[HIGH COURT OF AUSTRALIA.]

ROBERT SINCLAIR . . . . . APPELLANT;
DEFENDANT,

AND

ALEXANDER SINCLAIR . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *June* 2.

Griffith C.J., Isaacs and Higgins JJ.

Practice—Summary judgment—Rules of the Supreme Court of Victoria 1906, *Order XIV., r.* 1.

In an action for money lent, and on an account stated, the plaintiff and defendant both alleged that the money lent was advanced by the plaintiff to a partnership of which they were the members, and that a settlement of accounts had taken place between them. The plaintiff's solicitor deposed to a conversation in which the defendant promised to repay the money, but this was denied by the defendant.

On an application by a plaintiff for summary judgment under Order XIV. of the Rules of the Supreme Court of Victoria,

Held, on the evidence, that the application should have been refused.

Decision of *Hood* J. reversed.

APPEAL from the Supreme Court of Victoria.

The plaintiff, Alexander Sinclair, brought an action in the Supreme Court of Victoria against his brother Robert Sinclair, the defendant, the writ of summons being specially endorsed with a claim for money lent and money due to the plaintiff by the defendant on accounts stated on 15th November 1908 and on 1st December 1908. The particulars showed a total amount of £465 15s. lent on different days from 1st April 1906, to 6th June 1907.

On an application for liberty to enter final judgment for the amount claimed, *Hood* J. gave the plaintiff leave to sign final judgment on his giving an undertaking in writing to the defendant that he abandoned all claim to a partnership in certain land.

From this decision the defendant now appealed to the High Court.

Shields, for the appellant, referred to *Jacobs* v. *Booth's Distillery Co.* (1).

Arthur, for the respondent.

GRIFFITH C.J. The summary proceeding under Order XIV. is one that should be used with care. It is not intended to shut out a defendant from a *bonâ fide* defence. The case of *Jacobs* v. *Booth's Distillery Co.* (1), cited by Mr. *Shields*, shows how far the Court will go to protect the rights of a defendant. The circumstances of this case are very simple. The action is for money lent and for money due on an account stated. The plaintiff and the defendant are brothers. The affidavit in support of the summons for final judgment is made, not by the plaintiff, but by his solicitor, and, with the exception of one conversation to which he deposes, all the evidence which he gives consists of documents from which he draws inferences, to some of which he is prepared to swear. That is a very singular thing to begin with. When we look at the facts deposed to the case is still more singular. The case made by the plaintiff is that he and defendant were partners in a farm, and that the plaintiff wanted an account of the partnership dealings, and the plaintiff's solicitor then wrote to the defendant asking for an account. Thereupon a conversation took place between the solicitor and the defendant in which it is alleged that the defendant denied that there ever was a partnership, but stated that there had been a loan from the plaintiff to him, which he would repay as he could. The plaintiff insisted that there was a partnership and again demanded an account. Finally he brought an action for money lent and for money due on an account stated, and he relied on the statement of the defendant in one of the letters that "the amount of money

(1) 85 L.T., 262.

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lent was £465." The defendant made an affidavit in which he stated, as the plaintiff had always himself alleged, that there was a partnership. The plaintiff's solicitor says that his client told him that there was a partnership; the correspondence shows that there was a partnership, and yet the solicitor ventures to swear that the money was due for money lent and on an account stated. The defendant says that there was a partnership, and that if he used the expression "money lent" he meant money advanced by the plaintiff to the partnership. That is a perfectly possible, and a probable, construction of the language, if it was used. Under these circumstances, if anything is certain, it is that there was a partnership. Both parties say so, and the only possible way of supporting the claim is by showing an account stated. But an account stated depends on an agreement that a particular sum is due. The plaintiff would have to show that the partnership was dissolved by mutual consent, and that an agreement was made that the defendant should pay to the plaintiff a particular sum. But the evidence shows nothing of the sort, and, as far as it goes, contradicts such a state of facts. Under the circumstances, it is surprising that the Judge made the order now appealed from. I think the appeal should be allowed.

ISAACS J. I concur.

HIGGINS J. I concur.

Appeal allowed. Order appealed from discharged. Defendant to have leave to defend. Summons remitted to the Supreme Court. Respondent to pay the costs of the summons up to the present time, and the costs of this appeal. Certify for counsel.

Solicitor, for appellant, *C. H. Wadham.*
Solicitor, for respondent, *Henry Grave.*

B. L.