[HIGH COURT OF AUSTRALIA.]

THE CLOVERDELL LUMBER COMPANY PROPRIETARY LIMITED AND OTHERS DEFENDANTS, APPELLANTS;

AND

ABBOTT . . . . . RESPONDENT.
PLAINTIFF,

APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 12, 13, 17.

Knox C.J., Isaacs and Gavan Duffy JJ.

Practice—Specially endorsed writ—Final judgment—Leave to defend—Money lender—Excessive rate of interest—Rules of the Supreme Court 1916 (*Vict.*), *Order XIV., r.* 1 —*Money Lenders Act* 1915 (*Vict.*) (*No.* 2701), *secs.* 4, 5, 6.

By a specially endorsed writ issued in the Supreme Court of Victoria against a company and several persons, the plaintiff claimed against the company a certain sum as being principal, interest and other moneys due under a covenant in a mortgage of land by the company to the plaintiff, and against the other defendants the same sum as being due under an agreement in writing between them and the plaintiff. The mortgage, which was in respect of a loan of £3,000, contained a covenant for payment of interest at fourteen per cent per annum reducible to twelve per cent on punctual payment, with a proviso that on default in due payment of interest the principal should forthwith become due. On a motion by the plaintiff under Order XIV. of the *Rules of the Supreme Court* 1916 (Vict.) for leave to sign final judgment, it was stated in an affidavit by one of the other defendants, who was a solicitor and a director of the defendant company, that the loan was to the defendant company and that the other defendants were guarantors; that the defendants "are advised" that the amount of the loan "can be raised within a short time" at a lower rate of interest; that the defendant company agreed to the rate of fourteen per cent, only because it would have lost its interest under certain contracts had it not secured a loan at the time; that, if the company and its advisers had not considered the rate of interest excessive, the interest in arrear would have been duly met and the present claim would not have existed; that at a date before the alleged default in payment of interest the company reduced its liability by payment of £600, but that this sum had been wrongly apportioned between capital and interest;

that the plaintiff held security which before such reduction of liability "was ample and is still more than ample"; that the value of the security, "which is freehold," is between £6,000 and £8,000; that the plaintiff is not and was not at the time of making the loan registered as a money lender; and that the deponent "has been advised by counsel and verily believes" that the transaction of the loan was illegal. The defence sought to be raised was based on the provision of sec. 5 of the *Money Lenders Act* 1915 that, in a case in which there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, the Court may reopen the transaction and relieve the borrower from payment of any sum in excess of the sum adjudged by the Court to be fairly due and may revise or alter any security given for the loan.

Held, by *Knox* C.J. and *Gavan Duffy* J. (*Isaacs* J. dissenting), that leave to sign final judgment under Order XIV., rule 1, was properly given.

Per Isaacs J.: A person who makes one loan at a rate of interest exceeding twelve per cent per annum is a "money lender" within the definition of that term in sec. 4 of the *Money Lenders Act* 1915 (Vict.), namely, "every person whose business is that of money lending . . . or who lends money at a rate of interest exceeding twelve per centum per annum."

Decision of the Supreme Court of Victoria (*Cussen* A.C.J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Mima Evelyn Abbott against the Cloverdell Lumber Co. Pty. Ltd., John Martyn, Albert John Franklin James and Isabella Sophia Johns, by a specially endorsed writ dated 14th December 1923. The plaintiff's claim against the defendant Company was for the balance of interest and other moneys due under the covenant contained in a mortgage dated 29th September 1921 given by the defendant Company to the plaintiff, namely, £2,505 for balance of principal, £103 1s. for one quarter's interest at fourteen per cent per annum due on 24th November 1923, and £5 5s. for law costs; the total sum claimed being £2,613 6s. The claim against the other defendants was for the same total sum, as being the amount due under the covenants contained in an agreement in writing made between the plaintiff and such defendants, and dated 29th September 1921. The plaintiff also claimed against all the defendants interest on the above-mentioned sum of £2,505 at fourteen per cent per annum from 24th November 1923 until payment or judgment. The plaintiff applied on summons before *Cussen* A.C.J. for leave to sign final judgment in the action

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against all the defendants. The defendants opposed the application, and supported their opposition by an affidavit made by John Martyn (one of the defendants), which was substantially as follows :—

1. I am one of the defendants herein and prior and up to the institution of these proceedings I acted as solicitor for the defendant Company and other defendants, and have personal knowledge of the facts herein deposed to.

2. The loan referred to in the writ herein was made only to the defendant Company, the other defendants being merely guarantors.

3. The defendants are advised by Mr. McNaughton, the secretary to the Bank of Victoria, that the amount of the mortgage herein can be raised within a short time at a rate of interest substantially less than that charged.

4. The defendant Company agreed to the rate of fourteen pounds per centum only because it would have lost its interest under certain uncompleted contracts had it not secured a loan at the time.

5. That had the Company and its advisers not considered the rate of interest excessive the interest now in arrears would have been duly met and the present claim would not have existed.

6. That in November last the Company reduced its liability by £600, but this amount has been wrongly apportioned between capital and interest.

7. That the plaintiff holds security the property of the defendant Company, which before the reduction mentioned in par. 6 hereof was ample and is still more than ample. The value of the said security, which is freehold, is between £6,000 and £8,000.

8. That I have caused search to be made in the office of the Registrar-General, and have ascertained that the plaintiff is not and was not at the time of making the loan registered as a money lender.

9. That I have been advised by counsel, and verily believe, that the transaction of the loan the subject matter of this action was illegal.

Cussen A.C.J. made an order that the plaintiff be at liberty to sign final judgment against the defendants for the sum of £2,666 2s. with £15 for costs; and subsequently judgment was entered accordingly.

From the decision of *Cussen* A.C.J. the defendants now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Vroland, for the appellants. The appellants, by the affidavit of Martyn, raised a defence under the *Money Lenders Act* 1915, and should have been allowed to defend the action. The respondent is a "money lender" within the definition of that term in sec. 4 of the Act, for this is a loan at over twelve per cent interest, and one such loan is sufficient to bring the lender within the definition. (See *Cornelius* v. *Phillips* (1).) If the respondent is a money lender the transaction is one in which relief could be given under the Act. The affidavit states facts from which the implication should be drawn that the rate of interest was excessive, and if it was excessive some relief should be given to the respondents. [Counsel referred to *Wilson* v. *Moss* (2).] The question of whether the rate of interest is excessive is a question of law (see *Abrahams* v. *Dimmock* (3)). There should be unconditional leave to defend because, if the rate of interest were reduced from fourteen per cent to from seven to ten per cent, there never would have been any default in payment of interest, since the excess which was paid would have covered the amount non-payment of which is alleged to have constituted the default. If that view is not adopted, then, if more interest has been paid than the Court would allow as a proper amount, the excess paid would reduce the amount of the principal owing, and, as it is not certain how much is owing for principal and how much for interest, the appellants should have unconditional leave to defend. The transaction was illegal because it was a loan by an unregistered money lender, which is made an offence by the Act (see secs. 5, 6 (4)). From the statement in the affidavit as to the value of the security being ample a presumption can be drawn that at the time the loan was made it was ample (*Encyclopædia of the Laws of England*, 2nd ed., vol. XI., p. 472). A plaintiff is entitled to final judgment under Order XIV. of the *Rules of the Supreme Court* 1916 (Vict.) only where there is no reasonable doubt that he is entitled to judgment (*Clarke* v. *Union*

(1) (1918) A.C. 199.
(2) (1909) 8 C.L.R. 146, at pp. 154, 165.
(3) (1915) 1 K.B. 662.

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Bank of Australia Ltd. (1)), and the affidavit in this case raises a reasonable doubt on that matter. (See also *Ward* v. *Plumbley* (2).)

Pigott (with him *Herring*), for the respondent. One isolated transaction of a loan at more than twelve per cent interest does not constitute the lender a " money lender " within the meaning of the *Money Lenders Act* 1915. The definition only includes a person whose business is that of a money lender. Even if the respondent be a money lender, the affidavit does not raise a case for relief under the Act. There is no statement that the rate of interest was excessive, nor are any facts alleged from which an inference can be drawn that it was excessive. The contention sought to be raised under pars. 8 and 9 of the affidavit, that the transaction was illegal, is not arguable. The defence sought to be raised only goes to part of the claim and there is no statement that it does so, as is required by Order XIV., r. 3. The loan in this case was not at more than twelve per cent. Whether the borrower pays more than twelve per cent rests with himself. (See *Wallingford* v. *Mutual Society* (3).) Final judgment should be entered for the amount admitted to be due (*Lazarus* v. *Smith* (4); *Wells* v. *Allott* (5)).

Vroland, in reply.

Cur. adv. vult.

Mar. 17.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. By a writ in the action the respondent claimed against the appellant Company £2,613 6s., being the balance of principal, interest and other moneys due under the covenant contained in a mortgage dated 29th September 1921 given by the defendant Company to the plaintiff, and against the other appellants the same sum, being the amount due under the covenants contained in an agreement in writing made between the respondent and those appellants. The appellants having entered an appearance in the action, the respondent took out a summons for liberty to sign

(1) (1917) 23 C.L.R. 5.
(2) (1890) 6 T.L.R. 198.
(3) (1880) 5 App. Cas. 685, at p. 702.
(4) (1908) 2 K.B. 266.
(5) (1904) 2 K.B. 842.

final judgment for the amount endorsed on the writ and costs. The mortgage, which was an exhibit to the affidavit filed in support of the summons, was expressed to be given in consideration of an advance of £3,000, and contained a covenant for payment of interest at the rate of fourteen per cent per annum, reducible to twelve per cent on payment within seven days after due date and for payment of the principal sum on 24th May 1924, with a proviso that on default being made in the due payment of the interest the principal sum should forthwith become due. The affidavit in support of the summons contained a statement that all the appellants were justly and truly indebted to the respondent for interest on the principal sum of £2,505, part of the sum claimed, at the rate of fourteen per cent per annum from 24th November 1923 until payment or judgment.

In answer to the application the appellants filed the affidavit of John Martyn—one of the appellants—who was also a director of, and solicitor for, the appellant Company. The allegations in that affidavit may be stated as follows, namely: (1) the loan was to the appellant Company and the other appellants were guarantors; (2) the appellants are advised that the amount of the loan can be raised at a lower rate of interest; (3) the Company agreed to the rate of fourteen per cent, only because it would have lost its interest under certain contracts had it not secured a loan at the time; (4) if the Company and its advisers had not considered the rate of interest excessive, the interest in arrears would have been duly met and the present claim would not have existed; (5) in November 1923 the Company reduced its liability by £600, but this amount has been wrongly apportioned between capital and interest; (6) the plaintiff holds security which before the reduction above mentioned was ample and is still more than ample; (7) the value of the security, which is freehold, is between £6,000 and £8,000; (8) the respondent is not and was not, at the time of making the loan, registered as a money lender; (9) the deponent has been advised by counsel and believes that the transaction of the loan was illegal.

On the hearing of the application *Cussen* A.C.J. gave leave to sign final judgment and stayed execution for three weeks.

By Order XIV., rule 1, it is provided that on an application for liberty to enter final judgment the Judge may, unless the defendant

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by affidavit or otherwise satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment. By rule 6 it is provided that leave to defend may be given unconditionally or subject to such terms as to giving security or otherwise as the Judge may think fit.

It is not suggested on behalf of the appellants that the affidavit filed disclosed a good defence on the merits. The only question therefore is whether it disclosed such facts as should have been deemed sufficient to entitle them to defend. In our opinion it did not. The defence suggested on this appeal was based on the provision of sec. 5 of the *Money Lenders Act* 1915 that, in a case in which there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, the Court may reopen the transaction and relieve the borrower from payment of any sum in excess of the sum adjudged by the Court to be fairly due, and may revise or alter any security given for the loan. The essential condition of relief under this provision is evidence that the interest charged is excessive. The affidavit contains no statement that the interest was in fact excessive, nor any statement of fact raising an inference to that effect.

In *Wallingford* v. *Mutual Society* (1) Lord *Blackburn*, speaking of the affidavit required from a defendant in answer to an application under Order XIV., said :—" There may very well be facts brought before the Judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits. I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, 'I say I owe the man nothing.' . . . You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it

(1) (1880) 5 App. Cas., at p. 704.

reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned."

We think the order made by the Judge was correct, but, as the appellants desire an opportunity of defending on terms, the order will be that, if the appellants within seven days give security to the satisfaction of the Prothonotary for the sum of £2,400, part of the sum claimed, they are to have leave to defend. If not, the appeal is to be dismissed. In any case the appellants must pay the costs of the summons before *Cussen* A.C.J. and the costs of this appeal.

We express no opinion on the question whether the respondent is a money lender within the meaning of the *Money Lenders Act* 1915.

ISAACS J. In my opinion this appeal should be allowed and the defendants permitted to have, which is all they ask, the normal right of every defendant to defend the action, and not to have their case, as was said by Lord *Halsbury* L.C. on a recent occasion, "stifled by an order of the Court under Order XIV." In saying this I am bound, in justice to the learned Judge from whom this appeal comes (*Cussen* A.C.J.), to say that he has given no reasons for his judgment because, as I gather, he reasonably thought that course unnecessary. The case appears to have been, in the hurry of the moment, so conducted by the parties as, without any loss of legal rights, to lead to some misapprehension. His Honor apparently did not think it necessary, therefore, to examine and pronounce upon the strict rights of the parties, and so I do not feel that I am, in the ordinary sense, differing from the views of *Cussen* A.C.J. on a subject so familiar as the procedure under Order XIV. Before us, however, strict rights were strenuously argued, and we have no option but to determine them.

1. *Order XIV.*—For myself, with great respect to the contrary opinion, I am unable to understand how it is possible to decide in favour of the plaintiff consistently, not only with the established decisions of the Victorian Supreme Court and the very clear declarations of the English Courts, including the House of Lords, but also with the express decision of the Privy Council in *Jones* v. *Stone* (1),

(1) (1894) A.C. 122.

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followed by this Court in *Clarke* v. *Union Bank of Australia Ltd.* (1). The Judicial Committee in the case referred to—consisting of Lord *Watson*, Lord *Halsbury*, Lord *Macnaghten*, Lord *Morris*, Sir *Richard Couch* and Lord (then Lord Justice) *Davey*—had under their consideration Order XIV. of Western Australia, in all material respects identical with Order XIV. of England and of Victoria; and of Order XIV. Lord *Halsbury* in the judgment said (2): "The proceeding established by that Order is a peculiar proceeding, intended only to apply to cases *where there can be no reasonable doubt that a plaintiff is entitled to judgment*, and where, therefore, it is inexpedient to allow a defendant to defend *for mere purposes of delay*." It will at once be observed where their Lordships lay the burden. *In dubio*, the plaintiff fails to get a summary judgment; that is, the plaintiff fails unless he, on the whole of the material, clears the ground of any doubt. Otherwise the normal right of defence stands. I should have thought that the express decision of the Privy Council direct on the point—and none the less that this Court, though differently constituted, acted upon it—would have been sufficient to conclude the matter, because, on the basis stated, it could scarcely be contended that the plaintiff could succeed. But the argument went further afield, and it is desirable to refer also to other authorities, which, however, in my opinion, strongly confirm the cases cited.

Implicit in what has been said is the necessity of expounding that remedial and humane piece of legislation, the Victorian *Money Lenders Act* 1915, with reference to this case. The whole contest between the parties is whether the circumstances here appearing, *combined* with the provisions of the *Money Lenders Act*, on its proper construction, entitle the defendant to defend under Order XIV. In other words, the guillotine operation contemplated by Order XIV. cannot be directed to proceed without a consideration of serious questions, both of fact and of law, involved in the protection claimed under the *Money Lenders Act*. The plaintiff's contention is that, by reason of default in punctual payment of a quarter's interest at fourteen per cent per annum payable quarterly, the repayment of the principal sum, normally to take place next May, was accelerated and was payable before 14th December 1923, when the writ was issued.

(1) (1917) 23 C.L.R. 5.

(2) (1894) A.C., at p. 124.

The plaintiff's position is that the matter is so clear that no opportunity for contesting liability should be given to the defendants, and that the Court, on the materials now before it, is bound to conclude that fourteen per cent per annum payable quarterly (which is of course more than fourteen per cent per annum *simpliciter*) is a legitimate rate of interest. The defendants dispute that, and claim the right to have the chance of establishing their position by proceedings under the *Money Lenders Act*, which provides for the revision of interest in certain cases where "excessive." The defendants have placed certain facts before the Court which I consider, on the principles enunciated in decided cases, to be sufficient, though as to this I have the misfortune to hold an opinion opposed to that of my learned brothers.

Perhaps it is better to take the most recent and (after the Privy Council case) the most authoritative case first, *Codd* v. *Delap* (1), which is the case I have already first alluded to. It came before Lord *Halsbury* L.C. and Lords *Macnaghten*, *James of Hereford* and *Lindley*. The principle that emerges from that decision is explicitly stated in the judgment of Lord *James of Hereford* in these words (2): "Order XIV. is a very useful process indeed, but it has to be used with very great care, and *must never be used unless it is clear that there is no real substantial question to be tried.*" Apparently in an action on a foreign judgment all that the defendant swore was that it had been obtained by fraud without more, and the House of Lords held that to be sufficient. Lord *Halsbury* said (2):—"There is an affidavit by the person sued that he has a good defence. *I am not satisfied that he has not a good defence. I do not say that he has.* I know nothing more about it than this: that in the state of conflict which there is between the parties, with the allegation that the judgments relied upon have been obtained by fraud, there is still a question to be tried, and not to be stifled by an order of the Court under Order XIV." Lord *Lindley* said (2): "Unless it is obvious that the allegation of fraud is frivolous and practically moonshine, Order XIV. ought not to be applied." That case was in 1905, and the observations being necessary to the decision must prevail over any earlier observations *obiter*, however weighty. In *Jacobs* v. *Booth's Distillery Co.* (3) in 1901, the

(1) (1905) 92 L.T 510.

(2) (1905) 92 L.T., at p. 511.

(3) (1901) 85 L.T. 262.

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same tribunal, composed of the same learned Lords with the addition of Lord *Brampton*, also very forcibly expounded the true tenor of Order XIV. An order for summary judgment had been made by the Divisional Court, and sustained by the Court of Appeal. Again the principle underlying the case may be stated in the words of Lord *Halsbury* L.C. He first said that if Order XIV. were administered in the way exemplified by the order under appeal, "it would be desirable for the Legislature to consider whether that order should continue to be put in force." His reason for so saying is apparent from his formulation of the scope of the Order. The Lord Chancellor said:—"People do not seem to understand that the effect of Order XIV. is, that, upon the allegation of the one side or the other, *a man is not to be permitted to defend himself in a Court; that his rights are not to be litigated at all.* There are some things *too plain for argument*; and where there were pleas put in *simply for the purpose of delay*, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV. was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights." Lord *James of Hereford* said:—"The view which I think ought to be taken of Order XIV. is that the tribunal to which the application is made should simply determine, '*Is there a triable issue to go* before a jury or a Court?' It is *not for that tribunal to enter into the merits of the case at all.* It ought to make the order only when it can say to the person who opposes the order, '*You have no defence.* You could not by general demurrer, if it were a point of law, raise a defence here. We think it *impossible* for you to go before any tribunal to determine the question of fact.'"

Taking those two decisions of the House of Lords (the two most recent of that tribunal, and entirely in accordance with the Privy Council case quoted), it seems to me to be clearly established that when the rule of Court says "the defendant by affidavit or otherwise" shall "satisfy him" (the Judge) "that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend," it does not mean the defendant must set forth a non-demurrable statement of defence, a premature

pleading; or even enumerate facts that could be combined into such a pleading. All the defendant has to do is to establish a state of facts that displaces the prima facie effect of the statement of the mere *belief* of the deponent—in this case the solicitor's clerk—that there is no defence in fact or law. Unless that statement of the solicitor's clerk as to his "belief" remains unimpaired—and if the matter is left in doubt, it is impaired—the plaintiff has no right to the summary judgment under Order XIV. if regard is to be paid to the decisions mentioned. Employing Lord *Halsbury's* words, it is no longer too "plain for argument"; applying Lord *James of Hereford's* words, the Court cannot say to the defence "You have no defence" either at law or in fact. The head-note to that case seems perfectly right. The Court, on an application under Order XIV., has no right to do more than ascertain whether, on the materials before it, it is clear the defendant has no defence whatever. With deep respect, I consider it reversing the true position on this "peculiar proceeding," when the burden is thrown on the defendant of satisfying the Court that the defence he relies on is maintainable even prima facie, and simply because a clerk to the plaintiff's solicitor has, in the usual form, sworn as to his "belief" that the defendants have no defence. That is most pointedly determined in *Ray* v. *Barker* (1), where *Brett* L.J. said:—"In this case we have to consider what is the true construction of Order XIV. When the existence of the debt has been clearly established upon the affidavits, the plaintiff is entitled to an order empowering him to sign judgment. The defendant, however, is to have leave to defend, either if he has a good defence upon the merits, or if he discloses 'such facts as may be deemed sufficient to entitle him to defend.' If therefore the defendant shows such a state of facts as leads to the inference that *at the trial of the action he may be able to establish a defence* to the plaintiff's claim, he ought not to be debarred of all power to defeat the demand made upon him: by the very words of the Order the plaintiff is not to be allowed to sign judgment *merely because the defendant's affidavit does not show a complete defence.*" *Cotton* L.J. says (2):—"The affidavit may not make it clear that there is a defence, but the defendant may be able at the trial to establish a

(1) (1879) 4 Ex. D. 279, at p. 283. (2) (1879) 4 Ex. D., at p. 284.

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bona fide defence. I am not satisfied that in the present case a valid defence exists; but the defendant may *plausibly argue* that he has a good defence." In *Wallingford* v. *Mutual Society* (1) Order XIV. was considered. In that case the House of Lords held that Order XIV. was not applicable from the nature of the case, and therefore, strictly speaking, no observations as to the precise working of the Order were necessary to the decision. But some valuable statements were made by several of their Lordships obiter. Lord *Selborne* L.C. said (2) it was a "means . . . of coming by a short road to a final judgment, *when there is no real bona fide defence to an action.*" That emphasizes the position upon which the House in the later cases judicially acted. Lord *Selborne* proceeds: "But it is of at least equal importance, that parties should not in any such way, by a summary proceeding in Chambers, be shut out from their defence, when they ought to be admitted to defend." Reading that with the preceding sentence, it means they should be admitted to defend unless it appears there is no real bona fide defence. He refers (3) to "what is prima facie every subject's right (the being let in to defend)." Lord *Hatherley* (4), referring to Order XIV., uses the expression "if a man really has no defence." Lord *Blackburn* (5) refers to the patent distinction between the defendant's (1) satisfying the Judge that he *has* a *defence*, and (2) satisfying him that it is *reasonable* to be allowed to *raise* a defence. To succeed in the first, there must be sufficient to connect up, so to speak, into a pleadable defence; but as to the second there may be gaps. The very time of the plaintiff's application may be enough to account for the absence of the connecting links; but, whatever the reason, complete connection is unnecessary either by way of express statement or inferential conclusions. Lord *Blackburn's* words are: "You must satisfy the Judge that there is reasonable ground for saying so." That does not mean reasonable grounds for a judicial conclusion, but *reasonable grounds for the defendant asserting and contending that he has a good defence.* He may not yet have, and may never have, the material to sustain it; he may not yet have the knowledge that such material exists,

(1) (1880) 5 App. Cas. 685.
(2) (1880) 5 App. Cas., at p. 693.
(3) (1880) 5 App. Cas., at p. 695.
(4) (1880) 5 App. Cas., at p. 699.
(5) (1880) 5 App. Cas., at p. 704.

but yet he may reasonably believe it exists. Lord *Blackburn* confirms that, when he adds: "facts which make it reasonable that you should be allowed to raise that defence." *Wallingford's Case* (1), read either alone, but most certainly when read so as not to conflict with the two later cases in the House of Lords and with the Privy Council case in which it was cited to the Board, supports the principle as I have formulated it. The Victorian Full Supreme Court in 1886, in *Daly* v. *Egan* (2), held, in accordance with that principle and with *Wardens of St. Saviour's Southwark* v. *Gery* (3), that where a defendant has any plausible ground of defence he has a right to defend. Other Victorian cases are in accord. There is a case in the Court of Appeal—*Thompson* v. *Marshall* (4), before *Bramwell*, *Brett* and *Cotton* L.JJ.—which directly enunciates the duty of the Court when *in dubio*. The facts are unimportant since the principle is unequivocally expressed by *Bramwell* L.J. in the following words, concurred in by the rest of the Court:—"Order XIV. was intended to apply to *clearly* undefended causes, and to prevent defendants from putting in statements of defence for the purpose of delay where there *could be no defence* on the merits. Here the Judge *had a doubt* as to whether there *might* be a defence or not, and therefore this is not a case for judgment in a summary manner."

The exposition of the function and range of Order XIV., which is by far more important than the fate of this particular application, permits of the proper appreciation of the effect of the affidavits on both sides in this case.

2. *The Facts.*—Certain facts are beyond doubt on the materials we have. The loan was £3,000 for three years normally maturing on 24th May 1924, a day not yet arrived. The interest was fourteen per cent per annum, but being payable quarterly was in effect more. It was reducible to twelve per cent punctually, but nevertheless the rate was fourteen per cent as claimed in the action. The defendants have paid £720 admittedly as interest at twelve per cent, which covers a period of two years, and then according to the terms of the mortgage covenant default occurred accelerating the due date of the principal. Another sum of £600 was also paid, of which £495 is

(1) (1880) 5 App. Cas. 685.
(2) (1886) 12 V.L.R. 81; 7 A.L.T. 124.
(3) (1887) 3 T.L.R. 667.
(4) (1879) 41 L.T. 720.

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appropriated by the plaintiff to reduction of principal, and in some way the balance should be appropriated to interest.

Now comes a most material and, as I think, eloquent fact. The whole debt as claimed by the plaintiff, including interest, is £2,613 6s., and for this, on the unchallenged affidavit of the defendants, the plaintiff holds as security a first mortgage of country freehold land of the present value of from £6,000 to £8,000. It is manifest, therefore, that the security is sufficient, and greatly over sufficient, to cover, not merely the debt and all possible interest to the end of the term, with power of sale, &c., but also all possible costs which the plaintiff might incur in the course of the action if the defendants were permitted to defend. We were told that that was practically all the property the defendant Company had. What reason can exist under any circumstances for exacting further security from the defendants as a condition of exercising what Lord *Selborne* calls " prima facie every subject's right," I am unable to perceive.

The facts disclosed by the defendants' affidavit are, in effect, these: (1) that an official of the Bank of Victoria stated that the amount of the mortgage could be raised within a short time at a rate of interest substantially less than that charged; (2) that the Company agreed to fourteen per cent only because of business pressure to preserve uncompleted contracts; (3) that the failure to pay the interest in arrear was because it was considered excessive; (4) that in November 1923 the Company reduced its liability by £600, by which I understand a reduction of principal—but, says the affidavit, the plaintiff wrongly apportioned the sum between capital and interest; (5) that the security was ample before the reduction by £600—and that the security is now between £6,000 and £8,000. I lay no stress on the fact of non-registration of the plaintiff as a money lender.

On the whole circumstances so appearing, the defendants claim the right to defend so as to be permitted to get the benefit of the *Money Lenders Act* 1915, and so to apply for a reduction of interest. It is obvious that if the interest were reduced to ten per cent, then, supposing the defendants were to have to rely on £720 for interest, there would have been no default at the date of the writ, and consequently the principal would not have become prematurely due:

much more if the interest is to be taken at £825, for then the same result would follow at eleven per cent interest.

The defendants, it is true, do not say in so many words that the interest was excessive in 1921, when the loan was obtained. But, in the first place, they do practically say it was so in their opinion by fact No. 2. And what can "excess" be but a matter of opinion? I would go further and say that the "excessive" nature of interest is not a matter of fact in the ordinary sense, to be deposed to by a witness. Lord *Wrenbury* (then *Buckley* L.J.) referred to it, and the Court dealt with it, as a "question of law" (*Abrahams* v. *Dimmock* (1)). Consequently, I would not attribute to the absence of direct sworn statement on the question of excess, the nature of a flaw in the testimony, even if this were the trial of the action—and much less now. Besides, it needs no expert to tell us that fourteen per cent per annum payable quarterly for a three years loan on a gilt-edged security is, unless there is some unlooked-for explanation, an exorbitant charge; and for myself, with the common knowledge of affairs that even a Judge may be presumed to have, I am unable to look upon it as unchallengeable even if no expert comes to tell me so. In *Wilson* v. *Moss* (2) the law as I understand it in relation to "excessive" is stated upon the authority of the House of Lords and other tribunals; and I simply refer to what I there said. It is true there is an absence of direct statement as to the value of the land at the time of the mortgage. But there is the very potent statement of its value now. And we must have regard to the nature of the land, its locality, the period of the loan, the knowledge that every person has that no such convulsion in values of real property of that nature has taken place as to be at all likely to account for the margin between £3,000 of debt and £6,000 to £8,000 of security—especially if, as we were told at the Bar, the plaintiff was a trustee and bound by law to observe a margin. Even if we could wildly imagine a hundred per cent rise in value, that would still leave the land more than sufficient to cover the loan, to say nothing of the personal guarantee of the three individuals. There is also a presumption of evidence that comes in aid of the defendants. The present existence of facts does in some cases operate retrospectively as evidence of former condition

(1) (1915) 1 K.B., at p. 672. (2) (1909) 8 C.L.R., at pp. 167-168.

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(see *Phipson on Evidence*, 6th ed., at p. 104). It is not necessary to do more than cite three authorative examples. One is *Bristow* v. *Cormican* (1), where Lord *Blackburn* said: "The acts of ownership done in Lord O'Neill's time from 1837 to 1872 along his demesne would justify the jury in drawing an inference that similar acts had been done during the long interval from 1661 to 1837." The next is *Sanders* v. *Sanders* (2), where the Court of Appeal held that payment of rents from 1864 to 1877 was, in the absence of evidence to the contrary, sufficient to support the inference of prior payments from 1833 to 1864. The third is even more direct, *Doe* v. *Fuchau* (3), where the insufficiency of a distress on a certain date was prima facie evidence of an insufficient distress on an earlier date. Substitute "sufficiency" for "insufficiency" and "a sufficient" for "an insufficient," and the case is directly in point.

The defendants rely on the united force of four considerations to prevent summary judgment. Those are (1) the facts actually stated in the affidavit; (2) the inferences, or rather the *possible* inferences, to be drawn from those facts, because we have no right to exclude possible inferences; and (3) the rule of evidentiary law adverted to; and (4) the effect of the provisions of the *Money Lenders Act* 1915. To decide that the defendants have not brought their case within the Act, without considering the meaning and extent and effect of the Act, is like deciding that they fail under Order XIV. without determining the scope and effect of that provision. If the provisions of the Act are such that *when linked up* with the defendants' allegations the defendants have a reasonable ground to defend the action, then the defendants have satisfied the requirements of Order XIV. That surely means that we have to examine and determine the scope and ambit of the *Money Lenders Act* so far as relates to the matter before deciding against the defendants. And equally, before determining against the plaintiff, we have, I consider, to say at the threshold whether the plaintiff is, within the meaning of the Act, a "money lender" for the purposes of this case.

3. *The Money Lenders Act* 1915.—*The Money Lenders Act* 1915 has received, to some extent, judicial consideration. The only general

(1) (1878) 3 App. Cas. 641, at pp. 669-70.

(2) (1881) 19 Ch. D. 373.

(3) (1812) 15 East 286.

observation necessary to quote is that of Lord *Loreburn* L.C. in *Samuel* v. *Newbold* (1), namely, "Nor ought a Court of law to be alert in placing a restricted construction upon the language of a remedial Act." This observation receives added force when applied to the Victorian Act, which openly extended further than the English Act the protection to borrowers. Two instances should be mentioned, because immediately pertinent. First, in England bargains are not examinable merely because the interest is excessive; in Victoria they are. Next, in England the expression "money lender" includes only persons whose "business" is that of money lending; in Victoria, in addition to that, "money lender" is declared to mean "every person . . . who lends money at a rate of interest exceeding twelve per centum per annum." It is, of course, undeniable that in the present case the plaintiff is a person who did lend money at a rate of interest exceeding twelve per cent per annum. It is urged that the Court should give a restrictive meaning to the word "lends," so as to exclude a single transaction, or even any number of transactions, however high the rate of interest or however harsh and unconscionable the bargain may be, unless the lender can be said to do it "habitually"; which, in effect, is the same as saying "carrying on business." That construction would, of course, fly in the face of Lord *Loreburn's* opinion above quoted. It would favour usurious lenders, and would deprive a necessitous and oppressed borrower of the protection which the primary meaning of the words naturally confers, and it would, as was candidly admitted in argument, really add nothing to the prior words of sec. 4. I reject the limitation. The Victorian Parliament, finding English decisions limiting the benefits of the Act to "businesses" of money lenders, enlarged it so that a Court under its provisions could relieve from oppression even in an isolated transaction, just as can a Court of equity in a proper case. This is emphatically shown by the definition of "loan" and "lend" in sec. 3, which expressly relate to "every contract" which is a loan of money. The plaintiff is therefore a money lender for the purposes of this case.

It is perfectly correct, as Mr. *Vroland* said, that the Victorian Parliament in 1915, adhering to its view in 1906, considered twelve

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

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per cent the extreme limit for interest in a contract such as that we are now considering, if the contract is to be free from the operation of the Act. What, then, is the operation of the Act? It is, *quâ* this action, that by sec. 5, the action being brought to recover the loan and interest, the defendant, if he adduces "evidence which satisfies the Court that the interest charged is excessive," may have the transaction reopened, &c, and a reasonable rate of interest fixed. The defendants are not called upon at this juncture, and indeed it it decided that they have no right, to enter now on the "evidence" that the interest is "excessive." This is not the time for that, and all that the defendants ask is a chance of doing that in due course, pointing among other circumstances to the interest being over twelve per cent. The legislative limitation of interest to twelve per cent in the Act, *if the money lender is to escape the supervision of the Court or the effects of the Act*, appears in several places, as in secs. 4 (*d*), 9 and 10. It is evident, therefore, that the mere circumstance of interest being charged at a rate exceeding twelve per cent on a loan is, in the view of the Victorian Legislature, *a special circumstance calling for special protection, and special judicial supervision.* I have no doubt personally that that special circumstance in this case cannot be ignored without very materially weakening the beneficial provisions of the Act, and I am clearly of opinion that, as that is added to the other circumstances in evidence, there is abundant reason for permitting the defendants to defend, and, therefore, for allowing this appeal.

If appellants within seven days give security to the satisfaction of the Prothonotary for the sum of £2,400, *part of the sum claimed, they shall have leave to defend. If not, appeal to be dismissed. In any case appellants to pay costs of summons and of this appeal.*

Solicitors for the appellants, *John Martyn & Sons.*

Solicitors for the respondent, *Blake and Riggall.*

B.L.