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APPELLANT'S CASE.

In the Privy Council.

No. 54 of 1925.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA, NEW SOUTH WALES REGISTRY.

BETWEEN

WILLIAM HARRINGTON PALMER .. .. (*Applicant*) *Appellant*,

AND

RANDAL WESTROPP CAREY .. .. (*Respondent*) *Respondent*.

CASE FOR THE APPELLANT.

Record.

1. This is an appeal by special leave from a judgment of the High Court of Australia (Chief Justice Sir Adrian Knox, Isaacs and Starke JJ.) dated the 10th June 1924 reversing by a majority of two to one (the Chief Justice dissenting) a judgment of the Chief Judge in Bankruptcy in the State of New South Wales (Street C.J.) dated the 19th December 1923 in favour of the Appellant.

p. 64.

p. 60.

2. The main questions involved in this case are questions of law :—

(1) Whether, when 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 the proceeds thereof to the lender upon terms that the lender shall hold such proceeds upon trust both for lender and borrower in certain fixed shares and subject to certain deductions, the lender before sale by the borrower acquires such an equitable interest in the goods as will in the event of bankruptcy of the borrower defeat wholly or in part the claim of the Official Assignee to take and realise the goods for the benefit of the general body of creditors.

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(2) Whether under the laws of New South Wales in the event of such an agreement being held to be an equitable assignment of such goods the same is not void unless registered as a Bill of Sale.

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There is also a further question as to how much of the money borrowed by the bankrupt in this case who was the trader in question was affected by the agreement in question.

3. There is no dispute as to the facts.

Record. p. 3, l. 33.

4. The Appellant was appointed assignee in bankruptcy of the estate of one Alfred Edwin Johnstone on the 21st June 1921.

5. Prior to his bankruptcy Alfred Edwin Johnstone (hereinafter referred to as the bankrupt) carried on business in Sydney as an Indentor and Importer.

6. On the 30th April 1917 the bankrupt being anxious to obtain money for the purchase of goods to be sold in his business entered into an agreement in writing with the Respondent whereby the Respondent agreed to advance to the bankrupt various sums of money up to an aggregate of one thousand pounds. The terms of this agreement were as follows :—

Exhibit B, p. 72.

"(1) The borrower shall from time to time purchase goods or " stocks for the purpose of the said business and the lender agrees " to advance the purchase moneys therefor and which will be applied " exclusively for such purposes as aforesaid.

"(2) In consideration therefor the borrower hereby covenants " with the lender as follows, viz :—

"(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."

pp. 38, 39.

By a subsequent verbal arrangement between the parties about the 16th May 1917 it was agreed that the amount to be lent under the agreement should be increased to £1,500 and the share of the gross profits to be deducted by the lender increased to one-half.

7. In accordance with the above arrangements the Respondents advanced sums to the aggregate of £1,500. The Respondent also had by the 13th May 1921 advanced further sums so that on that date a sum of £3,308 4s. 1d. remained owing to him in respect of his total advances. No

p. 83.

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18990 16 3

Record.

further agreement was made as to these further advances, but all the money so advanced was employed in the purchase of stock.

In addition to the loans by the Respondent, the Respondent's father one J. R. Carey advanced to the business during the same period various sums from time to time amounting in all to £9,000. No evidence was given as to the terms on which the first £4,000 was advanced but as to the final loan of £5,000 made on the 11th August 1920 an agreement was made in the following terms:—

Exhibit 9, p. 75.

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"36 York Street,
"Sydney.
"9th August, 1920.

p. 81, l. 30.

"J. R. Carey, Esq.,
"Milsons Point.

"Dear Sir,

"We hereby agree that in consideration of your advancing to us "the sum of five thousand pounds (£5,000) for three months from date "that no further purchase of goods will be made until our stock is "reduced to under seven thousand pounds (£7,000). The above "mentioned sum to bear interest at the rate of ten per cent. per annum.

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"Yours faithfully,

"ALFRED E. JOHNSTONE.
"R. W. CAREY."

The balance owing on the above loans by J. R. Carey was on the 13th May 1921, £7,500.

p. 83, l. 4.

The position as on the 13th May 1921 is shown by the Balance Sheet as on that date prepared by the Respondent and dated 31st May 1921.

Exhibit Z, p. 83.

8. In addition to the loans above referred to by agreement between the Bankrupt and the Respondent arrangements were come to with the Commonwealth Bank of Australia for an overdraft in the name of the Respondent secured by bond warrants and other documents relating to the goods purchased to be lodged with the bank. The balance sheet above referred to shows a sum owing to the Bank on that date of £8,179 11s. 10d. This amount had increased by the 31st May 1921 to £8,182 12s. 2d.

p. 31, l. 17.

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p. 34, l. 35.

p. 85, l. 27.

9. On the 31st May 1921 in view of the embarrassed circumstances of the bankrupt at that time admittedly known to the Respondent the Respondent procured the bankrupt to sign a document in the following terms:—

"In consideration of your giving me a release for the sum of "£18,990 16s. 3d. (eighteen thousand nine hundred and ninety pounds "sixteen shillings and three pence) 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."

p. 84, l. 9.

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Record.

The total sum referred to in this document is the aggregate of the sums aforesaid of £3,308 4s. 1d., £7,500 and £8,182 12s. 2d. owing to the Respondent the Respondent's father and the Bank respectively on the date in question.

10. On receipt of this document the Respondent on the 7th June 1921 wrote the bankrupt in the following terms :—

p. 85.

" Dear Sir,

" In consideration of the sale and delivery to me of the stock-in-" trade and tenants 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 10 " 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 " overdrafts in my name with the Commonwealth Bank amounting to 20 " £8,182 12s. 2d. but to personally undertake all liability therefor."

p. 58, l. 27.

11. In accordance with the arrangement aforesaid the Respondent took delivery and entered into possession of the bankrupt's stock in trade and other goods which are the subject of this litigation, the cost price of which with charges amounted to £15,151 9s. 11d.

p. 4, l. 16.
p. 79.

On the 21st June 1921 the bankrupt's estate was sequestrated and the Appellant having been appointed assignee in Bankruptcy of the bankrupt's estate discovered that the assets apart from the goods in the hands of the Respondent were £558 16s. 0d. and the unsecured debts exceeded £4,000. Unsecured debts amounting to £3,708 1s. 2d. were proved in these pro- 30 ceedings.

pp. 1-2.

12. The Appellant therefore took steps under Section 134 of the New South Wales Bankruptcy Act 1898 to have the transaction of the 31st May 1921 set aside as void against him. On the 2nd June 1922 he filed a notice of Motion in the Supreme Court of New South Wales in Bankruptcy for a declaration to that effect and for an order directing the Respondent to pay to the Appellant the value as at the date of such transaction of the assets thereby disposed of upon the following grounds :—

p. 2, l. 7.

" (1) That the said Lease fixtures stock-in-trade book debts and " all other assets were the property of the said bankrupt at the com- 40 " mencement of the bankruptcy herein and as such passed to and " became vested in the said official Assignee.

" (2) That the said sale handing over delivery assignment and " transfer were made by the said bankrupt with intent to defeat or " delay his creditors.

"(3) That the said sale handing over delivery assignment and "transfer were void as against the said official Assignee within the "meaning of Section 56 of the Bankruptcy Act 1898.

"(4) That the said Randal Westropp Carey converted to his own "use or wrongly deprived the said Official Assignee of the use and "possession of the said Lease fixtures stock-in-trade book debts and "other assets."

13. The relevant sections of the Bankruptcy Act of New South Wales 1898 as amended by Act No. 6 of 1919 are as follows :—

10 "S. 134. (4) Whenever the Official Assignee or trustee claims "any property as part of the bankrupt's estate, or claims any right "against any person, whether such person is or is not a party to the "bankruptcy, the Court may upon motion by the assignee or trustee "or any person interested in such property hear and determine, either "upon affidavit or upon oral evidence, or both upon affidavits and oral "evidence, the question raised by such claim, and make such order "thereupon as he may deem expedient or necessary, for the purpose of "doing complete justice between all the parties interested.

"S. 56. (1) Every alienation, transfer, gift, surrender, delivery, 20 "mortgage, or pledge of any estate or property, real or personal, every "warrant of attorney or judicial proceeding made, taken, or suffered "by a person being at the time insolvent or in contemplation of sur-"rendering his estate under this Act, or knowing that proceedings for "placing the same under sequestration have been commenced, or "within sixty days before the sequestration thereof, and, whether "fraudulent or not, having the effect in any such case of preferring any "then existing creditor to another shall be absolutely void.

"(2) For the purpose of this section the word insolvent means "the inability of a person to pay his debts as they become due from his 30 "own moneys."

14. The relevant sections of the Bills of Sale Act of New South Wales (No. 10 of 1898, as amended) are as follows :—

"3. . . . 'Bill of Sale' shall include bills of sale, assignments, "transfers, declarations of trust without transfer, and other assurances "of personal chattels, and also powers of attorney, authorities, or "licenses to take possession of personal chattels as security for any "debt, but shall not include the following documents, that is to say :—

"Assignments for the benefit of the creditors of the person "making or giving the same ; marriage settlements ; transfers or 40 "assignments of any ship or vessel, or any share thereof ; transfers "of goods in the ordinary course of business of any trade or calling ; "bills of sale of goods in foreign parts or at sea ; bills of lading ; India "warrants ; warehouse-keepers' certificates, warrants, or orders for "the delivery of goods ; or any other documents used in the ordinary "course of business as proof of the possession or control of goods,

Record.

" or authorising, or purporting to authorise, either by indorsement
" or by delivery, the possessor of such document to transfer or
" receive goods thereby represented.

* * * * * *

" 5. No bill of sale shall have any validity as against the official
" assignee or trustee of a bankrupt estate, unless it is duly registered in
" accordance with, and within the time prescribed by this Act or any
" Act amending the same, and unless such registration is renewed by
" the grantee, or his assignee, once at least in every twelve months.

" 6. No promise to give a bill of sale shall have any validity for 10
" any purpose, against the official assignee or trustee of a bankrupt
" estate, unless it be in writing, stating the amount secured thereby, the
" names, residences, and occupations of the parties thereto, and signed
" by the person making the promise, and unless it be registered in
" accordance with and within the time prescribed by this Act, or any
" Act amending the same, with regard to the registration of bills of
" sale, and unless such registration is renewed by the promisee once
" at least in every twelve months."

15. The Partnership Act 1892 of New South Wales (55 Victoria No. 12) after declaring in Section 2 that the advance of money by way of loan to 20 a person engaged or about to engage in any business on a contract with that person that the lender shall receive a share of the profits arising from carrying on the business does not of itself make the lender a partner, provides, by Section 3 :—

" 3. In the event of any person to whom money has been advanced
" by way of loan upon such a contract as is mentioned in the last
" foregoing section, or of any buyer of a goodwill in consideration of
" a share of the profits of the business being adjudged a bankrupt,
" entering into an arrangement to pay his creditors less than twenty
" shillings in the pound, or dying in insolvent circumstances, the lender 30
" of the loan shall not be entitled to recover anything in respect of his
" loan, and the seller of the goodwill shall not be entitled to recover
" anything in respect of the share of profits contracted for, until the
" claims of the other creditors of the borrower or buyer for valuable
" consideration in money or money's worth have been satisfied."

16. The Motion came on before the Bankruptcy Court (Street C.J.) on the 13th September 1922 and following days. The Respondent contended that he was a partner with the bankrupt and therefore was a joint owner with him of the property in question. The Respondent gave evidence as to the nature of his interest in the business and his relations with the bankrupt. 40 On the 18th September 1922 the Court gave judgment in favour of the Appellant granting him the declaration prayed for and ordering a reference to the Registrar for the purpose of ascertaining the value of the assets.

pp. 36. 37.

p. 54.

17. The Chief Judge gave the following reasons for his decision :— Record. pp. 50-53.

(1) That it was clear from the nature of the agreement of 30th April 1917 and the evidence of the Respondent, and on the documents especially the agreement of 31st May 1921 and the letter of 7th June 1921 that no partnership was ever formed between the Respondent and the bankrupt.

(2) That in the absence of joint ownership of the relevant assets the transaction of 31st May 1921 entered into by the Respondent with knowledge of the insolvent circumstances of the bankrupt must be 10 void against the Appellant.

18. The Respondent appealed to the High Court of Australia (Chief Justice Sir Adrian Knox, Isaacs and Starke JJ.) and on the 31st July 1923 p. 56. the Court gave judgment by consent of both parties ordering that the order appealed from be varied to the extent of allowing a deduction from the amount to be paid to the Appellant thereunder in respect of any security lien or charge to which the Respondent might be entitled under Clause 3 of the agreement of 30th April 1917. The Court further ordered by consent that the matter should be referred back to the Bankruptcy Court for the determination of the existence and extent of such security lien or charge. 20 The Appeal of the Respondent in other respects was dismissed with costs so that on the contention of the Respondent that he was a partner there is a concurrent finding of fact against him and no appeal has been or is being brought from this decision.

19. The learned Judges in the High Court of Australia gave no reasons for their order which was made as aforesaid by consent. The question of the lien was not raised by Counsel for the Respondent but the suggestion was first thrown out by Mr. Justice Starke in the course of the hearing.

20. In accordance with the order aforesaid the matter again came before the Bankruptcy Court of New South Wales (Street C.J.) on 18th December p. 60. 30 1923 and on the 19th December 1923 the Court delivered judgment to the effect that the Respondent was not entitled to any security lien or charge under Clause 3 of the agreement of the 30th April 1917.

21. Street C.J. gave reasons for his decision as follows :— pp. 61-62.

(1) No such charge was expressed to be given in the agreement of 30th April 1917 and if such charge had been intended it might have been expected to be expressed.

(2) The subsequent action of the Respondent and in particular the transaction of 31st May 1921 was inconsistent with such charge having been in the contemplation of the parties.

40 **22.** On the 7th January 1924 the Respondent gave notice of Appeal from the above judgment of the Bankruptcy Court to the High Court of p. 63. Australia and the appeal coming on for hearing in that Court (Chief Justice Sir Adrian Knox, Isaacs and Starke JJ.) judgment therein was delivered

Record.

pp. 64, 65.

on the 10th June 1924 reversing the decision appealed from by a majority of two to one (the Chief Justice dissenting).

23. The learned Judges in the High Court gave the following among other reasons for their decision :—

The Chief Justice in his dissenting judgment said :—

p. 65.

(1) That the wording of the agreement of 30th April 1917 was apt to express a contract but not to indicate an assignment of any interest in the goods to be acquired, and that a trust could not be created contrary to the real intention of the parties alleged to have created it. 10

(2) That the conduct of the Respondent and the transaction of 31st May 1921 were inconsistent with any such intention.

(3) That the Respondent's contention involved a very far-reaching proposition of law as to assignment of after-acquired property especially in view of the decision of the Court in *Malick* v. *Lloyd* (16 C.L.R. 403) that such an assignment did not require registration under the Bills of Sale Acts.

Mr. Justice Isaacs held :—

p. 68.

(1) That the agreement of 30th April 1917 created a trust or interest in favour of the Respondent beginning with the application of the money 20 lent thereunder and following the goods and their proceeds.

(2) That such goods having come into existence before the bankruptcy the principle in *Holroyd* v. *Marshall* (10 H.L.C. 191) applied and the Appellant was only entitled to the goods subject to the trust or interest in favour of the Respondent.

(3) That the decision of the Judge in Bankruptcy that the agreement of 31st May 1921 was void under Section 56 of the Bankruptcy Act against the Appellant made the agreement void *ab initio* and it was not now open to the Appellant to contend that the rights of the Respondent under the earlier agreement had been thereby annulled. 30

p. 70.

Mr. Justice Starke gave reasons similar to those given by Mr. Justice Isaacs and observed that the further point arising in the circumstances as to whether the agreement of 30th April 1917 was not in contravention of the Bills of Sale Act was not argued because of the decision of the Court in *Malick* v. *Lloyd* (*ubi supra*).

24. The Appellant respectfully submits that the creation of an equitable interest is always a question of intention of the parties and that on the true contruction of the agreement of 30th April 1917 both in itself and when read in connection with the subsequent conduct of the parties and in particular the agreement of 31st May 1921 no intention appears to create any 40 interest in the future acquired property of the bankrupt other than a contractual interest under such agreement.

To construe the agreement as giving the Respondent a lien in respect of money lent would, it is submitted, defeat the object of Section 3 of the New South Wales Partnership Act 1892.

25. The Appellant further submits that upon the true construction of said agreement both in itself and when read in connection with the subsequent conduct of the parties it was a condition precedent to the lenders' right to receive the proceeds of the sale of the goods in question that the sale should be one under the control of the borrower and that by reason of the transaction of 31st May 1921 and the subsequent conduct of the lender such control was prevented.

26. The Appellant further submits that if any such equitable interest or charge was created as was held by the High Court of Australia to exist 10 it was destroyed by the subsequent agreements of 31st May 1921 and 7th June 1921 which did not become void *ab initio* by the declaration of the bankruptcy judgment under Section 56 of the Bankruptcy Act, but was thereby avoided only in so far as assets purporting to pass thereunder were necessary to satisfy creditors in the bankruptcy.

27. The Appellant further submits that if the interpretation given to the agreement of 30th April 1917 by the High Court of Australia be correct the said agreement not having been registered as a Bill of Sale is void under the Bills of Sale Act 1898, and that the decision of that Court in *Malick* v. *Lloyd* (*ubi supra*) that the Acts did not apply to the assignment of after- 20 acquired property is wrong and ought to be overruled.

28. The Appellant further submits that even if the construction put by the learned Judges constituting the majority of the High Court of Australia on the legal effect of the agreement of 30th April 1917 be correct, the equitable interest thereby created only attaches to goods purchased with money lent by the Respondent thereunder. It can have no reference to that part of the total sum of £18,990 16s. 3d. which represents the £7,500 owing to the Respondent's father or the £8,182 12s. 2d. owing to the Commonwealth Bank. As to the total of £3,308 4s. 1d. owing to the Respondent it can only attach to such (if any) of the goods purchased with the £1,000 referred 30 to therein (or at least with the additional £500 which was the subject of the verbal extension of the agreement on the 16th May 1917) or their proceeds as had not been disposed of prior to the date of sequestration of the bankrupt's estate.

29. The Appellant therefore submits that the judgment of the High Court of Australia was wrong and ought to be overruled and that the judgment of the Supreme Court of New South Wales in its Bankruptcy Jurisdiction dated the 19th December 1923 was right and ought to be restored for the following among other

REASONS.

40 1. Because the agreement of 30th April 1917 does not purport to create any equitable right or interest in the bankrupt's property in favour of the Respondent.

2. Because the creation of any such interest in the circumstances of this case would be contrary to the policy of the New South Wales Partnership Act, Section 3, and should not be inferred.

3. Because if the agreement of 30th April 1917 did create any equitable right or interest in the Respondent the agreement was void under the Bills of Sale Act (N.S.W. No. 10 of 1898).

4. Because the agreement of the 31st May 1921 had the necessary effect of annulling any equitable right or interest which the Respondent might have had under the earlier agreement. 10

5. Because it was a condition precedent to the creation of any such right or interest that the borrower should have control of sale of goods and the fulfilment of this condition was prevented by conduct of the lender and by the transaction of 31st May 1921.

6. Because the effect of the order of the Supreme Court of New South Wales in its Bankruptcy Jurisdiction dated 18th September 1922, confirmed by the High Court of Australia (subject to a variation in this respect irrelevant) by its order of 31st July 1923, was not to make the agreement of 31st May 1921 void *ab initio* but only to avoid it as against the Appellant to the extent that the property thereby affected was required to satisfy the claims of the other creditors in the bankruptcy. 20

7. Because the agreement of 30th April 1917 could only affect the money advanced by the Respondent under that agreement and not other advances subsequently made without reference to that agreement or money advanced on special terms and conditions by the Respondent's father or the Commonwealth Bank. 30

8. Because the reasons given for his judgment on the 19th December 1923 by Chief Judge Street and for his dissenting judgment in the High Court of Australia on the 10th June 1924 by the Chief Justice of Australia are right.

9. Because the reasons given for their judgments by the learned judges constituting the majority in the High Court of Australia on the 10th June 1924 are wrong. 40

A. C. CLAUSON.
GEOFFREY LAWRENCE.

In the Privy Council.

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BLAKE & REDDEN,
17, Victoria Street,
S.W.1.