No. 24 of 1940 (5)

IN THE HIGH COURT OF AUSTRALIA.

Hallmark Autos Proprietary Limited

v.

Paterson

REASONS FOR JUDGMENT.

Judgment delivered at Melbourne

on 8th November 1940

H. J. Green, Govt. Print., Melb.

O.2774

HALLMARK AUTOS PTY. LTD.

V.

PATERSON.

Order:

Appeal allowed with costs. Judgment of the Supreme Court discharged and in lieu thereof order that the action be dismissed with costs and the counterclaim be dismissed with costs, the costs being set off and to include the costs of pleadings interrogatories discovery and shorthand notes.

HALLMARK AUTOS PROPRIETARY LIMITED.

V.

PATERSON A.H.

JUDGMENT. RICH A.C.J.

The decision of this appeal depends upon a complicated method of finance by which the appellant's second hand car business was maintained. Judgment was recovered by the respondent Paterson against the appellant in the Supreme Court on a common count for money lent, amplified by amendments at the trial, but he formed only one integer in the combination by which the finance was brought from its source to the appellant's business where the need for it was felt. As no doubt is well known the second hand car trade practises a method of finance specially devised to serve the double purpose of meeting its necessities and of avoiding or evading the requirements of the Bills of Sale legislation. How far either of these purposes has been accomplished is fortunately no concern of ours. But for the decision of the present case, it is not unimportant to remember that the source whence the money is provided is a car distributing company, which demands that second hand cars purchased from the public shall become its property and handed over to the dealer, whom it provides with money, only under the terms of a hire purchase agreement, into which he

enters with it. The respondent Paterson occupies the position of that dealer. Normally he would establish relationships with the public from whom and to whom the second hand cars would be bought and sold. But for accidental reasons into which it is unnecessary to enter it was found desirable to interpose between him and the public yet another individual - a dealer, one Hall. Hall bought and sold the cars from and to the public and carried on the business. He obtained the money to do so from the respondent and the respondent from the car distributing company. When a car was bought from a member of the public Hall purported to sell it to the respondent, who provided him with the money, and the respondent, who obtained the money from the car distributing company, entered into an agreement with it for hire purchase on the footing that the car had become the property of the company. When a second hand car was resold to a member of the public the transactions were reversed and the respondent invoiced, that is, it purported to sell the car to Hall. Hall converted his business into a company and that company is the appellant.

The appellant company carried on the same practice with the respondent. The profit of the car distributingcompany consisted in a percentage per annum called"interest"and the profit of the respondent consisted in a commission which he charged the appellant Hall and then the appellant company. When a car was invoiced back to the respondent the price shown in the invoice was that originally paid together with the commission and also the percentage which the respondent was under the necessity of paying to the car distributing company. After the formation of the appellant company one Glen took over Hall's interest and this was made the occasion of stating in writing some or all of the terms which governed the relationship of the plaintiff and the respondent. It is our task to say whether money provided on these terms is money lent by the respondent to the appellant company and repayable as such in some and what conditions or on the contrary is to be treated as the price of the car paid by the respondent to the appellant so that the respondent may exercise ownership over the car but not regain the money. So much turns upon the written agreement that I shall set out its terms in full:-

" Memorandum of Agreement made between A.H.Paterson,Hallmark Autos

" Pty.Ltd. and John Glen.

" 1. A.H.Paterson agrees to pay for and consign to Hallmark Autos all
" motor cars purchased for resale by the company.

" 2. A.H.Paterson agrees to allow the above cars to remain on consign-
" ment until such time as they are sold by Hallmark Autos or as
" otherwise mutually arranged. Also,all cars at present on
" consignment to the company.

" 3. A.H.Paterson agrees to confirm all valuations in respect of the
" above cars when required.

" 4. A.H.Paterson agrees to accept payment for cars sold within 7 days
" after date of sale.

" 5. Hallmark Autos agrees to pay A.H.Paterson interest on the cost
" price of all cars sold at the rate of 15% per annum for the period
" cars are in stock from date of consignment until sold. Provided
" that interest on any cars in stock over three months shall be sub-
" ject to mutual arrangement.

" 6. A.H.Paterson agrees to charge no interest in respect of cars sold
" and paid for within 7 days of the date of purchase. Also A.H.
" Paterson agrees to charge no interest for a peridd of three months
" in respect of any cars bought through him from Austin's direct.

" 7. In addition to interest Hallmark Autos agrees to pay A.H.Paterson
" commission on sales from consignment as follows :-
" On Cars bought for under £100 - £2:10:0
" " " " " £100 to £150 £3:10:0
" " " " " £150 to £200 - £5:0:0

" 'ON Cars bought for over £200 - £7:10:0
" Provided that no commission shall be paid in respect of any cars
" sold at a loss.

" 8. Hallmark Autos agrees to sign a consignment note for each car deli-
" vered.
" All cars on consignment to be insured against fire and damage at
" Hallmark Autos' expence.

" 9. Hallmark Autos agrees to hold all consignment cars as bailee for
" for A.H.Paterson only.

" 10.John Glen agrees to hereby personally guarantee all of the above
" arrangements."

A word or two should be said by way of explanation of these provisions. Two points arise on the first clause. The first is that the words "pay for" markedly indicate a sale. The second is that "consign" strongly suggests a bailment for the purpose of resale. Clause 2 is pointed at two things viz - (1) That the respondent shall give to the appellant a right to retain the cars in the latter's possession until it is able to resell them unless otherwise agreed.

(2) that the written document shall cover past as well as future transactions.

Clause 3 is unimportant but its meaning which is obscure probably is that the respondent shall formally admit the prices at which the cars were bought. Clause 4 is clumsily worded but means that the respondent shall not demand payment until seven days after the resale of the car. The purpose of clause 5 is to secure to the respondent the amount of interest payable on his part to the car distributing company from which he obtained the money. Apparently if cars were held in stock over three months the rate of interest payable by him was subject to arrangement with the car distributing company. The respondent relies on the use of the word"interest" to show that the money was a loan by him to the appellant. Clause 6 is another provision reflecting the arrangements between the car distributing company and the respondent with respect to "interest". Clause 7 speaks for itself and needs no comment except as to the proviso. The proviso means that if the appellant company resold a car at less than it paid for it together with "interest" the respondent would charge no commission. This clause is relied upon by both sides. The appellant says that the word "consignment" indicates that the respondent is the owner of the car and that the whole clause shows

that he is to receive a commission as owner's profit while the appellant receives the margin as the person carrying on the business of finding second hand cars and effecting their resale. The respondent says that the proviso as to loss shows that the appellant is the substantial owner. Clause 8 does not seem to have been acted on in practice but it is manifestly based upon a view that the respondent is the owner of the car and the appellant company bailees for the resale and this is explicitly stated in clause 9. Clause 10 seems to have no other purpose than to bring in Glen's personal responsibility for the carrying out of the agreement. In my opinion the appellant is right in the complexion it places upon the transaction. The parties had reasons which appeared to them to be the best for basing their financial arrangements on the sale and resale of the property viz -the individual motor car. It is no doubt true that the provision of money was the motive actuating the transactions and that commonly this is done by advance or loan. But from the car distributing company down to the respondent and even further viz -to the Motor Car Finance company financing the ultimate buyer

the personal credit of the party obtaining the money had an insignificant importance when compared with the necessity of acquiring property in and control over the car. The whole practice is obviously moulded to give effect to an imperious desire of holding property in the car. Without registering a Bill of Sale the parties could not have it both ways and it seems to me evident that the respondent assumed the role of purchaser and not of lender. I attach no significance to the word "interest". It is a word found in contracts of sale of real estate and in many other transactions where money is treated as outstanding otherwise than on loan, and it reflects doubtless the terminology of the car distributing company. I accept the appellant's view of clause 7 of the agreement. The difficulty in placing upon the transaction the complexion of a loan is well illustrated by the entanglements which beset the respondent in working out the implications governing the time and events at and in which the alleged loans would become payable. The implications in the judgment under appeal are at variance with the text of the written agreement, and the implications suggested in the reasons of Macfarlan J. could only be regarded as necessary if the parties had unmistakably said that the money

was lent and had failed to provide otherwise for its repayment.

In my opinion the appeal should be allowed.

HALLMARK AUTOS PROPRIETARY LIMITED V PATERSON.

JUDGMENT. STARKE J.

The respondent sued the appellant in the Supreme Court of Victoria on a common count for money lent and also upon a special contract for moneys paid by way of loan upon security. Judgment was entered for the respondent, who was the plaintiff in the action, against the appellant, who was the defendant, and from this judgment an appeal is now brought to this Court.

The hearing of the action occupied more than six days, but the relevant facts may be summarised:-

1. The appellant Company was a dealer in second hand motor cars which it purchased from members of the public.

2, The Company had not, apparently, sufficient funds to carry on this business without assistance.

3. So an arrangement was made with the respondent, who was also a dealer in second hand cars, whereby he should finance or provide the Company with moneys to meet or recoup itself the purchase money of the cars which it purchased.

4. Generally speaking, the Company paid for the motor cars purchased by it and then the respondent gave his cheque to the Company for the amount of purchase money which it had paid.

5. Invoices were then prepared in this form:-

"Mr. A.H.Paterson

Bought of Hallmark Autos [illegible]"

A description of the motor car bought and its price was added. On the invoice, a receipt was endorsed for the amount of the price.

6. The books of account of both the Company and the respondent were entered up in accordance with the invoice.

7. The cars so purchased remained in the possession of the Company upon consignment, as it was called, for resale.

8. The Company agreed to pay the [illegible] for this accommodation interest on cost price of the cars at the rate of

15% per annum from the date of consignment until sold, subject to certain special stipulations, and in addition commission on sales from consignment of the cars at certain agreed rates varying with the amount for which the cars were bought.

9. The respondent had an agreement with a Company called the Austin Distributors Ltd., which enabled him to refinance the second hand cars purchased by the appellant Company.

10. The Austin Distributors Ltd. appear to have inspected the cars so purchased and if they approved of the price paid for them that amount less ten per centum was paid to the respondent, who signed an order form in this form:- "Please supply to me Used Car, hereinafter called "the vehicle" (described) as inspected ..... to be delivered at your showrooms ..... at or about ..... or as soon thereafter as possible. Subject to the terms and conditions hereinafter set out, I hereby agree to accept delivery of the vehicle and to hire the same from you on the terms of your usual hiring agreement." A hire purchase agreement was also entered into between the respondent and the Austin Distributors Ltd.

11. The respondent agreed to pay the Austin Distributors Ltd. for his accommodation 15 per centum per annum from date of supply until sold subject to certain special stipulations.

12. The cars so refinanced with the Austin Distributors Ltd. were nevertheless handed over to or remained in the possession of the appellant Company upon "consignment for sale".

13. Upon the resale of the cars, the appellant Company paid to the respondent the moneys he had provided for the purchase of the car, any interest payable to him, and commission, and he in turn paid to Austin Distributors Ltd. the moneys it had provided for the respondent for the purchase of the cars and any interest payable to it.

14. In cases in which cars were resold and the purchasers had made default and the appellant Company retook possession of

the cars, the same procedure appears to have been adopted, the unpaid balance of the purchase money being treated as the repurchase price of the cars by the Company, the respondent, and Austin Distributors Ltd.

14. In April 1939, the appellant Company and the respondent signed a memorandum of agreement setting forth the terms of the arrangement between them. It was entered upon because the principal shareholder in the Company was disposing of his shares to one Glen who agreed to "personally guarantee all of the above arrangements". So far as material, this agreement was as follows:

"1. A.H.Paterson agrees to pay for and consign to Hallmark Autos all Motor Cars purchased for resale by that Company.

2. A.H.Paterson agrees to allow the above cars to remain on consignment until such time as they are sold by Hallmark Autos or as mutually agreed. Also, all cars at present on consignment to the Company.

.....

4. A.H.Paterson agrees to accept payment for cars sold within 7 days after date of sale.

5. Hallmark Autos agrees to pay A.H.Paterson interest on the cost price of all cars sold at the rate of 15% per annum for the period cars are in stock from date of consignment until sold. Provided that interest on any cars in stock over three months shall be subject to mutual arrangement.

6. A.H.Paterson agrees to charge no interest in respect of cars sold and paid for within 7 days of the date of purchase. Also A.H.Paterson agrees to charge no interest for a period of three months in respect of any cars bought through him from Austin's direct.

7. In addition to interest, Hallmark Autos agrees to pay A.H.Paterson commission on sales from consignment as follows:-

On Cars bought for under £100	-	£2:10:0
" " " " £100 to £150	-	£3:10:0
" " " " £150 to £200	-	£5: 0:0
" " " " over £200	-	£7:10:0

Provided that no commission shall be paid in respect of any cars sold at a loss.

8. Hallmark Autos agrees to sign a consignment note for each car delivered. All cars on consignment to be insured against fire and damage at Hallmark Autos' expense.

9. Hallmark Autos agrees to hold all consignment cars as bailee for A.H.Paterson only."

The question which arises on these facts is whether the respondent lent to the appellant Company the moneys which he paid it to meet or recoup itself the price of the cars which it purchased, taking security therefor by the transfer to him of the legal title in the cars, or whether the respondent purchased the cars from the Company and acquired an absolute legal title thereto, consigning them to the Company for the purpose of resale. The learned trial judge reached the former conclusion. The question is wholly one of fact.

There is no magic in the word "finance": a transaction may be financed by means of a loan or by means of a transfer of goods for a price and the consignment of the goods for resale. Again, parties may adopt any form of transaction that suits their business purposes so long as they do not contravene the law. The facts which stamp the present transaction as a loan in the view of the learned judge were that the Company paid interest and commission for the money with which it was provided, that it had possession of the cars and power to sell them at its own discretion and, subject to the interest and commission charges, took the profits and suffered the losses, if any, on resale, and bore the costs of reconditioning, repairing and insuring the cars. Against this, the various invoices, documents books of account, and the agreement of the 28th. April were relied upon. The learned judge was of opinion that the documents were all consistent with his view that the transaction was one of loan and that vesting the property in the cars in

the respondant was only a method of giving him security for his loans. It was argued that such a transaction would not have given the respondent any security or have enabled him to refinance the cars with the Austin Distributors Ltd. The parties no doubt contemplated this refinance, which suggests an additional reason for vesting the legal property in the cars in the respondent so that he could deal with the Austin Distributors Ltd. as if he were the owner though vis à vis the appellant Company the legal title in the cars was vested in him by way of security for his loans.

It is not accurate to say that the transaction found by the learned judge would not afford the respondent any security. The security, for practical purposes, would be of as much or as little value in the one case as in the other case despite the difference in legal operation. The finding of the learned judge was reasonably open upon the evidence. Indeed, it would be a singular business transaction if the respondent, who only set out to finance the purchase of the cars, were the absolute owner of them but without any voice in or control over the reconditioning, repair or resale of the cars; without any interest in the proceeds of resale, other than for money provided by him, interest, and commission, and without any right to be repaid his money or any interest or commission if the cars were sold at a loss or became unsaleable. The conclusion of the learned judge is he much more reasonable and businesslike, which after all is not a bad test of the real intent of the parties.

There remains for consideration the question when the moneys provided by the respondent were repayable. The memorandum of April 1939 indicates that the parties contemplated a resale within three months, for they provided "that interest on any cars in stock over three months shall be subject to mutual arrangement". The cars in question here were in stock over three months and have not been resold. They became unsaleable,

whereupon operations under the arrangement between the parties came to an end before action brought. The learned judge held in these circumstances that the money paid by the respondent to the appellant Company for the finance of the cars became due and payable and in this I also agree,

The judgment awards a sum of £15 for interest. It was said that this amount was not claimed by the writ, but the learned judge's observations as to amendments shows that he was prepared to make any amendments necessary to cover the judgment which he actually gave. In any case, the declaration claimed seems sufficiently wide to cover a claim for interest. The judgment, I should add, makes no provision for the retransfer or delivery to the appellant Company of the cars, the subject of the moneys provided by the respondent, but the respondent undertook so to retransfer or deliver them on payment of those moneys. Such a judgment is rather informal, but the appellant Company took no objection at the time, possibly because it had possession of the cars, or because they were valueless. It is not a matter for objection at this late stage of the proceedings.

The appeal should be dismissed.

HALLMARK AUTOS PTY LTD.

v.

PATERSON

JUDGMENT DIXON J.

HALLMARK AUTOS PTY. LTD.

v.

PATERSON

This appeal turns on the true nature of the relation established between the appellant, a company dealing in secondhand cars, and the respondent Paterson, who provided the money to pay for the secondhand cars bought by the appella-nt company in the course of its business. Paterson, who is the plaintiff in the action, claims that, when he provided the purchase money for a secondhand car bought by the appellant company, the transaction amounted to a loan; a loan, it is true, upon special terms but nevertheless

a loan of money which ultimately must be repaid by the company. On the other hand, the appellant company says that, when Paterson provided the money for a car, he became, both in form and in substance, the purchaser of the car outright, that the money was provided by him not as a loan or advance but as the price payable by him for the car, that the car was left in the hands of the company for resale, not as owner, but as bailee only, and that as his return Paterson was to receive out of the proceeds of resale the amount he had paid, increased by certain stipulated additional sums, and the company, as its profit, was to retain the balance.

Paterson himself conducts, but in another locality,

a business of which buying and reselling secondhand cars form a part. At one time he carried on the business at the premises which later the appellant company occupied. He decided however to give up that place of business and he consented to his manager, whose name is Hall, setting up there on his own account. Hall adopted the title of Hallmark Autos and afterwards formed the appellant company, under the name of Hallmark Autos Pty.Ltd., for the purpose of taking over the business. Then the company passed from Hall's control.

Paterson, in carrying on the business of buying and selling secondhand cars, had relied for the purpose of

obtaining funds on a course of dealing with a company called Austin Distributors Ltd. When he was minded to buy a second-hand car, having decided what price he would give, a thing they call "valuing" the car, he caused it to be inspected by Austin Distributors Ltd. If that company approved of the value, Paterson, having bought the car and having paid the owner the price so decided upon, immediately obtained a cheque for the same amount from Austin Distributors Ltd. and entered into an agreement with them to hire the car from them, on the footing that they had become the owners, that is by buying it from or through him; and as a first instalment of hire he paid them ten per cent of its price or "value".

Then later he would enter into a full hire-purchase agreement in respect of the car containing all the usual clauses for the protection of the "owner", that is , Austin Distributors Ltd. It appears also that promissory notes for the balance of "hire" were sometimes given by Paterson to Austin Distributors Ltd. When Paterson resold a secondhand car he paid to Austin Distributors Ltd. the full amount which they had paid in the first instance for the car together with " interest" at fifteen per cent per annum. The terms prevailing between him and Austin Distributors Ltd. are not proved very distinctly but it would seem that the

hire-purchase agreements usually had a currency of three months and stated a total amount of hire equal to the sum paid for the car together with fifteen per cent per annum for three months. If at the end of three months Paterson had not succeeded in reselling the car, the hire-purchase money apparently was not demanded at once but was allowed to run on, and, when he did resell the car, fifteen per cent per annum for the entire period does not seem to have been exacted . Further there is reason for supposing that if the car was resold within a week of its being bought, Austin Distributors Ltd. did not ask for "interest" . But whenever it was resold they were repaid in full the amount they

had paid in respect of the car. The "resale" by Paterson would usually be on hire-purcahse terms, but he would obtain ready money to pay off Austin Distributors Ltd. by means of some one of the "motor car finance companies" who, on such occasions, put out their funds on the security afforded by the hire-purcahse agreements. Sometimes a car thus resold came back upon Paterson's hands because the purchaser made default under his hire-purchase agreement. Such "repossessed cars", as they are called, were made the subject of a new hire-purchase agreement between Paterson and Austin Distributors Ltd., who provided an amount corresponding to the balance unpaid, and so, doubtless covered the repayment

to the motor car finance company which on repossessing the car Paterson became liable to make.

When Hall set up on his own account he desired, not unnaturally, to continue the course of business which Paterson, his former employer, had established with Austin Distributors Ltd. But apparently it was believed that that Company would not willingly allow Hall to take the respondent's place in relation to itself both in future purchases of secondhand cars and also in past transactions still outstanding. To overcome the difficulty, Hall and Paterson agreed arranged that the latter would continue to obtain money from Austin Distributors Ltd. for secondhand cars bought for resale,

notwithstanding that it was Hall and not he who now carried on at the old premises the business of dealing in second-hand cars. When Hall bought a car, the respondent Paterson would pay him the money to cover the purchase price which Hall paid the seller. Paterson would then proceed as he would have done if he and not Hall had bought the car direct from the seller; he would cause Austin Distributors Ltd. to inspect it, obtain from them the amount representing the price, enter into a hire-purchase agreement with them on the old terms and repay them ten per cent as a first instalment of hire. The gain or advantage to be obtained by Paterson from the arrangement consisted in what was called a commission to be

paid to him on the resale of a car by Hall. Unless the resale resulted in a loss, Hall was to pay Paterson a "commission" of £2-10-0 if the car had been bought for under £100-0-0 ; £3-10-0 if for a price between that sum and £150.; £5, if between £150. and £200., and over that amount £7-10-0. When the first car was bought under this arrangement, Hall and Paterson agreed that the former should invoice it to the latter and should receipt the invoice. When the car was resold by Hall Paterson invoiced it back to him at the original price with "interest" and "commission" added. Accordingly Hall carried on his business as follows- He "valued" a car brought to him by an owner desirous of selling

it; after the respondent and Austin Distributors Ltd. had accepted the "value", he bought it, paid the seller, invoiced the car to Paterson at that "value" and obtained a cheque from him for the amount and receipted the invoice. Paterson then obtained a cheque for the same amount from Austin Distributors Ltd. and entered into an agreement to hire the car from them, paid them ~~three~~ ten per cent as a first instalment of hire and later on entered into a more formal hire-purchase agreement with them. The car was left in Hall's hands for resale; " on consignment" as it was expressed. Any unexpired registration of the car was transferred into Hall's name. When Hall resold the car he paid Paterson the old price

together with fifteen per cent per annum, amounts covering what he was bound to pay Austin Distributors Ltd. Hall also paid him the amount of "commission" appropriate to the transaction. Paterson invoiced the car to Hall as upon a sale by the former to the latter and receipted the invoice.

When Hall "repossessed " a car which he had disposed of on hire-purchase terms, it was dealt with in like manner, i.e. invoiced to the respondent and made the subject of a hire-purchase agreement between him and Austin Distributors Ltd. and so on. No hitch occurred in this course of business before Hall made over his business to the company he had formed. The company carried on in the same way

and indeed no difficulty arose before Hall sold his interest in the company. The purchaser, whose name is Glen, bought Hall's shares on about 26th. April 1939. At Glen's request or that of the accountant advising him, a meeting took place between him, the accountant, Hall and Paterson for the purpose of defining and recording the arrangement under which Paterson, on the one side, and, on the other, Hall and then the company had been carrying on. As a result a document was drawn up 28th. April and executed by Paterson, the Company and Glen. It will be necessary to refer to the clauses of the document material/which governed both past and future transactions, but before doing so it is better to complete the statement

of the facts giving rise to the present proceedings.

Among the cars in the company's possession on 1st. May 1939, the date as at which Glen a-cquired Hall's shares, there were a number of secondhand cars in which Paterson was concerned. Some of these were cars which he had bought or obtained independently of Hall or the Company but which he had entrusted to the Company for sale on his behalf. Others however were secondhand cars which the company had bought and, according to the practice described, had invoiced to Paterson, who had paid the company the"value" or price and had obtained a corresponding sum from Austin Distributors Ltd. and given them a hire-purchase agreement.

In this appeal we are concerned with four such cars. The four cars were(1) a Hillman Minx Sedan bought by the company on 27th. March 1939 for £120. and invoiced for that sum to Paterson on the same day: he gave the company his cheque for the same amount and the invoice was receipted; (2) a Chevrolet Roadster bought by the Company on 5th. April 1939 for £150. and similarly dealt with; (3) another Chevrolet Roadster bought for £110 by the Company on 21st April 1939 and similarly dealt with; (4) a Dodge Senior Sedan repossessed by the Company on 28th April 1939 and invoiced by the Company to Paterson for £65. : he paid that sum to the Company and the invoice was receipted. In all four cases

it would appear that Paterson obtained corresponding amounts from Austin Distributors Ltd., entered into hire purchase agreements with that company, and paid them the first instalments of hire representing ten per cent of the respective amounts.

For a few months after Glen took control of the appellant company the same course of practice seems to have been pursued, but then the relations between Paterson and the company broke down. What exactly happened is not made quite clear, but in July a request was made that Paterson should take away a large number of his cars. The request related, at all events primarily, to cars acquired independently of Hall and the company. On 3rd August the company notified

Paterson that it terminated the "agency" and asked that he remove "a number of second hand cars placed by" him "with the company as agents, on consignment for sale to the public." Probably this letter contempla_ted cars sent by Paterson to Hall or the company for sale on his behalf, rather than those bought by Hall or the company and invoiced by him under the practice described. It is needless, however, to go into the details. It is enough to say that the four cars with which we are now concerned were not removed and remained unsold and in the possession of the appellant company. On 4th November 1939 Paterson commenced this action against the company claiming an amount of £445 as money lent, being the

total of the four sums which he had paid to the company in respect of the four cars.

The action was tried by Macfarlan J. who held; (1) that when Paterson provided money for a car, he lent the money; (2) that money provided for a car became repayable not only if and when the car was resold, as expressly stipulated, but also, under an implied condition, if and when the company renounced any further attempt to sell the car; (3) that the transfer or purported transfer of the car to Paterson, the "invoicing" to him, was by way of security only, and (4) that the company had said that it was impossible to sell the four cars in question and given up any further attempt to do so.

His Honour also made a declaration prayed in the amended Statement of Claim. According to this declaration, the contract between the parties involved repayment by the company, together with interest (at the rate and in the conditions already mentioned) and "commission", within seven days from the date of resale of the car for which the money was provided or, if the car should not have been resold within ~~xix~~ three months (or alternatively within a reasonable time thereafter), then repayment at the end of that time with 15% per annum, notwithstanding that there had been no resale.

Judgment was given for Paterson for £445 and costs.

It will be seen that, as more than three months had elapsed from the respective times when the cars had been bought and Paterson had provided the money, the declaration of right supplied a ground upon which the judgment against the company might stand quite independently of His Honour's reasons. It is true that the declaration does not say which of the alternatives put forward by the pleader, viz. three months or a reasonable time, is the correct one. But the alternative form of the pleading, doubtless because of its unimportance, does not seem to have attracted attention either at the trial or when the judgment or order was settled.

His Honour did not rely for his conclusion upon the

written agreement dated 28th.April 1939, but he regarded that document as expressing only some of the terms of the contract or ~~agreement~~ arrangement between the parties and, so far as it went, as being not inconsistent with his conclusion. The appellant company, however, claims that the terms of the document are incompatible with the view that the transaction amounted to a loan and with the implications involved in the declaration and in the reasons given by the learned judge.

The document is headed "Memorandum of agreement made between A.H.Paterson, Hallmark Autos Pty.Ltd. and John Glen." Glen is made a party because, by the last clause, he agrees personally to guarantee the "arrangements" contained in the

preceding clauses.

It is unnecessary to set out the agreement in full. The provisions more material to the present question are to the following effect. Paterson "agrees to pay for and consign to" the Company all cars " purchased for resale by " the company (cl.1). Paterson agrees to allow such cars "to remain on consignment until such time as they are sold by" the Company " or as otherwise mutually agreed. Also, all cars at present on consignment to the Company" (cl.2). Seven days after the date of sale are allowed for payment for cars sold (cl.4). The Company agrees to pay Paterson " interest on the cost price of all cars sold at the rate of

fifteen per cent per annum " from the " date of consignment until sold ", with a proviso that if the period is more than t three months, interest shall be subject to mutual arrangement (cl.5). No interest is to be charged if the car is sold and paid for within seven days of its purchase (cl.6).

" In addition to interest " the Company agrees to pay Paterson commission on sales from consignment as follows: then is set the scale already stated: "Provided that no commission shall be paid in respect of any cars sold at a loss" (cl.7). The Company " agrees to sign a consignment note for each car delivered." Cars on consignment to be insured at the Company's expense (cl.8). The Company

" agrees to hold all consignment cars as bailee for A.H. Paterson only" (cl.9).

Throughout the document there is a recurring insistence upon Paterson's being the owner of the car for which he provides the money and the Company holding it only as bailee. Paterson is to pay for it: then he"consigns" it to the Company. It is to remain on consignment until sold. The Company holds as bailee for him. "As bailee for Paterson only" probably means as bailee for him and not otherwise . It is unlikely that the parties intended it to mean as bailee for him and for no one else.

This insistence accords with the practice followed

by the parties in invoicing the car, when bought, to Paterson and, when sold, back from him to the Company. Each invoice expressed a sale and showed receipt of the price by the seller. The agreement, by its reference to interest and commission payable to Paterson on the resale of the car, implies that when the Company does resell it the Company shall not be accountable to him for the purchase money. A full owner, it may be said, should be entitled to the full net price realized by his bailee or agent. But it does not follow that the Company is to be regarded as a pledgor or mortgagor of the chattel. As the course of dealing shows, the parties

regarded Paterson as under an obligation to resell the car to the Company when the latter had made a sale. It is evident that the manner in which Austin Distributors Ltd. dealt with Paterson represents a practise adopted in the hope of making a registrable bill of sale unnecessary, and when Paterson consented to allow Hall to come in and, so to speak, interpose himself between Paterson and the customers of the business who sold secondhand cars to the person conducting it or bought them from him, it was necessary that Paterson should have the same title to the cars as otherwise he would have had as the result of taking a hire-purchase agreement from Austin Distributors Ltd. So long as the arrangement continued

and the business of Hall or the Company went on, the question whether Paterson in providing the money for a car made a loan on the security of the chattel or bought it absolutely could not arise. It is only the termination of the arrangement which produces the difficulties. No doubt the agreement might be brought to an end by reasonable notice on either side. The death or bankruptcy of an individual party thereto or the winding up of the company would also determine its operation, except as to past incomplete transactions. It is the failure of the parties to provide for such an event that has caused the difficulty. To meet it the learned

judge has worked out implications which depend upon the view that the transaction was basally one of loan. He attached importance to its undeniable financial character. Its object was to "finance" Hall's purchase of secondhand cars. But business may be"financed" by many forms of transaction. If the party ~~which~~ who otherwise must bear an outlay of money is relieved of the necessity or obtains the funds or the credit, the transaction for him is "financed".

Whether Paterson's providing of money in respect of secondhand cars bought by Hall or the Company and invoiced to him amounted to a loan depends not on the financial object or motive which actuated the parties but upon the terms and

conditions of their agreement, express and implied, and upon the procedure they adopted.

The express terms of the agreement as set out in the document drawn up between Paterson and the Company tend strongly against the view that the former provided the money as a laan on the security of the car. No doubt the use of the word "interest" may suggest a loan. But it is not inappropriate for a per-centage calculated by time on money which is laid out in any other manner. In all else a loan seems almost to be negatived. Clause 2 is drawn so as to impose on Paterson the necessity of leaving tha car on consignment with the Company until it is sold or until it is

otherwise agreed. That means that in the absence of the restraint placed upon him by the provision Paterson could in virtue of his ownership take the car away at any time and dispose of it as he chose. Clause 1 describes him "paying for" the car. Clause 8 means that the Company shall give a note amounting to an acknowledgement that it holds possession of the car for Paterson on consignment and, though the provision does not appear to have been acted upon, it shows an intention to safeguard Paterson against any suggestion that the Company had any form of property in the car. That too is the purpose of clause 9 in providing that the Company shall be bailee for him. The forms adopted for carrying

out the arrangement, e.g. the invoicing to and by Paterson, mean that ostensibly at all events Paterson took a title to the car that was absolute and not one by the way of pledge or mortgage. No reason appears for treating the actual relation established as in opposition to the ostensible relation between the parties. Moreover Paterson's course of dealing with Austin Distributors Ltd. made it necessary (scil. apart from any question of validity) that as between him and them he should be in the position of a hirer able at any time to account for the car and, in case of default, to surrender to them as owners. Then Paterson's mode of recording the

transactions in his ~~transactions~~ own books of account confirms the view that the cars were bought by him from, and resold by him to, the Company as and when it bought and resold the cars to customers of the business.

All these considerations point to the conclusion that the Company was a bailee of the cars for sale on special terms and not a borrower securing a loan by a pledge or mortgage of chattels. No doubt the mode of winding up the agreement must, on this footing also, be worked out by implications, but the conditions to be implied affect, not the repayment of the money, but the surrender by the Company of the cars. It is true that expenditure on repairing and

reconditioning the cars is a usual incident of the Company's business of dealing in secondhand cars and that upon surrendering a car before selling it the Company would lose and Paterson would gain the benefit of any repairs and renovations Clause 2 may be sufficient protection to the Company against such a loss, if it means that the Company is entitled to retain the cars until they are sold, in default of some arrangement to the contrary. If this is not its meaning, at all events the bailment or "consignment" cannot be brought to an end until a reasonable opportunity has been allowed for reselling the car. If it be correct that the Company has renounced all attempt to resell the cars in question

the result is that Paterson is entitled to resume possession of the cars, not that he can demand the money.

The implication upon which is founded the declaration sought by the prayer of the Statement of Claim and made in the judgment or order under appeal appears hardly to be consistent with clause 5 of the agreement, which plainly contemplates the possibility of more time than three months being required before a car is resold, and makes that a ground for adopting another rate of interest. But as the declaration is based on the view that the transaction is one of loan it is unnecessary to consider it further.

In the Supreme Court the Company counter-

claimed for storage of the cars but the counterclaim was dismissed. That part of the judgment is no longer in question.

It should perhaps be stated that no contention was raised, or upon the facts proved or the pleadings could have been raised, to the effect that the Company impliedly undertook to indemnify Paterson against his liability to Austin Distributors Ltd.

Further it should be noticed that the validity or invalidity of any of the transactions under the bills of sale law could not be material to an action for money lent,

In my opinion the action ought to have been dismissed . I think the appeal should be allowed with costs and the judgment of the Supreme Court should be discharged : in lieu thereof it should be ordered that the action be dismissed with costs and the counterclaim be dismissed with costs, the costs being set off.