[HIGH COURT OF AUSTRALIA.]

WILSON . . . . . APPELLANT;
DEFENDANT,

AND

MOSS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 4, 5, 12, 17, 19.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Money lender—Re-opening transaction—Excessive interest—Action to enforce agreement or security—Promissory note—Retrospective effect—Money Lenders Act 1906 (*Vict.*) (*No.* 2061), *secs.* 2, 4—*Appeal to High Court—Cross appeal—Rules of the High Court* 1903, *Part II., Sec. III., Rule* 13.

An action upon a promissory note is an action to enforce an agreement or security within the meaning of sec. 4 of the *Money Lenders Act* 1906.

Where the rate of interest charged by a money lender upon a loan is, either originally or in the result, larger than in the opinion of the Court is fair and reasonable under the circumstances, it is excessive within the meaning of sec. 4 of the Act, and the rate of interest may in itself be evidence that it is excessive.

The transaction which a County Court Judge may re-open under sec. 4 may include dealings between the parties prior to the commencement of the Act if the Court is of opinion that they form part of a transaction of which the making or giving of an agreement or security after the passing of the Act is another part.

The authority given to a County Court Judge to re-open a money lending transaction is discretionary.

A money lender in October 1900 lent to an officer of the Victorian Public Service, with a salary of £350 a year, a sum of £50, and took from the borrower a promissory note for £55 10s. payable in three months, and indorsed by a third person. At the end of the three months the borrower paid £5 10s.

and gave a fresh promissory note for £55 10s. This was repeated every three months until June 1904, when the borrower paid off £20 in addition to the £5 10s. then due, and gave a promissory note for £33 10s. payable in three months. Thereafter at the end of each three months the borrower paid £3 10s. and gave a fresh promissory note for £33 10s. This continued until, in January 1907, after the commencement of the *Money Lenders Act* 1906, the borrower gave a promissory note for £33 10s. The money lender having brought an action in the County Court upon the last promissory note,

Held, that from the original loan of £50 to the giving of the promissory note sued on this was one transaction.

Held also, that the rate of interest was excessive.

Held further, that any rate above 35 per cent. per annum would have been unreasonable, and that as, even assuming a rate as high as 35 per cent. to be a reasonable rate, the payments which were in fact made before the commencement of the Act would have amounted to more than the total sum of the original debt and interest at that rate, judgment should have been given for the defendant on the promissory note.

Where in one action two distinct causes of action are sued upon, and a judgment is given for the plaintiff as to one cause of action and for the defendant as to the other, the fact that special leave to appeal to the High Court in respect of one of the causes of action is given to one of the parties does not entitle the other party to give a cross notice of appeal under *Rules of the High Court* 1903, Part II., Sec. III., Rule 13, in respect of the other cause of action.

Decision of the Supreme Court: *Moss* v. *Wilson*, (1908) V.L.R., 140; 29 A.L.T., 203, in part reversed.

APPEAL by special leave from the Supreme Court of Victoria.

The plaintiff Moss brought an action in the County Court at Melbourne upon two promissory notes against the defendant Wilson. One promissory note was made on 21st January 1907 by Wilson payable to Moss, was indorsed by one Cunningham, and was for £33 10s. payable in three months. The other promissory note was made on 20th January 1907 by Cunningham payable to Moss, purported to be indorsed by Wilson, and was for £30 payable in three months.

The defences taken were that the plaintiff was not the holder of either of the notes; that the defendant did not make or indorse either of the notes; that, if the defendant did place his signature upon the note for £30, he thereby incurred no liability to the plaintiff; and, as to both of the notes, the *Money Lenders Act* 1906, sec. 4.

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The transactions leading up to the making of the note for £33 10s. began in 1900. In October of that year the defendant, who was then an officer in the Victorian Public Service at a salary of £350 a year, applied to the plaintiff, who was a money lender, for a loan of £50. The plaintiff asked for £5 10s. as interest on a loan of £50 for three months, the defendant giving a promissory note for the principal and interest indorsed by Cunningham. To these terms the defendant agreed, he received the £50 and gave his promissory note for £55 10s. payable in three months and indorsed by Cunningham. At the end of the three months the defendant paid £5 10s. and gave a fresh promissory note for £55 10s. payable in three months and indorsed by Cunningham. The same thing happened every three months until, in June 1904, the plaintiff paid £20 off the principal and the interest up to date and gave a similar promissory note to the others, but for £33 10s., of which £3 10s. was for interest. The interest was paid and a fresh promissory note was given every three months until, on 21st June 1907, the defendant gave the promissory note for £33 10s. indorsed by Cunningham, and which was sued upon.

The facts as to the promissory note for £30 are not material to this report.

The County Court Judge held as to the note for £33 10s. that the rate of interest was excessive and that the bargain was harsh and unconscionable; he thought that under the circumstances 12½ per cent. per annum was a fair rate of interest to be charged; and he ordered an account to be taken of the sums which had been paid by the plaintiff to the defendant, and by the defendant to the plaintiff, that in taking such account the plaintiff should be allowed interest at 12½ per cent. per annum, and that any surplus which had been paid by the defendant to the plaintiff, should be repaid by the plaintiff to the defendant.

As to the promissory note for £30 he held that the plaintiff was not the holder in due course and that the defendant was not liable to him as indorser.

The plaintiff appealed from the judgment as to both promissory notes to the Supreme Court, which, as to the note for £33 10s., reversed the judgment and ordered judgment to be

entered for the plaintiff, and upheld the judgment as to the note for £30 : *Moss* v. *Wilson* (1).

The defendant then obtained special leave to appeal to the High Court from so much of the judgment of the Supreme Court as was unfavourable to him. Thereupon the plaintiff gave a notice of cross appeal as to that part of the judgment which was unfavourable to him.

Duffy K.C. and *Schutt*, for the appellant. The County Court Judge had jurisdiction under sec. 4 of the *Money Lenders Act* 1906 to re-open the whole transaction from the original loan made in 1900. That jurisdiction is given whether the proceedings are looked upon as an action to recover money lent after the commencement of the Act or as an action to enforce an agreement or security made or taken after the commencement of the Act in respect of a loan made before the commencement of the Act. This action comes within the latter class. A promissory note is a "security" within the meaning of sec. 4, notwithstanding that it comes within the definition of a "loan" in sec. 2. What is aimed at by the word "security" is that class of things which money lenders usually take as security, and one of the most usual things is a promissory note indorsed by another person. See sec. 5 (1) (*c*), 5 (1) (*e*). At any rate a promissory note is an "agreement" within sec. 4. One of the objects of sec. 4 is that if, after the Act comes into operation, any new transaction is entered upon with relation to a transaction before the Act, the whole thing is to be looked upon as one transaction and may be re-opened from the beginning. The County Court Judge was justified in finding that the rate of interest was excessive. The Act indicates that any interest beyond 12 per cent. per annum may be excessive, see secs. 3, 8. The mere amount of the interest charged is evidence that the interest is excessive. Sec. 4 (1) of the Victorian Act differs from sec. 6 of the English *Money Lenders Act* 1900 (63 & 64 Vict. c. 51), in that the requirements, that the interest charged shall be excessive and that the transaction shall be harsh and unconscionable, are alternative in the Victorian Act and conjunctive in the English Act.

(1) (1908) V.L.R., 140; 29 A.L.T., 203.

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[Counsel referred to *Samuel* v. *Newbold* (1).]

Starke and *Mann*, for the respondent. "Excessive" is a relative word. A rate of interest to be excessive must exceed some limit capable of statement. In this Act it means a rate of interest which is obviously beyond what is proved to be a fair charge in all the circumstances of the case, *e.g.*, the security, the risk and the time of repayment. See *Carringtons, Ltd.* v. *Smith* (2); *In re A Debtor* (3); *Levene* v. *Greenwood* (4). Whether the rate is excessive cannot be judged by the rates usually paid on commercial loans. Under the *Pawnbrokers Act* 1890, sec. 17, a pawnbroker is authorized to charge up to 50 per cent. per annum on loans exceeding £10, and he has security for those loans. Unless the rate of interest is something monstrous, the Court cannot say it is excessive without knowing all the circumstances.

[ISAACS J. referred to *Wells* v. *Allott* (5).]

There the question was whether the defendant should have leave to defend on an Order XIV. application. The rate of interest might in that case be so large as to be *primâ facie* excessive. The original loan here was for a period of three months, and, if the rate of interest was not excessive for a loan for that period, the mere fact that, by reason of the loan not having been repaid at the end of the period and having been renewed from time to time for several years, the total payments of interest have been larger than the sum originally lent, cannot affect the reasonableness of the rate. The burden of proving that the rate of interest is excessive is thrown upon the borrower and he must show circumstances which make it excessive.

[ISAACS J.—The rate may be so large as to call upon the lender to justify it.]

The Act in no case throws upon the lender the burden of supporting the rate of interest. At any rate, it is not so large in this case as to cast that burden on him. If the borrower could not get the money anywhere else for less than he agrees to pay in the particular case, the rate is obviously not excessive.

(1) (1906) A.C., 461, at p. 466.
(2) (1906) 1 K.B., 79.
(3) (1903) 1 K.B., 705.
(4) 20 T.L.R., 389.
(5) (1904) 2 K.B., 842.

[GRIFFITH C.J.—That would make the lender the sole judge as to what is an excessive rate of interest.]

So far as the decision of the Supreme Court was a decision upon a question of fact, if they have not improperly considered any fact, this Court will not interfere, especially when the appeal is by special leave.

[GRIFFITH C.J.—Each of the Judges of the Supreme Court held that there was no evidence to support the judgment of the County Court Judge.]

They gave several reasons for their judgment and, if one of them which goes upon facts only is good, this Court will not interfere.

The rate which the County Court Judge allowed should be increased.

[*Duffy* K.C.—The assessment of interest made by the County Court Judge is not open on this appeal.]

[GRIFFITH C.J.—We think the respondent may attack the assessment.]

The rate of 12½ per cent. per annum for a loan of this kind is absurdly small.

The County Court Judge had no jurisdiction to re-open the transactions which took place before the commencement of the Act. This is an action for money lent after the commencement of the Act, and the "transaction" which the Act permits to be re-opened is the loan of £30 made after the commencement of the Act. See the judgment of *Cussen* J. (1). If it was not an action for money lent after the commencement of the Act, it was one for money lent before the commencement of the Act. It was in no way an action to enforce an agreement or security. The "agreement" referred to in sec. 4 (1) is an agreement in respect of some obligation other than personal obligation to pay money. A promissory note is not a "security" except as between the holder and an indorsee.

Sec. 4 (3) prevents the recovery of excessive interest except when the proceedings to recover it are instituted within 12 months from the time when the transaction is finally closed. Here on the evidence the giving of each promissory note consti-

(1) (1908) V.L.R., 140, at p. 159; 29 A.L.T., 203, at p. 209.

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tuted a separate transaction which was finally closed when the succeeding promissory note was given.

It is discretionary with the Court whether and to what extent it will re-open the transaction. The appellant has been guilty of laches and delay which disentitle him to relief. The interest charged is not so monstrously extravagant as to call for the Court's interference.

Counsel proposed to open the cross appeal.

[GRIFFITH C.J.—This is not a case of cross appeal. The judgments in respect of the two promissory notes are entirely distinct.]

The special leave to appeal is not limited to one part of the case, but opens the whole matter in respect of which the judgment of the Supreme Court was given. The case is now in the same position as if there was a right of appeal without leave. [Counsel referred to *Rules of the High Court* 1903, Part II., Sec. III., Rule 13.] At any rate special leave to appeal in respect of the £30 promissory note should now be given.

[GRIFFITH C.J.—On the whole we think this is not a case in which special leave should be granted. The two matters are quite distinct from one another.]

Schutt, in reply. A liberal interpretation should be given to the Act as it is remedial: *Samuel* v. *Newbold* (1). If the word "security" was not intended to cover promissory notes, then the only reference to promissory notes is in sec. (5) (1) (*e*), and it was well known that the most usual way of carrying out money lending transactions was by means of promissory notes.

[ISAACS J. referred to secs. 9 (3), and 11 (3).]

The word "renewals" in sec 4 (1) shows that the words "agreement or security" were intended to cover promissory notes and other negotiable instruments.

The word "enforce" implies a claim for money lent: *Tassell* v. *Hallen* (2).

[ISAACS J. referred to *Instruments Act* 1890, sec. 21, and *Read* v. *Anderson* (3).]

If it is discretionary in the County Court Judge to re-open the

(1) (1906) A.C., 461, at p. 467. (2) (1892) 1 Q.B., 321.
(3) 13 Q.B.D., 779.

transaction, this Court should not interfere unless he acted upon a wrong principle.

Cur. adv. vult.

GRIFFITH C.J. This was an action brought in the County Court by the respondent against the appellant on a promissory note for £33 10s., dated 18th January 1907, made by the appellant in favour of the respondent, and payable three months after its date. It appeared that the promissory note was the last of a long series of promissory notes, each of three months' currency, given in respect of a loan of £50 made by the respondent to the appellant on 18th October 1900. The defence set up by the appellant was a request for relief under the *Money Lenders Act* 1906, which came into force on 1st January 1907. The respondent is a money lender within the definition of that Act. Sec. 4 of that Act provides that:—"Where proceedings are taken in any Court by a money lender . . . . for the recovery of any money lent after the commencement of this Act or the enforcement of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, 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 inquiries fines bonus premium renewals or any other charges are excessive or that the transaction is harsh and unconscionable or is such that a Court of Equity would give relief the Court may re-open the transaction and take an account between the money lender . . . . and the person sued and may notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation re-open any account already taken between them and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal interest and charges as the Court having regard to the risk the value of the security the time of repayment and all the other circumstances may adjudge to be reasonable; and if any such excess has been paid or allowed in account by the debtor may order the creditor or the money lender to repay it."

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The material facts of the transaction are as follows: The respondent was a money lender as I have said. The appellant was an officer of the Public Service of Victoria in receipt of a salary of £350 a year. He wanted to borrow £50. It appears that he probably could not have got the money on easier terms than those imposed upon him by the respondent, which were these. The appellant received £50. He gave a promissory note for £55 10s. payable three months after its date. When that promissory note became due, he paid £5 10s. and gave another promissory note for £55 10s. payable in three months. So the transaction went on, the appellant paying £5 10s. every quarter, that is, £22 in cash every year. This continued until June 1904, when the appellant paid £20 in addition to the £5 10s. and gave a promissory note for £33 10s. Thereafter he paid £3 10s. every three months and gave a new promissory note for £33 10s. So that the appellant for the loan of £50 paid £5 10s. four times a year. That is said to be 44 per cent. per annum. In reality, it is a great deal more. A very simple calculation will show that it is more than 50 per cent. per annum. Those are, I think, the only facts I need state at present. The Judge of the County Court thought that the rate of interest was excessive, and that he therefore had jurisdiction under the Act to re-open the whole transaction. He directed an account to be taken from the time of the first transaction of the moneys paid by the appellant, he allowed simple interest at the rate of $12\frac{1}{2}$ per cent. per annum, and he ordered the respondent to repay the excess which should be found to have been paid by the appellant. That apparently amounts to between £40 and £50. The respondent appealed to the Supreme Court and his appeal was allowed, and judgment was entered for the respondent for the amount of the promissory note.

The learned Judges of the Supreme Court were unanimous in allowing the appeal, but they differed in their reasons. *à Beckett* J. took the view which had been expressed by *Channell* J. in the case of *Carringtons, Ltd.* v. *Smith* (1), and thought that some evidence should have been given as to the current rate of interest charged in respect of similar loans, and that in the absence of

(1) (1906) 1 K.B., 79.

such evidence a Judge should not re-open the transaction merely because in his opinion too much interest was charged. That view was not pressed before us. The learned Chief Justice did not concur in that view. He held that it cannot be said that a rate of interest which an intelligent man who has no security to offer, who fully understands the transaction into which he is entering, and who is not subject to any pressure by the lender, is willing to pay is excessive. *Cussen* J. took the same view. He also thought that the action should be treated as an action for money lent after the commencement of the Act, and not as an action for the enforcement of an agreement or security made or taken after the commencement of the Act. He also thought that the Act was not retrospective, and that for this reason also the respondent must succeed.

I am unable to accept the view that this action was one for the recovery of money lent after the commencement of the Act. The money was not lent after the commencement of the Act. It was lent before that time. The action is brought upon an instrument made after the commencement of the Act in respect of a loan made before the commencement of the Act. To the retrospective effect of the Act I will refer later. Nor can I agree with the view of *Madden* C.J. If that view were accepted, the usefulness of the Act would be so cut down that practically nothing would be left of it. The view taken by *Channell* J. seems to be untenable after the decision of the House of Lords in *Samuel* v. *Newbold* (1). That was a case on the construction of a similar English Act, except that in the English Act it is not enough that the interest charged should be excessive, unless it be also shown that the transaction is harsh and unconscionable, or is such that a Court of Equity would give relief. In that case Lord *Loreburn* L.C. said (2):—"What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact, and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particu-

(1) (1906) A.C., 461.

(2) (1906) A.C., 461, at p. 467.

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larly if it be unexplained. If no justification be established, the presumption hardens into a certainty. It seems to me that the policy of this Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power."

I think, therefore, the view taken by *Madden* C.J. and *Cussen* J. upon that point was erroneous. It follows that the judgment of the Supreme Court cannot be supported on any of the grounds given by the Judges.

In anticipation of the Court coming to that conclusion, the respondent asked to be allowed to attack the judgment of the County Court, and we allowed him to do so. If the judgment of the Supreme Court is set aside, it is the duty of this Court to do justice between the parties and consider what judgment the County Court should have given.

The respondent contends that this action is not a proceeding for the enforcement of an agreement or security made or taken after the commencement of the Act within the meaning of the Act. He urges that the word "enforcement" is not an apt word to describe the bringing of an action upon a promissory note. One answer to that is that the *Instruments Act* 1890 uses that very word to describe that precise proceeding. Again: it is said that the words "agreement or security" are not apt to describe this transaction. What was the transaction between the parties? After the passing of the Act a fresh agreement was entered into that the respondent would give the appellant further time to pay the money, and in consideration of that the appellant gave a promissory note. That is the agreement embodied in the promissory note sued upon, which, in my opinion, is also a security within the meaning of the section. I think, therefore, that that objection fails, so that the action is one in which the County Court had jurisdiction.

Then was the interest excessive? For my part I have no hesitation in saying that I think it was. Even if 50 per cent., to which it really amounted, would not have been excessive for an isolated transaction, yet in the course of years, as the matter went on, the subsequent charges for renewals may have been very

excessive. It is not necessary to pursue that any further, but I think it is sufficient to say that the interest was excessive either at first or later on. It is then objected that this is not the same transaction. The Court is empowered to re-open "the transaction." It is said that each transaction was closed when the interest was paid and a new promissory note was given. Of course that is not so, unless each new promissory note was taken in accord and satisfaction of the preceding one, which is highly improbable. Moreover the Statute expressly says that the Court may exercise its powers "notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation." So that objection fails. It was one transaction, and it follows that the Court may re-open it and take an account.

What rate of interest, then, should be allowed in taking the account? Without suggesting that 35 per cent. per annum would have been a reasonable rate and would not have been excessive, I have no hesitation in saying that anything more would be excessive. A very simple calculation will show that if interest be calculated at 35 per cent. per annum and the annual repayments be taken as 45 per cent. per annum effectively, the debt would have been extinguished, all but a few shillings, at the end of five years. If interest at 40 per cent. per annum were allowed and the effective rate of interest were taken at 50 per cent. per annum, the debt would have been extinguished earlier, during the course of the fifth year. So that in either view the debt was extinguished before the Act came into operation, and the respondent after that received other payments for a year or eighteen months without any consideration. It follows that there was really no consideration in the view of the legislation for this promissory note when it was given in 1907, and the Court is justified in saying so and giving judgment for the appellant on the promissory note.

Then comes the question whether the Court should give a retrospective effect to the Act? Now the Act allows the re-opening of the whole transaction, and authorizes the Court to order any excess which has been paid to the lender to be repaid by him. But it is quite possible to read that provision as not extending to money

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lawfully received before the Act came into operation, and there is no doubt, as *Cussen* J. pointed out, a general presumption that no Act shall be construed so as to have a retrospective operation on vested rights unless its language is such as plainly to require such a construction. It would be very hard to say that, where a man has received a sum of money which he could not lawfully be made to repay, a subsequent Statute imposes upon him an obligation to repay money which he has lawfully received. Whether the Act does in terms authorize such an order or not, I think as a matter of judicial discretion the Court ought not to exercise such a power in this case, if it exists.

For these reasons I think that justice will be done by ordering judgment to be entered for the defendant *simpliciter*. I think the judgment of the Supreme Court should be discharged, and the order of the County Court varied by entering judgment for the defendant with costs.

BARTON J. I concur. I also consider that the Act with respect to what is called its retrospective operation is plainly so framed that where money has been lent before the commencement of the Act there is nothing to prevent the operation of sec. 4. Whether the action is for the recovery of money lent after the commencement of the Act, or is for the enforcement of an agreement or security made or taken after the commencement of the Act in respect of money lent either before or after the commencement of the Act, those expressions being followed by the terms of the enactment which allow, under certain circumstances, a re-opening of the transaction, I am clearly of opinion that there is a discretion given to the Court—although no doubt it is a discretion to be exercised with caution and wisdom—to re-open the transaction *ab initio*. If, upon a view of all the circumstances, the Court thinks it necessary to re-open the transaction, there is a discretion to re-open it to that extent. Whether that should be done here is another question. The word used is "may." The Court, when it entertains a certain opinion on the facts, is not bound to re-open the transaction; it may do so. It is therefore discretionary with the Court whether it will do so. Where a transaction extending over years, like the present one,

has from its circumstances such a continuity and coherence that it would be playing with words not to call it one transaction, it seems to me the way is certainly open for the exercise of the power, and it is a matter of circumstances appealing to the discretion of the Court whether the power will be exercised. There is a principle as to the construction of Statutes which has been invoked, viz., that an Act is retrospective only so far as appears from its plain language. I give effect to that rule of construction in what I have said. But it is competent for the Court to do more, and that is, to bear that rule in mind and act in some analogy to it if it does decide to re-open the transaction. Therefore it is competent for the Court so to exercise its discretion as to give the Act an effective operation which will not unnecessarily rip up and injure transactions begun before the commencement of the Act, especially if it can come to the conclusion that one party has taken and the other has given all that is just before the commencement of the Act. That I agree with the Chief Justice is what has happened here.

I must not be taken as thinking that even interest at 35 per cent. per annum would not, in many cases be excessive. But what I think the Court has to bear in mind is that it ought to be reluctant to give drastic effect to its discretionary power with respect to transactions which have largely had effect before the commencement of the Act.

Now, making a calculation at a rate of interest which any person must consider in the circumstances of this case to be more than ample, the respondent was paid off with that handsome rate of interest before this Act came into operation. It seems to me that is a fair starting point for this Court. It may look at the matter in this way:—Although we could re-open the transaction from its commencement, although we could arrive at a certain rate of interest for the transaction from its very beginning, still, under the circumstances, where the transaction was entered into before the Act came into operation, it is a fair conclusion to come to, so that the transaction may be given due and meet effect, that whatever is done with regard to re-opening should apply only to the period subsequent to the Act coming into operation. Now, allowing the rate of interest the Chief Justice has spoken of, I

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am of opinion that justice can properly be done in this case by allowing the respondent to keep the gain he had made up to the commencement of the Act, which gave him back with his principal a very handsome rate of interest, and that the discretion of the Court may be exercised by saying as to the rest, "no more." That is the judgment for the defendant of which the Chief Justice has spoken. It seems to me that such a conclusion is fairly within words which are part of those by which the discretion is confided to the Court:—"Relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal interest and charges as the Court having regard to the risk the value of the security the time of repayment and all the other circumstances may adjudge to be reasonable."

I do not propose to say more with regard to the construction of the Act except as to the point raised that the words "the enforcement of any agreement or security" in sec. 4 do not apply to the enforcement of a promissory note or bill of exchange taken for a debt. I am clearly of opinion that they do so apply. "Security for money" is a name commonly applied to a promissory note or a bill of exchange. "Security for money" is a term used in another section in a collocation which admits of its being read either in the sense of a charge, or mortgage or bill of sale only, or also in the sense of a promissory note or bill of exchange. The latter is the sense in which it is used in sec. 5 (1) (*e*). As the words are, in my opinion, wide enough to include that which in general language is known as a class of security, viz., a promissory note, I apply myself to this question—Why should we conclude that the more comprehensive of the two constructions open ought not to be given to the word? That may be judged by results. To say that this section can be put into operation only where a bill of sale or the like has been given to secure a loan and interest, and that the remedy is not applicable also in the commoner case where a promissory note has been given, is to my mind to put forward a construction unduly restrictive of the policy of the Act. The latter class of cases is the most numerous and concerns that section of the community which has not much security in the shape of land or chattels to

offer, and is most oppressed by these transactions. I fail to find ground for the narrower construction, and I agree that a promissory note comes well within the term "security," and that the enforcement by action of a promissory note is a term aptly and properly described as the enforcement of a security, although that term may with equal justice be also applied to proceedings for the specific performance of many contracts evidenced by writing or otherwise. I am not aware that there is any other point as to which I wish to add to the judgment already delivered, but I think both that the terms of the Act will be satisfied and that the ends of justice will be met by the proposed order.

O'CONNOR J. I am of the same opinion. Having regard to the importance of the questions raised I propose to add a few words to what has already been said as to the construction of the Act. The first objection is that the Judge of the County Court had no jurisdiction to apply the Act. The original loan was made before the Act came into operation, and the jurisdiction to apply the Act can only arise if the action was for the enforcement of an agreement or security made or taken after the commencement of the Act in respect of money lent. If it was such an action the jurisdiction of the County Court Judge to re-open the whole transaction is clear, whether the loan was made before or after the commencement of the Act. Mr. Justice *Cussen*, who in the Supreme Court delivered the principal judgment, seems to have been oppressed with the fear that a decision of the Court should be arrived at which would make the Act unfairly retrospective. It is no doubt a rule of construction of Statutes that an Act will not be so interpreted as to be retrospective unless it declares in express terms, or it is to be gathered from the whole of the Act, that the legislature intended it to be retrospective. That, after all, is only a branch of the higher and more important rule that we must in all cases ascertain what is the real intention of the legislature, and if the intention as expressed in the Act is such that on the whole we can see that it was intended to be retrospective, then, whatever the effect may be upon existing contracts, it must be held to be retro-

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spective. That position is well put by Lord *Hatherley* L.C. in *Pardo* v. *Bingham* (1) where he said:—Baron *Parke* did not consider it an invariable rule that a Statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was, whether the legislature had sufficiently expressed an intention. In fact, we must look to the general scope and purview of the Statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the legislature contemplated." If this Act is looked at in the light of a guide of that kind, I think the meaning of it is perfectly plain. The Act is to be applied, in the first place, where money is lent after the commencement of the Act, and, in the second place, it is to be applied where proceedings are taken for the enforcement of an agreement or security made or taken after the commencement of the Act in respect of money lent before or after the commencement of the Act. The legislature, therefore, considered that where a money lender is satisfied with the agreements and securities which he obtained before the Act he is exempt from its provisions. But where the parties choose after the commencement of the Act to alter their position, where a money lender after the passing of the Act makes an agreement or takes a security which gives him new rights and puts him in a new position, then the Act says under these circumstances the whole transaction may be re-opened. I read the Act that way, and that reading will apply also to another question with regard to which *Cussen* J. raised a question as to the retrospective effect of the Act, that is, with regard to the construction of the word "transaction." *Cussen* J. held that the "transaction" to be re-opened is the transaction that is dealt with in the instrument which comes before the Court and on which the action is founded. It appears to me that it is impossible to so restrict the meaning of the word "transaction" if any substantial effect is to be given to the enactment. It is well known that the class of dealings at which the Statute is aimed is one in which the persons who are obliged for some reason to enter into these oppressive contracts remain in the hands of money lenders year after year until

(1) L.R. 4 Ch., 735, at p. 740.

their position becomes utterly hopeless. The bonds which bind them to these oppressive contracts—and they are always devised with great ingenuity—are substantially these:—There is the original debt, and it is kept alive by renewals of the promissory note or other security which has been given. Now, if justice is to be done, where the law says the transaction is to be re-opened, it can only be done by going back to the inception of the transaction. If any effect, therefore, is to be given to the Statute, I am of opinion it can only be done by interpreting the word "transaction" as covering the whole transaction from its very inception.

These being the principles upon which this Act is to be construed, I proceed to inquire whether the proceeding upon the promissory note sued upon here was a proceeding for the enforcement of an agreement or security. I am clearly of opinion that it was. In the first place "security" is a word which covers a promissory note. If the word "security" does not cover it, then the word "agreement" certainly does. In regard to the argument put by Mr. *Starke* that the thing as to which the proceeding is taken must be of a kind to be enforced, and that the proceeding is a different thing from a proceeding for the recovery of money, I may point out that the agreement or security which gives jurisdiction to re-open is not only an agreement or security in which collateral rights and interests may be involved, but may be an agreement made directly between the parties. Under these circumstances I have no difficulty in coming to the conclusion that even if this was not a security it was an agreement within the Act, and that in either case there was jurisdiction in the County Court Judge to re-open the transaction.

There being jurisdiction to re-open the transaction, to what extent could it be re-opened? That depends upon the meaning of the word "transaction." Giving the full meaning to it, as I have pointed out should be done, the learned Judge was justified in re-opening the transaction from its very beginning. But before he could take the action he did he must have been satisfied that the interest charged was excessive. I think it ought to be understood that in the construction of this Act we must clear our minds completely of any notions founded

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upon the words of the English Act. The Victorian Act puts the question of excessive interest upon quite a different footing and eliminates many elements which had to be considered in the English cases. According to the provisions of the Victorian Act transactions may be perfectly honest, straightforward, open and aboveboard in every respect—and I see no reason to suppose that was not so in this case—but if, notwithstanding all that, the interest is excessive, then the law enables the agreement to be re-opened and the rights of the parties to be re-considered by a Court of justice.

The next matter for inquiry is, was there anything before the Judge of the County Court from which he could come to the conclusion that this rate was excessive? As to the view taken by *à Beckett* J. in the Court below I have only this observation to make, that I think this is one of the cases in which may be applied the expression used with regard to another branch of law —*res ipsa loquitur*. If the interest, having regard to all the circumstances of the case, appears to the Judge to be substantially greater than what ought reasonably to be charged, then it is excessive. Having regard to the facts before the County Court Judge in this case I have no hesitation in saying that there was abundant evidence from which he might come to the conclusion that the interest was excessive. So far, therefore, I am of opinion that the County Court Judge had jurisdiction to enter upon a consideration of the whole transaction and readjust the rights of the parties. The question then arises has he exercised his discretion in a proper way? In my opinion he came to a wrong conclusion in adjudging that there was an amount due on the whole of this transaction to the person who originally borrowed the money. Whether the result of the readjustment is an amount to be paid by the borrower or by the lender will depend very largely upon the amount of interest to be allowed. In my opinion the Judge of the County Court in allowing 12½ per cent. per annum took a rate very much too low under the circumstances. I think the rate reasonably considered should be much higher. Without going into detail upon the point I entirely concur in the decision at which my learned brother the Chief Justice arrived. I have had an opportunity of seeing the calculations

made by him, and I think a fair exercise of the discretion of the County Court Judge in this case would have been to allow the lender such a rate of interest as would bring the liability to an end at the commencement of the Act. Under the circumstances therefore I agree that the proper order to make will be to vary the order of the County Court Judge by entering judgment for the appellant.

ISAACS J. I entirely agree with all that has been said by my learned brothers, and in view, not only of the importance of the Act itself and of the novelty of these provisions on the Statute book, but also of the fact that we are differing from the carefully considered opinions of the Judges of the Supreme Court, I propose to add some additional observations.

The first thing to be considered in this connection is the attitude the Court should adopt when approaching the construction of the Act, and I think the keynote of the whole thing is found in the passage read by the Chief Justice from the judgment of Lord *Loreburn* L.C. in *Samuel* v. *Newbold* (1) :—"The policy of this Act" (and there is no distinction in this respect between the English Act and the Victorian Act) "was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power." There is one further observation of Lord *Loreburn* L.C. which I will add. He said :—"Nor ought a Court of Law to be alert in placing a restricted construction upon the language of a remedial Act." Now armed with that rule to guide us in construing the Statute, the question that we have to consider is whether there was evidence upon which the County Court Judge could properly find that the interest on the transaction was excessive. As has been pointed out, in form the action was the ordinary one on a promissory note, and it was held by the Supreme Court that it was really an action for money lent and not an action to enforce an agreement or security. It was argued here that neither the word "enforcement" nor the words "agreement or security" were apt or appropriate to the circumstances

(1) (1906) A.C., 461, at p. 467.

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of this case; that enforcement of an agreement or security did not mean suing to recover money. So far as relates to the question whether the word "enforcement" is appropriate to suing upon a promissory note, secs. 21, 38, and 39 of the *Instruments Act* 1890 are instances in which the legislature has used that very word to describe the very thing which is traversed by the contention. The case of *Read* v. *Anderson* (1) is one of many instances in which Courts have used the word "enforce" to signify the bringing of an action to recover money. As for a promissory note not being an "agreement," it is, of course, an agreement; it is a contract on its own footing. That is its primary meaning. As to a promissory note being a "security" that word is not a word of art. Amongst other references *Romer* J. in *In re Rayner*; *Rayner* v. *Rayner* (2), said that "security" is a commercial term and not a word of art. It is a term which varies in its signification with the history of commerce. One has only to turn to cases where actions have been brought upon negotiable instruments—I am not referring to will cases—to find there repeated references by Judges and by counsel to negotiable instruments as "securities," calling them by that name: Judges like Lord *Kenyon*, *Parke* B., *Lush* J., *Bowen* L.J. and Lord *Lindley*, and counsel like *Sir Roundell Palmer* and others —and they are men who used language accurately. In modern times, if one wishes to know the accepted use of the term, one need only turn to the *Encyclopædia of the Laws of England*. There it is said to include, amongst other things, promissory notes and bills of exchange. That being so, if we are to accept *Samuel* v. *Newbold* (3) as a guide in interpreting the Act, not to be alert in adopting a restricted construction, there can be no reason whatever for not giving to these terms their ordinarily accepted legal meanings, unless you find in the context something overpowering those meanings. The context of the Act does not, in my opinion, lead to such a conclusion. Sec. 5 (1) (*e*) is pointed to as evidencing the intention of the legislature to differentiate between "security" and "promissory note." It also differentiates between "debt" and "chose in

(1) 13 Q.B.D., 779, at p. 783. (2) (1904) 1 Ch., 176.
(3) (1906) A.C., 461.

action." No one can say that a debt is not a chose in action. It seems to me the legislature was extremely careful in its use of language, and was endeavouring to use the most comprehensive words to signify the meaning it intended to convey.

Then it is said that a restricted application ought to be given because the Act is retrospective. I do not know why. It is not a case of implication which should not be carried further than is necessary, but an express retrospective operation is to be given in certain events, and one of these events has happened. Again, reverting to the principle of interpretation laid down in *Samuel* v. *Newbold* (1), I cannot see why the remedial provisions of the Act as to its retrospectivity should be cut down—I mean as a matter of jurisdiction. Therefore that brings us to this result, that the transaction that may be re-opened is the whole of the transaction, and the question that then arises is whether the interest is excessive. " Excessive," of course, means more than is fair and reasonable in the circumstances. But it does not follow that in all cases the borrower has the onus thrown upon him of showing all the circumstances. The *quantum* or rate of interest may in itself be such as, to use the words of *Collins* M.R. in *Wells* v. *Allott* (2), makes the loan appear *primâ facie* to carry an excessive rate of interest. As *Cozens-Hardy* L.J. said in the same case (3) " the interest appears on the face of the transaction to be excessive." In *Samuel* v. *Newbold* (4) Lord *James of Hereford* said:—" What amounts to excessive interest is to be determined by the tribunal in each case, the question of risk being a material matter for consideration." Further on he says (5):—" The word 'excessive' applied to interest is, of course, a relative and elastic term, impossible of absolute definition. But we know the general rate of interest in commercial transactions, and in loans on perfect security. We know the rate of interest juries are in the habit of giving in cases of adjudging damages. But in respect of ordinary loans deviation from these guides, dependent upon the facts of each case, must doubtless be expected and ought to be allowed. But such deviation must be reasonable in relation to facts." The tribunal is, of course, to determine

(1) (1906) A.C., 461.
(2) (1904) 2 K.B., 842, at p. 844.
(3) (1904) 2 K.B., 842, at p. 848.
(4) (1906) A.C., 461, at p. 473.
(5) (1906) A.C., 461, at p. 475.

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in the end when all the evidence is given whether the interest is excessive. The very amount of it may of itself be some evidence that it is excessive even if nothing more appears to convince the Court that it is. *Palles* C.B. had an instance before him in which 2,000 per cent. per annum was charged. It was gravely argued here that such a rate is not of itself evidence that it is excessive. *Palles* C.B. thought that it was, and I think so too. A question to be considered is, what is the point at which the rate of interest is to be taken by the Court as being excessive? But I take it that the interest may reach such an amount as to call upon the lender to justify it. It must not be forgotten that it is the lender who fixes the interest, and he must know, or ought to know, how he arrived at it. He it is who has the commanding position. When interest is so much above the ordinary rate as say 50 per cent. is, there must be a considerable amount of necessity. There is a passage from the judgment of *Northington* L.C. (then Lord *Henley*) in *Vernon* v. *Bethell* (1), which is quoted by Lord *Macnaghten* in *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (2), in which he says:—"Necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them." So that a money lender who fixes, say 50 per cent., is a person who is supposed at all events to arrive by some process of reasoning at that amount as being a fair amount. In *Samuel* v. *Newbold* (3), Lord *Macnaghten* quoting *Sir William Grant* in *Bowes* v. *Heaps* (4), said:—"'It is not every bargain which distress may induce one man to offer that another is at liberty to accept.'" Now the money lender calculates the risk, or he ought to do so, and it should not be hard for him—much easier, at all events, than in many cases for the borrower—to state the elements which have been taken into consideration. So, without saying anything more about the point at which the interest becomes excessive, I say that 50 per cent. per annum, a rate at which the whole of the capital would be returned at the end of two years, is certainly high enough to make it incumbent upon the lender to justify it.

(1) 2 Eden, 113.
(2) (1904) A.C., 323, at p. 327.
(3) (1906) A.C., 461, at p. 471.
(4) 3 V. & B., 117, at p. 119.

Now, in this case the actual amount of capital advanced was small; there was another name upon the promissory note which the lender must have thought worth something; there was the position of the appellant in the Public Service, an important situation, with the salary which was referred to by the Chief Justice. All these circumstances, taken in conjunction with the actual rate of interest charged, throw a considerable burden upon the lender to justify. I do not say he might not justify 50 per cent. or more if the circumstances were such as in the opinion of the Court properly explain his reason for taking such a large amount.

In this case the County Court Judge fixed 12½ per cent. per annum. But the fixation of that amount does not depend upon the demeanour of witnesses or upon their credibility or upon any other matter as to which this Court is not in an equally good position to determine the propriety of the amount fixed. Therefore the matter is open for our consideration. I agree in what has been said as to the course to be adopted.

I would say as to the retrospectivity of the Act that, while I would place no limitation or restriction upon it with regard to the jurisdiction of the Court, yet regarding the fixation of the amount of interest it is, in my opinion, a material circumstance. It ought to be borne in recollection that before the Act came into operation a money lender was not, so to speak, put upon his guard. He was not told by the legislature that he ought to be careful and that his bargain might be challenged in this way, and therefore that is a material circumstance and ought to have weight. On these considerations I agree in the order proposed by the Chief Justice.

Appeal allowed. Judgment of the Supreme Court discharged. Judgment of County Court varied by entering judgment for the defendant with costs, and omitting direction as to accounting.

Solicitor, for appellant, *W. S. Doria.*

Solicitors, for respondent, *P. D. Phillips, Fox & Overend.*

B. L.