H. C. OF A. 1956.

ELECTRIC LIGHT AND POWER SUPPLY CORPORATION LTD. v. ELECTRICITY COMMISSION OF N.S.W.

Dixon C.J.
McTiernan J.
Williams J.
Webb J.
Fullagar J.
Kitto J.
Taylor J.

Court was made. Possibly it would be embodied in the order made upon the case stated. But even if the foregoing hypothesis were correct, it would still seem to be an insufficient ground for implying an intention to exclude the party's right to a case stated. There would be no reality in the implication. But is the hypothesis correct ? It is no doubt true that the form of certificate given at the end of the rules of court recites the day on which the court made a final order and certifies what *was*, not *is*, that final order. But when the words of r. 39 are examined together with those of rr. 34 and 46, it seems reasonably clear that what they intend is to prevent the pronouncement in open court being treated as the definitive act of the court. If it were so a case could not be demanded under s. 17, unless that section received a construction based not on its tenor and common understanding but almost entirely on the sidenote. The purpose seems to be to keep the cause open, so to speak, and to make the certificate alone definitive. When r. 39 says " take effect ", the natural understanding of those words is to negative the idea that the order or decision takes effect when pronounced. It is an understanding that accords with the introductory words of sub-s. (5) of s. 17. To read them as giving a retroactive effect is only to create difficulties in the operation of s. 17 in ordinary cases.

Once this view of the rules is taken the substantial difficulties are dissipated.

The result of the foregoing reasons is that the request for a case stated was properly made and erroneously refused.

It follows that special leave should be granted, the appeal should be allowed and a mandamus should issue.

The order should be : special leave to appeal granted. The parties consenting, order that the application be treated as the appeal. Appeal allowed with costs. Order of the Supreme Court discharged. In lieu thereof rule nisi for a mandamus made absolute.

Special leave to appeal granted. Order that the application be treated as the appeal. Appeal allowed, the respondent commission to pay the costs of the appeal. Order of the Supreme Court discharged. In lieu thereof rule nisi for mandamus made absolute, the respondent commission to pay the costs of the rule.

Solicitors for the appellant, *John Wight & Co.*

Solicitor for the respondents, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

R. D. B.

[HIGH COURT OF AUSTRALIA.]

BEDWELL . . . . . APPELLANT;
RESPONDENT,

AND

STAPLETON . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND

H. C. OF A. 1954.

BRISBANE, *July* 27, 28; *Aug.* 4.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Bankruptcy—Prior transaction—Business purchased for bankrupt in name of third person—Advance of purchase money by third person to bankrupt—Agreement for repayment of purchase price with interest plus additional sum of money—Procuration fee—Validity of transaction—Whether property held in trust for bankrupt.

Money-lenders—Procuration fees—Moneys "charged, recovered or received"—Whether actual recovery etc. of money necessary—Severability of illegal portion of transaction—The Money Lenders Acts 1916 *to* 1946 (*Q.*), *s.* 14 (1), (2).

Section 14 (1) of *The Money Lenders Acts* 1916 *to* 1946 (Q.) provides, *inter alia*, that it shall not be lawful for any person to charge, recover or receive, directly or indirectly, any moneys for or in respect of the making of any loan, and s. 14 (2) of such Acts provides that every contract made or entered into or transaction entered into and performed in breach of or with intent to evade or avoid the section shall be absolutely void.

Prior to his bankruptcy D. had negotiated for the purchase of a business of a motor garage and service station from one N., who held the premises under a sub-lease, but, owing to financial difficulties, was unable to proceed with the transaction. In order to make the purchase possible, B. paid the purchase price to N., the draft agreement being altered by striking out D.'s name and substituting B.'s as purchaser. B. also took an assignment of the sub-lease. D. entered into possession of the premises and conducted the business. The arrangement between B. and D. was that B. should pay to N. the purchase price of £2,300 and do so by way of advance to D., that B. should become the purchaser from N. in order to have as security the property in the lease, plant and other assets of the business, except stock, which was separately purchased by D., and that D. should pay to B. within a reasonable time the

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sum of £2,550 with interest at five per cent per annum in the meantime. The official receiver claimed that B. held the property in the business in trust for D.

Held, (1) that the words "every contract made" in sub-s. (2) of s. 14 contemplate an executory contract to charge or receive moneys of the kind in question, and, accordingly, the verbal contract that D. should pay and B. should receive the additional sum of £250 was caught by the sub-section;

(2) that B. was not a trustee of the lease and assets of the business but held them as security for the repayment of the amount of £2,300 with interest at five per cent upon the grounds:—(a) that upon its proper construction s. 14 (2) does not avoid the whole transaction of which the charge in the nature of a procuration fee forms only an incident or part, and, accordingly, the sub-section invalidated only so much of the arrangement between D. and B. as would require D. to pay the extra £250. *Siemon* v. *Gray* (1939) Q.W.N. 36, approved; *Re Goldner* (1953) Q.S.R. 138; (1953) 16 A.B.C. 102 and *Re Buckley* (1953) Q.S.R. 219; (1953) 16 A.B.C. 247, disapproved; (b) even if s. 14 (2) could be construed so as to invalidate the whole transaction including the charge of the procuration fee, the invalidity could not extend further than the debt for money lent and affect the contract between N. and B. and the assignment of the sub-lease to B., by virtue of which B. stood as the legal owner of the lease, plant and assets, except the stock, of the business. The fact that the contract imposing the personal liability for the debt was invalidated would not give D. any title in equity to the property except on terms that he himself did the essential equity of paying the amount provided by B. to acquire the property.

Decision of the Supreme Court of Queensland (*Hanger* J.), reversed.

APPEAL from the Federal Court of Bankruptcy, District of Southern Queensland.

Proceedings were instituted in the Federal Court of Bankruptcy, District of Southern Queensland, by Leslie Thomas Stapleton, as official receiver of the bankrupt estate of one Colin Joseph Dempsey, against Edward Kempton Bedwell in connection with a motor garage and service station known as "Dux Motors" situate at Toowoomba, Queensland, and carried on by Dempsey before his bankruptcy. The official receiver claimed the business as part of the bankrupt's estate, and, upon the proceedings coming on to be heard, *Hanger* J. declared that Bedwell held the business in trust for the bankrupt Dempsey.

From this decision Bedwell appealed to the High Court.

The relevant facts and his Honour's findings appear sufficiently in the judgment of the Court hereunder.

C. G. Wanstall, for the appellant. Section 14 (1) of *The Money Lenders Acts* 1916 *to* 1946 makes it unlawful for any person to

charge for making or procuring a loan of money. The loan itself is not prohibited, the collateral charges only being struck at. Section 14 (2) avoids transactions made in breach of s. 14 (1), this nullifying provision being introduced by the amending Act of 1934. The original s. 14 of the 1916 Act permitted limited charges by any person, except the lender or his agent, for obtaining a loan. The right given to the borrower was to recover to the extent of any contravention. The section avoided nothing, the right of recovery being restricted to the extent of the contravention. The loan was not affected and the section was directed to transactions collateral to the loan. That section was repealed in 1933 and replaced by a new section declaring it unlawful for any money-lender to charge for procuring a loan. A person, not a money-lender, was not prevented from charging a procuration fee. The transaction was not avoided, the borrower being relegated to his common law rights. Section 14 (2) was first introduced as part of *The Law of Distress and Other Acts Amendment Act of* 1934. Section 27 (2) of the latter Act supports the view that only the charge, not the loan, is avoided. The loan transaction remains operative and the Court is limited to reviewing the charge or procuration fee. [He referred to *Whiteman* v. *Sadler* (1).] A legislature amending one part of an Act, other parts of which have earlier been judicially interpreted, is deemed to have accepted the interpretation if it leaves such other parts unamended: *D'Emden* v. *Pedder* (2); *Bridge* v. *Bowen* (3). In *Siemon* v. *Gray* (4) *E. A. Douglas* J. restricted s. 14 (2) to the procuration fee only, and the legislature, when amending the Act in 1946, left s. 14 untouched. [He referred to *Re Goldner* (5).] The appellant was not a trustee for Dempsey. He bought the business agreeing to resell it to Dempsey on certain conditions which were not fulfilled. [He referred to *Butler* v. *Grining* (6); *Official Assignee* v. *Goldstein* (7).]

D. G. Andrews, for the respondent. Bedwell advanced £2,300 to Dempsey for which accommodation he was to receive £250 and the business was placed in the former's name as security. So much of the dealing between Neild and Bedwell as gave Bedwell any beneficial interest in the property is avoided by s. 14. Under the agreement Dempsey became the beneficial owner. The transaction is one of security for an advance. *Langman* v. *Handover* (8) does

(1) (1910) A.C. 514.
(2) (1904) 1 C.L.R. 91, at p. 110.
(3) (1916) 21 C.L.R. 582.
(4) (1939) Q.W.N. 36.
(5) (1953) Q.S.R. 138.
(6) (1949) Q.S.R. 306.
(7) (1921) 29 C.L.R. 377.
(8) (1929) 43 C.L.R. 334.

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not touch the present matter. The right to relief arises under the statute.

[DIXON C.J. referred to *Bull* v. *Attorney-General for New South Wales* (1).]

The bankrupt was entitled to relief upon the terms of the statute giving relief.

[DIXON C.J. Can you get equitable relief without equitable terms in a jurisdiction in which there is a fusion of law and equity ? Does not an equity arise requiring the respondent to do equity by repaying £2,300 ?]

Whilst an equity arises, the relief comes from the statute which does not require the imposition of equitable terms: *Schnelle* v. *Dent* (2); *Langman* v. *Handover* (3). [He referred to *Siemon* v. *Gray* (4); *Re Goldner* (5); *Re Buckley* (6).] The amendment since *Siemon* v. *Gray* (4) was only in aid of the remedy. Since 1934 it has been unlawful to charge procuration fees and the whole transaction is avoided. Had part only of the transaction been struck at the legislature would have said so expressly as it has done in s. 15 (2).

C. G. Wanstall, in reply.

Cur. adv. vult.

Aug. 4.

THE COURT delivered the following written judgment :—

This is an appeal against an order of the Supreme Court of Queensland exercising the federal jurisdiction conferred by the *Bankruptcy Act* 1924-1950. The appeal is brought pursuant to s. 73 (ii.) of the Constitution and s. 26 (2) of the *Bankruptcy Act*. The order which was made by *Hanger* J. declared, on the motion of the official receiver, who is the respondent to the appeal, that certain property was held by the appellant in trust for a bankrupt. The bankrupt is one Colin Joseph Dempsey who, before his bankruptcy, engaged in the conduct of a business of a motor garage and service station in Toowoomba. It appears that in the early part of 1950 Dempsey was inspired by a desire to purchase the business of Dux Motors, the motor garage and service station in question. An agreement was actually drawn up for the purchase by Dempsey of the business from the proprietor, Robert Graham Neild. Neild held the premises under a sub-lease expiring on 30th January 1954 containing a covenant not to assign without the written consent

(1) (1913) 17 C.L.R. 370.
(2) (1925) 35 C.L.R. 494.
(3) (1929) 43 C.L.R., at pp. 357-360.
(4) (1939) Q.W.N. 36.
(5) (1953) Q.S.R. 138.
(6) (1953) Q.S.R. 219.

of the head lessor and sub-lessor. There was nothing to recommend Dempsey to the lessor or to the sub-lessor as a tenant and, indeed, nothing to recommend him as a purchaser to Neild. In point of fact he lacked money and was not a person of any substance. The proposed purchase, therefore, could not go on. Finding himself not in a situation to proceed with it Dempsey resorted in his need to the appellant Bedwell. Bedwell was prepared to find the money for the purchase price, a sum of £2,300, and so make the purchase possible. The draft agreement was altered by striking out Dempsey's name and substituting that of Bedwell as purchaser. There was no difficulty about Bedwell's securing the approval of the lessor and sub-lessor as the assignee of the lease or fulfilling the contract of purchase. An assignment to him of the sub-lease was executed. It was not registered under the *Real Property Act* until 12th March 1952 but that is not material. Bedwell paid the whole of the purchase money to Neild. It was, however, Dempsey who was placed in possession of the premises and who actually proceeded to conduct the business. Moreover, in February 1952 he was registered under the *Firms Act* as constituting the firm called Dux Motors.

The first step in the case is to determine the true nature of the transaction between Bedwell and Dempsey. *Hanger* J. did not find it easy to ascertain the true character of the relationship because he was not prepared to rely upon the evidence of Bedwell and because, as is apparent, Dempsey's evidence was vague, contradictory and elusive, and because in any case the latter's credibility was of no high order. It is unnecessary to discuss the facts or the evidence. It is enough to say that we agree in the view that *Hanger* J. adopted. His Honour found that the relationship between Dempsey and Bedwell was that of borrower and lender and that the assets were taken in the name of Bedwell by way of security for the loan. But he found too that it was a term of the loan that Dempsey should pay to Bedwell, not the sum of £2,300 constituting the purchase price, but a sum of £2,550, a term that in the learned judge's opinion contravened s. 14 of *The Money Lenders Acts* 1916 *to* 1946 prohibiting charges in the nature of procuration fees. His Honour found that in addition interest was to be charged at five per cent per annum. There is but slender evidence of this fact, but we think that the finding was justified. To state the transaction between Dempsey and Bedwell more precisely, its terms were that Bedwell should pay to the vendor Neild the sum of £2,300 constituting the purchase price and do so by way of advance to Dempsey, that Bedwell should

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become the purchaser from Neild in order that he might have as a security the property in the lease, the plant and other assets of the business, except stock, which was separately purchased by Dempsey, and that Dempsey should pay to Bedwell within a reasonable time £2,550, with interest at five per cent per annum in the meantime.

It will be seen that Bedwell became the legal owner of the lease, plant and assets of the business other than stock as a mortgagee. Dempsey became entitled to an equity of redemption; there was no defeasance drawn up in writing, but Dempsey's equity to redeem arose from the fact that Bedwell obtained the legal title in order to secure repayment of the loan together with interest and the additional sum of £250. He was entitled to have the property transferred to him upon paying £2,550 with interest according to the terms of the oral contract.

It seems to be clear enough that the addition of the sum of £250 to the amount advanced is of a description that if charged recovered or received would fall within the first paragraph of s. 14 of *The Money Lenders Acts* 1916 *to* 1946 (Q.). The material words of that paragraph provide that it shall not be lawful for any person to charge, recover, or receive, directly or indirectly, any moneys for or in respect of the making of any loan. *Hanger* J. held that the transaction violated this provision. His Honour then proceeded to apply sub-s. (2), which provides that every contract made or entered into or transaction entered into or performed in breach of or with intent to evade or avoid the section shall be absolutely void. The result of applying the section was, in his Honour's view, to make the entire transaction void and to leave Bedwell in the position of trustee. It was on that basis that the declaration was made declaring him to be a trustee of the sub-lease and other assets of the business for the official receiver as a trustee of Dempsey's estate.

We think that there are two answers to this conclusion on which we are prepared to base our decision. But before dealing with them it is desirable to refer to a question concerning the application of the first paragraph of s. 14 to the transaction at the stage which it had reached. It is a question whether upon their true meaning the words "to charge, recover or receive" cover the mere making of the verbal contract that Dempsey should pay and Bedwell should receive the additional sum of £250. That is to say it is suggested that it is not enough that a mere executory promise should be made to pay moneys of the forbidden description; a violation of the paragraph does not take place unless and until

there is either a recovery or a receipt of the money or something amounting to a charge in account which would be tantamount to payment. Much support for this suggestion is found in sub-s. (3), and perhaps a little more in the second part of sub-s. (2) of s. 14. The latter provision says that any money or money's worth directly or indirectly paid or allowed to or received by any person in contravention of the section may be recovered by the borrower from such person. This looks as if the words " paid or allowed to or received " are regarded as synonymous with " charge, recover or receive ". Sub-section (3) uses in the same context the identical words of par. 1. It provides that any person guilty of an offence against the section shall be liable to the penalty provided, and, in addition, upon conviction the court may order him to repay any moneys *charged*, recovered or received by him contrary to the provisions of the section. It seems clear enough that the word " charged " in sub-s. (3) refers to some deduction, charge in account or other means of placing the lender in funds or imparting to him the actual benefit of the moneys of the forbidden description. It is suggested that it has the same meaning in the first paragraph of s. 14. This would mean that although the sum of £250 if paid would have borne the character of moneys " charged or received for or in respect of the making of a loan ", a breach of the section had not occurred because the actual charging or receiving lay in the future. Except for this point there can be no doubt that the sum of £250 was of the forbidden description. It is true that it was exacted by the lender himself and not an agent or third party, but there is nothing to exclude the lender from the category of persons upon whom the prohibition should operate.

We are disposed to think that the words in sub-s. (2) " every contract made " contemplate an executory contract to charge or receive moneys of the kind in question, notwithstanding the difficulties which the words " in breach of this section " must occasion in view of the foregoing considerations. We therefore pass to the two matters which appear to us to afford answers to the declaration made.

In the first place we are of opinion that upon the proper construction of sub-s. (2) of s. 14, having regard to the subject matter and the context, it does not mean to annihilate any more of a transaction comprising a charge, recovery or receipt obnoxious to the first paragraph of s. 14 than affects or relates to the moneys of the prohibited description. It does not avoid the whole transaction of which the charge in the nature of a procuration fee forms only an incident or part. It may be that the words of sub-s. (2)

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"every contract made or entered into or transaction entered into or performed in breach . . . of this section" are capable of an application extensive enough to cover the entirety of the contract or transaction which contains a term or provision for a charge or recovery or receipt of moneys of a forbidden description. But they are equally capable of an application restricted to the term or condition which contravenes the first paragraph of s. 14. Statutory provisions invalidating transactions are not to be construed more widely than their language requires or the purpose of the legislation demands. In *In re Burdett*; *Ex parte Byrne* (1), *Fry* L.J., delivering the judgment of the Court of Appeal, said:—"In our judgment, clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and, when open to question, are to receive a wide or a limited construction according as the one or the other will best effectuate the purpose of the statute (per *Turner* L.J. in *Jortin* v. *South-Eastern Ry. Co.* (2) " (3). The evident policy of this legislation is to penalize and prevent the exaction of what may briefly be described as payments in the nature of procuration fees and to require the repayment thereof if they are obtained. There is no reason to suppose that it was intended to destroy the validity of the entire transaction if such an exaction forms an incident in it or is attendant upon it. It is to be noticed that the sum of money which is recoverable by the borrower under the second part of sub-s. (2) is the money or money's worth paid, allowed to or received by any person in contravention of the section, not the full loan, if it has been repaid in full, or so much as has been repaid. In the same way, under sub-s. (3) when the court imposes a penalty for an offence against the first paragraph of sub-s. (1) the court cannot order the repayment of any moneys except moneys charged, recovered or received contrary to the provisions of the section. These considerations point to the conclusion that sub-s. (2) avoids only so much of the transaction as offends against par. 1 of s. 14 or, to express the same view in another way, it renders the transaction, not completely ineffectual, but ineffectual to accomplish a result offending against that paragraph. In the somewhat similar provision contained in s. 15 (2) express words are introduced limiting the invalidity of the particular transaction against which s. 15 is directed. It is to be invalid to the extent that it is in breach of that section. It is suggested that the legislature intended to draw

(1) (1888) 20 Q.B.D. 310.
(2) (1854) 6 De G.M. & G. 270, at p. 275 [43 E.R. 1237, at p. 1239].
(3) (1888) 20 Q.B.D., at p. 314.

a distinction between the two provisions in this respect. But the higher degree of probability is that each provision was based on the same policy and that the difference in expression is due to the accidents or exigencies of drafting.

For the reasons given we construe sub-s. (2) as invalidating only so much of the arrangement between Bedwell and Dempsey as would result in requiring Dempsey to pay an extra £250. This conclusion accords with the decision of *E. A. Douglas* J. in *Siemon* v. *Gray* (1). His Honour said of a contract of mortgage which included a procuration fee: "I cannot see that, because that stipulation is in contravention of the provisions of *The Money Lenders Act*, the whole contract of mortgage is made unenforceable" (2). After setting out the words of sub-s. (2) his Honour proceeded: "It appears to me that that provision relates to the forbidden transaction of the extra charge or procuration fee" (2). We think this view is to be preferred to that expressed by *Hanger* J. in *Re Goldner* (3), or by *Matthews* J. in *Re Buckley* (4). From what has been said it follows that the transaction between Dempsey and Bedwell resulted in Bedwell's becoming mortgagee of the sub-lease, plant and other assets of the business in respect of a debt of £2,300 with interest at five per cent, which debt was enforceable against Dempsey as a personal obligation as well as against the security. Dempsey is entitled to an equity of redemption on paying the sum of £2,300, with interest at five per cent, in the meantime.

But in the second place we think that, even had our construction of the section been different, that is to say had we been of opinion that sub-s. (2) of s. 14 annihilated the whole contract or transaction which included the charge of the procuration fee, the invalidity could not have extended further than the debt for money lent. Bedwell entered into the contract with Neild. As between Neild and Bedwell it was a valid contract. He obtained an assignment of the lease from Neild and that assignment was registered. It was a valid assignment which, on no construction to which s. 14 (2) is possibly open, could that section invalidate. Bedwell therefore stood as the legal owner of the lease, the plant and assets of the business. The fact that the contract which imposed the personal liability for the debt was invalidated would not in itself be sufficient to entitle Dempsey to assert an unconditional equitable title to the property. It would leave him in much the same situation as if in a legal mortgage of real estate under the general law the personal

(1) (1939) Q.W.N. 36.
(2) (1939) Q.W.N., at p. 63.
(3) (1953) 16 A.B.C. 102; (1953) Q.S.R. 138.
(4) (1953) 16 A.B.C. 247; (1953) Q.S.R. 219.