ~~two~~ 2. that in order for the learned trial Judge to have found for the defendant it was

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necessary for the Court to find the defendant's case established beyond reasonable doubt, and there is nothing to show that the Court so found. There were two further grounds, one dealing with the alleged cheque for Twenty Pounds and the other with regard to the Resident Magistrate's assessment of the weight of evidence.

The learned Counsel for the appellant in making his submissions to us stated that he was not now saying that the defendant's case had to be established beyond reasonable doubt as set out in the grounds, but what he was saying was that the defendant had to establish what he was alleging, to wit fraud, and that the burden cast on him was on a higher scale than that which was required of the plaintiff to establish his case. In short, the degree of proof depended on the seriousness of the issue and where fraud is alleged the burden is quite heavy. On the other hand, it was submitted by Counsel for the respondent that while he was not disagreeing with Mr. Rattray's submission as to the burden where fraud was alleged being of a high nature on the person alleging it that he was saying that in this particular case fraud was incidental to the main issue and he was relying on the wording of Section 2, ~~sub-section~~ (1) of the Money Lending Law which reads -

> "Where proceedings are taken in any Court by any person for the recovery of any money lent either before or after the commencement of this Law, or the enforcement of any agreement or security made or taken in respect of money lent either before or after the commencement of this Law, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, enquiries, fines, bonuses, premiums, renewals or any other charges, are excessive, or that, in any case, the transaction is harsh or unconscionable, the Court may re-open the transaction, and take an account between the parties ..."

Counsel for the respondent submits that the burden was on the appellant to satisfy the Court that he had in fact lent Sixty Pounds and not Twenty Pounds as ~~said~~ stated by the defence and that the burden was also on the appellant to satisfy the Court that the transaction was not 'harsh or unconscionable'. It seems to me that the main issue which had to be decided by the Resident Magistrate was what was the amount of the loan - was it Sixty Pounds with interest at 20% as stated by the Plaintiff, or was it Twenty Pounds with

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interest at 1/6d in the pound per week as stated by the defendant. If the amount loaned was Twenty Pounds and the rate of interest charged 1/6d in the pound per week, that would work out at a rate of interest which would be 15% per week or 52 times 15% for a year, which is beyond doubt an excessive amount of interest to charge on a loan. The Resident Magistrate in his reasons for judgment, which are very full, states this on page 7 - "the versions of the plaintiff and defendant widely differ, are mutually exclusive and irreconcilable the one with the other; to determine the issues between the parties the Court must wholly accept one version and wholly reject the other".

Well, it seems to me that that states very succinctly the position as it was before the Resident Magistrate. He then proceeds and says this - "the Court was not satisfied with the plaintiff's version of the loan transaction and was wholly unconvinced as to the truthfulness of the plaintiff and his witnesses from their demeanour and uncertain manner. The evidence of Arthur Graham, in particular, was outstandingly unacceptable." Then he proceeds to deal with the alleged cheque for Twenty Pounds which the defendant had said he had received from the plaintiff and after dealing with that "the Court accepted the version of the defendant and his wife, both of said whom gave their evidence in a quite firm and convincing manner." He then sets out at length his findings of fact.

Now clearly the burden of proving his case lay on the plaintiff. He sued for Sixty Pounds. It was for him to satisfy the Court that he had in fact lent Sixty Pounds to the defendant and that no part of that Sixty Pounds had been repaid. It was therefore important to the plaintiff that he should be believed. He produced a cheque for Sixty Pounds which bore the endorsation of the defendant; the defendant admitted that it was his signature on the back of that cheque but stated that that was not the cheque which he had received from the plaintiff, and asked the Resident Magistrate to draw the inference that that must have been the cheque he had endorsed in the plaintiff's book without having seen the face of it.

The plaintiff also relied on the demand note and he relied on two witnesses Egbert Campbell and Arthur Graham.

Now, it appeared to me that ~~the first place that~~ the plaintiff's case received a rather nasty jolt with reference to the "Further and Better Particulars which had been supplied by the plaintiff's solicitors.

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In the defendant's notice requiring these particulars, it appears to be - question 3 - how much money was handed to the defendant and denomination of the moneys. In the Plaintiff's answer supplied by his solicitor the question is answered thus 'Sixty Pounds cash in notes either one pound and/or five pound notes'. Absolutely no mention whatever of the cheque for Sixty Pounds, (Exhibit I). In his sworn evidence, the plaintiff said 'I loaned him Sixty Pounds, it was a cheque I gave for Sixty Pounds'. He was challenged on this by the defendant's solicitor 'did you ever instruct your solicitor that the loan of Sixty Pounds was made up of cash in notes of either one pound or five-pound notes?', his answer 'no, sir'. 'Are you saying that you at no time gave those instructions to your solicitor?', answer 'no, sir, my solicitor did tell me he had received a request for further and better particulars, I gave the particulars to someone in the solicitor's office but I never told them the money was made up of one pound and five-pound notes?'.

Well, no explanation was given in the evidence for the plaintiff as to how this serious error, if error it was, could have arisen.

The second serious jolt to the credibility to be attached to the Plaintiff's case came from the witness Graham. Arthur Graham appears to be a handcart man for he describes himself as a delivery man who delivers liquors and aerated waters for people with bars in the vicinity in his handcart. He was shown Exhibit I and he identified it as the cheque which he said he had taken to the Bank of London and Montreal at the request of the defendant, to cash for the defendant who did not want to be seen personally at the bank, according to the plaintiff's story. In examination-in-chief he said this - 'I tendered cheque to the Bank. I would be able to recognise it if I saw it today. Exhibit 'I' now shown to me was the cheque I cashed for Sixty Pounds." NO SIR" The Resident Magistrate noted "here witness puts on his glasses and then again looks at the cheque and answers 'Yes, Sir, this is the cheque'. Well apparently the solicitor for the defendant observed this conduct on the part of the witness when he was asked the question in chief and he pursued it when his turn came to cross-examine the witness and this is what he said about it - "the teller never asked me my name. That name signed at the back was Mr. Reid's name. I don't know the signature of Mr. Reid but I say it was Mr. Reid's name written on the back of Exhibit I, I saw Mr. Reid write his name at the back of the cheque. I saw the teller look at the back of the cheque. He never asked me if my name was Reid. The teller asked me no questions, he only cashed the

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cheque for the cheque was already endorsed. The teller took up Sixty Pounds and handed to me. I read the name Gerald Birch written at the back of Exhibit 1". The solicitor asked the question 'and so this Exhibit 1 is not the cheque you took to the bank?', answer, 'Exhibit 1 is not the cheque I cashed at the Bank', and the witness goes on 'for the cheque cashed at the bank had Mr. Reid's name at the back of it'.

His credit was perhaps further shaken when he says this 'Mr. Reid asked me to give evidence in this case this morning', (it appears this is the morning of the trial) 'when he asked me this morning he asked me if I remembered the ~~day~~ date I cashed the cheque for the man for he had the man in Court, and he wanted me to prove if I remember 24/5/61 when I cashed cheque for the defendant and delivered the money to him'.

Well, ~~perhaps~~ the Resident Magistrate was not impressed with Graham, one minute he identifies Exhibit 1 as the cheque and the other minute he denies that very cheque and ~~it~~ this would undoubtedly have affected his consideration of the credit of the plaintiff himself.

Now, Egbert Campbell the other witness for the plaintiff describes himself as being an auctioneer. He said he knew the defendant Birch, saw the defendant at Oxford Street. He had a cheque with him somewhere between the 20th and 26th of May 1961; he spoke to the defendant and he saw the cheque and he recalled that the amount was for Sixty Pounds. He recalled that the cheque was drawn and signed by H.E. Reid and made payable to Birch, and he identified Exhibit 1 as the cheque ~~and~~ except for some red pencil markings which do not appear to be material, which now appear on the cheque. ~~Well~~ He said he took the defendant to one Knight to cash the cheque and Knight did not like the look of the figures Sixty Pounds on the cheque and refused to change it, and Campbell says he took the defendant to one Miss Pantery to cash the cheque but she did not have sufficient money to change it. ~~Well~~ This witness was challenged. In cross-examination it was suggested to him that he was a professional witness often giving evidence in Courts. The witness denied this. Then he said 'today is the first time I have come to Court in connection with this matter. I saw the cheque in Court. The last time I saw this cheque was when defendant showed it to me, since then I have not seen it. This was the first cheque I had ever seen signed by Mr.Reid.'

There was further cross-examination and he said 'I always regard cheques as important, that is why I remember the 20th and 26th of May especially. I have that day fresh in my mind, no one reminded me, I remembered

remembered this date on my own'.

Well it was quite obvious that the Resident Magistrate did not believe this witness also. It seems strange that he should have had such a clear recollection of the cheque, the amount of the cheque, the date of the cheque, how the cheque was signed, when it was the first time he had ever seen a cheque written by ~~the man~~ Reid.

Now, it was put to the plaintiff that there was another cheque in existence, a cheque for Twenty Pounds which was the cheque which the defendant said he cashed and he was cross-examined about it. He was asked 'would he endeavour to look for and bring to the Court cheque No. 25311' the number having been supplied by the defendant'. His answer was 'I would not be willing to do so unless ordered by the Court to do so or unless my lawyer asked me to do so.' He was asked if he would bring his cheque book to Court with the stubs and he gave the same answer that he was not willing to do so. He was asked if he would authorise the Bank to give information to the Court as to this cheque as to whether it had been actually cashed, his answer was 'no, I am not willing to give the Bank any such instruction'. He was then asked 'in order to assist the Court, will you be willing to authorise the Bank to inform this Court of the date and amount in which the cheque 25311 was drawn and the date it was cashed'. ~~Well~~, At this stage learned counsel for the plaintiff objected to the questions in relation to information between the plaintiff and the bank when no Notice to Produce had been served on the defendant and, surprisingly to me, the submission was upheld and the matter dropped. It was quite obvious that these questions were directed to the credit of the plaintiff; if the plaintiff had nothing to hide he should have been anxious and willing to produce his returned cheques or his cheque book with the cheque counterfoils, which apparently he had but was just simply unwilling to produce ~~them~~.

Now it was clear that no Notice to Produce was served but the defendant when giving evidence gave evidence as to the contents of this cheque, i.e. what was written on it. No objection was taken by the Plaintiff's counsel to this. In fact, in cross-examination his evidence was if anything strengthened as he produced a memorandum which he said he had made at the time recording particulars of this cheque and noting details of the alleged transaction. This document was, as I say, brought into light by perhaps

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incautious cross-examination by Plaintiff's counsel - well the fact remains, the evidence was there, evidence which the Resident Magistrate had to consider.

Counsel for the appellant urges that the Resident Magistrate should not have allowed the 'mere say so' of the defendant and his wife as to the existence and the contents of the cheque to weigh with him as against the factual evidence of Exhibit 1, (the cheque for Sixty Pounds) and Exhibit 2, (the demand note). But these are the very documents that were being put forward by the plaintiff to support his case that he was owed Sixty Pounds and quite clearly under the Money Lending Law if the Court had evidence before it that the transaction had been one for Twenty Pounds and not Sixty Pounds and that the rate of interest charged was 1/6d in the Pound it was a harsh and unconscionable transaction and the Court was entitled to re-open the matter and to go behind the documents which the defendant admitted signing, Exhibit 1 and Exhibit 2. It became a matter of the most vital importance to both plaintiff and defendant to persuade the Resident Magistrate as to which story was true, and as the Resident Magistrate has said in his Reasons for Judgment when considering this alleged cheque for Twenty Pounds, "even though the Defendant did not subpoena the production of that cheque, it would seem wise and advantageous for the plaintiff to have produced the spent cheque leaf and offer some evidence in relation to it, instead of failing to produce it, ignoring the defendant's evidence in relation to it as untrue while merely stating that he had no recollection whatsoever concerning it."

It seems to me therefore that there were essential questions of fact for the Resident Magistrate to decide and it was for him to decide on which of these persons, the money lender or the borrower, he could place reliance. He accepted fully the case for the defendant and rejected fully the case for the plaintiff.

Now that brings me to another aspect of the matter. Assuming that the loan was for Twenty Pounds, was it repaid or was it not repaid? Evidence was given by the defendant on this point in considerable detail. He stated that he had paid to the plaintiff an aggregate of £34. 10/- over a period of just under six months. He said that the first payment he made was one of 30/- which was on Sunday the 28th of May; that the plaintiff came to him at his home and collected the money

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from him at his (the defendant's) home and that was for interest on the loan for the week; he says he asked for a receipt and the plaintiff told him he did not give receipts and gave him three reasons which I need not repeat, they are set out clearly in the evidence. The defendant said that his wife was a witness to this payment and the defendant's wife supported him on this.

The other payments were made in different amounts and at different places. The second payment was Three Pounds which the defendand said he paid on the 10th of June to the plaintiff at his work place. Again the defence is alleging that the plaintiff was coming around as a collector and came to him at his work place at Kelly's Engineering Works. I have already related that when these payments reached £15 the defendant says the plaintiff agreed to release him from payment of further interest and take the subsequent payments for principal. The Resident Magistrate accepted the evidence of the defendant as to these payments.

The defendant, apart from the first payment of 30/-, had no evidence whatever to corroborate his evidence that he had in fact paid these amounts, and the question of payment has given this Court some amount of concern and consideration. It is for that reason that I personally read last night the evidence of the defendant and his witness and compared it with the evidence of the plaintiff again, and the conclusion that I have arrived at is that the defendant stood up remarkably well under cross-examination, which was searching, with regard to these payments, and it seems to me that the minute the learned Resident Magistrate accepted the defendant as a witness of truth in respect of the initial transaction, that is the loan of Twenty Pounds and completely rejected the plaintiff, that it is not unreasonable for him similarly to have accepted completely the evidence of the defendant with regard to the repayments, particularly, as I say, he appeared to stand up very well under cross-examination. I do not feel that it was unreasonable in all the circumstances of this case, for the Resident Magistrate to have arrived at the conclusion ~~to the effect~~ that he in fact did arrive at, and on his finding that £34.10/- had been paid that meant that the defendant had repaid the loan of £20. and had also paid £14.10/- for interest on the sum of £20 over a period of slightly less than six months; therefore the defendant would have more than discharged his obligations to the plaintiff.

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It is my view therefore that the appeal must be dismissed and the judgment of the Court below confirmed.

MR. JUSTICE LEWIS:

I agree. I would say just a few words on two points - one, is the question as it relates to fraud and the other the question of repayment.

~~The~~ first as to ~~is the~~ fraud. As I understand learned Counsel for the appellant, he says that in this case there was an allegation of fraud although it did not appear as such on the defence as put down, but it came out in the evidence and that there was a duty on the defendant to discharge the onus of proving fraud, and fraud being a matter of considerable gravity the onus was a heavy one undoubtedly; he also says the defendant failed to discharge that onus. Undoubtedly, if this case involved an allegation of fraud learned Counsel's proposition as to the burden would be correct. The authority which was cited Hornal v. Neuberger Products Ltd. 1957 (1) Q.B.Div. p.247, supports his proposition, But did this case involve fraud? I do not think so. In order ~~You see,~~ to see what was involved it is necessary for us to look at the ~~statement of claim, the~~ particulars of claim and the defence. The particulars of claim were for ~~the~~ money loaned and was supported by the further particulars which said that this money was loaned in cash ~~fact~~. The defence, as notice was given, was two-fold :- one, the ~~defence~~ transaction was harsh and unconscionable with special reference to the Money Lending Law and, secondly, that the defendant had paid too much interest and that he would be entitled to a refund. ~~That seemed to involve a kind of back door counter claim.~~ The so-called two further legs which were added at an early stage of the plaintiff's case are really, in my view, particulars of the reasons in which it was alleged that the transaction was harsh and unconscionable. First, that the loan was not for Sixty Pounds but only for Twenty Pounds, although there was no denial that the defendant had signed a demand note for Sixty Pounds. In other words, he was saying "I admit I signed a demand note for Sixty Pounds, but it was a harsh and unconscionable transaction for in truth it was only a transaction for Twenty Pounds". Secondly, that the interest charged was 1/6d in the pound per week and that was in excess of the interest charges allowed under

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the Money Lenders Law.

Now, when the plaintiff came into Court, instead of saying as he had alleged in his further and better particulars of claim, that he had lent the money ~~encashed~~ IN CASH, he said 'no, I lent the money on cheque, here is the cheque which I produce'. The defendant then said, "I agree that you paid me by cheque but the cheque was for Twenty Pounds", so he put the plaintiff to proof, on proof of which undoubtedly the plaintiff fell down since his witness Graham completely let him down.

There was no suggestion by the defendant that he had been deceived in any way. He had with his "eyes wide open" as he says, gone into the transaction. As part of the terms on which the plaintiff was agreeing to lend him the Twenty Pounds he was required and agreed to sign a promissory note for Sixty Pounds and to endorse another cheque beside the cheque he was given; he was in no way deceived. It must have been in his contemplation that if he did not pay the money lent he would have been sued on the note for Sixty Pounds, and in what other way could have the ~~Sixty-Pound~~ cheque have been used except for the purpose of supporting the claim? Any suggestion in the evidence which arises from the fact that the plaintiff cashed that cheque for Sixty Pounds and used the money, any suggestion which arises from that of fraud is in my view incidental in this case and was not an issue for the learned Resident Magistrate.

The defendant does not for one moment suggest that that Sixty Pounds belonged to him, or that the cheque for Sixty Pounds was one which ought to have gone into his pocket.

With regard to the repayment, had I tried the case I should certainly not have accepted the defendant's evidence that he had repaid this money. It seems to me that there the balance of probabilities was definitely on the plaintiff's side - for this man who was in dire distress, who was out of a job as he says for some two months and his wife says for some five or six months, alleges that he had repaid £34.10/- during a period of six months, that seems to me to be a very unlikely story. However, it was direct evidence given by the defendant which the Magistrate accepted. There is no question of this Court being asked to draw an inference from any evidence. The Magistrate accepted it; in my view, however, individual members of the Court might differ from him on that aspect, the Court ought not to interfere with the judgment.

I agree the appeal should be dismissed.

MR. JUSTICE WADDINGTON:

I also agree that this appeal should be dismissed with costs to the respondent. I would like to add a few words. It appears to me that apart from the exhibits in the case, it was essentially a question of fact for the learned Resident Magistrate as to which of the parties were telling the truth. Now, a serious allegation had been made by the plaintiff against the defendant that he was not telling the truth. I will not advert to the facts any more than had been so very well done by my brethren, but the main issue was the question as to whether the loan was one for Sixty Pounds or one for Twenty Pounds, and the defendant's evidence was that he had received a cheque and he gave the number of the cheque, for Twenty Pounds. Now, it would in my view have been quite improbable that the defendant would have made such an allegation if it was in fact false, well knowing how very easy it would have been for the plaintiff to have refuted that allegation quite conclusively, he merely had to produce the cheque stub or the paid cheque, if it had been in fact a cheque paid to the defendant, and that would have completely confounded his allegation.

It was not surprising therefore in my view that the learned Resident Magistrate accepted the defendant's version of the facts, rather than that of the plaintiff.

As regards the question of repayments, that I will admit also caused me some concern but I think a very significant feature of the plaintiff's case is the fact that this professional money lender, who claimed that he had loaned Sixty Pounds was prepared to waive his interest of 20% for a period of just under six months. I think that is something that might have weighed with the Resident Magistrate and I think that on the evidence he was right in coming to the finding that the defendant repaid £34.10/- and a repayment of £34.10/- would mean that he had paid £14.10/- for interest over a period of just under six months or a rate of about 300% per annum and that in my view is a harsh and unconscionable one andif there had been a counter claim by the defendant for repayment of the money, I would be prepared to say there should have been judgment for the defendant on the counter claim for

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quite a substantial portion.

As I said before I think the appeal should be dismissed with costs to the respondent.

MR. JUSTICE DUFFUS:

Costs fixed at Twelve Pounds.
