[HIGH COURT OF AUSTRALIA.]

AUSTIN DISTRIBUTORS LIMITED . . APPELLANT;
PLAINTIFF,

AND

A. H. PATERSON CAR SALES PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1941.

MELBOURNE, *May* 21; *June* 4.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Money-lenders—Definition—Exception—Business not having for its primary object the lending of money—Business of motor-car traders—Dealing in new and used cars—On cash and hire-purchase terms—Financing used-car dealers—Security by hire-purchase agreements—Advances made to dealers—Whether financing of dealers incidental to business of motor-car traders—Money Lenders Act 1938 (*Vict.*) (*No.* 4625), *secs.* 3 (1),* 22.

A company which carried on the business of importing or buying, and selling for cash or on terms, new and used motor vehicles, also undertook the financing (at rates of interest exceeding eight per cent per annum) of a small number of dealers in motor vehicles. Dealers were financed in respect both of the acquisition by them of used vehicles from third parties and of the acquisition by them from the company of used cars which had been traded-in on purchases of new vehicles from the company by persons introduced by such dealers. Security for an advance made to a dealer in respect of his acquisition of a motor vehicle was taken by letting the vehicle to the dealer under a hire-purchase agreement for a short term; if the dealer sold the vehicle on terms,

* The *Money Lenders Act* 1938 (Vict.) provides as follows:—Sec. 3 (1): "'Money lender' means every person whose business (whether or not he carries on any other business) is that of money lending or who advertises or announces himself or holds himself out in any way as carrying on that business and who lends money at a rate of interest exceeding eight per centum per annum but does not include— . . . (*d*) any person bona fide carrying on the business of banking or insurance or bona fide carrying on the business of financing pastoral pursuits or the business of stock and station agents or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money."

the new purchaser entered into a hire-purchase agreement with the company and the short term hire-purchase agreement with the dealer was thereupon cancelled.

Held that the company was not a money-lender within the *Money Lenders Act* 1938 (Vict.), in that it fell within the exception in sec. 3 (1) (*d*) of that Act of "any person . . . bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money."

Decision of the Supreme Court of Victoria (*Martin* J.) reversed.

APPEAL from the Supreme Court of Victoria.

Austin Distributors Ltd. was a company carrying on business in Melbourne, Victoria. Its business was as follows:—(*a*) purchasing and disposing of new Austin motor vehicles imported by it; (*b*) disposing of used motor vehicles traded-in to it by purchasers from it of new motor vehicles; (*c*) purchasing and disposing of used motor vehicles; (*d*) financing used-car dealers in the manner hereinafter referred to; (*e*) disposing of used vehicles referred to in *b* and *d* by hire-purchase agreements; (*f*) disposing of used vehicles traded-in to it by way of part payment for other used vehicles; (*g*) disposing of vehicles repossessed by it from hirers; (*h*) selling spare parts, accessories, petrol, and oils; and (*i*) repairing and servicing of vehicles.

From 1928, the company had financed used-car dealers and, owing to having unused capital available, this part of the business was encouraged. It, however, never assumed a large portion of the business, and in the balance-sheet of the company for the accounting period ending 30th June 1939 the amount of this finance was shown at £3,033 in a total of £142,000, and in the balance-sheet for 30th June 1940 it was £2,883 in a total of £107,000, and at no time during these accounting periods did it exceed £3,360. The company did not have any separate staff or office for this portion of the business, and did not lend money to the public generally, but financed only eight dealers.

The method of this finance was as follows:—A dealer would buy a used motor car from a vendor, paying his own cheque therefor, and take it along to the company to be inspected, and if the company's officers approved of it the dealer would sign a form requesting the company to deliver him the motor car and agreeing to enter into the company's usual hiring agreement. The company having assented to the request, advanced to the dealer the price which he had paid to his vendor, less ten per cent. The dealer then signed a hire-purchase agreement. Under this agreement the company

H. C. OF A. 1941. AUSTIN DISTRIBUTORS LTD. v. A. H. PATERSON CAR SALES PTY. LTD.

purported to hire the motor car with an option of purchase. The purchase price under this agreement was fixed by taking the amount paid by the dealer to his vendor, adding to it the stamp duty paid on promissory notes which the dealer had to give to the company by way of collateral security for the hire, and adding to these items interest thereon at fifteen per cent from the date of the advance to the date of repayment. The hire under the agreement was payable by a deposit of ten per cent of the purchase price (satisfied by the deduction in the advance), and the balance of the purchase price within three months. The dealer, after execution of the agreement, took delivery of the motor car and sold it to a new purchaser. If he sold for cash, he paid to the company the amount of advance with interest to the date of repayment; if on terms, he got the new purchaser to enter into a hire-purchase agreement with the company and guaranteed its performance, whereupon the original hire-purchase agreement between the company and the dealer was cancelled.

In December 1940, in the Supreme Court of Victoria, the company sued A. H. Paterson Car Sales Pty. Ltd., a dealer, for £1,915 5s. 8d., being moneys due on promissory notes given by way of collateral security in transactions of the nature set out above. On 12th February 1941, on a summons for final judgment, A. H. Paterson Car Sales Pty. Ltd. was given leave to defend, and on the same application, Austin Distributors Ltd. by its counsel admitting that the amount claimed included loans within the meaning of the *Money Lenders Act* 1938 (Vict.), it was ordered by consent that the only issue upon the trial of the action should be whether the loans by Austin Distributors Ltd. to A. H. Paterson Car Sales Pty. Ltd. were free from illegality by reason of its coming within the exception provided by clause *d* in the definition of "money lender" in the Act. On the trial, *Martin* J. held that the onus was on Austin Distributors Ltd. to show that it fell within the exception set forth in clause *d*, and, in his opinion, it had not done so. Accordingly, it was a money-lender within the meaning of the *Money Lenders Act* 1938, and as admittedly it had no licence to carry on as such, by virtue of sec. 22 of the Act it could not recover. He therefore gave judgment to the defendant with costs.

Austin Distributors Ltd. appealed to the High Court from that decision.

Further facts appear in the judgments hereunder.

Fullagar K.C. and *Coppel*, for the appellant. Any person "bona fide carrying on any business, not having for its primary object the lending of money, in the course of which and for the purposes whereof

he lends money" is not a money-lender (*Money Lenders Act* 1938, sec. 3). The trial judge wrongly divided the appellant's business up into a number of sections. He was not entitled to find that the appellant was carrying on a money-lending business unless it can be shown that its business did not come within exception *d* of the definition of money-lender in sec. 3 of the *Money Lenders Act* 1938. The primary object of the appellant's business was not money-lending; the type of transaction here was hire-purchase, which is not money-lending at all (*Transport and General Credit Corporation* v. *Morgan* (1); *Olds Discount Co. Ltd.* v. *John Playfair Ltd.* (2)).

[WILLIAMS J. referred to *Drury* v. *Victor Buckland Ltd.* (3); *Price* v. *Parsons* (4).]

Part of the plaintiff's business was to sell cars on hire-purchase terms, and all persons who were financed were customers of the plaintiff. The plaintiff had no separate staff for this form of transaction, and it used the same forms as it used in all its business transactions. Outside finance was, however, a small part of the plaintiff's business. The loans were made for the purposes of the business, namely, lending money to customers in order to secure their custom and to extend the hire-purchase part of its business (*Furber* v. *Fieldings Ltd.* (5); *Litchfield* v. *Dreyfus* (6); *Edgelow* v. *MacElwee* (7)). The onus was on the respondent to prove that the appellant was carrying on a money-lending business (*Lapin* v. *Heavener* (8), *sub nom. Lapin* v. *Abigail* (9) in the High Court). The test is, What was the main purpose of the business? The financing of dealers was proportionately a small part of the business.

Dean, for the respondent. The onus is on the appellant to show it comes within the exception. It must show that it bona fide carried on some other business and the loans were in the course of and for the purposes of such other business. The trial judge has held that that onus has not been sustained. A court of appeal should be reluctant to disturb this finding, especially as it is a finding against a party on whom the onus lies, and should not undertake a new inquiry for itself without seeing the witnesses. As to the meaning of the exception, one must first find a primary business (*Edgelow* v. *MacElwee* (10); *Furber* v. *Fieldings Ltd.* (5); *Bonnard* v. *Dott* (11), *Fagot* v. *Fine* (12)). The mere fact of loans being made to customers

(1) (1939) Ch. 531, at p. 551.
(2) (1938) 159 L.T. 332.
(3) (1941) 1 All E.R. 269.
(4) (1935) 54 C.L.R. 332.
(5) (1907) 23 T.L.R. 362.
(6) (1906) 1 K.B. 584.
(7) (1918) 1 K.B. 205.
(8) (1929) 29 S.R. (N.S.W.) 514, at pp. 520-524, 534-536.
(9) (1930) 44 C.L.R. 166.
(10) (1918) 1 K.B. 205.
(11) (1905) 92 L.T. 822.
(12) (1911) 105 L.T. 583.

H. C. OF A. 1941.

AUSTIN DISTRIBUTORS LTD. v. A. H. PATERSON CAR SALES PTY. LTD

was not sufficient to bring the transactions within the exception. The appellant's primary business was buying and selling new and used cars. In the challenged transaction, there was clearly a loan of money, as the respondent bought the car without reference to the appellant, who never acquired a title to it. The respondent can resell as and when he likes, and the appellant gets fifteen per cent interest and nothing else. It was clearly a money-lending transaction, and was not allied at all to buying and selling motor cars.

Coppel, in reply. This court is in no worse position than the Supreme Court to draw inferences of fact. The issue does not depend on the testimony of witnesses (*Dominion Trust Company* v. *New York Life Insurance Co.* (1)).

Cur. adv. vult.

June 4.

The following written judgments were delivered :—

RICH A.C.J. I agree with the judgment of *Williams* J., which I have had the opportunity of reading, and am of opinion that the appeal should be allowed with costs.

STARKE J. The *Money Lenders Act* 1938, No. 4625 of Victoria, provides that no money-lender shall be entitled to recover any money lent by him or interest in respect thereof or to enforce any agreement made or security taken in respect of any loan made by him unless licensed under the Act or registered under the Act of 1928 or any corresponding provision or enactment (Act, sec. 22). " Money lender " means every person whose business (whether or not he carries on any other business) is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business, and who lends money at a rate of interest exceeding eight per cent per annum, but does not include (*inter alia*) (*d*) any person bona fide carrying on the business of banking or insurance or bona fide carrying on the business of financing pastoral pursuits or the business of stock and station agents or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes of which he lends money (Act, sec. 3).

The appellant brought action against the respondent in the Supreme Court of Victoria upon certain promissory notes made by the respondent in favour of the appellant and interest thereon in the manner prescribed by the *Instruments Act* 1928, Part I. (Summary Proceedings on Bills of Exchange—which includes promissory notes).

(1) (1919) A.C. 254.

Leave was given to defend the action, but, upon the appellant admitting that the amount claimed in the action included loans by the appellant to the respondent within the meaning of the *Money Lenders Act* 1938, it was ordered by consent that the only issue upon the trial of the action should be "whether the loans by the appellant to the respondent were free from illegality by reason of its coming within the exception provided by clause *d* in the definition of 'money lenders' in sec. 3 of the Act." That issue was decided adversely to the appellant, which now appeals to this court.

It was said by *McCardie* J. in *Edgelow* v. *McElwee* (1) that "no system of loans will fall within exception *d* unless such loans are in substance and actuality directly incidental to the business which is the primary object and pursuit of the person who makes the loans." A more practical guide to the meaning of the exception is perhaps found, in Victoria, by looking to the exception from the definition of money-lender of persons bona fide carrying on the business of financing pastoral pursuits or the business of stock and station agents. Finance may be arranged in various ways (*In re George Inglefield Ltd.* (2)), but the term is one of business, not of law. An ordinary method of financing pastoral pursuits is by advancing moneys against wool clips, or providing money for the purchase of stock, stores, plant and so forth. So, also, in carrying on the business of stock and station agents advances are made to clients dealing in stock for the purpose of financing their transactions. Such arrangements are part of the "commercial . . . life of the community" (*Transport and General Credit Corporation* v. *Morgan* (3)). They are recognized by the Act as mercantile services which are not within the mischief at which the *Money Lenders Act* is aimed. The primary object of the business in such cases is the carrying on of a commercial activity in which advances are made incidentally to and for the purposes of that activity: it is not the business of money-lending in the popular and ordinary use of those words.

The present case raises the question whether an activity, carried on by the appellant, of financing dealings in used motor cars in connection with its business as sellers and distributors of Austin motor vehicles, falls within the exception contained in sec. 3 (*d*) of the *Money Lenders Act*, which excludes from the operation of the Act any person bona fide carrying on any business, not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends the money. The business of the appellant consists, *inter alia*, of importing and selling, either for

(1) (1918) 1 K.B., at p. 207. (2) (1933) Ch. 1, at p. 27.
(3) (1939) Ch., at p. 551.

H. C. OF A. 1941. AUSTIN DISTRIBUTORS LTD. v. A. H. PATERSON CAR SALES PTY. LTD. Starke J.

cash or on terms, new Austin motor vehicles, the purchase and sale of used cars of any make, and financing dealers who have purchased cars from others than the appellant. It was expressly admitted by the learned counsel for the respondent at the trial that the activities of the appellant were within its powers, and the learned counsel on both sides abided by that admission on this appeal. I have no doubt that the admission was not made without good and sufficient reason, and an examination of the memorandum and articles of association of the appellant company (which, because of the admission, were rejected as evidence), for the purpose of ascertaining whether the admission was rightly or wrongly made, serves no useful purpose.

Dealing in used motor cars is a recognized commercial activity in Victoria and elsewhere in Australia. But many dealers require finance or money to provide for their purchases and dealings. They go to persons or to companies carrying on business such as the appellant for that purpose, and become regular applicants to them for the necessary funds. One of the methods of such finance is to obtain an advance from the financing company in respect of a car purchased by the dealer, and approved by the company, and then to enter into a hire-purchase agreement for that car with the company. The agreement provides or admits that the company is the owner of the vehicle, and it hires the vehicle to the dealer at a rental to be paid at fixed periods, for which promissory notes are to be given as collateral security. It also gives an option of purchase to the dealer upon payment of a sum of money stated in the agreement. The rental and purchase price are all fixed in relation to the price of the car, interest on the moneys advanced, and stamp duty. It is in connection with such a transaction that the promissory notes sued upon in this action were given. Sometimes the dealer disposes of the vehicle during the currency of the hire agreement and the financing company may accept the purchaser as the new hirer in place of the dealer, who, in that case, pays interest only for the period of time that he was advanced in respect of the vehicle, but this is unimportant in the present case, for the dealer, I gather, never disposed of the vehicles in connection with which the promissory notes sued upon were given.

The question whether a transaction of the nature described falls within the exception above stated is substantially one of fact, but the burden of bringing itself within the exception is clearly, I think, upon the appellant. There is no substantial difference between companies financing pastoral pursuits or stock and station agents financing stock dealings and companies financing dealings in used motor vehicles. All are distinct mercantile services. The primary

object of the transactions is not money-lending in the popular and ordinary sense, but the conduct of well-recognized and useful commercial activities. The money-lending is but incident to those activities, and in no sense its primary object.

The learned trial judge held that financing dealers in the manner suggested was not an operation carried on by the appellant in the course of and for the purposes of its business. But if it is conceded, as it was, that financing dealers is within the capacity of the appellant and formed part of its activities, then, with respect, I fail to understand why transactions financing dealers, and the respondent in particular, were not carried on in the course of and for the purposes of its business. The question rather is whether the primary object of the appellant in its business was money-lending. And, as *Simonds* J. said in *Transport and General Credit Corporation* v. *Morgan* (1): "It appears to me that on a consideration of" the facts in this case "it is quite impossible to construe the words . . . 'money-lending,' 'the business of money-lending' and 'money-lending transactions' as covering a transaction of this kind, which, as I have said, has become a part of a normal mercantile transaction and an essential part of the industry in a recognized commercial sense."

It was suggested from the Bench on the hearing of this appeal that the transaction between the appellant and the respondent was not one of money-lending at all, but I do not think that question is open on the form of issue which was directed to be tried. Counsel who agreed to the issue doubtless considered the matter, and possibly had before them facts which are not before this court. It is better to allow parties to litigate their rights upon their chosen ground unless some overriding consideration of public interest or of justice is concerned.

The appeal should be allowed.

McTIERNAN J. The appellant in the course of its business sold both new and used cars through dealers. One of the objects expressed in the memorandum of association is to join with any other person or company in carrying on any business or transaction which it is authorized to carry on, or to carry on or engage in any business or transaction capable of being conducted so as directly or indirectly to benefit the company, and to lend money, to guarantee contracts or otherwise to assist, any such person or company. In 1928 it carried into effect these objects by entering into transactions with a number of dealers in motor cars, which have

(1) (1939) 1 Ch., at p. 552.

H. C. OF A. 1941. AUSTIN DISTRIBUTORS LTD. v. A. H. PATERSON CAR SALES PTY. LTD. McTiernan J.

been described as " outside finance." In the course of this business the respondent, who was one of these dealers, gave the appellant the promissory notes sued upon in this action. These promissory notes were collateral with hire-purchase agreements entered into between the appellant and the respondent in relation to various used motor cars.

The hire-purchase agreements were entered into in these circumstances. The respondent purchased these cars from strangers and paid for them by its own cheques. It then brought each car to the appellant for inspection, and, if satisfactory, a price was agreed upon, and the respondent signed a form requesting the appellant to supply it with the used car, and, subject to the terms and conditions contained in the form, the respondent agreed to accept delivery of the car and to hire it from the appellant on the terms of the usual hiring agreement. This order was accepted by the appellant, and the respondent then received a cheque for the amount it had paid for the car, less ten per cent, and then signed the appellant's hire-purchase agreement, securing to the appellant the payment of the price of the car, which was fixed at the sum the respondent paid for the car with interest at the rate of fifteen per cent. The respondent was at liberty to sell the car at such price as he thought fit, either for cash or on terms. If he sold the car for cash he immediately exercised the option which he had under the hire-purchase agreement to pay to the appellant the amount of hire due to it at the date of discharge, which included interest calculated only up to that time. But if he sold the car on terms the respondent procured the execution by the purchaser of a hire-purchase order addressed to it and requesting it to arrange with the appellant for the hire by the appellant to the purchaser of the car if the appellant approved. A fresh hire-purchase agreement was entered into between the appellant and the purchaser, and the respondent was released from its hire-purchase agreement upon discharging its liabilities as at that date. In the case of the other dealers with whom the appellant conducted this form of dealing, the appellant purchased the car, paying its own cheque to the owner, and then entered into the hire-purchase agreement with the dealer.

An application by the appellant for summary judgment was dismissed. The appellant in that application admitted that the money sued for included loans by it to the respondent within the meaning of the *Money Lenders Act* 1938 of Victoria. The respondent having been given leave to defend the action, it was ordered by consent of both parties that the only issue upon the trial should be whether these loans by the appellant to the respondent were free

from illegality by reason of the appellant "coming within the exception provided by clause *d* in the definition of money-lender in sec. 3 of the said Act." This clause contains exceptions to the definition of "money lender." It is as follows: "Any person bona fide carrying on the business of banking or insurance or bona fide carrying on the business of financing pastoral pursuits or the business of stock and station agents or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money."

The question now is whether the moneys sued for, which, according to the admission, were lent by the appellant to the respondent, were in fact lent in the course of and for the purpose of any business bona fide carried on by it which did not have for its primary object the lending of money. The question is clearly answered by the description given of the transactions. It seems to me that the primary object of the business in the course of which and for the purpose of which the money was lent was the buying and selling of motor cars. The primary object of the hire-purchase agreements was not the lending of money, but they were the method employed by the company for carrying out dealings resulting in sales of cars. In my opinion the observations of *McCardie* J. in *Edgelow* v. *MacElwee* (1) are strongly in the appellant's favour in this case: "In my opinion no system of loans will fall within exception *d* unless such loans are in substance and actuality directly incidental to the business which is the primary object and pursuit of the person who makes the loans." It follows that the appellant came within clause *d* of sec. 3 of the *Money Lenders Act* 1938 of Victoria.

The appeal should be allowed with costs, the judgment of the Supreme Court set aside and judgment entered for the appellant with costs for £1,915 5s. 8d. with interest.

WILLIAMS J. The appellant as plaintiff sued the respondent as defendant in the Supreme Court of Victoria to recover the sum of £1,950 5s. 8d., being the amount payable in respect of twenty-four promissory notes with interest, made by the defendant in favour of the plaintiff. On 12th February 1941 a consent order was made in Chambers which, after reciting that the plaintiff admitted by its counsel that the amount claimed in the action included loans by the plaintiff to the defendant within the meaning of the *Money Lenders Act* 1938, directed that the only issue at the trial should be whether the loans were free from illegality by reason of the plaintiff's coming within the exception provided by clause *d* in the definition of money-lender in sec. 3 of the Act.

(1) (1918) 1 K.B., at p. 207.

H. C. OF A. 1941. AUSTIN DISTRIBUTORS LTD. v. A. H. PATERSON CAR SALES PTY. LTD. Williams J.

The parties no doubt applied for the order with the very laudable desire of shortening the hearing as far as possible. Time and expense can always be saved by admissions of fact, which it is the duty of counsel to make so far as they are able to do so without prejudicing the interests of their clients. But the admission referred to in the order was a mixture of law and fact, and the court cannot be bound by admissions of law, but must decide the case according to the legal rights which flow from the evidence. The issue which was directed only arose if and when the defendant had proved that the loans were made in the course of transactions sufficient in number and frequency to have the indicia of being a money-lending business. Moreover, as *Farwell* J. pointed out in *Litchfield* v. *Dreyfus* (1), " speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible." While here the evidence showed that the plaintiff confined its loans to eight second-hand car dealers.

A question, therefore, which was on the threshold of the issue that was fought, appears to have been tacitly determined in the defendant's favour. The order was procedural only, so that, when it appeared that there was another issue in addition to the one directed, the learned trial judge could have allowed any amendments that were necessary. But no amendments were asked for, and the parties elected to proceed upon the basis mentioned. His Honour found for the defendant, and the plaintiff has appealed to this court.

The evidence consisted of the oral testimony of two witnesses called on behalf of the plaintiff, and a number of documents. Nothing turned on demeanour, and the facts were practically common ground. The details of the particular transactions in respect of which the promissory notes were given were not proved. The particular documents were not tendered. The evidence only showed the general nature of the transactions and documents.

The principal business of the appellant is the buying of new and second-hand motor vehicles, and their disposal to customers for cash or under hire-purchase agreements.

The appellant has showrooms in Bourke Street for its new and used cars, offices, a spare-part department, and a garage at the rear. It also has workshops at South Melbourne. It employs a staff of approximately forty at Bourke Street and one hundred and fifty at South Melbourne. New vehicles are purchased from the Austin Motor Co. in England and sold to customers in Australia by the appellant or its agents. The agents purchase the vehicles for cash

(1) (1906) 1 K.B., at p. 589.

or on terms, namely, payment of a deposit and the balance in ninety days secured by a hire-purchase agreement and a promissory note. Prospective customers frequently desire to trade-in a used vehicle, and it is necessary for the appellant to accept it in part payment and then resell it. The appellant also purchases and sells used vehicles independently of transactions involving the sale of a new one. These sales often involve the trade-in of another used vehicle. The vehicles traded in are usually sold to retail second-hand dealers, who resell to the public.

About 1928 the appellant commenced to use some of its surplus funds for the purpose of financing the purchase of used cars by a few of these dealers. They would buy a vehicle after the appellant had inspected it, and the appellant would pay the vendor, or they would pay for the vehicle themselves, and then ask the appellant to inspect it. If the appellant approved of the purchase, it would then recoup the dealer the amount he had paid to the vendor. The vehicle would be delivered by the vendor to and remain in the possession of the dealer. The dealer would then enter into a hire-purchase agreement with the appellant for an amount sufficient to recoup the appellant the amount it had paid, plus the cost of the stamp duty on the promissory note, and interest at the rate of fifteen per cent per annum, less a deposit of ten per cent already paid by the dealer to the appellant. By the hire-purchase agreement, the whole balance was made payable in one instalment at the end of three months, and the dealer agreed to give the appellant a promissory note for this amount. The agreement provided that until the amount of the deposit and the balance had been paid and the dealer had exercised the option of purchase which it contained, property in the vehicle should remain in the owner and the hirer should be the bailee thereof. It contained a clause allowing the dealer to return the vehicle to the appellant upon payment of the deposit and one-third of the balance. If the dealer resold the vehicle during the period of three months, the appellant only required repayment of the amount which it had advanced, with interest to the date of payment. If the resale was on terms, the purchaser usually entered into a hire-purchase agreement with the appellant, his performance of the terms thereof being guaranteed by the dealer. The existing hire-purchase agreement between the appellant and the dealer was cancelled. The evidence shows that the only persons with whom the appellant engaged in this method of finance were eight dealers, of whom the respondent company was one. It only represented a small portion of the appellant's business, the amount outstanding under these so-called "outside finance" transactions

H. C. OF A. 1941. AUSTIN DISTRIBUTORS LTD. v. A. H. PATERSON CAR SALES PTY. LTD. Williams J.

never having exceeded £3,600 at any time in the last two years. Of the amount of £142,000, shown in the appellant's balance sheet for the year ending 30th June 1939, the sum of £3,033 represented the amount of such finance outstanding on that date. The interest that the appellant charged in the case of hire-purchases of new cars worked out at 14.7 per cent per annum. The term of the hire-purchase agreement which the purchasers from the dealers entered into with the appellant was usually about eighteen months and the interest charged about fifteen per cent per annum. The financing of hire-purchase agreements was a profitable source of investment. Such agreements, in the case of the sale of the appellant's own cars, were admittedly entered into in the course of and for the purpose of its business. By engaging in this outside finance the company found profitable investment for some of its surplus funds. The dealers were able to increase their turnover, and this assisted them to buy and sell the appellant's own second-hand vehicles. It also helped to retain their goodwill. But the main benefit to the appellant was the refinancing that followed the resale of the vehicle by the dealer to a member of the public. The appellant never lent money to members of the public generally. It only financed the disposal of its own vehicles, new and second-hand, and purchases by these eight dealers and their resales of used cars in the manner already mentioned.

The *Money Lenders Act* 1938, sec. 3, defines loan to include an advance, discount, money paid for or on account of or on behalf of or at the request of any person, and includes every contract (whatever its terms or form may be) which is in substance or effect a loan of money, and also a contract to secure the repayment of any such loan, and " money lender " to mean every person whose business (whether or not he carries on any other business) is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business and who lends money at a rate of interest exceeding eight per cent per annum, but does not include (*d*) any person bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

The business of financing purchasers of goods under the hire-purchase system is not one of money-lending (*Transport and General Credit Corporation* v. *Morgan* (1)). The financier does not lend any money. If he is the real vendor of the goods he makes a bargain of hire-purchase with the customer ; if he is not, the bargain nevertheless proceeds upon the basis that he is, and the hirer-purchaser

(1) (1939) Ch., at p. 551.

would be estopped from denying it. This was the position whenever the appellant disposed of one of its own vehicles to a purchaser, whether a dealer or a member of the public ; or financed the purchase of a car by such a member from a dealer. In the case of the transaction in issue the property in the vehicle was in the dealer at the time the hire-purchase agreement with him was made. In view of the admission, this agreement must be treated as being in substance a security for the repayment of the advance with interest. At common law it is possible for the lender and borrower to agree to secure the repayment of an advance at interest by the borrower giving the lender a mortgage over the property to be charged or by the borrower selling this property to the lender with a right of pre-emption if he pays an amount equal to such advance and interest within a certain time (*Rowe* v. *Oades* (1) ; *In re George Inglefield Ltd.* (2)). In the present case the transactions between the parties took the latter form. Since the appellant did not take delivery of the vehicle, its proprietary rights therein were derived from the hire-purchase agreements, which were therefore bills of sale, being assurances of personal chattels containing a licence to seize the same upon default. Not having been registered, they would have been void as securities under the *Instruments Act* 1928 (Vict.), sec. 30, if the respondent had been an individual, but since it is a company the agreements were valid *inter partes* but void against the liquidator or an execution creditor (*Companies Act* 1938 (Vict.), sec. 79). Sec. 51 of the *Instruments Act* 1928 (Vict.) only avoids the sale, and does not avoid the hire-purchase agreement. Some of the dealers with whom the appellant entered into similar transactions were however individuals, and, in their case, the hire-purchase agreements were void as securities under sec. 30. But the question whether the document is an unregistered bill of sale is quite different from whether it is void under the *Money Lenders Act* as having been made with an unregistered money-lender. In the one case only the security is avoided, while in the other the whole transaction is illegal. The former inquiry relates to a particular transaction. The latter can only arise where the transaction takes place as one of a series or repetition of acts. The character of the documents is of importance in determining whether the loans were made in the course of and for the purpose of the appellant's business. Profits could be made in this business in two ways : (*a*) on the sale of vehicles, and (*b*) by financing the purchase of vehicles. Counsel for the respondent stressed the point that in the transactions impugned the appellant only made the second class of profit. But this profit was a valuable one ; and,

(1) (1905) 3 C.L.R. 73. (2) (1933) Ch., at pp. 27, 28.

H. C. OF A. 1941.

AUSTIN DISTRIBUTORS LTD. v. A. H. PATERSON CAR SALES PTY. LTD.

Williams J.

in the case of other vehicles in which the appellant dealt, this was the only profit it made. For instance, when the purchaser of a new car wanted to trade-in an old car a dealer was asked to inspect and state the price at which he would buy it from the appellant. This would be the amount the appellant would allow for the car traded-in. The appellant would then sell this car to the dealer at the price stated less a discount of fifteen per cent, the price of the new car having been fixed at a figure which would allow the appellant to do so. The only profit the appellant would make on the old car would be out of the hire-purchase agreements entered into on the sale to the dealer and his resale to a member of the public. Two separate profits on the one transaction are, no doubt, very acceptable when it is possible to make them, but one substantial profit is better than nothing. All the hire-purchase transactions involved dealings in motor vehicles. In every case the appellant was placed in the position of an owner who was disposing of the car under such an agreement. If the hirer completed his contract the appellant obtained the price of the vehicle, including the interest charged. If the hirer failed to do so, and returned the vehicle, it remained the property of the appellant. The hirer was free from liability for future instalments of hire. The appellant was entitled to dispose of the vehicle for his own benefit. The better the price the dealer could offer for the cars traded-in to the appellant, the brighter the prospect of the appellant selling a new car, because, the higher the offer for the used car, the greater the probability the purchaser would decide to buy one of the appellant's new cars. The sale of the new car provided the appellant with a used car to sell to the dealer on a hire-purchase agreement which could be novated for a similar agreement with the purchaser from him. The more cars the dealer had to sell, the better his turnover, the wider his circle of customers, and the greater the prospect of a rapid transfer from the temporary hire-purchase agreement with the dealer to the long-term agreement with his customer. The appellant's practice of foregoing interest after the date of resale was strangely inconsistent with the cult of money-lending. Such forbearance supports the evidence of its managing director that the main purpose of this outside finance was to obtain the refinance that followed. Its effect was to increase the appellant's turnover in sales and the finance of sales.

It was, therefore, to quote *McCardie* J. in *Edgelow* v. *MacElwee* (1), "in substance and actuality directly incidental" to its business of buying and selling and financing the selling of motor vehicles.

(1) (1918) 1 K.B., at p. 207.

The transactions were treated as part of the appellant's general business, they were entered as such in its books and records, they were embodied in its usual documents and transacted by its ordinary staff. They were not entered into with members of the public. The vehicles purchased with moneys so advanced were indeed part of that web of cars which the appellant spun to catch the public in its hire-purchase parlour.

In my opinion the evidence establishes affirmatively that the appellant was carrying on a bona-fide business of dealing in motor vehicles, that this business did not have for its primary object the lending of money, and that it was in the course of this business and for the purpose thereof that the appellant lent its money to the second-hand dealers.

It is therefore unnecessary to decide on which party, having regard to the terms of the order, the onus of proving the issue lay, but, in an action pursued on normal lines, it would have been on the respondent (*Lapin* v. *Heavener* (1), *sub nom. Lapin* v. *Abigail* (2) in the High Court and *Abigail* v. *Lapin* (3) in the Privy Council).

The appeal should be allowed.

Appeal allowed. Order of the Supreme Court set aside and judgment entered for the appellant for the sum of £1,915 5*s.* 8*d. together with interest thereon at the rate of six per cent from the date of writ until payment. Respondent to pay the appellant's costs in this court and in the Supreme Court.*

Solicitors for the appellants, *Madden, Butler, Elder & Graham.*
Solicitors for the respondents, *H. E. Elliott, Downing & Oldham.*

O. J. G.

(1) (1929) 29 S.R. (N.S.W.) 514; 46 W.N. 164.
(2) (1930) 44 C.L.R. 166.
(3) (1934) A.C. 491, at p. 510.