payment into Court to the credit of this cause." Save as aforesaid decree affirmed and appeal dismissed with costs.

H. C. OF A. 1925-1926.

MAYNARD v. GOODE.

Solicitors for the appellant, *Throsby, Young & Stellway*, Wagga Wagga, by *Dowling, Tayler & Macdonald.*

Solicitors for the respondent Goode, *Walsh & Blair*, Wagga Wagga, by *McDonell & Moffitt.*

B. L.

[PRIVY COUNCIL.]

PALMER . . . . . APPELLANT;

AND

CAREY . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT.

Contract—Construction—Agreement to lend money to trader—Repayment out of proceeds of goods—Security, lien or charge of lender over goods—Equitable assignment.

PRIVY COUNCIL.* 1926.

April 19.

By an agreement in writing made in New South Wales between the respondent and a person carrying on business as an indentor, which recited that the latter required additional capital to enable him to extend his business and that the respondent had agreed to advance various sums of money, it was agreed that the borrower should from time to time purchase goods for the purpose of the business and the respondent should advance the purchase-money therefor, which would be applied exclusively to such purchase. In consideration therefor the borrower agreed (*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 respondent at a certain bank; to attend diligently to the business and to the sale of the goods; and to keep proper books of account

* Present—Viscount Cave L.C., Lord Parmoor, Lord Wrenbury, Lord Blanesburgh and Lord Darling.

PRIVY COUNCIL. 1926. PALMER v. CAREY.

and permit the respondent to have free access to and to inspect such books. It was further agreed that during the continuance of the agreement a monthly account should be taken by the borrower and furnished to the respondent of the purchases and sales and showing the net gross profits derived therefrom, and that the respondent, 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 respondent.

Held, that the respondent had not a security, lien or charge over or on goods purchased by the borrower pursuant to the agreement or over or on moneys the proceeds of the sale of such goods.

Decision of the High Court: *Carey* v. *Palmer*, (1924) 34 C.L.R. 380, reversed.

APPEAL from the High Court to the Privy Council.

This was an appeal by William Harrington Palmer from the decision of the High Court: *Carey* v. *Palmer* (1).

The judgment of their Lordships, which was delivered by Lord WRENBURY, was as follows:—

The appellant is assignee in bankruptcy of the estate of one Alfred Edwin Johnstone, a trader. He was so appointed on 21st June 1921. The question on the appeal is whether an agreement, dated 30th April 1917, made between Johnstone of the one part and the respondent of the other part is an equitable assignment. If it is not, no other question arises. If it is, then, inasmuch as the agreement was not registered under the Bills of Sale Acts, a further question arises under those Acts.

The trial Judge held that the agreement was not an equitable assignment. The High Court of Australia, by a majority (the Chief Justice dissenting), held that it was. The assignee in bankruptcy appeals.

The facts are that in April 1917 the bankrupt wanted to obtain money for the purchase of goods to be sold in his business of an indentor and importer, which he carried on in Sydney. The respondent, who may be called the lender, agreed to advance him money for this purpose, and the terms upon which the advances were to be made were expressed in the agreement of 30th April

(1) (1924) 34 C.L.R. 380.

1917. The effect of that agreement is as follows:—The borrower was from time to time to purchase goods for his business and the lender was to advance the purchase-money for them. The borrower was (art. 3) to sell the goods as soon as possible and to pay the proceeds of sale into the lender's credit at the lender's bank. The borrower (art. 4) was to be diligent in carrying on the business, and (art. 5) to keep proper books of account and give the lender access to them. A monthly account (art. 6) was to be furnished to the lender, and he, after deducting the amount he had advanced and one-third of the gross profits, was to pay the borrower the remaining two-thirds of the gross profits, and (art. 7) the agreement was not to constitute a partnership.

The amount to be advanced was originally fixed at £1,000. By verbal arrangement this was increased to £1,500 and the lender's share of gross profits was increased to one-half. The £1,500 was advanced. Further sums were advanced, partly by the respondent's father and partly by the Commonwealth Bank by way of overdraft on the lender's account. These amounts ultimately ran up to £18,990 16s. 3d. By letters dated 31st May 1921 and 7th June 1921 the lender, with knowledge that the borrower was financially embarrassed, entered into an agreement in writing with the borrower by which, in consideration of the release of this sum of £18,990 16s. 3d., the borrower assigned to the lender all the stock of his business.

On 21st June 1921 the bankrupt's estate was sequestrated and the appellant was appointed assignee in bankruptcy. The assignment of the goods in 1921 has been declared void, and the only question to be determined is whether the lender has, under the agreement of 30th April 1917, any charge upon or equitable interest in the stock-in-trade or the moneys in the hands of the lender.

The article in the agreement of 30th April 1917 upon which reliance was placed by the respondent and which the trial Judge held did not create an equitable assignment was art. 3. That article, when stated in full, is as follows: "3. To sell such goods or stock as soon as possible after the purchase thereof and to pay the proceeds of such sale forthwith into the credit of the lender at the Head Office of the Commonwealth Bank in Sydney."

PRIVY COUNCIL. 1926. PALMER v. CAREY.

The law as to equitable assignment, as stated by Lord *Truro* in *Rodick* v. *Gandell* (1), is this: "The extent of the principle to be deduced . . . is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will constitute a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way. But if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance.

Their Lordships have to look at the agreement of 30th April 1917 with these principles in mind. Under art. 1 of that agreement the money when borrowed is the borrower's money, and the lender becomes a creditor. The goods when purchased are the borrower's goods. They have been bought with his money. There is nothing in the agreement to make them the lender's goods. The goods are to be sold. The proceeds of sale when the goods are sold belong to the borrower. They arise from the sale of goods belonging to him. Under art. 3, however, the proceeds are to be paid to the lender's credit at his bank. This gives the lender a most efficient hold to prevent the misapplication of the proceeds, but there is nothing in that article to give him a property by way of security or otherwise in the moneys of the borrower before or after he, the lender, has them in his charge. Art. 6 was not relied on as giving an equitable charge, and it is difficult to see how it could be relied upon for that

(1) (1852) 1 DeG. M. & G. 763, at pp. 777-778.

purpose. It is an article determining the distribution between the parties in manner there defined of a fund which is in the hands of one of them.

Their Lordships, therefore, fail to find in the agreement any provision creating, contractually or otherwise, any right of property in either the goods or the proceeds of sale of the goods. The Chief Justice says (1): "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." Their Lordships agree with this. In their judgment the trial Judge and the Chief Justice are right, and this appeal must be allowed, and the order of the trial Judge of 19th December 1923 restored with costs before the High Court of Australia and before this Board. The second question, namely, as to the *Bills of Sale Act*, therefore, does not arise.

Their Lordships will humbly advise His Majesty accordingly.

(1) (1924) 34 C.L.R., at p. 388.