[HIGH COURT OF AUSTRALIA.]

WESTLEY CASTLES . . . . . APPELLANT;
DEFENDANT,

AND

HYMAN LOBEL FREIDMAN . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 8, 9, 15.

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

Money Lenders and Infants Loans Act 1905 (*N.S.W.*), (*No.* 24), *sec.* 1—*Procedure under Act—Pleading—Plea to whole cause of action.*

In an action by a money lender to recover the principal sum lent and interest, it is sufficient for a defendant who intends to rely upon the *Money Lenders and Infants Loans Act* 1905 to plead facts bringing the case within the Act, without excepting any specific part of the claim. The common law rules of pleading must be taken to be so far altered as to allow this to be done. If the facts proved bring the case within the Act, the Court will direct an account to be taken, and judgment will be given for the amount, if any, so found to be due.

Decision of the Supreme Court, 10th March, 1910, reversed.

APPEAL by the defendant by special leave from the decision of the Supreme Court of New South Wales.

The plaintiff sued the defendant upon his promissory note for £1,800. There was also a second count for money lent, and for money due on accounts stated.

The defendant, as to the first count pleaded that the plaintiff was a money lender within the meaning of the *Money Lenders and Infants Loans Act* 1905, that the said promissory note

was made by the defendant and delivered by the defendant to the plaintiff as security for the sum of £850 lent by the plaintiff to the defendant for the period of six months, and save as aforesaid there never was any consideration for the said promissory note, and further that the interest charged on the said sum of £850 being the sum actually lent, viz., the sum of £950, was excessive, and that the said transaction with the defendant by the plaintiff was harsh and unconscionable in its nature.

To the second count, except as to the sum of £850 parcel of the said moneys, the defendant pleaded never indebted.

The plaintiff demurred to the first plea upon the following grounds:—(1) The plea confesses but does not avoid the first count of the declaration. (2) The plea professes to be directed to the whole of the first count of the declaration but is in fact directed only to a part. (3) The *Money Lenders and Infants Loans Act* 1905 cannot be employed for the purpose of the plea pleaded, but is available only for the purpose of reopening transactions and taking accounts.

The Supreme Court gave final judgment for the plaintiff upon the demurrer.

The defendant by special leave appealed from this decision upon the grounds :—(1) That the plea demurred to being a notice of defence under the *Money Lenders and Infants Loans Act* 1905 is not open to demurrer. (2) That the Supreme Court pursuant to the jurisdiction in it vested should have overruled the demurrer, and ordered the questions whether the interest charged was excessive and whether the transaction was harsh and unconscionable to be tried. (3) On the plea the Supreme Court should have taken or ordered to be taken accounts between the parties.

The plaintiff gave notice of his intention to apply to rescind the special leave given. After the judgment for the plaintiff on demurrer the defendant obtained from *Cohen* J. a *rule nisi* to re-open the transaction, and a stay of proceedings was granted in the action.

The material portions of the Act are sufficiently stated in the judgment of *Griffith* C J.

Armstrong and *Perry*, for the appellant. The Supreme Court

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held that the defendant should have taken independent proceedings to set aside the transaction, and that the plea filed was not an answer to the first count of the declaration. But if the common law rules of pleading are at variance with the Statute, they must be modified to give effect to its provisions. The Act conferred a new right upon borrowers. The proper tribunal to investigate the transaction is the tribunal which tries the action: *Wells* v. *Allott* (1). The defendant was bound to set up this defence by his plea in order to entitle him to give evidence in support of it. In any case the Court should not have given final judgment for the plaintiff, as the result was to entitle the plaintiff to recover the whole amount claimed. Whether or not the plea is defective, the defendant is entitled to have the transaction investigated. By the judgment given he is precluded from doing so.

Pickburn, for the respondent. The plea is bad on the second ground taken on demurrer. The plea purports to be a plea to the whole amount claimed, although it only applies to the interest. The proper form of plea would be that as to £950, part of the money claimed, there should be an inquiry. The Act contemplates that the transaction should be investigated by a Judge in independent proceedings: *Lazarus* v. *Smith* (2). It is not a matter that a jury is competent to determine. All that the Supreme Court decided was that the plea as framed was not a good answer to the first count. Admittedly the plaintiff is entitled to recover the principal sum borrowed by the defendant.

Armstrong, in reply referred to *Bonnard* v. *Dot* (3); *Wilson* v. *Moss* (4).

Cur. adv. vult.

The following judgments were read:

December 15.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of New South Wales awarding final judgment for the plaintiff for the sum of £1,800, the amount of the promissory

(1) (1904) 2 K.B., 842.
(2) (1908) 2 K.B., 266.
(3) (1906) 1 Ch., 740.
(4) 8 C.L.R., 146.

note declared upon in the first count of the declaration. To this count only one plea was pleaded, which the Court held bad upon demurrer, and the judgment is therefore final. The Court applied to the case the ordinary rule of common law pleading that a plea pleaded to a whole cause of action, but which only shows a defence to part, is bad altogether. If this rule is applicable to the plea in question their judgment was right, and this is the question to be determined.

The *Money Lenders and Infants Loans Act* 1905 provides, by sec. 1, that "where proceedings are taken in any Court by a money-lender for the recovery of any money lent . . . and there is evidence which satisfies the Court," *inter alia* "(1) that the transaction is such that a Court of Equity would grant relief; or (2) that the interest charged in respect of the sum actually lent is excessive;" or (3) that (in certain cases) "the transaction is harsh and unconscionable in its nature, the Court may re-open the transaction, and take or direct to be taken an account between the money-lender and the person sued," with power to re-open settlements of account, and to award, if necessary, repayment of any amount already paid in excess of what is fair. The plea demurred to alleged that the plaintiff was a money lender within the meaning of the Act, that the note was given as security for a loan of £850, money lent by the plaintiff to the defendant for six months, that, save as aforesaid, there was no consideration for the note, that the interest charged on the £850, namely £950, was excessive, and that the action was harsh and unconscionable. These allegations brought the case within the words of the Act.

In my opinion, the provisions of the Act are inconsistent with the application of the ordinary rule of common law pleading already mentioned to cases within the Act. The rule must therefore give way to the Statute. In order to obtain the benefit of the Act the defendant must set up the facts on which he relies, otherwise there would not be any issue upon which the relevant evidence could be offered. The learned Judges, as we are told, thought that the plea, being in form pleaded to the whole claim, would, if proved, be a bar to the whole, but this is not so. If the facts alleged were proved the Court would direct an account to

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be taken, and judgment would be given for the amount found to be due on taking the account.

In cases falling within the Act it is impossible from the nature of the case for the defendant to specify what sum, if any, will appear to be due on taking the account. All sums already paid in respect of the debt and interest will be allowed to him, and if it appears to the Court that the plaintiff has been overpaid he may be ordered to repay the surplus. In order to invoke this new jurisdiction it is, I think, technically sufficient to plead facts bringing the case within the Act, and it is not necessary to except any specific part of the claim. If the defendant intends to admit that any part of it is due it would certainly be better that he should do so, and, if he leaves it doubtful whether he so intends or not, the plea may perhaps be ordered to be struck out or amended. In the present case it is at least arguable that the plea is open to the construction that it admits a debt of £850 and interest at some rate.

If it is so construed, it still did not, in my judgment, justify the Court in giving final judgment for the plaintiff for the full amount claimed. In that view the nearest analogy in the ordinary common law pleading practice would be, I think, a plea to a count for unliquidated damages which does not answer the whole cause of action, in which case a judgment for the plaintiff on demurrer to the plea would be interlocutory and not final. So, in the present case, if the plea is admitted, the only judgment (if any) that could be given would be interlocutory. The analogy is, however, not perfect, for, when the defendant pleads facts bringing the case within the *Money Lenders Act*, *non constat* that the plaintiff will recover anything.

In the present case it is sufficient to say that the final judgment for the plaintiff, which is the judgment that follows from allowing the demurrer, was erroneous, and that that judgment must be discharged.

Leave should be given to both parties to amend as they may be advised.

The motion to rescind the special leave to appeal should be dismissed. The delay in giving notice of motion would, of itself, be a sufficient reason for the dismissal. Apart from that reason,

the importance of the matter is unquestionable, and the appellant's delay was accounted for on evidence which remains uncontradicted.

BARTON J. The requisites under the *Money Lenders and Infants Loans Act* 1905 (N.S.W.) (5 Edw. VII. No. 24), sec. 1 (1), where proceedings have been taken by a money lender, are (*a*) evidence that plaintiff is a money lender within the Act, (*b*) evidence that satisfies the Court that (1) the transaction is such that a Court of Equity would give relief, or (2) the interest on the sum actually lent is excessive, or (3) the amounts charged for expenses, fines, bonuses, premiums, renewals, or any other charges are excessive; and (*c*) in cases 2 and 3, evidence that the transaction is harsh and unconscionable in its nature.

If these requisites are established then the Court will grant relief of the kind stated in the section.

The Court may re-open the transaction and take or direct to be taken an account between the money lender and the person sued, and re-open any account already taken, and relieve the defendant from paying any sum in excess of the sum found to be fairly due for such principal and interest and charges as may be found to be reasonable, and if any such excess has been paid or allowed by the debtor in account, may order the creditor to repay it, and may set aside, wholly or in part, or revise or alter any security given or agreement made in respect of money lent by the money lender, and may order him to indemnify the debtor if he (*i.e.* the money lender) has parted with the security.

The first count was on a promissory note for £1,800 given by the defendant to the plaintiff at six months.

The defendant pleaded to the first count that the plaintiff is a money lender within the meaning of the Act, that the note was made by the defendant and delivered to the plaintiff as security for £850 lent, that save as aforesaid there was never any consideration for the promissory note, that the interest which had been charged, namely £950, was excessive, and that the transaction was harsh and unconscionable.

On demurrer the Supreme Court of New South Wales held this plea bad.

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The object of sec. 1 is for the Court, if the requisites of the section have been established, to find out how much, if anything, the defendant owes to the plaintiff. Until the Court discovers this there is no sum certain or ascertainable for which judgment can be given.

Such a defence or pleading as this enables the Court to obtain the necessary evidence directed to the several allegations made, so that it may know what order to make.

Without some such plea, and with the issues necessarily directed to other points, would the evidence thus necessary be relevant to the issues under trial? Probably, almost certainly, such evidence would not be relevant, in which case the evidence would be rejected, and the order contemplated could not be made.

But where the facts required by the section co-exist, it is contemplated that the order should be made, even if it is certain that the defendant must pay something, or some certain minimum. For in such cases relief is as necessary as in others.

Here the plea might be read perhaps as admitting a liability to the extent of £850. But it is pleaded to the whole cause of action in the first count, and the section gives the Court power, where such facts as are alleged in this plea are proved, to re-open the entire transaction, for the purpose of ascertaining, where anything appears to be fairly due, what is the entire sum so due, and relieving the debtor from the payment of any sum in excess of that sum. Accordingly evidence needs to be taken under this plea if the Court is to be in a position to exercise its powers.

Under these circumstances it seems to me that a plea alleging that the conditions for the application of the section exist ought not to be disposed of by demurrer, though that might—I do not say it would—be a fit way to dispose of it if it failed to allege any fact essential to the case to be made for a re-opening of the transaction. The Statute makes an exception to the strict rules of pleading so far, at any rate, as is necessary to allow the new powers to be invoked, and a plea asserting the facts necessary to be established for that purpose cannot be regarded as bad in substance.

The appellant was driven by the course which the respondent adopted and the consequent judgment of the Court to seek relief

by direct application to a Judge to re-open the transaction, seeing that he had been erroneously denied the relief which he sought by his plea. I do not think his having made the application to *Cohen* J. can be made a ground for rescinding the special leave given, and the respondent's motion with that object should be refused.

I agree that the appeal should be allowed, with liberty to both parties to amend.

O'CONNOR J. In this case the respondent, as payee, sued the appellant as maker of a promissory note for £1,800. The latter pleaded, and it was his only answer, a plea alleging a state of facts which, if established to the satisfaction of the Court, would entitle him, under the *Money Lenders Act* 1905, to have the transaction which had resulted in the promissory note re-opened at the trial. The respondent demurred, substantially, on the ground that the rights conferred by the Act could not be set up as a defence to the action. The Supreme Court, adopting that view, held that the plea was no answer to the declaration, and gave judgment for the plaintiff on the demurrer.

The question for the determination of this Court is whether that decision was right.

It is, in my opinion, clear that where a money lender, within the meaning of the Act, is suing for repayment, whether directly for the amount of the loan, or upon a promissory note given to secure it, the borrower is entitled in the course of the trial, upon satisfying the Judge that the interest is excessive, or the transaction harsh and unconscionable in its nature, to have the transaction re-opened, an account taken, and judgment entered in accordance with the order of the Court on the taking of the account. The contention was raised that the defendant's only remedy under the Act, the action having been begun, was to initiate proceedings for an account and obtain a stay of the action pending the proceedings. It is not necessary on this appeal to decide whether that course is now open to the defendant. But it is clear from the language of sec. 1 that he is entitled, if he thinks fit, to claim the benefit of the Act during the trial, if the evidence satisfies the Judge of the existence of a

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state of facts authorizing the re-opening of the transaction. In the magistrate's Court or in the District Courts, where no formal pleadings are required, there can be no reason why the defendant in such an action should not claim in open Court at the outset of the hearing the right to give evidence, bringing himself within the benefit of the Act. The difficulty has arisen in the present instance only because of the rules of pleading, in accordance with which a Supreme Court action in this State must be conducted. The plaintiff having filed his declaration on a promissory note, the defendant must answer it within a certain time by filing a plea. If he fails to do so the plaintiff may sign judgment against him for the amount of the note. Having determined to take the benefit of the Act in the course of the trial, there was therefore no other course open to the defendant than to file a plea alleging facts which, if established to the satisfaction of the Judge, would bring his case within the first section. The plea might have been more explicit, but I think it alleges in terms substantially sufficient a state of facts justifying the re-opening of the transaction at the trial. It tenders an issue as to the existence of those facts. It was objected that the plea did not purport to answer the whole cause of action, that it disputed only the interest and admitted on its face that the principal was due. Fairly interpreted it cannot in my opinion be so read. It is impossible to ascertain until the account has been taken how much may be due to the plaintiff on the accounts as re-adjusted at the trial. The amount of the note represents the balance of the transaction as the parties have agreed to it. But the Court cannot re-adjust the balance without opening up the whole transaction. The plea alleging, as it does, facts entitling the defendant to have the whole transaction re-opened, I do not see how it can be read as admitting any portion of the balance represented by the note to be due. Paraphrased into informal language it says, "our business is within the *Money Lenders Act*, and the facts are such that I am entitled to demand an account at the trial to settle how much, if any, of the amount of the note the Court will order me to pay." It must be conceded that a plea alleging nothing more than that must be held bad in substance, if brought to the test of the existing rules of common law pleading. It does not answer the cause

of action. To adopt the pleader's phrase, "it confesses but does not avoid." It does not tender an issue for the jury, but an issue partly for the Judge and partly for the jury, and the issue itself is interlocutory only. But, on the other hand, it alleges all that is necessary to raise the issue of fact at the trial on which the right to the benefits of the *Money Lenders Act* depends. Rules of pleading cannot stand in the way of asserting in the Courts rights conferred by Statute. If there is a conflict between a statutory right and the rules of pleading the latter must give way, and the rules must be modified so as to enable the right to be asserted.

The learned Judges of the Supreme Court based their decision no doubt on the view that the *Money Lenders Act* does not permit the borrower to have the relief under the Act administered in the course of the trial, but that view is, as I have pointed out, not justified by the language of the Statute.

In conferring the right to have the transaction re-opened at the trial, the Act necessarily empowers a defendant to raise an issue as to the existence of the facts out of which his right has arisen. In the plea demurred to the defendant has raised that issue, and in language which I think is substantially sufficient. That being so, the plea is in my opinion good in substance, and the demurrer must be overruled. I agree that both parties should have liberty to amend.

With regard to the motion to rescind special leave to appeal, I concur in the view of my learned brother the Chief Justice. The question of law raised is of very general importance, and having regard to the opinions expressed by the learned Judges in deciding the demurrer, there was no other course open to the defendant, if he wished to assert the right he has claimed, than to appeal to this Court. It is no reason for refusing him the opportunity of obtaining in this Court the right as he now claims it that he has initiated in the Supreme Court proceedings for obtaining the benefit of the Act in another form, particularly when it is remembered that he was practically forced to take those proceedings in order to stay the operation of the plaintiff's judgment for the full amount of the note. On the whole case, therefore, I am

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of opinion that the appeal must be allowed, and the motion to rescind special leave must be dismissed.

ISAACS J. I agree that this appeal should be allowed. The error of the judgment appealed from is, in my opinion, due to a fundamental misconception of the scope and objects of the *Money Lenders and Infants Loans Act* 1905. To apply to that Act the unbending rules of common law pleading and consequently to hold the statement to be no legal answer at all, and thereupon to clear the way for a judgment in full for the plaintiff's claim, is to mistake the whole situation. The *Money Lenders and Infants Loans Act* 1905 instituted an entirely new jurisdiction. While greatly resembling in form the redress afforded by equity in certain cases of hardship and unconscionable bargains, or where the parties were not on an equal footing, the relief enacted by its provisions has gone far beyond anything previously known to our jurisprudence; and the functions of the Court—for it is to the Court itself that the power is entrusted—are so dissimilar from those in its common law jurisdiction as to render it altogether impossible to confine their exercise within the ordinary limits of its antique procedure. To attempt to do so, would effectually cripple the Act. In England some of the Courts were in like danger of too narrowly interpreting the remedial action of the Statute, and it required the corrective interpretation of the House of Lords to preserve to this novel legislation its full effect. *Samuel* v. *Newbold* (1) is, next to the Act itself, the most authoritative source of information, and is the most valuable judicial guide to the construction of its provisions. For the present purpose I find it unnecessary to look elsewhere than at the Act and that case. The English Act is substantially the same as the New South Wales Statute, and the judgments of the learned Lords are strictly applicable to the law of this State. Lord *Atkinson* said (2):—"The *Money Lenders Act of* 1900 in my opinion confers upon the Courts of this country a new jurisdiction, and gives to borrowers a form of relief different in kind and range from that theretofore granted to any class of tribunal in this country." Lord *Macnaghten* said (3):—"The first thing, I

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

(2) (1906) A.C., 461, at p. 476.

(3) (1906) A.C., 461, at p. 468.

think, which must strike anyone in reading the Act is that the jurisdiction created and conferred by it is not committed exclusively to the Division of the High Court already conversant with somewhat analogous questions. Any branch of the High Court, any County Court, any Court in the Kingdom, to which the money lender may resort for the purpose of enforcing his extreme rights is armed with power to protect the money lender's victim." Then the learned Lord goes on to show how much wider the power is than was possessed even by the Court of Chancery. That Court relieved expectant heirs, and even set aside their bargains, ordering the securities to stand as security for the money actually advanced with interest. But, says Lord *Macnaghten* (1): "the Court never remodelled the bargain," and adds: "So the Act involves a new departure in principle, and the working of the machinery is entrusted to hands rougher it may be, but not less ready, and not, I think, less competent for the purpose which the legislature had in view; and yet it is argued that there is an atmosphere of Chancery about the Act from which there is no escape."

Every word of that is applicable to the Act of New South Wales, and if we alter the word "chancery" to "common law pleading" his concluding words would be quite appropriate to the present appeal. I have on another occasion quoted the words of Lord Chancellor *Loreburn* in the same case (2), "that the policy of this Act was to enable the Court to prevent oppression, leaving it in the discretion of the Court to weigh the case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power." These observations make it transparently plain that it is foreign to the language and the spirit of the Act to place any fetters whatever upon its remedial power. What it affords to the debtor is not merely a strict legal defence to a money claim: it enables him to obtain "relief," a term which recalls the jurisdiction of equity, and is not consonant with the rule that a plea must afford a strict legal answer to the whole of a rigidly defined area of the plaintiff's claim. But though called relief it is not restricted to the ordinary grounds of equitable intervention. It is given on much wider grounds, and

(1) (1906) A.C., 461, at p. 468. (2) (1906) A.C., 461, at p. 467.

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in a larger class of cases, and the form of relief, by remodelling the contract, to use Lord *Macnaghten's* words, demonstrates the impossibility of requiring a defendant to follow the rules of strict common law pleading. Those rules are intended only for the statement of rights and liabilities which the law assumes are already definitely fixed and ascertained or ascertainable. But the relief permitted by the Act depends on the judicial discretion of the Court, and therefore nothing is fixed—not even the existence of the contract sued upon. The immediate object of the defendant's pleading is to induce the Court to reopen the transaction, which means leaving the matter entirely at large.

It is a claim, as Lord *Loreburn* L.C. says, to go behind the existing contract, that is, to sweep it away, and make a new and a fairer one. How then can the pleading be regarded as bad, merely because it does not answer some specific portion of the existing contract? If the defence is successful nothing will be owing on the contract sued upon, because it will cease to exist.

A defendant may, if he chooses, admit a specific amount, not because it is already contracted for, but as being fair; or he may challenge the whole claim, or if he has already paid more than he considers fair, he may counter-claim a return. He takes or refrains from taking a particular course of admission or payment in, with the full knowledge that the Court will consider it in dealing with costs as was done by the Court of Appeal in *Blair* v. *Buckworth* (1). But in re-opening the transaction the Court, instead of enforcing wholly or partly the contract made by the parties, places itself in the position of arbiter between them, and makes what it considers a just and reasonable contract for them, or, as the Act describes it, "a new obligation," as if for the first time, and in doing so has regard to the risk and all the circumstances of the case. The Court then enforces that new obligation, and, if necessary, directs any securities for the old bargain to stand as security for the new, and directs indemnity in a proper case if a security has been parted with. Any statement delivered as pleadings is ordinarily delivered, however inartistically drawn, provided it substantially shows one or more of the three conditions specified in sub-sec. 1 of the first section, and gives fair

(1) 24 T.L.R., 474.

distinct notice to the plaintiff of the case relied on, is, in my opinion, sufficient in point of law. If its form or contents are embarrassing or vexatious, that may be corrected, but unless in substance it is plainly outside the provisions of the Act it cannot be entirely rejected on general demurrer as worthless in point of law. The Court did not decide that the claim for relief could not be made in the direct proceedings in the action. But it appears that incidentally the question was raised and the defendant took separate proceedings to invoke the jurisdiction. The only direct materiality of that proceeding now is that the respondent has urged that the appellant should be disallowed his costs of this appeal on the ground that his subsidiary proceedings in the Supreme Court would have sufficed. I only desire as to that to say that in *Wells* v. *Allott* (1) the Court of Appeal, interpreting the Act as I should independently interpret it, is very clear that the proper tribunal to exercise the statutory jurisdiction when the money lender sues is that before which his action comes for trial. The Court—and where there is also a jury, it is nevertheless the Court alone for this purpose—before which the proceedings come is charged then and there with a duty under the Act. Supposing all the ordinary defences fail, it must still discharge this special function before proceeding to give judgment on the plaintiff's claim.

I concur in the orders proposed by the learned Chief Justice.

Appeal allowed.

Solicitor, for appellant, *J. D. Sly.*

Solicitor, for respondent, *E. W. Perkins.*

C. E. W.

(1) (1904) 2 K.B., 842.