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COFIELD v. WATERLOO CASE CO. LTD.

RICH J. I have had the advantage of reading the judgment of my brother *Isaacs*, and agree with it.

Appeal allowed. New trial on second count only. Costs of first trial to abide result of second trial. Appellant to have costs of new trial motion to Supreme Court. Appellant to have such costs of this appeal as are usual in forma pauperis.

Solicitor for the appellant, *V. Ackerman.*
Solicitor for the respondent, *J. G. Webster.*

B.L.

Rev *Palmer* v *Carey* (1926) 37 CLR 545

[HIGH COURT OF AUSTRALIA.]

CAREY . . . . . APPELLANT;

AND

PALMER . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3, 4, 7.

MELBOURNE, *June* 10.

Knox C.J., Isaacs and Starke JJ.

Contract—Construction—Agreement to lend money to trader—Repayment out of proceeds of goods—Bankruptcy of trader—Transfer of goods to lender declared void—Security, lien or charge of lender over goods.

By an agreement in writing made in New South Wales between the appellant and a person carrying on business in Sydney as an indentor, which recited that the latter required additional capital to enable him to extend his business and that the appellant had agreed to advance various sums of money not exceeding £1000, it was agreed that the borrower should from time to time purchase goods for the purpose of the business and the appellant should advance the purchase-money therefor, which would be applied exclusively to such purchase. In consideration therefor the borrower covenanted (*inter alia*) to sell the goods as

soon as possible after the purchase thereof and to pay the proceeds of sale forthwith into the credit of the appellant at a certain bank; to attend diligently to the business and to the sale of the goods; and to keep proper books of account and permit the appellant to have free access to and to inspect such books. It was further agreed that during the continuance of the agreement an account should be taken by the borrower and furnished to the appellant on a certain day in each month of the purchases and sales and showing the net gross profits derived therefrom, and that the appellant, after deducting the amount so advanced by him together with one-third of the gross profits, should pay to the borrower the remaining two-thirds of the gross profits for his own use and benefit absolutely; and that the agreement should not in any way constitute or be deemed to constitute a partnership between the parties, and should be terminable at any time at the option of the appellant. The agreement having been carried into effect and acted upon for about four years and sums largely exceeding the agreed limit having been advanced by the appellant, at a time when the borrower was in financial difficulties a further agreement was made between the parties by which, in consideration of the sale and delivery by the borrower to the appellant of the stock-in-trade and tenant's fixtures in the premises where the business was carried on, the appellant agreed (*inter alia*) to release and discharge the borrower from all liability under the earlier agreement. Shortly afterwards the borrower sequestrated his estate, and on the motion of his official assignee, the respondent, an order was made by the Supreme Court in Bankruptcy declaring void as against the official assignee (*inter alia*) the sale and delivery of the above-mentioned stock-in-trade and fixtures.

Held, by *Isaacs* and *Starke* JJ. (*Knox* C.J. dissenting), that by the earlier agreement the appellant acquired a security, lien or charge on the goods the subject matter of the agreement.

Held, also, by *Isaacs* and *Starke* JJ., that the later agreement, having been declared to be void as against the official assignee, could not be relied on by him as destroying the rights of the appellant under the earlier agreement.

Decision of the Supreme Court of New South Wales in Bankruptcy (*Street* C.J. in Eq.) reversed.

APPEAL from the Supreme Court of New South Wales.

On 30th April 1917 an agreement in writing was entered into between Alfred Edwin Johnstone (thereinafter called "the borrower") and Randal Westropp Carey (thereinafter called "the lender") which, so far as is material, was as follows:—

"Whereas the borrower is carrying on the business of an indentor at No. 108 The Strand Arcade in Sydney aforesaid and whereas the borrower requires additional capital to enable him to extend his said business and whereas the lender has agreed to advance to the

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borrower various sums of money in the aggregate not to exceed the sum of one thousand pounds for the purpose aforesaid on having the repayment thereof together with a share of the profits in lieu of interest in manner hereafter appearing Now this agreement witnesseth as follows :—(1) The borrower shall from time to time purchase goods or stock for the purpose of the said business and the lender agrees to advance the purchase-moneys therefor which will be applied exclusively for such purchases as aforesaid (2) In consideration therefor the borrower hereby covenants with the lender as follows namely (3) To sell such goods or stock as soon as possible after the purchase thereof and to pay the proceeds of sale forthwith into the credit of the lender at the head office of the Commonwealth Bank in Sydney (4) To attend to and carry on the business and sale of such goods or stock diligently during the continuance of this agreement and not absent himself therefrom (5) To keep proper books of account and to permit the lender or any accountant nominated by him to have free access to and to inspect and make extracts from such books (6) That during the continuance of this agreement an account shall be taken by the borrower and furnished to the lender on the twentieth day of each month of the purchases and sales and showing the net gross profits derived therefrom and on receipt thereof the lender after deducting the amount so advanced by him as aforesaid together with one-third of the gross profits pay to the borrower the remaining two-thirds of the gross profits for his own use and benefit absolutely (7) This agreement shall not in any way constitute or be deemed to constitute a partnership between the parties hereto and shall be terminable at any time at the option of the said lender."

Pursuant to the agreement moneys were advanced by Carey to Johnstone and the business was carried on by Johnstone until June 1921, when the advances made by Carey exceeded £10,000. Johnstone being in pecuniary difficulties, as Carey knew, on 31st May 1921 signed and gave to Carey a document in these terms : "In consideration of your giving me a release for the sum of £18,990 16s. 3d. being the amount due by me to you for goods purchased for my business carried on at 36 York Street Sydney I hereby sell to you all and singular the stock-in-trade and fittings now on my

premises together with the goods now in bond you paying the Commonwealth Bank of Australia the amount due thereon." On 1st June Carey wrote to Johnstone as follows: "In consideration of the sale and delivery to me of the stock-in-trade and tenant's fixtures on premises No. 36 York Street Sydney I hereby release and discharge you from all moneys due by you to me under an agreement of 30th April 1917." On 7th June 1921 a further agreement was entered into between them, the terms of which were embodied in a document signed by Carey and addressed to Johnstone which, omitting formal parts, was as follows:—"In consideration of the sale and delivery to me of the stock-in-trade and tenant's fixtures in premises now occupied by you on the second floor of premises No. 36 York Street Sydney I hereby release and discharge you from all liability claims and demands by me whatsoever under agreement between us of 30th April 1917 and also all claims by me for share of profits of the said business to date hereof. And for the consideration aforesaid I also release you from and undertake all liability for and indemnify you from and against all actions claims and demands by my father John R. Carey for and on account of any moneys advanced to you or to both of us or to the said business by my said father and employed in the business carried on by you at the above-mentioned premises. And I also undertake not to make any claim or demand on you in connection with the overdraft in my name with the Commonwealth Bank amounting to £8,182 12s. 2d. but to personally undertake all liability therefor."

Three weeks afterwards Johnstone sequestrated his estate, and William Harrington Palmer was appointed his official assignee. Subsequently, on the motion of the official assignee to the Supreme Court in Bankruptcy, *Street* C.J. in Eq. made an order declaring void as against the official assignee the sale, handing over, delivery, assignment and transfer by Johnstone to Carey of the lease, fixtures, stock-in-trade, book debts and all other assets of Johnstone of or in connection with the business carried on by Johnstone. On appeal by Carey to the High Court it was by consent ordered (*inter alia*) that the matter be referred back to the Supreme Court in its bankruptcy jurisdiction to determine whether Carey was entitled

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to any security, lien or charge under clause 3 of the agreement of 30th April 1917, and, if so, for what amount. Pursuant to that order the motion was further considered by *Street* C.J. in Eq., who made an order declaring that Carey was not entitled to any such security, lien or charge.

From that decision Carey now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Maughan K.C. (with him *Mason*), for the appellant. The agreement of 30th April 1917 created an equitable charge over the goods which were the subject matter of it and over the moneys which were the proceeds of the sales of those goods, to secure the moneys advanced by the appellant from time to time and the moneys which were due under it in lieu of interest. When there is an agreement between a lender and a borrower for payment out of the proceeds of sale of property there is a charge on the property until sale and on the proceeds after sale (see *Legard* v. *Hodges* (1); *Tailby* v. *Official Receiver* (2); *Ex parte Flower* (3); *Hunt* v. *Mortimer* (4); *Burn* v. *Carvalho* (5); *Fisher* v. *Miller* (6); *Bligh* v. *Davies* (7); *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (8); *Brown, Shipley & Co.* v. *Kough* (9); *Re Rogers*; *Ex parte Holland and Hannen* (10); *Ex parte Delhasse*; *In re Megevand* (11); *Muntz* v. *Smail* (12); *Palmer* v. *Culverwell, Brooks & Co.* (13)).

[ISAACS J. referred to *Ward* v. *Duncombe* (14).]

The agreement of 7th June 1921 being set aside, the respondent took the goods with all the incidents which attached to them immediately prior to that agreement, that is to say, subject to the charge in favour of the appellant.

Loxton K.C. and *Davidson*, for the respondent. The agreement of 30th April 1917 was merely one of borrowing and lending. The goods purchased pursuant to it became the property of Johnstone,

(1) (1792) 1 Ves. Jun. 477.
(2) (1888) 13 App. Cas. 523, at p. 543.
(3) (1835) 2 Mont. & Ay. 224.
(4) (1829) 10 B. & C. 44.
(5) (1834-39) 4 My. & Cr. 690.
(6) (1823) 1 Bing. 150.
(7) (1860) 28 Beav. 211.
(8) (1886) 34 Ch. D. 128.
(9) (1885) 29 Ch. D. 848, at pp. 854, 865, 870.
(10) (1891) 8 Morr. Bky. 243.
(11) (1878) 7 Ch. D. 511, at p. 516.
(12) (1909) 8 C.L.R. 262, at pp. 304, 305.
(13) (1901) 85 L.T. 758.
(14) (1893) A.C. 369, at p. 392.

and when the goods were sold and the purchase-money paid to the appellant's account he would have received all he was entitled to under the agreement. The appellant would not have been entitled to follow the goods. No proprietary right in the goods was conferred upon the appellant by that agreement. An agreement between a lender and a borrower that payment shall be made out of a particular fund does not create an equitable charge (see *Bligh* v. *Davies* (1)). No partnership was created (*Alfaro* v. *De la Torre* (2) ; *Smith* v. *Watson* (3)). If a creditor hands over property to his debtor which is to become part of the general property of the debtor and the creditor is entitled to be repaid in some other form, he has no interest in the property (*South Australian Insurance Co.* v. *Randell* (4) ; *Ex parte Sheil* ; *In re Lonergan* (5)). Even though apart from the bankruptcy of Johnstone the appellant might have had a charge, upon bankruptcy none existed (*Badeley* v. *Consolidated Bank* (6)). The Court should not read into the agreement the creation of a proprietary right unless without such a right the agreement would be futile (*Douglas* v. *Baynes* (7) ; *Hamlyn & Co.* v. *Wood & Co.* (8)).

[ISAACS J. referred to *Bank of Scotland* v. *Macleod* (9).]

A Court of equity would not give specific performance of the agreement, but the appellant's only remedy for a breach would be damages for not performing it. Whatever the rights of the parties were under the agreement of 30th April 1917, the respondent took the goods by reason of the infirmity of the title of the appellant, and not by reason of the strength of the title of Johnstone. To the respondent's contention that the appellant's rights under the agreement of 30th April 1917 were put an end to by the agreement of 7th June 1921, it is no answer to say that the latter agreement has been declared void as against him. The latter agreement has no effect as against him, but it may take away the appellant's rights. [Counsel also referred to *Ideal Bedding Co.* v. *Holland* (10).]

(1) (1860) 28 Beav. 211.
(2) (1876) 24 W.R. 510.
(3) (1824) 2 B. & C. 401.
(4) (1869) L.R. 3 P.C. 101.
(5) (1877) 4 Ch. D. 789.
(6) (1888) 38 Ch. D. 238.
(7) (1908) A.C. 477, at p. 481.
(8) (1891) 2 Q.B. 488.
(9) (1914) A.C. 311, at p. 323.
(10) (1907) 2 Ch. 157, at p. 175.

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Maughan K.C., in reply, referred to *Holroyd* v. *Marshall* (1); *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (2); *Rodick* v. *Gandell* (3); *Riccard* v. *Prichard* (4); *Ex parte Copeland* (5); *Bailey* v. *Culverwell* (6).

Cur. adv. vult.

June 10. The following written judgments were delivered :—

KNOX C.J. Upon a previous appeal in this matter this Court on 3rd July 1923, by consent of the parties, varied the order appealed from and referred the matter back to the Supreme Court in its bankruptcy jurisdiction to determine whether the appellant was entitled to any security, lien or charge under clause 3 of the agreement of 30th April 1917, and, if so, for what amount.

The learned Judge in Bankruptcy, having inquired into the matter, held that the appellant, Randal Westropp Carey, was not entitled to any such security, lien or charge over or on the lease, fixtures, stock-in-trade, book debts or other assets mentioned in his previous order or any portion thereof. The question on this appeal is whether that decision was right. The relevant facts may be briefly stated as follows : The bankrupt, Alfred Edwin Johnstone, carried on business in Sydney as an indentor and importer, and on 30th April 1917 the agreement referred to in the order was made between him and the present appellant. It provided that the appellant should advance moneys to be applied by the bankrupt exclusively in the purchase of goods for his business. In consideration of these advances the borrower agreed by clause 3 to sell such goods as soon as possible after the purchase thereof and to pay the proceeds of sale forthwith into the credit of the appellant at the head office of the Commonwealth Bank in Sydney. This is the clause on which the appellant relies as giving him an equitable interest by way of charge or trust in the stock-in-trade hereafter to be mentioned. The borrower also agreed to attend diligently to the business and sale of such goods and stock, to keep proper books, to which the appellant

(1) (1862) 10 H.L.C. 191.
(2) (1915) 2 Ch. 345.
(3) (1851-52) 1 D.M. & G. 763, at p. 777.
(4) (1855) 1 K. & J. 277.
(5) (1833) 2 Mont. & Ay. 177.
(6) (1828) 8 B. & C. 448.

was to have free access, and to furnish an account each month of purchases and sales on the basis of which the lender was to deduct the amount advanced by him and divide the profits between himself and the borrower. The agreement was expressed to be terminable at any time at the option of the lender. In the early part of 1921 the advances made by the appellant under the agreement amounted to more than £10,000; and in May of that year the appellant ascertained that the bankrupt was in difficulties and, after consulting his solicitor, entered into an arrangement with the bankrupt, the terms of which were embodied in the following document of 7th June 1921:—"Briarcourt, Wollstonecraft, 7th June, 1921.—Mr. A. E. Johnstone, 36 York Street, Sydney,—Dear Sir,—In consideration of the sale and delivery to me of the stock-in-trade and tenant's fixtures in premises now occupied by you on the second floor of premises No. 36 York Street Sydney I hereby release and discharge you from all liability claims and demands by me whatsoever under agreement between us of 30th April 1917 and also all claims by me for share of profits of the said business to date hereof. And for the consideration aforesaid I also release you from and undertake all liability for and indemnify you from and against all actions claims and demands by my father John R. Carey for and on account of any moneys advanced to you or to both of us or to the said business by my said father and employed in the business carried on by you at the above-mentioned premises. And I also undertake not to make any claim or demand on you in connection with the overdraft in my name with the Commonwealth Bank amounting to £8,182 12s. 2d. but to personally undertake all liability therefor.—Yours faithfully, R. W. Carey."

Three weeks later the bankrupt sequestrated his estate; and his official assignee, the present respondent, subsequently instituted proceedings against the appellant to recover the value of the assets acquired by the appellant under the arrangement of 7th June, and obtained a declaration that the sale to the appellant was void as against the official assignee, and an order that the appellant should pay to the official assignee the value of the property seized subject to certain deductions. Then followed the former appeal to this Court and the variation of the order to which I have referred above.

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KNOX C.J.

The contention for the appellant is that by force of clause 3 of the agreement of April 1917 he obtained an equitable assignment of or charge over the stock-in-trade of the business carried on by the bankrupt, or alternatively that under that clause the bankrupt held the stock-in-trade in trust for the appellant. This argument, I think, involves the proposition that whenever a trader borrows money to be applied in the purchase of goods for his business and agrees with the lender that he will sell the goods and pay him the proceeds of sale, the lender acquires such an equitable interest in the goods as will, in the event of the bankruptcy of the borrower before the goods have been sold, defeat wholly or in part the claim of the official assignee to take and realize the goods for the benefit of the general body of creditors. The effect of upholding the argument of the appellant would be far-reaching—especially in New South Wales, where, as the law stands, an assignment of after-acquired property stands outside the provisions of the *Bills of Sale Act* requiring registration (see *Malick* v. *Lloyd* (1)).

In order to succeed, the appellant must establish that before and at the date of the sequestration of the bankrupt's estate he had an equitable interest in the assets in question as distinct from a mere contractual right to have the goods sold by the bankrupt and the proceeds of sale paid into the appellant's bank account. The words of the agreement on which the appellant relies are apt to express a contract by the bankrupt to apply the money in the purchase of goods, to sell those goods, and to pay the proceeds of the sale into the appellant's bank account, but I can see nothing in them to indicate that the intention was to assign any interest in goods purchased by the bankrupt or to create either a charge over or a trust of such goods in favour of the appellant. The agreement was, I think, an ordinary business transaction, by which the appellant agreed to finance the bankrupt in his business, protecting himself by securing free access to the books of the business, by the stipulation as to rendering accounts and by his reservation of the right to terminate the agreement at any time. If the intention had been to create a trust in favour of the appellant, there would have been no difficulty in expressing that intention, and, if there were no

(1) (1913) 16 C.L.R. 483.

intention of creating a trust, the Court will not impute a trust where none in fact was contemplated (*Lewin on Trusts*, 11th ed., at p. 85). I adhere to the opinion expressed by my brother *Gavan Duffy* and myself, in *Commissioner of Stamp Duties* (*Q.*) v. *Joliffe* (1), that a trust cannot be created contrary to the real intention of the parties alleged to have created it.

I agree with the learned Judge in Bankruptcy in thinking that the matter does not rest solely on the words of the agreement, and that the question is one of intention. I agree also with him in thinking that the conduct of the appellant in entering into the arrangement embodied in the document of 7th June 1921 and in afterwards claiming to be a partner in the business affords abundant evidence that there was no intention to create in his favour any charge or trust in respect of the goods in question.

In my opinion the parties neither entertained nor expressed an intention that the appellant should have any equitable interest either by way of charge or by way of trust in the assets now in question.

For these reasons I am of the opinion that the appeal should be dismissed.

ISAACS J. The question is whether the appellant, under clause 3 of the agreement of 30th April 1917, has any "security, lien or charge" on the goods the subject matter of the agreement of 31st May 1921. The last-mentioned agreement has been declared void as against the official assignee, but the appellant claims that, independently of that agreement and by force of the earlier agreement, he is entitled to a "security, lien or charge" over the goods. The respondent contends (1) that apart from the later agreement no such security, lien or charge was created, and (2) that the later agreement before avoidance destroyed whatever security might exist, and that the subsequent avoidance does not restore the security (if any).

Learned counsel for the appellant maintained that, as prior to bankruptcy the Court of Equity would have restrained misapplication of the money lent to any purpose other than that agreed upon and would have restrained departure from the agreed destination of the proceeds of sale of the goods, the rights protected by such remedy

(1) (1920) 28 C.L.R. 179, at p. 181.

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survived, notwithstanding the bankruptcy of Johnstone, and have not been affected by the agreement of May 1921, since that has been avoided. As to the survival of the rights, the test is the nature of the rights themselves before bankruptcy, and not whether the remedy of injunction or specific performance would have been available to the appellant as against Johnstone, before the latter's bankruptcy. Indeed, if Carey's protection depended simply on specific performance, it would indicate his failure now, because it would demonstrate that his only rights up to bankruptcy were contractual, and therefore, bankruptcy intervening, that remedy was gone. Carey can only succeed if he establishes, not that he would have succeeded against Johnstone on a personal contract, to which equity applies the remedy of specific performance as a better remedy than damages, but that by the agreement of April 1917 there arose, once the goods were purchased, a trust or interest in those goods—that is to say, a trust or interest attaching to the goods automatically on their purchase and binding on the conscience of Johnstone to deal with them as agreed upon so as to place their proceeds in the hands of Carey as provided in the agreement. That depends on the construction of the document read as a whole and in relation to the circumstances. The dominant purpose of the instrument as evident from its tenor was that Carey should not have to rely on the personal undertaking of Johnstone to repay the money lent as a mere unsecured debt. He was to be entrusted with the money only upon the terms that it should be applied exclusively to purchasing goods for the business, that it should be transformed into goods, and that the goods, once purchased, were to be retransformed "as soon as possible" by business operations into money and that money should be handed *in specie*, that is, the full actual proceeds, to the appellant, and these should be in the sole control of the appellant for distribution according to agreement. All that Johnstone was entitled to was a certain proportion of the gross *profits* after deducting the money lent.

In my opinion, there was a trust or interest created, beginning with the application of the money lent and following the goods and their proceeds. Clause 3 of the agreement is part of the arrangement creating the trust or interest. The goods came into existence

before the bankruptcy; the doctrine of equity usually called that of *Holroyd* v. *Marshall* (1), although much older, as Lord *Macnaghten* says in *Tailby* v. *Official Receiver* (2), applies, and the official assignee became entitled to the goods, but subject to the trust or interest in favour of Carey. *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (3), is the latest case, and in the judgment of Lord *Phillimore* (then *Phillimore* L.J.) may be read an exposition of the relevant law rendering superfluous further elucidation of principles or authorities, and needing only application to any given case.

The second point raised by the respondent, namely, that the agreement of 31st May 1921 was potent to destroy whatever rights Carey had, but powerless to give him any in substitution, is not, in my opinion, sustainable. The learned Chief Judge in Bankruptcy was asked by the trustee to declare it void, and he did declare it void practically by reason of the provisions of sec. 56 of the Act of 1898, namely, preference to a creditor. That avoidance necessarily goes back to the first moment of the existence of the agreement. The official assignee has therefore succeeded in obtaining a judgment that it never had any lawful existence. It would be not only illogical but monstrous that he could now set up, for purposes destructive of honest rights, a transaction that he has succeeded in having declared void *ab initio*, not void by any discretion of the Court, but inherently void by reason of the circumstances existing when it was entered into. I do not stop to examine cases establishing that in the ordinary course of litigation, where a party has by insisting on one view of a transaction obtained some advantage in the suit, he is not allowed subsequently, by reversing his attitude, to obtain another advantage. The official assignee's contention is now that Carey, by the agreement of 31st May 1921, considered as a valid agreement, parted with all his claim for money lent, according to one term of the agreement, and by the avoidance of the same agreement considered as an invalid agreement he has lost the goods, that is, the consideration for relinquishing his debt, according to the correlative term of the same agreement. This is so opposed to all elementary notions of justice and honesty that, unless coerced by some supreme authority—

(1) (1862) 10 H.L.C. 191.
(2) (1888) 13 App. Cas. 523.
(3) (1915) 2 Ch. 345.

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unknown to me so far—I must decline to sanction it by any approval of mine. *In re Gunsbourg* (1) might be usefully read, though more for the reasoning than the decision.

In my opinion the appeal should succeed.

STARKE J. The question in this case depends, in my opinion, upon the true construction of the agreement of 30th April 1917. Does that agreement give Carey "a mere right in contract" or does it give him "something in the nature of an estate or interest" (*In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (2))? It provides for advances to Johnstone for the purchase of goods or stock for the purpose of his business as an indentor, and provides also for the sale of such goods or stock, and payment of the proceeds of the sale into the credit of Carey in the Commonwealth Bank. As the goods were not in existence at the time of the agreement, it did not operate, either in equity or at law, as an assignment of goods. But it might "operate as a contract to assign if and when the property comes into existence," and then "equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment" (*In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind*; *Collyer* v. *Isaacs* (3)). It is not disputed that the goods came into existence long before the date of Johnstone's bankruptcy.

Now, it must depend upon the intention of the parties, as gathered from their agreement and the surrounding circumstances, whether that agreement operated as a contract creating some interest in the goods and the proceeds thereof, or whether it merely gave rise to a right in contract. The mode or form of the agreement is absolutely immaterial, provided the intention of the parties is clear (*Tailby* v. *Official Receiver* (4)). And I agree with my brother *Isaacs*, and for the reasons given by him, that this particular agreement did operate as an assignment in equity to Carey of an interest in the goods and the proceeds thereof, as security for his advances and his profits provided for in clause 6 of the agreement.

(1) (1920) 2 K.B. 426.
(2) (1915) 2 Ch., at p. 364.
(3) (1881) 19 Ch.D. 342, at p. 351.
(4) (1888) 13 App. Cas., at p. 543.

The transaction embodied in the document of 7th June 1921 was however relied upon as a release and discharge of Johnstone from all liability, claims and demands under the agreement of 30th April 1917. But Johnstone's official assignee in bankruptcy obtained a decree that this transaction was void against him; and he cannot now be allowed to say that, though the transaction is void against him, yet it is effective for the purpose of destroying Carey's rights under the April agreement. He cannot both reprobate and approbate the June transaction.

It was not argued that the provisions of the April agreement contravened the Bills of Sale Acts of New South Wales, in view of the decision of this Court in *Malick* v. *Lloyd* (1).

Appeal allowed. Declare that the appellant is entitled to a security, lien or charge under the agreement of 30th April 1917 *over and on the moneys the proceeds of goods purchased by means of his advances to secure such advances as are still unpaid and also one-half of the gross profits in accordance with clause* 6 *of the said agreement. Cause remitted to the Supreme Court to be further dealt with consistently with this judgment. Appellant to have his costs in the Supreme Court and in this Court.*

Solicitors for the appellant, *Rawlinson & Hamilton.*

Solicitor for the respondent, *G. W. Ash.*

B. L.

(1) (1913) 16 C.L.R. 483.