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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 54

14618

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

BETWEEN

WILLIAM HARRINGTON PALMER - - (*Applicant*) *Appellant*

AND

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

RECORD OF PROCEEDINGS.

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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*.

RECORD OF PROCEEDINGS.

No. 1.

Notice of Motion.

Re ALFRED EDWIN JOHNSTONE - - - - *Bankrupt*

Ex Parte THE OFFICIAL ASSIGNEE.

RANDAL WESTROPP CAREY - - - - *Respondent*.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

No. 1.
Notice of
Motion,
2nd June
1922.

TAKE NOTICE that this Honourable Court will be moved at the Supreme Court House King Street Sydney on Tuesday the twentieth day of June One thousand nine hundred and twenty-two at the hour of ten o'clock in the forenoon or so soon thereafter as the course of business will permit on behalf of William Harrington Palmer Official Assignee of the Estate of the abovenamed bankrupt FOR AN ORDER declaring void as against the said Official Assignee the sale handing over delivery assignment and transfer by the said bankrupt to the said Randal Westropp Carey of the Lease fixtures stock-in-trade book debts and all other assets of the said Bankrupt of or in connection with a certain business carried on by the said Bankrupt in York Street Sydney AND FOR AN ORDER directing the said Randal Westropp Carey to pay to the said Official Assignee the value as of the date of the said sale and delivery or as of such other date as this Honourable Court shall direct of the said Lease fixtures

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

No. 1.
Notice of
Motion,
2nd June
1922—con-
tinued.

stock-in-trade book debts and all other assets AND FOR AN ORDER referring it to the Registrar in Bankruptcy to inquire and ascertain the nature and value of the said Lease fixtures stock-in-trade book debts and other assets AND FOR AN ORDER directing the said Randal Westropp Carey to pay the Official Assignee the costs of this Motion upon the following grounds—

(1) That the said Lease fixtures stock-in-trade book debts and all other assets were the property of the said Bankrupt at the commencement of the bankruptcy herein and as such passed to and became vested in the said Official Assignee. 10

(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. 20

AND FURTHER TAKE NOTICE that it is intended to rely on the act of bankruptcy committed by the said Bankrupt in selling handing over assigning and transferring the said Lease fixtures stock-in-trade book debts and other assets for the purpose of antedating the commencement of the bankruptcy herein AND FOR SUCH FURTHER AND OTHER ORDER in the premises as this Honourable Court shall think fit to make.

DATED this Second day of June One thousand nine hundred and twenty-two.

G. W. ASH,
Solicitor for the said Official 30
Assignee.

To the withinnamed Randal Westropp Carey.

NOTE.—It is intended to serve this Notice of Motion on the above-named Randal Westropp Carey and to use in support thereof oral evidence.

No. 2.

Respondent's Appearance.

PALMER v. CAREY.

The abovenamed Respondent Randal Westropp Carey by Rawlinson and Hamilton his Solicitors appears herein and disputes the whole of the Applicant's claim.

Dated this seventh day of June 1922.

RAWLINSON & HAMILTON,
Solicitors for the Respondent.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

No. 2.
Respon-
dent's
Appearance,
7th June
1922.

10 NOTE.—This appearance is filed by Messrs. Rawlinson and Hamilton of 91 Phillip Street Sydney Solicitors for the said Randal Westropp Carey whose address is Number 36 York Street Sydney aforesaid and all notices and documents may be served at the office of the said Rawlinson and Hamilton.

No. 3.

Evidence of William H. Palmer.

Motion under Sec. 134.

Mr. Loxton, K.C., Mr. R. K. Manning and Mr. Kidston appeared for The Official Assignee.

20 Mr. Flannery, K.C., and Mr. H. H. Mason appeared for the Respondent.

(Admitted by Counsel for respondent that the date of sequestration was 21st June, 1921; that it was a voluntary sequestration, and that W. H. Palmer, the applicant, was appointed Official Assignee).

(Evidence of Respondent given before Registrar in Bankruptcy on 30th June, 1921, tendered and marked Ex. "A." Same read to the Court.)

(Agreement referred to in depositions dated 30th April, 1917, tendered and marked Ex. "B.")

WILLIAM HARRINGTON PALMER,

30 Sworn and examined as under :

Mr. Loxton: *Q.* You are the Official Assignee of the bankrupt estate of A. E. Johnstone?—*A.* Yes.

Q. You were appointed Official Assignee on 21st June, 1921?—*A.* Yes.

Q. Immediately after your appointment you went into possession of the assets of the bankrupt?—*A.* Yes.

Q. Apart from the assets that are being attacked in this notice of motion, what are the only assets of the bankrupt? (*Objected to by Mr. Mason.*)

Applicant's
Evidence.

No. 3.
William H.
Palmer.
Examina-
tion.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

Applicant's
Evidence.

No. 3.
William H.
Palmer.
Examina-
tion—con-
tinued.

Mr. Loxton : Q. Well, so far as you have been able to ascertain?
(*Question objected to—Mr. Mason submitting that assets outside the
York Street business are not in question here. Evidence admitted.*)

Mr. Loxton : Q. What were the assets other than those that you are
attempting to recover under this notice of motion?—*A.* They were good,
consisting of silks, crepes, book debts, household furniture, rebates from
the Customs, refund of Railway season ticket and an interest in land on the
Mountains.

Q. Dealing with the real estate at Medlow—what was the position of
that?—*A.* The bankrupt had entered into a contract to purchase it from 10
Miss Laverty, on terms. I endeavoured to realise on it—it was advertised,
and an auction sale held, but there were no offers. Subsequently I received
the sanction of the Court to accept £10 for my interest in it, which I did.

Q. Have you realised upon the personalty?—*A.* Yes, I think I have
realised everything except some bad debts that I cannot collect.

Q. What is the total amount you have been able to realise in respect
of the assets?—*A.* £558/16/- net. That includes the Medlow land.

Q. Is that what you consider a fair value of the assets that you have
before arrived to?—*A.* Yes.

Q. I understand that no proofs have been yet lodged in respect of the 20
York Street property?—*A.* Not that I know of.

Q. With respect to the Clarence Street property, what do the proofs
that have been already lodged at the present time, come to?

(*Question objected to by Mr. Mason : Question not pressed.*)

(*Two documents dated respectively 31st May and 1st June, 1921, tendered
and marked Ex. "C."*)

No. 4.
John
Fennell.
Examina-
tion.

No. 4.

Evidence of John Fennell.

Sworn, examined as under :

Mr. Loxton : Q. You are the Managing Director of John Fennell and 30
Company Limited, Indent Merchants and Manufacturers' Agents, carrying
on business in Clarence Street, Sydney?—*A.* Yes.

Q. I believe your company had a number of transactions with the
bankrupt prior to the sequestration of his estate, and prior to the 31st May,
1921?—*A.* Yes.

Q. He was indebted to you in a certain amount prior to 31st May,
1921?—*A.* Yes.

Q. What was the extent of his indebtedness?—*A.* £420.

Q. Was that for goods supplied to him?—*A.* Yes.

Q. You had sued him in respect of portion of that indebtedness?—
A. For about half.

Q. And had actually obtained judgment in respect of that half?—
A. Yes.

Q. Did you hold any promissory notes or bills of exchange?—A. Yes, we held a promissory note for the balance.

Q. What was the amount of that balance?—A. £220.

Q. Was that promissory note ever presented, or did he become bankrupt before the presentation?—A. It was presented and dishonoured.

10 Q. Presented prior to the 31st May?—A. No, it was not due till after that date.

Q. It was presented between the 31st May and the 21st June, 1921, that is, the date of sequestration of his estate?—A. I would not say for certain. I have an idea it ran till about the end of June before it was presented.

Q. That was after he became bankrupt?—A. Yes.

Q. Did you ever see the respondent Carey in connection with any transaction with the bankrupt?—A. No, not in connection with the bankrupt.

20 Q. Did you ever discuss the bankrupt's affairs with him?—A. Not till after—I should say about July.

Q. Did the bankrupt ever give you a cheque prior to the 31st May, 1921?—A. Yes; that would be the cheque that we sued on.

Q. Was the cheque presented and dishonoured prior to the 31st May?—A. Yes.

Q. What was the amount of the cheque?—A. £200 (*Cheque handed to witness*) That is the cheque.

30 *(Cheque tendered; formally objected to on the ground of relevancy; admitted and marked Ex. "D." His Honour intimated to Mr. Mason that the admission of the cheque would not prevent his discussing the weight to be given to it or its relevancy.)*

Q. (*Handing document to witness*): Just look at that document and see whether you can identify it as anything you handed to anybody?—
A. It would be a statement which would more than likely go through the post to Johnstone.

Q. Do you recognise what that statement is?—A. Yes, a statement for goods supplied.

Q. What do you say in respect of that document; you still say that is a statement?—A. Yes.

40 Q. And that relates to your transactions with the bankrupt?—A. Yes.
(Above statement tendered—objected to on the same ground as in Ex. "D"; admitted and marked Ex. "E.")

Q. Do you want to correct your evidence in saying no promissory note had been dishonoured prior to 31st May?—A. I do not think it was dis-

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Wales
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ruptcy).*

Applicant's
Evidence.

No. 4.
John
Fennell.
Examina-
tion—con-
tinued.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

Applicant's
Evidence.

No. 4.

John
Fennell.
Examina-
tion—con-
tinued.

honoured. It was renewed. We withdrew the promissory note and accepted a cheque and a promissory note for the balance.

Q. About when would that be?—*A.* About 26th May.

Q. How was it you came to do that?—*A.* He pointed out at the time that he was not in a position to meet the full amount (*objected to*).

Q. What conversation passed between you and the bankrupt?—

A. When the first promissory note was about due Johnstone called upon me and said that he could not meet the full amount and asked whether we would give him an extension. I told him yes, and he then gave us a cheque for £200, and the balance on a promissory note. 10

Q. That cheque was the cheque you have spoken about as having been dishonoured and in respect of which you issued the writ?—*A.* Yes.

(*Order given by Johnstone and Carey to John Fennell and Co. Limited, dated 30th September, 1919, tendered and marked Ex. "F."*)

Cross-exa-
mination.

Cross-examination.

Mr. Mason: *Q.* Just look at Ex. F. That is an order that was given in 1919 to your firm?—*A.* Yes.

Q. Do you recognise the signatures on that document?—*A.* Yes.

Q. Mr. Carey's and Mr. Johnstone's?—*A.* Yes.

Q. The goods referred to in Exhibit E—that is the invoice of 1st June, 1921—were supplied to Clarence Street?—*A.* No, to York Street. 20

Q. When were they supplied to York Street?—*A.* I should say round about February–March, from memory.

Q. Do you say those goods were delivered to York Street?—*A.* They were bought by Mr. Johnstone and invoiced to York Street. Whether they were delivered or not I do not know.

Q. I am asking you are you in a position to say those goods mentioned in Ex. E were delivered to York Street?—*A.* No, I am not.

Q. Who ordered those goods?—*A.* Mr. Johnstone.

Q. Mr. Johnstone personally?—*A.* Yes. 30

Q. Who ordered the goods mentioned in Exhibit F?—*A.* Mr. Johnstone and Mr. Carey.

Q. And are those the only two transactions your firm has ever had with Johnstone or with Johnstone and Carey?—*A.* To my knowledge, yes.

Q. What was the nature of those goods that are referred to in Exhibit E?—*A.* Silk goods.

Q. What sort of silk?—*A.* Piece goods, crepe de chine or Japanese silk.

Q. You did not see Mr. Carey at all in connection with this order referred to in Exhibit E?—*A.* No.

Re-exa-
mination.

Re-examination.

40

Mr. Loxton: *Q.* In respect of the goods referred to in Exhibit F, who saw you first of all with respect to those goods?—*A.* A broker,

Q. On whose behalf did he come or did he say he came?—A. Johnstone, and at the same time he mentioned Carey was the principal man in the business.

Q. And then you made out the invoice that way?—A. I think we made inquiries first. We made this out and insisted upon Mr. Carey signing it.

Q. And were those goods paid for?—A. Yes.

Q. That is, duly paid for within a reasonable period?—A. Yes.

Q. Then the next transaction was Mr. Johnstone came to see you?—
A. I think it originated through the same broker, Mr. Field. The terms
10 he wanted were 60 days, and Mr. Johnstone came along.

Q. (*Documents handed to witness*). Is that the invoice for those goods, that is, for the second lot of goods—the goods which you supplied in respect of which you got the promissory note?—A. Yes.

(*Above documents tendered, being invoice dated 24th March, 1921, and statement attached dated 23rd June, 1921, addressed to A. E. Johnstone, 36 York Street, Sydney. Marked Ex. "G."*)

Q. Did you know the Clarence Street business at all at the time?—
A. No.

Mr. Mason: Q. When the first order was given you insisted on Mr.
20 Carey signing?—A. Yes.

Q. Did you ask that Mr. Carey should sign the second time?—A. No.

Q. You made no inquiries at all?—A. No.

Q. Who introduced the business on the second occasion?—A. Mr. Field, the broker.

Q. What did Johnstone say to you on the second occasion?—A. When he saw me on the order?

Q. Yes?—A. He asked whether we would extend our terms—instead of making it cash against goods, extend it with the object, as he said, if we gave him 60 days it would assist them in doing more business with us.

30 Q. Did you ask what Mr. Carey had to say about that?—A. No, I made no inquiry at all.

Q. On the second occasion when the order was given what was said by Johnstone; did he say what he wanted the goods for?—No; we did not ask that.

Q. Will you swear that Johnstone did not tell your firm to deliver those to Clarence Street?—A. Yes, I will swear that.

Q. And will you swear that they were not delivered to Clarence Street?
—A. No, I will not.

40 Q. You cannot say one way or the other?—A. No. I cannot say whether they were delivered or whether he sent for them or what happened.

Q. You cannot say at all as to that?—A. No.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

Applicant's
Evidence.

No. 4.

John
Fennell.
Re-exa-
mination—
continued.

In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).

Applicant's
Evidence.

No. 5.
Sakuzo
Jimbo.
Examina-
tion.

No. 5.

Evidence of Sakuzo Jimbo.

On affirmation, examined as under :

Mr. Loxton : Q. You are the Manager for Yano and Joko, a Japanese firm of Merchants carrying on business here in the city?—A. Yes.

Q. You have had charge of the transactions that your firm has had with the bankrupt, Mr. A. E. Johnstone?—Yes.

Q. You made the necessary affidavit in connection with the proof of debt in connection with this estate?—A. Yes.

Q. (*Proof of debt handed to witness.*) You identify those promissory notes as being the promissory notes which were given by the bankrupt and which were dishonoured on their due dates in respect of which you have proved?—A. Yes. 10

Q. Those promissory notes were duly presented on their due date and dishonoured?—A. Yes.

(*Proof of debt tendered and marked Ex. "H."*)

Cross-exa-
mination.

Cross-examination.

(*Admitted that the goods were ordered on the dates upon which the promissory notes were made.*)

Mr. Mason : Q. Mr. Johnstone ordered these goods?—A. Yes. 20

Q. Did he tell you to send them round to Clarence Street?—A. At that time I am sure it was to the York Street warehouse.

Q. Were any of the goods sent to York Street? Do you know of your own knowledge where they were sent to?—A. I think to York Street warehouse.

Q. What was the nature of the goods?—A. All silk goods.

Q. What sort of silk?—A. For dresses or costumes.

Q. Who would deliver those goods?—A. Our carter.

Q. And I suppose when they were delivered your carter would get a receipt for them?—A. Yes. 30

Q. Would you produce your receipt book showing where these goods were delivered to?—A. Yes.

Q. You can have that here in the morning?—A. Yes.

Q. Did you ever see Mr. Carey at any time?—A. Yes, I saw him once in Mr. Johnstone's York Street warehouse.

Q. That was after the bankruptcy?—A. Yes.

Q. You never saw him before the bankruptcy at any time?—A. No.

(*Proof of debts tendered, marked Exhibit "H."*)

(This witness was recalled, see p. 16.)

No. 6.

Evidence of Robert Richard Allison.

Sworn, examined as under :

Mr. Loxton: *Q.* You are an accountant and a member of the firm of Alfred Newmarch and Allison?—*A.* Yes.

Q. You have been carrying on the profession of accountant for some years past in Sydney?—*A.* Yes.

Q. I believe acting on instructions from the Official Assignee you have investigated the books relating to the affairs of the bankrupt A. E. Johnstone?—*A.* Yes.

Q. And among other books you have made careful examination of the books produced to you by Mr. Carey the respondent in connection with the business of A. E. Johnstone?—*A.* Yes.

Q. What books have been produced to you by Mr. Carey as being the books of A. E. Johnstone in connection with the business carried on at 36 York Street?—*A.* I have seen the cash book, a couple of private ledgers, an invoice book, a day book and a journal, all the usual account books which would be kept in a business of that character.

Q. Did you have stock sheets of the stock of the business taken at the end of May, 1921?—*A.* Those stock sheets were produced to me.

(*Mr. Loxton calls for stock sheet as at 31st May, 1921 ; produced.*)

Q. (*Document handed to witness.*) Do you recognise that as the stock sheet of 31st May, 1921, as produced to you by Mr. Carey?—*A.* Yes.

(*Stock sheet, 31st May, 1921, tendered marked Exhibit "J."*)

Q. Had you also produced to you entries showing that the sundry debtors came to a certain amount—that is, the good debts owing to the business?—*A.* What was produced to me in respect of the book debts was the trading ledger in a loose leaf form, showing the debts due by individual customers.

Q. Did that statement show what the good debts were? (*Objected to.*)

Q. Mr. Carey did produce to you information in writing showing the amount of good debts?—*A.* What was produced to me was the balance sheet showing the total of the book debts owing to the business, and in support of that entry on the balance sheet the loose leaf ledger was produced to me showing the individual accounts.

Q. What material was there, apart from any balance sheet that may have been produced to you, as to the amount of the book debts?—*A.* The trading ledger is there showing the individual accounts.

(*Trading ledger as relating to accounts due by debtors to A. E. Johnstone tendered ; marked Ex. "K."*)

Q. Are you able to state as a result of your investigations of those pages what are the number of debts shown as good debts?—*A.* Approximately £1500.

Q. At what date?—*A.* At 31st May, 1921.

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Applicant's
Evidence.

—
No. 6.
Robert R.
Allison.
Examina-
tion.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

Applicant's
Evidence.

No. 6.
Robert R.
Allison.
Examina-
tion—con-
tinued.

Q. Does that include the amount of debts in respect of which bills receivable would be given?—A. No, that is totally separate.

Q. Were there any bills receivable?—A. Yes.

Q. Did you ascertain what they came to as at 31st May, 1921?—A. Yes.

Mr. Mason: Q. That is from a separate book?—A. Yes.

Mr. Loxton: Q. You were able to ascertain and you are able to state what they came to?—A. Yes.

Q. You made an actual report?—A. Yes. They came to £1055/11/1.

Q. Can you give the exact amount of the sundry debtors?—A. £1507/10/-.

Q. From your examination of the book were you able to ascertain whether those bills receivable were good bills or whether they included bills that would be valueless?—A. From my examination of the books I came to the conclusion that the bills then on hand were all good.

Q. Were the books in Mr. Carey's handwriting, that is, the entries that you have referred to?—A. Yes.

Q. Were you able to find any entry relating to a creditor named Montgomery and Sprodd?—A. Yes.

Q. Could you turn up that entry?—A. I can turn it up in the trading ledger here.

(Entries in trading ledger relating to Montgomery and Sprodd tendered; made part of Ex. "K.")

(At this stage the further hearing was adjourned until Thursday, 14th September, 1922, at 10 a.m.)

(This witness was recalled, see p. 17.)

10

20

No. 7.
Stanley M.
Wrefore.
Examina-
tion.

Thursday, 14th September, 1922.

(Bundle of proofs of debt tendered and marked Exhibit "L.")

No. 7.

Evidence of Stanley Mathews Wrefore.

Sworn and examined, as under:

Mr. Loxton: Q. What is your position?—A. Manager of the National Bank, York Street Branch.

Q. You made an affidavit in support of a proof of debt in the estate of the bankrupt?—A. The affidavit was made by the estate manager of the bank, Mr. Gregson.

Q. You produce a copy of the bankrupt's account with your bank?—A. Yes, from 1st April, 1921, to 21st June, 1921, being the date of the sequestration. I have examined it with the books of the bank—the books ordinarily kept by the bank in connection with such accounts—and then entries were made in due course.

(Proof of debt, and account referred to, tendered and marked Exhibit "M.")

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40

Cross-examination.

Mr. Flannery: *Q.* How long had the bankrupt had the account with this bank?—*A.* The account was opened at the 60 Pitt Street office at the latter end of 1919 or the beginning of 1920—1920 I think. It was transferred to the York Street branch about November of that year.

Q. Was it a business account, or was it an account into which cheques were paid and almost immediately drawn out again?—*A.* I could not say.

Q. Could an account be made up from the beginning of the bankrupt's connection with your bank?—*A.* Yes.

10 *Q.* Would the deposit slips be available, and the cheques drawn on the account?—*A.* Yes, it is a very lengthy process, but it is possible. The collection of the deposit slips and cheques would be more lengthy than the preparation of a statement of account.

Q. Could you give us an account showing to whom the cheques were made available?—*A.* That would mean looking up the cheques.

Q. I will ask that the account should be made from the beginning to date. With regard to Mr. Carey, did the bank do any business with him in connection with this account?—*A.* No.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

Applicant's
Evidence.

No. 7.
Stanley M.
Wrefore.
Cross-exa-
mination.

Re-examination.

20 Mr. Loxton: *Q.* Do you produce a book showing the bills dishonored by the bankrupt prior to the sequestration of his estate?—*A.* Yes.

(Book produced; it being agreed that the particulars required in same shall be noted by the reporter, in lieu of the book being tendered.)

Witness: On 9th May, 1921, there was a promissory note made by the bankrupt in favour of E. N. O'Grady, dated 5th January—a four months' bill, due on 9th May; it was presented to us through the Bank of Australasia, the amount being £217/12/5; it was dishonored with the answer "Refer to maker."

30 The next is, bankrupt's cheque, £300, dated 17th May, 1921, through Bank of Australasia—with the answer "Present again."

23rd May, 1921; three P/N's in favour of Yano and Jako; £420/16/8; £20 and £36/17/6; dishonored with answer "No advice."

24th May, 1921, P/N in favour of Yano and Jako, £57/10/-; dishonored—no advice.

24th May, 1921, cheque, £85; dishonored, with answer "Present again."

25th May, 1921, cheque, £420/16/8; dishonored—present again.

25th May, 1921, P/N in favour of Yano and Jako, £25; dishonored—no advice.

40 26th May, 1921, P/N in favour of John Fennell & Co., Ltd., £422/10/-—recalled.

26th May, 1921, cheque £200, dishonored—present again.

27th May, 1921, cheque £420/16/8, dishonored—refer to drawer.

27th May, 1921, cheque £139/7/6, dishonored—present again.

Re-exa-
mination.

In the Supreme Court of New South Wales (in Bankruptcy).

Applicant's Evidence.

No. 7.
Stanley M. Wrefore.
Re-examination—*continued.*

30th May, 1921, cheque £139/7/6, dishonored—refer to drawer.
 30th May, 1921, two P/N's in favour of Yano and Jako, £80 and £190; returned—no advice
 30th May, 1921, cheque £200, dishonored—refer to drawer.
 1st June, 1921, P/N in favour of Yano and Jako, £119/19/9, dishonored—no answer.
 10th June, 1921, P/N Yano and Jako £422/18/4, dishonored—no advice.
 11th June, 1921, P/N in favour of E. N. O'Grady, £288/14/9, dishonored—refer to maker.
 13th June, 1921, P/N in favour of Yano and Jako £21/5/-, dishonored—no advice.
 14th June, 1921, P/N in favour of Yano and Jako £291/13/4; dishonored on account of being insufficiently stamped.
 The date of the earliest bill or cheque dishonored is 5th January, 1921.

Mr. Flannery: *Q.* I would ask you to supply that copy account. What I want is this—if cheques were paid in on one day, and the account operated on as if a cheque had been given in exchange for those cheques at the time; that would present a certain feature in a banking account?—*A.* Yes.

Q. If that is generally so, a specimen of the account would suffice, I want to get the period anterior to January, 1921?—*A.* Supposing I give you from 1st October, 1920, to 31st January, 1921.

Q. Give us a little in each year, and what, in your judgment, is most characteristic of the class of account that it is?—*A.* Yes, very well. Supposing I get August, 1920, from our Pitt Street office and then from when the account was opened until, say, 31st January, will that suit?

Q. Yes, that will do. That is all I want at present.

His Honor: It will be sufficient if Mr. Wrefore sends those accounts up to the court, will it?

Mr. Flannery: Yes.

(Witness promised to do this.)

10

20

30

No. 8.
Charles R. Swan.
Examination.

No. 8.

Evidence of Charles Robertson Swan.

Sworn and examined, as under :

Mr. Loxton: *Q.* You are in the employ of S. S. Waley & Co., Ltd.?
 —*A.* I am the attorney.
Q. They are proved creditors in this estate?—*A.* Yes.

Q. You made the affidavit in support of the proof of debt?—A. Yes.
 Q. And the facts stated in such proof are true and correct in every particular?—A. Yes.

(Proof tendered and marked Exhibit "N.")

Q. You see that in that proof of debt, it states this (*reads same*). Where were those goods delivered that he purchased?—A. The whole transaction was concluded with Mr. Johnstone at his York Street address. I knew no other address at any time.

Q. In the whole transaction, that is the purchase by Johnstone, the sale to him by you and the delivery of the goods?—A. Yes.

Q. You did not know any other address except 36 York Street?—A. No.

Cross-examination.

Mr. Flannery: Q. Whom did you see in connection with the matter?—A. The matter was transacted originally through Mr. Field, a broker in York Street, who transmitted the order from Johnstone to us.

Q. That order was in writing?—A. It was a verbal order if I remember rightly, but we got a signed order from Johnstone.

Q. Did you not see Johnstone?—A. Not at that moment. I saw Johnstone some time later, when Johnstone told me that he could not put a credit up in London as originally arranged.

Q. Johnstone had informed you that he was going to put a credit up in London?—A. Those were the terms of the contract.

Q. Had you had any transactions with Johnstone before?—A. No.

Q. Where did you see Johnstone, when he told you he could not carry out his contract?—A. In my office—about September, 1920—the order was taken in the previous April.

Q. You had not seen Mr. Carey at that time?—A. No, I have never seen him in connection with this or any other transaction.

Q. In September, 1920, Johnstone said he could not carry out his contract—then was a fresh arrangement entered into?—A. The contract was never altered so far as I know.

Q. He had to give a credit in London?—A. Yes, originally.

Q. Was that altered?—A. He could not do it.

Q. Was that altered—was a further arrangement made?—A. No, except by letter from us to him.

Q. Some letter was written by you, and you afterwards saw Johnstone?—A. Yes, we saw him before and after writing the letter.

Q. And you made an arrangement with him?—A. Yes.

Q. When were the goods delivered?—A. The goods were shipped from England I think in December, 1920, and arrived here about February, 1921.

Q. Who does the deliveries for you?—A. We do not deliver.

Q. How do the goods get from the ship to the consignee?—A. As a rule the goods are shipped through a London shipping agent to Australia,

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 Supreme
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 New South
 Wales
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 ruptcy).

Applicant's
 Evidence.

No. 8.
 Charles R.
 Swan.

Examina-
 tion—con-
 tinued.

Cross-exa-
 mination.

*In the
Supreme
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ruptcy).*

Applicant's
Evidence.

No. 8.
Charles R.
Swan.
Cross-exa-
mination—
continued.

and the documents are sent out through the bank and presented to Johnstone for acceptance.

Q. And, the documents being presented for Johnstone's acceptance, on that he would give directions where the goods were to go?—A. Yes, that is his concern.

Q. My friend suggested to you that you knew where these goods had gone to? You yourself don't know where those goods went to?—A. No, not in the slightest.

Q. All that you know is that you made an arrangement with Johnstone; that he told you he could not carry it out; you made another arrangement with him; the goods were shipped in December, and should have come here in February—and the draft was accepted?—A. No it was not accepted.

Q. You sold the goods?—A. Yes.

Q. They were sold at Johnstone's risk in the ordinary commercial way?—A. The bill was noted against Johnstone, and then the goods were sold.

Q. Ex bond?—A. I think they were put into free store—they were not dutiable because they were free store goods; they were put into free store and sold. Johnstone never handled those goods; we did not give him an opportunity.

No. 9.
William
Anderson.
Examina-
tion.

No. 9.

Evidence of William Anderson.

Sworn and examined, as under :

Mr. Loxton: Q. You are an accountant in the employ of Suzuki & Co., proved creditors in this estate?—A. Yes.

Q. You made the affidavit in support of the proof?—A. Yes.

Q. It is true and correct?—A. Yes.

(Affidavit referred to tendered and marked Exhibit "O.")

Q. You notice that the debt is in respect of goods supplied in 1917?—
A. Yes.

Q. Did you see Mr. Johnstone in respect of the matter?—A. Yes, repeatedly.

Q. Did he say anything with respect to his failure to pay for those goods?

(Question objected to.)

Q. What was the last occasion on which you saw the bankrupt, roughly speaking?—A. Two or three years after the date of his contract. I saw him as late as 1920.

Q. What did he say to you then?—A. He simply delayed payment—
he said that he would pay later or as soon as he could.

Cross-examination.

Mr. Flannery: *Q.* The account consists of a total of £111/16/7, the whole of which, with the exception of 18/2, is dated 1917?—*A.* Yes.

Q. At that time where was Mr. Johnstone carrying on business?—*A.* In York Street, as far as I can remember, but I am not certain as to that.

Q. Do you remember him carrying on business anywhere else?—*A.* No. So far as I know, all our transactions were at 36 York Street—all the later transactions, anyway.

Q. Have you been to 36 York Street?—*A.* Yes.

10 *Q.* And you have seen Mr. Carey and Mr. Johnstone there?—*A.* Yes.

Q. All those accounts were paid?—*A.* Yes, all goods delivered after the 3rd May, 1917, have been paid for, with the exception of the 18/2. They ran into many thousands of pounds.

Q. Whose cheque did you get?—*A.* Mr. Carey's cheque.

Q. Do you remember that the York Street place had Mr. Carey's name up with Mr. Johnstone's?—*A.* Yes.

Q. And they were described on the stairway as indentors and importers?—*A.* I don't know.

Q. Have you been into the office?—*A.* Yes.

20 *Q.* The Office was occupied by both Carey and Johnstone?—*A.* Yes.

Q. Do you know what that item of 18/2 is—have a look at it (*showing document to witness*)?—*A.* The 18/2 would be for goods delivered.

Q. Do you know what they are?—*A.* Yes, the account is here (*looking at account*). One tan suit case.

Q. They did not deal in suit cases, did they?—*A.* I don't know.

Q. Is that the only suit case that you ever sold them?—*A.* I could not say, without going through the records; we generally sold them soft goods.

30 *Q.* Have a look at that (*showing document to witness*). Will you pledge yourself that up to the 3rd May, 1917, Mr. Johnstone was at 36 York Street?—*A.* I can't remember whether he was or not.

Q. These references to York Street on the accounts—they are not the original invoices?—*A.* Well (*turning over documents*) here is "A. E. Johnstone, Strand" on some of them.

Q. Just look through all of them?—*A.* (*witness complies*) The Strand.

Q. The first time you saw Mr. Carey in business I suppose was at 36 York Street?—*A.* Yes.

Re-examination.

40 Mr. Loxton: *Q.* You see that one for 18/2: that is 36 York Street?—*A.* Yes, there is no question about that.

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Wales
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ruptcy).*

Applicant's
Evidence.

No. 9.
William
Anderson.
Cross-exa-
mination.

Re-exa-
mination.

No. 10.

Further Evidence of Sakuzo Jimbo (recalled).

Applicant's
Evidence.

No. 10.

Sakuzo
Jimbo
(recalled).
Examina-
tion.

No. 11.

John T.
Higgins.
Examina-
tion.

Mr. Mason: Q. Have you got those carters' receipts?—A. Yes
(produces receipts).

Q. Can you say from these receipts where the goods were delivered
to?—A. No.

(Above receipts tendered by Mr. Loxton and marked Exhibit "P.")

No. 11.

Evidence of John Thomas Higgins.

Sworn, examined as under:

10

Mr. Loxton: Q. You are security clerk in the employ of the English
Scottish and Australian Bank Ltd.?—A. Yes.

Q. And your bank has lodged a proof as creditor in this estate?—
A. Yes, in the estate of A. E. Johnstone.

Q. Your bank took over the business, did it not, of the London Bank?
—A. Yes.

Q. And that is the proof of debt (indicating document)?—A. Yes.

(Above proof of debt tendered and marked Ex. "Q.")

Cross-exa-
mination.

Cross-examination.

Mr. Flannery: Q. Mr. Johnstone apparently discounted that with 20
you?—A. Yes.

Q. Did he have an account?—A. Yes.

Q. For what years did he have his account?—A. You mean how long
he had been banking with the bank?

Q. Yes.—A. I could not say without looking up the records.

Q. You took over his account from the London Bank?—A. Yes.

Q. Have you got that account?—A. We have got the account as far
as the bill was concerned. The amount owing us is the amount owing
on this bill. If you want a copy of his current account in the ledger that 30
can be produced.

Q. I do not want to bother the bank too much. If it is not a big
account I would like to have the whole of it, but if it is a long account
extending over years, or if the dealings are very numerous, if it is a business
man's typical account, I would like you to take out a typical month in
1918, and in 1919 and in 1920, and in 1921 too, if he had one in 1921?—
A. Yes. (This information to be sent to the court addressed to the Associate.)

(Bebarfald's proof of debt tendered by Mr. Loxton and marked Ex. "R.")

No. 12.

Further Evidence of Robert Richard Allison (*recalled*).

Cross-examined.

Mr. Flannery: *Q.* This stock sheet (Exhibit J) sets out a total of £15,151. You separated it, goods into bond amount to £8329/6/10, and to that landing charges are added making a total of £9,077/17/10?—

A. Yes.

Q. Did you see the ledger in which the bond warrants were entered?

—*A.* The bond warrants were not entered in any ledger.

10 *Q.* Well, the book in which they were entered?—*A.* No, I saw no record of the bond warrants anywhere.

Q. Did you make any inquiry?—*A.* Yes, I asked Mr. Rawlinson about the bond warrants.

Q. What did Mr. Rawlinson tell you with regard to the bond warrants? (*Objected to.*)

Q. I understand that you said yesterday that a certain amount of bills receivable were good?—*A.* Yes.

20 *Q.* Did you make any inquiry to ascertain whether these bills were good or not?—*A.* I made no specific inquiries, but I assumed they were good, because no reserve or provision had been made against them.

Q. You were looking at them as an accountant?—*A.* Yes.

Q. You had got £1055 11s. 1d. That is a sum of smaller sums?—*A.* Yes.

Q. Were not the items before you?—*A.* The items were before me in the bills receivable book.

Q. But you assumed that they were good because you found no reserve made, where?—*A.* In the private ledger.

Q. As at the 31st May?—*A.* Yes.

30 *Q.* So you say in accountancy they are taken at their face value?—*A.* Yes.

Q. But you yourself have no knowledge whether they are good security or not?—*A.* I did not inquire that far.

Q. The book debts I think you also suggested were good?—*A.* Yes.

Q. And that is for the same reason?—*A.* Yes.

Q. That is, that looking at the account as an accountant, finding no reserve you assumed they were taken by the person who made them up as good?—*A.* Yes.

*In the
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Applicant's
Evidence.

No. 12.
Robert R.
Allison
(recalled).
Cross-exa-
mination.

In the
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Court of
New South
Wales.
(in Bank-
ruptcy).

Applicant's
Evidence.

No. 13.
Charles H.
Feald.
Examina-
tion.

No. 13.

Evidence of Charles Horatious Feald.

Sworn, examined as under :

Mr. Loxton : Q. You are a merchant broker, and have been carrying on that business for the last 15 years?—A. Yes.

Q. You have known both the bankrupt, Mr. A. E. Johnstone, and the respondent, Mr. Carey, for some years past?—A. Yes.

Q. And you have had dealings with them in your capacity of a broker?—A. I did.

Q. Did you see either or both of them at 36 York Street?—A. Yes. 10

Q. You negotiated the only dealings between John Fennell & Co. and Mr. A. E. Johnstone in 1919?—A. Yes.

Q. I want you to look at Exhibit F, dated 30th September, 1919. You see the heading, it is an indent from Messrs.—you see what is written there?—A. Yes.

Q. You recollect that transaction?—A. I do.

Q. You see the Messrs. there are?—A. R. W. Carey and, in inverted commas, A. E. Johnstone.

Q. Did you have anything to do with the transaction?—A. Yes.

Q. Who first saw you in respect to it?—A. I interviewed Mr. Johnstone. 20

Q. What took place between you and Mr. Johnstone in respect to that transaction? (*Objected to. Question allowed.*)

Q. Just state what that transaction was?—A. I offered A. E. Johnstone some silk, he gave me the indent and I took it into Fennell, who was the owner of the silk, and submitted to him the offer, and he indented it through me.

Q. That is, Mr. Johnstone's offer you submitted to Mr. Fennell?—A. Yes.

Q. How did Mr. Carey's name come to get on the document?—A. I did not write the document; it was written in the office of Fennell & Co. 30

Q. You cannot give any explanation as to that?—A. Only what I was told.

Q. So far as the actual transaction was concerned it was one that was entered into between you and Mr. Johnstone in the first instance, you reported Mr. Johnstone's offer to Mr. Fennell and closed the transaction?—A. Yes.

Q. As to how it was Exhibit F came to be made out in the form it is, you cannot say?—A. No, I did not write it.

Q. Do you know anything about the delivery of those goods?—A. Yes. 40

Q. Do you know where the goods were delivered?—A. Yes.

Q. Where were they delivered?—A. At 36 York Street.

Q. Did you have any transactions later on than that?—A. I had a lot of transactions with Mr. Johnstone.

Q. Do you remember one in connection with a Chinese firm called Wing On & Co. ?—A. I do.

Q. About when was that transaction entered into?—A. 1921, or something like that, I could not tell you exactly. It is a long time ago.

Q. You believe it was in 1921 ?—A. Yes.

Q. That had relation, had it not, to 20 cases of socks ?—A. Yes.

Q. And did you subsequently see Mr. Carey with respect to that transaction, that is, after the socks had been delivered ?—A. Yes.

Q. What took place between you and about when would it be that you
10 saw Mr. Carey in respect of that transaction ?—A. The socks were ordered
by Mr. Johnstone in the first place, and when the goods were delivered, I
could not tell you how many cases, I think a few cases, were delivered to
York Street and the others were left in bond, the duty not being paid.
There were some difficulties in the matter, the Commonwealth Government
increased the duty on cotton goods from 15 to 45%, and that actually
brought the article to a very high price, and Mr. Johnstone suggested to
me to deliver three cases duty paid, the balance to be left for them in bond
in A. E. Johnstone's name. When I saw Mr. Carey in the matter he asked
20 me to take back again the bond warrant for 17 cases of Chinese cotton
hose, and to see Wing On & Co. and to try and induce them to take the goods
back again, because Johnstone would not be able to pay.

Q. Did he say anything else with reference to Johnstone's ability to pay ?—A. He told me that Johnstone would not be able to pay.

Q. Did he add anything to that, did he give any reasons ?—A. No, no reasons. He told me that Johnstone would not be able to pay. I went down and saw Mr. Chew of Wing On & Co. and gave him the bond warrant.

Q. Do you remember about when that conversation with Mr. Carey was ?—A. After a while I brought Mr. Gork Chew, the proprietor of the firm. We went down to Mr. Carey's office.

30 Q. What took place between you and Mr. Carey ?—A. There were there
Mr. Johnstone, Mr. Carey, Gork Chew and myself, and we tried to come
to some agreement with regard to these socks.

Q. Did Mr. Carey say anything as to why Johnstone was not taking them, on that occasion ?—A. I can only give the gist of the conversation, the actual words I could not remember.

Q. Do you remember whether he said anything about the quantity of goods that Johnstone handled ?—A. Yes, he said something about it. I had been inducing the Chinaman to take back again the socks, he was objecting to it; at last they came to the conclusion that Mr. Johnstone,
40 with the consent of Mr. Carey, should promise to take a certain amount,
I do not know how many, I think another three or five cases, and that that
would finish the transaction, we would be the losers of the balance. The
Chinaman tried to get it in writing, but he did not succeed.

Q. What was it he tried to get in writing ?—A. That Mr. Carey and Mr. Johnstone would agree to take later on when the market got better at least three or five more cases of the socks. Of course the Chinaman

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Applicant's
Evidence.

No. 13.
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tion—con-
tinued.

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Applicant's
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Feald.
Examina-
tion—con-
tinued.

asked me for an opinion and I told him it would probably be all right, and he accepted.

Q. When did these two conversations take place at which Mr. Carey was present?—*A.* That took place in 36 York Street, I could not tell you when.

Q. You know the fact of Mr. Johnstone becoming bankrupt?—*A.* Yes.

Q. How long about was it before he became bankrupt that this conversation took place?—*A.* It must have been a few months before.

Q. You have told His Honor as far as you recollect what the last conversation was that took place when Mr. Carey and Mr. Johnstone and Mr. Gork Chew were there, you have told His Honor all you remember at present?—*A.* They tried to justify the claim, to induce the Chinaman to take the socks. 10

Q. What reason was given by Mr. Johnstone or Mr. Carey for the contract not being carried out and the whole of the goods being taken?—*A.* I think the goods came a bit late in the first place, and then the duty was increased from 15 to 45%, making the articles a much higher price.

Q. Was anything said about Johnstone's ability to pay, on that last occasion?—*A.* I could not recollect, it was a long time ago. 20

Q. You say that you went to the solicitor's office, that is to Messrs. McElhone & Barnes?—*A.* Yes.

Q. That is, between the two occasions that you saw Mr. Carey?—*A.* Yes.

Q. Who were present in the solicitors' office?—*A.* The Chinese merchants, Wing On & Co., represented by Mr. Chew and another Chinaman. I do not remember his name, and Mr. McElhone, myself and Mr. McElhone's clerk.

Q. Not Mr. Johnstone or Mr. Carey?—*A.* No.

Q. What took place then?—(*Objected to.*) 30

His Honour: *Q.* Whose solicitors are McElhone & Barnes?—*A.* They represent Wing On & Co.

(*Above question not pressed.*)

Cross-exa-
mination.

Cross-examination.

Mr. Flannery: *Q.* The goods from the Chinese firm, that transaction was with Mr. Johnstone?—*A.* Yes.

Q. Was a contract entered into in writing?—*A.* No.

Q. Johnstone was the only person who appeared in that?—*A.* In the first place.

Q. And the bond warrants were as a matter of fact taken out in his name?—*A.* Yes. 40

Q. In Mr. Johnstone's name?—*A.* Yes.

Q. You are sure of that?—*A.* I could not say absolutely.

Q. Is it not a fact that you do not know in whose name they were?—*A.* They were in Mr. Johnstone's name, I know that.

- Q. Did you ever see them?—A. Yes, I handled them.
- Q. You handled the bond warrants in Mr. Johnstone's name?—A. Yes.
- Q. Credit was given in that case to Mr. Johnstone?—A. There was no credit given, there was only the bond warrant drawn.
- Q. Mr. Fennell, however, issued the invoice in the name of Carey and Johnstone?—A. I could not tell you, I did not see the invoice.
- Q. What have you got there before you?—A. A contract.
- Q. You had nothing to do with the actual drawing up of the contract?—A. No.
- 10 Q. You only brought the parties together?—A. Yes.
- Q. I suppose you have been up in Johnstone's office often in York Street?—A. Yes.
- Q. You know the names on the wall inside the building?—A. I would not say I do. I pass there a hundred times a day.
- Q. Do you know how Mr. Johnstone and Mr. Carey were described inside the building?—A. I think there were two names.
- Q. And then "Indentors and Importers"?—A. I could not tell you exactly now.
- Q. And when you went up to the office they were sitting in the same office?—A. Yes.
- 20 Q. With a telephone between them?—A. I think there were two tables, and a telephone between them.
- Q. And their business was done in this office?—A. Yes.
- Q. Who paid your accounts?—A. I never had any transaction direct, excepting that I had been getting the commission accounts.
- Q. You did not receive any cheques from them?—A. Yes, I did.
- Q. Whose cheques did you get?—A. I think Johnstone's.
- (Mr. Loxton calls for document dated 1st June, 1921, addressed by bankrupt to respondent. Produced and marked Ex. "S.")
- 30 (Mr. Loxton tenders proof of debt of Hill, Wood & Sullivan. Marked Exhibit "T.")
- (Mr. Loxton calls for letter of 8th March, 1922, from Official Assignee's solicitor to respondent's solicitor, and reply, dated 10th March, 1922. Produced and marked Ex. "U.")
- (Proof of debt of Metropolitan Business College tendered, and Mr Loxton undertaking not to base any argument upon it, is marked Exhibit "V.")
- Mr. Loxton closes his Case.
- (Mr. Flannery formally moves for a nonsuit, gives no reasons. Refused.)

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No. 13.
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Feald.
Cross-exa-
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continued.

No. 14.

Evidence of Randal Westropp Carey.

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tion.

Sworn, examined as under.

Mr. Flannery : Q. What is your name?—A. Randal Westropp Carey.

(Notice of motion amended by substituting "Randal Westropp Carey" for "Randolph Westoff Carey.")

Mr. Flannery : Q. You are an accountant by profession?—A. I am an associate of the Chartered Institute of Secretaries, London.

Q. When did you first have business relations with the bankrupt?—
A. March, 1917. 10

Q. Before that had you known him?—A. Yes, some considerable time.

Q. What were you doing in March, 1917?—A. I had an office in Vickery's Chambers.

Q. In March, 1917, you came into business relations with the bankrupt, Johnstone?—A. Yes.

Q. What was he doing at that time?—A. I understood he had an office in the Strand Arcade, he was an indentor and broker.

Q. Was he dealing in any particular class of goods, or dealing generally?—A. Generally, so far as I know, but mostly in soft goods.

Q. Did you enter into an arrangement with him in 1917?—A. Yes. 20

Q. When was the arrangement entered into between you and Mr. Johnstone?—A. It was in the early part of March that I wrote him a letter to the Strand Arcade.

Q. And shortly after the letter you saw him?—A. Yes.

Q. And the arrangement was made then in March, or in April?—
A. I think it was the end of March.

Q. After having arranged with him, did you go and see your solicitors?—A. Yes.

Q. Was a document drawn up between you?—A. Yes.

Q. Look at Exhibit B, the document apparently bears date 30th April, 1917?—A. Yes. 30

Q. Were the details of the arrangement arranged between you and Mr. Johnstone before that date?—A. Yes, some considerable time before.

Q. 36 York Street has been mentioned in connection with the case. When did you go to 36 York Street?—A. On the 14th May, 1917.

Q. And before that how long had Mr. Johnstone been there?—A. About a fortnight.

Q. A lease had been taken of these premises?—A. Yes.

(Mr. Flannery tenders Indenture of Lease dated 7th May, 1917, between F. H. Reid, of 36 York Street and A. E. Johnstone and R. W. Carey of 36 York Street; and also notice from A. E. Johnstone and R. W. Carey to F. H. Reid dated 17th March 1918, intimating that they are exercising option of renewal until 15th November, 1920. Marked Exhibit "I.") 40

Mr. Flannery : Q. Before going into the details of the case I want to get the broad lines of the business. You remained in York Street with him up till at least the end of 1920?—A. Yes.

Q. And from the 14th May, did you attend every day with the exception of occasions that you may have been absent through illness, did you attend every business day throughout the year at that office with these exceptions?—A. Yes, except when ill or on holidays.

Q. And during that time, from the 14th May to the end of 1920 you carried on no other business?—A. No.

10 Q. I want to get the broad outlines of the business. The business consisted in dealing with soft goods?—A. In the early part we dealt in all sorts of things—crockery, soft goods, suit cases, and other lines. I think those were the three main things.

Q. Did the business develop into a soft goods business almost exclusively?—A. Yes.

Q. When would the change be?—A. I should think about the end of 1917.

Q. I will deal with the soft goods business as a whole. You were indentors and importers?—A. Yes.

20 Q. Where were your sources of supply, where did you get your goods from?—A. From England and the East.

Q. And some locally?—A. Yes.

Q. I am going to ask you with regard to the British goods, the goods which came from abroad. How were they paid for?—A. They were all drawn on drafts on me for which I had to put up letters of credit through my bank.

Q. They were paid for by drafts drawn on you by the exporters?—A. Yes.

Q. Your bank was the Commonwealth Bank?—A. Yes.

30 Q. Head office?—A. Yes.

Q. How were the goods from the East paid for?—A. In some cases with a letter of credit, in some cases the goods were bought through agents here in Sydney.

Q. The letter of credit would be provided here, or in the East?—A. It would be provided here and sent up to the East.

Q. Who provided the credit?—A. The Commonwealth Bank.

Q. On your account?—A. Yes.

40 Q. And the goods in respect of which the documents were delivered by agents here, how were they paid for?—A. In some cases by cheque, in some cases by bills.

Q. So far as the Eastern business was concerned whose cheques was it paid for the goods?—A. In nearly every case mine.

Q. And when a bill was drawn?—A. They were all my bills.

Q. With regard to the local goods, who kept the books of the business?—A. I kept them all along, with the exception of one month, when there are a few entries made by an accountant got in on account of my illness.

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Q. And Mr. Johnstone dealt with the local warehouses?—A. Yes.

Q. You had no dealings with the local warehouses in the sense of going to the warehouses?—A. No, none whatever.

Q. The goods that were secured locally, how were they paid for?—

A. In nearly every instance by my cheque.

Q. I have dealt now in general fashion with the whole of your business—the British business, the Eastern business and the local business?—A. Yes.

Q. Does that practically cover the whole of the business that you had to do?—A. Yes.

Q. You had an account at the Commonwealth Bank, and out of that the credits were found, and on it the cheques drawn, as you have indicated?—A. Yes. 10

Q. Into that account were moneys paid that were received from persons who bought goods from 36 York Street?—A. In all instances, practically, up till about October, 1920, I should say.

Q. And whatever occurred with regard to cheques in the business not being paid in, on the occasion which you refer to in October, 1920, was that with your consent?—A. No.

Q. Or knowledge?—A. It was not with my consent or knowledge.

Q. Did Mr. Johnstone have an account to your knowledge?—A. Yes, he had an account with the London Bank, I think it was practically from our first relation. 20

Q. Did you know of cheques from customers of the business going into his accounts at periods anterior to October, 1920?—A. Yes.

Q. I want to ask you generally, with regard to that, when those cheques were paid into his account was notice given to you?—A. Almost immediately, the day after they were paid into his account he would give me a cheque for the lump sum and a memo to enter into the cash book, the customers' names and the amounts.

Q. Were bills receivable by the business paid into Mr. Johnstone's account?—A. Bills were discounted by Mr. Johnstone at one or two banks, as a matter of fact, and he gave me a cheque for the amounts the next day after they were discounted. 30

Q. With regard to those instances where the business cheques or bills went into his account and there was almost immediate repayment or recoupment, except in those instances, so far as you knew did all the receipts of the business go into your account at the Commonwealth Bank?—A. Yes, with the exception of those two instances, up till October, 1920.

Q. And then something occurred which was done as you have indicated without your knowledge or consent?—A. Yes. 40

Q. Still dealing with the matter generally, at the business premises, 36 York Street, was your name displayed?—A. Yes, on the stairs and in the street.

Q. How was it displayed in the street?—A. "R. W. Carey" on the top of the plate, and "A. E. Johnstone" on the bottom of the plate.

- Q. That was one plate?—A. Yes.
- Q. And your office, I believe, was on the second floor?—A. Yes.
- Q. Was there reference to you and Johnstone inside on the stairway?—
A. Yes, half-way up on the first landing, “R. W. Carey, A. E. Johnstone, Indentors and Importers,” and a hand pointing up the stairs.
- Q. Had the office itself one room or two?—A. It was one large flat with a small office partitioned off at one end. The rest of the room was used as a store.
- Q. Was the office occupied by you and Johnstone, jointly?—A. Yes.
- 10 Q. There was a telephone, was there not?—A. Yes.
- Q. Were both your names in the telephone book?—A. (*Objected to.*)
- Q. Who paid the account of the telephone?—A. (*Objected to.*)
- Q. With whose cheque was the telephone account paid?—A. (*Objected to.*)
- (*Mr. Loxton, in order to save time, admits that the account was kept by witness.*)
- Q. A cheque was paid out of the Commonwealth account?—A. Yes.
- Q. Was an entry made in respect of that in certain books?—A. Yes, it would be the cash book.
- 20 (*Mr. Loxton asked His Honour to allow alternative claim in the event of His Honour being of opinion that this witness was a partner of A. E. Johnstone, and the usual accounts to be taken, it being quite a different case to what was set out before the Registrar. His Honour said that he would deal with that at a later stage. Mr. Flannery said that if the application was made he would submit.*)
- Mr. Flannery: Q. Entries were made with regard to the payment of the telephone in the cash books of the business you kept?—A. Yes.
- Q. And the telephone account was debited against the business?—
A. Yes.
- 30 Q. And that was right throughout the period you have been telling us about?—A. Yes.
- Q. Was there a box at the Post Office in connection with the business?—
A. Yes.
- Q. Is this a sample account in connection with the box?—A. (*Objected to.*) (*Allowed by His Honour.*)
- Q. Is that a sample account?—A. Yes.
(*Tendered and marked Ex. 2.*)
- Q. Was the money paid to the Postmaster-General for the use of the box debited to the business?—A. Yes.
- 40 Q. And that appears in the cash book?—A. Yes.
- Q. Was there a safe in the office?—A. Yes.
- Q. What was kept in that?—A. All the books and papers in connection with the business.
- Q. Who kept the keys of that?—A. A duplicate key Mr. Johnstone had and I had the other.

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Q. Were there duplicate keys of the doors of the premises?—A. Yes; I had one, and Mr. Johnstone had the other.

Q. Who had the keys of the Post Office box?—A. Mr. Johnstone had a key and I had one.

Q. During the whole of the time from 14th May or any earlier date up till the bankruptcy, did you receive any salary?—A. No.

Q. Did Johnstone receive any salary?—A. No.

Q. Goods which were left in bond so far as you know, were bond warrants ever taken out in Mr. Johnstone's name?—A. (*Objected to.*)

Q. When a bond warrant is handed to the bond for goods do you know 10 whether it is retained or not by the keeper of the bond?—A. No, it is not, it is handed to the owner of the goods.

Q. So if goods were in bond and you had a bond warrant on a transfer in respect of the goods the bond warrant— (*Objected to.*)

Q. Have you had goods in bond and held the bond warrant for them?—A. Yes.

Q. Have you sold those goods?—A. Some of them.

Q. On the sale of the goods what happened to the warrant?—A. The warrant is handed back to the owner of the bond.

Q. And have you bought goods which were in bond?—A. Yes, I think 20 we have.

Q. What happens to the bond warrant when you have bought goods which were in bond? (*Objected to.*)

Q. Have you insured goods in the business?—A. Always.

Q. Have you any policy of insurance of those goods at the present time?—A. Yes.

Q. Is it here?—A. I think there is one here.

Q. Is this a policy of insurance in regard to goods in the business?— (*Question objected to.*)

(*Document tendered, Mr. Loxton objects on the ground that it cannot 30 throw light on the ownership of the goods. His Honour admits document. Policy of the Triton Insurance Company, Ltd., of the 31st January, 1919, tendered and marked Ex. 3.*)

Mr. Flannery: Q. Did you know Messrs. Robinson and Morton Mitchell, Insurance Brokers?—A. Yes.

Q. Which of them did you see?—A. Sometimes I saw Mr. Robinson, and sometimes Mr. Mitchell.

Q. And in arranging for insurance, were they seen in the presence of Mr. Johnstone?—A. I think they were on one occasion, but not often.

Q. Do you remember when that occasion was?—A. I could not 40 remember.

Q. Were debits respecting insurance made in the cash book?—A. (*Ob-
jected to.*)

Q. In what book would debits for insurance appear?—A. In both the cash book and the ledger.

(Mr. Flannery tenders the ledgers of the business from the inception of the business relationship between witness and the bankrupt up to the bankruptcy of Johnstone. Objected to. Admission of books *holus bolus* disallowed by His Honour. Mr. Flannery states he only intends to refer to specific accounts in the ledger.)

Mr. Flannery: Q. Could you turn up the insurance folios in the three ledgers?—A. (Inspecting books.) Yes.

(Mr. Flannery tenders folio 37 of the 2nd ledger which begins at April 1919. Objected to.)

10 His Honour: Q. You used to effect your insurance through Insurance brokers?—A. Yes.

Q. And the brokers, Robinson and Mitchell, paid the premium and rendered you the account?—A. Yes.

Q. Do these entries here relate to the accounts received from Robinson and Mitchell?—A. Yes.

Q. They represent accounts rendered to you by Robinson and Mitchell for premiums paid by them?—A. Yes.

Q. Do the words "Stock, Fittings, etc." represent the various properties in respect of which the premiums were paid;—A. Yes.

20 (Folio 37 of ledger B tendered and marked Ex. 4.)

Mr. Flannery: Q. Is there an account in ledger A with regard to telephone?—A. Yes, folio 167, under the heading "general expenses."

Q. Is there an account there also with regard to Post Office box?—A. Yes, on the same folio.

(Folio 167, ledger A, tendered and marked part of Ex. 4.)

Q. Is there a folio in which telephone and Post Office box are included in ledger B?—A. Yes, it will be under the same heading of "general expenses." It is folio 69.

(Folio 69 of ledger B tendered; marked part of Ex. 4.)

30 Q. Will you turn up the folio of ledger A, which contains your account?—A. It is folio 150 in ledger A.

Q. And in ledger B?—A. It is folio 1.

Q. The accounts on the folios you have referred to are they both kept on the same basis?—A. Yes.

Q. What is the basis—explain the items and how you make the credits and debits?—A. (Witness explains account.) The credits are on the right hand column. The balance of my account as on November 30th, 1917, shows £307/7/1.

40 Mr. Loxton: Q. In order to understand this we must see some other book?—A. I do not think so. (Witness looks at folio 175, and explains entries.) The balance of £887 is profit; the half of it was put to the credit of my account, and half to Mr. Johnstone's account, which the ledger will show.

His Honour: Q. I understand your course of business was this; you ascertained the profit on trading account, simply by taking the difference

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between what the goods cost you and what you sold at; then didn't you deduct from that balance the expenses of the business, and in that way arrive at the net profit or loss?—*A.* To a large extent it was done that way; but the proper way to do it is: supposing you start in January this year, and you have on hand £5000 worth of stock, and at the end of June you have £1000 worth of stock, then, your purchases and your stock-on-hand at January are added together, and your purchases and stock-on-hand in June, and a balance is struck between those two, and either it is a profit or a loss on the trading account, and against that the expenses of the business are put, giving either a net profit or a net loss.

Q. Then, having ascertained that, you can apportion either the net profit or the net loss?—*A.* Yes.

(*Folio 150, ledger A; Folios 1, 2 and 3 ledger B, tendered and marked Ex. 6.*)

(*The folios in the ledgers referring to bankrupt's account are 152 and 153 in ledger A, and from 5 to 10 in ledger B.*)

His Honour: *Q.* Are these books that are being referred to now, amongst the books produced to Mr. Allison?—*A.* Yes. I produced all the books in connection with the business but I did not give them to Mr. Allison.

Q. These books which are referred to now were made available for Mr. Allison?—*A.* Yes.

(*Folios 152 and 153 in ledger A, and 5 to 10 in B, tendered and marked Ex. 7.*)

Witness: Folios ledger A, 175 and 147, and B from 249 to 237 inclusive show the profit and loss account, and taken in conjunction with the trading account, appearing at A174 and B91 and 92, show the transfer of profits and losses to my account and the account of Mr. Johnstone.

Q. Give us the reference to the folios of the journal through which the appropriation account travels?—*A.* Ledger A, Journal 13; Ledger B, Journal 23, 32, 44, 57, 66, Ex. 8.)

(*Folios in the ledgers and journal relating to profit and loss account tendered and marked 78, 87.*)

Q. Give me the folios of the ledgers relating to the account of your father, John R. Carey?—*A.* A, 170; B, 25.

(*A, 170; and B, 25 tendered and marked Ex. 9.*)

Q. I want you to refer to a *present to J. R. Carey, and a debit to the business for £5000?—*A.* That is the 11th August in ledger B.

Q. Was that money the subject of an agreement in writing between your father and you and Johnstone?—*A.* Yes.

(*Letter A. E. Johnstone and Carey addressed to J. R. Carey and dated 9th August, 1920, tendered and marked Ex. 10.*)

Q. When you commenced business in York Street, did the York Street business acquire any stock from Johnstone?—*A.* Yes. The entries with

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regard to that appear in the cash book. There is one entry on Fol. 1 of the cash book for £49/16/4.

Q. The goods were brought to York Street from where?—A. From the Strand.

Q. Were those goods paid for out of the Commonwealth Bank account?—A. Yes.

Q. Will you refer to the other entries where Johnstone has been paid?—A. There is one on 1st May, £49/16/4; 3rd May, £35/18/8; there may have been others too—you can refer to them in the ledger.

10 Q. Will you find the folios there?—A. It is in ledger A3.

(Folio 1 of cash book and ledger A3 tendered and marked Ex. 11.)

Q. Whatever was paid out in respect of the business, was that paid out of your account?—A. Out of the Commonwealth account.

Mr. Flannery: I will tender all the Commonwealth Bank accounts.

(Mr. Loxton objects to the pass book.)

Q. Have a look at the entry in this current pass book (*showing book to witness*). The address has been altered?—A. The reason for the alteration of the address is that letters sent from the Commonwealth Bank took a considerable time to come round to me at York Street—being up two floors, the postman won't deliver them—so to facilitate the letter being sent to me, the address was given as Box 834 G.P.O. That is the box we have already referred to.

Q. When would that be?—A. Practically since the book was opened—I should say at least two years.

(Bank pass books admitted and marked Ex. 12.)

Mr. Flannery: Q. Who conducted the correspondence with the British exporters?—A. Mr. Johnstone.

(Letter dated 3rd March, 1920, Baker Butterworth & Co., to Carey and Johnstone, York Street, Sydney, tendered; objected to; rejected.)

30 Q. You told us that you came into the office of 36 York Street on 14th May?—A. Yes.

Q. You had previously signed the document (*Ex. B*)?—A. Yes.

Q. Did you have a conversation with Mr. Johnstone some time after that as to what you were to do, and as to the terms on which you were to do it?—A. Yes, I should say that was about 16th May.

Mr. Loxton: This conversation was after the written agreement.

Mr. Flannery: Q. At that time, how much money had been brought into the business by you?—A. I had arranged for an overdraft of £1000. The conversation took place in York Street between myself and Johnstone.

40 We had a discussion as to the running of the business, and we agreed to alter the agreement, and instead of my taking one-third, and Mr. Johnstone two-thirds, I was to take half and he take half, in consideration of which I had to come in and keep the books and give my whole time to the business. That was all that was said.

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Q. Start from the beginning and give us the whole conversation?—
A. I told Johnstone I was not going to put any more money into the business, that it would want more money put into the business, and if he wanted more money put into the business, I was not prepared to carry on a one-third and two-third basis. We had a conversation about altering the agreement, and the agreement was altered from one-third and two-thirds to half and half, gross profits and I had to give my whole time to the business. I spoke to Johnstone about getting more money and he suggested we should get some from my father, which was done—£500.

(At 4.5. p.m. the further hearing was adjourned until Friday, 15th 10
September, 1922, at 10 a.m.)

Friday, 15th September, 1922.

Mr. Flannery: Q. When was that agreement exhibit B entered into?
—*A.* During March. It was signed on 30th April. On the date it was signed the alteration from £200 to £1000 was made. The initials annexed thereto are mine and Mr. Johnstone's and the solicitor's.

Q. Before that date you had had conversations about an advance of £200?—*A.* Yes.

Q. But on this date the advance was to be £1000?—*A.* Yes.

Q. You told us yesterday that the conversation took place between 20
you about the 16th May. How long did that conversation take?—*A.* About half an hour.

Q. I want you to look at the ledger at your father's account, and give us the first credit that is given to him in that account?—*A.* That is on 26th May, 1917, £500. The next credit is £500 on the 6th September, 1917.

Q. Do you remember anything else that was discussed at the conversation on 16th May?—*A.* Yes, I said to Mr. Johnstone, "We must get more money into the business because we are buying heavily and more capital will be required." He agreed that it would be better to get it in. I said 30
"We will have to get £500 at least." Mr. Johnstone agreed. The £500 was obtained, and the reference to it there is on the 26th May.

Q. On a later date was there a conversation about further capital?—
A. Yes, I should say a few days before the 6th September there would be another conversation of the same nature. I told Mr. Johnstone that as we were still buying heavily we would have to get more money into the business. He agreed to it, and a further sum was borrowed.

Q. Is there any credit of a similar nature in your father's account in that year?—*A.* No.

Q. What is the next credit?—*A.* The next credit is on the 13th Janu- 40
ary, 1919, and is for £2000.

Q. Well, I am only dealing with 1917 at present. The credit at the Commonwealth Bank—what overdraft was secured during May?

(Question objected to by Mr. Loxton, who submits that this information will appear on the document.)

Mr. Flannery: Q. Have you got an account in the ledger with regard to the Commonwealth Bank?—A. Yes.

Q. Can you turn that up—the whole of the Commonwealth banking account I mean?—A. That is at ledger A 154, and in B 11, 12, 13 and 14.

(Ledger A 154, and B 11, 12, 13, and 14 tendered and marked Exhibit 13.)

Q. Did you have a conversation with Mr. Johnstone before the credit given by the Commonwealth Bank to the business exceeded £1000?—

10 A. Yes.

Q. When would that be?—A. I should think that would be some time in the latter part of 1920.

Q. And what was that conversation. Tell us what took place?—A. To the best of my recollection what took place was that I told Mr. Johnstone that we wanted a further overdraft over and above the amount that we had, and that he agreed to that, and that I then saw the bank and arranged for a further overdraft.

Q. What was the overdraft at the bank on the 30th May, 1921?—

20 A. The books here show it as being £8179/11/10.

Q. And what was it at the end of 1920?—A. At the end of 1920 it was £10,023/18/1.

Q. And what was the high-water mark?—A. The books show here on the 31st January, 1921, £10,082/1/3.

Q. The purchase of goods in any substantial quantity, was that the subject of any discussion?—A. Yes, always.

Q. Did you and Mr. Johnstone agree on the subject before the enterprise was undertaken?—A. On all large sums.

30 Q. Look at this slip, will you. Whose handwriting are those in (showing documents to witness)?—A. Those are in Mr. Johnstone's handwriting.

Q. Take any one of them will you and tell me the date of it?—A. This one is dated 17th May, 1921 (selecting one and showing to Mr. Flannery). Mr. Johnstone gave me this slip.

Q. Did you have a conversation with him at the time?—A. Yes, we had a conversation—I would ask him for the accounts that he had collected and paid into his own account, and he would give me a slip like this and a cheque for £46/0/1.

(Slip referred to showing £46/0/1, tendered and marked Ex. 14.)

40 His Honour: Q. This is explanatory of your evidence given yesterday to the effect that Johnstone used to collect amounts and pay them into his account, and then used to give you a memorandum of them?—A. Yes, that is typical of it.

Mr. Flannery: Q. You have here a bundle of documents which were used for a similar purpose, have you?—A. Yes.

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Q. And are they all in the bankrupt's handwriting?—A. Yes.

Q. Did the bankrupt ever tell you his object in pursuing this particular practice?—A. Yes, he told me that his object was to boost his own credit up with whatever bank he was dealing with.

Q. Did the bankrupt have a conversation with you with regard to the discounts?—A. Yes, he did.

Q. What took place?—A. The same conversation took place.

Q. Did he write you a letter?—A. Yes, he also wrote me a letter with regard to the discount.

(Letter dated 9th February, 1919, bankrupt to respondent, tendered and marked Ex. 15.) 10

Q. That refers to your evidence given yesterday, I understand, in reference to the practice with regard to bills which went into his London banking account?—A. Yes.

Q. The folios that were put in the ledger as your account are the only account that was kept in the business for and against you, is that so?—A. Yes.

Q. And the only two accounts that were kept by the business against the bankrupt were the folios that were put in yesterday, and a folio dealing with the purchase of goods from him. Is that so?—A. Yes. 20

Q. And there was no special capital account left?—A. No—well, the capital account is the two accounts in the ledger, but the capital itself was all found by me. The bankrupt brought nothing in at all in the way of cash or in the way of goods except what appear in that purchase account which were paid for by the business.

Q. Is this a letter from the bankrupt to you, written when you were away from the business ill (*showing document to witness*)?—A. Yes, that is so.

(Letter dated 16th June, 1919, from bankrupt to respondent tendered and marked Ex. 16.) 30

Q. Was the whole of the business discussed between you and the bankrupt when you were there or when you were away on the footing indicated by that letter (*referring to Ex. 16*)?—A. Yes.

Q. The next item in your father's account is an advance of £2000. When was that?—A. That was on the 13th January, 1919.

Q. Before that advance was made was there any discussion between you and the bankrupt?—A. Yes, there was, a conversation took place on the same lines as previously.

Q. What is the next item in regard to your father's account?—A. The next item is on the 25th August, 1919, for £1000. 40

Q. And before that advance of £1000 was there a discussion?—A. Yes, there was a similar discussion.

Q. And what is the next item?—A. The next item is on the 11th August, 1920, and is for £5000.

Q. And before that was borrowed was there a discussion with Mr. Johnstone?—A. Yes, there was a discussion with Mr. Johnstone on the same lines.

Q. You might describe that conversation that took place with regard to the £5000?—A. I spoke to Mr. Johnstone about it. I told him we had not the money to meet the bills that were falling due. He said, "Can't you get some money from your father?" I don't think there was anything more said. Then I saw my father. A document was subsequently signed on the 9th August. Before that was signed I told Johnstone he would have
10 to sign a letter to the effect that we were not to buy any more goods until the stock was reduced to £7000. On that consideration we got a loan of £5000 from my father, at 10% interest.

Q. After the 9th August, 1920, did you buy any further stock?—A. We had stock arriving from England up to the end of December, 1920, and we made a few small local purchases amounting to about £25, in January and that was the last lot of stock that was bought in York Street. Those local purchases appear in the invoice book.

Q. Who kept that book?—A. Mr. Johnstone did. It is all in his handwriting, with the exception of a few entries at the bottom of one page, and
20 the totals.

Q. Was anything entered in the invoice book after January, 1921?—A. No.

Q. Did anything come on to the premises at 36 York Street after January, 1921?—A. No.

(Folios 149 to 155 of invoice book tendered and marked Ex. 17.)

Q. After the signing of that document of August, did the bankrupt have a conversation with you about bringing in other stock to York Street?—A. Yes, he did, and I told him I would not allow him to bring in any stock.

Q. Was there any conversation in 1920 about his desire to bring further
30 stock into the business?—A. I don't think so.

Q. When was the first conversation in 1921 about his desire to bring in further stock?—A. That was a conversation in the office on 22nd March, 1921. He said he wanted to bring the stock in to sell from there, and I said I would not allow it. He said he had the best barrister's opinion in Sydney that he had a right to carry on other business if he wished, so long as he did not use the funds of this business. He lost his temper and cleared out of the office, then.

Q. When did you first know that he was carrying on business in
40 Clarence Street?—A. Not until after he was bankrupt.

Q. When did you first think he might be carrying on business other than at York Street?—A. In March or the beginning of April—people had rung up on the telephone and asked for stock that we had not got.

Q. You have seen the accounts that my friend has put in in this application?—A. Yes.

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Q. Were any of the goods the subject of those accounts and proofs of debt supplied to the business at 36 York Street?—*A.* No.

Q. Even now do you know at what address in Clarence Street this business was carried on?—*A.* No.

Q. Who made out the stock sheets?—*A.* Up till December, 1920, Johnstone made out all the stock sheets. In March, 1921, I took the stock and Johnstone valued it; in May I took the stock and put the same valuation on as Johnstone did in March. In May, 1921, he was not present.

Q. Did the stock sheets contain any of the goods which are the subject of the proofs of debt here?—*A.* No. 10

Q. You dealt, yesterday, generally with the cheques that were paid into bankrupt's account without your knowledge and consent?—*A.* Yes.

Q. Turn to the folio in his account containing the item referable to that?—*A.* They are folios 9 and 10 in ledger B. Those are in my handwriting. These are moneys that he misappropriated. I spoke to Johnstone about it—about the outstanding accounts at the time and he told me he was in difficulties. This conversation was about the 26th or 27th May, 1921. I knew there were a lot of good accounts outstanding. He told me he had paid the cheques into his bank and used the money, and he gave me the details. 20

Q. An entry was made and initialled by the bankrupt?—*A.* Yes, that is in the journal at folios 84 and 85. The column beginning "J. Andrews, 27th May," on folio 84, and ending "Young" on folio 85, is a list of cheques which Johnstone took without my consent; and the cheques totalling £43/8/- immediately following are in a similar position. The amounts of £26/15/9 and £3/4/6 are adjustments. The initials are the bankrupt's.

(Folios 84 and 85 in the journal tendered, and marked Ex. 18.)

(Stock sheets of 31st December, 1920, and 31st March, 1921, tendered; objected to; admitted, and marked Exhibit 19.) 30

Q. Did you have any conversation with Mr. Johnstone as to goods coming from abroad that were not to be taken out of bond?—*A.* Yes, I told Johnstone in October, 1920, that we would have to get all the warrants in my name and they would have to be lodged with the Commonwealth Bank to secure a further overdraft—and that was done.

Q. Did you have a discussion with Johnstone as to the course to be taken with regard to insuring goods?—*A.* Yes, that was agreed upon early in the business, viz.: that the insurance should be made out in our joint names. A separate insurance account was kept. 40

Q. Did you take any goods from the stock for your own purposes?—*A.* Yes.

Q. Did you take moneys out of the business?—*A.* Yes, and they were debited. The bankrupt did the same.

(Letter dated 5th August, 1919, bankrupt to respondent; and telegram in reply of 6th August, 1919, tendered and marked Ex. 20.)

(Letter dated 17th June, 1919, bankrupt to respondent, tendered and marked Ex. 21.)

Q. The balance sheets were made up every six months?—A. Yes.

(Balance sheets of York Street business in handwriting of bankrupt called for. Mr. Loxton objects to these being put in.)

His Honour: Q. Who prepared the balance sheets from time to time?
—A. I did, invariably.

Mr. Flannery: Q. Were copies of those balance sheets taken before May, 1921, by the bankrupt?—A. Yes. He took copies and examined
10 the balance sheets.

Mr. Loxton: We don't produce those that were taken before May,
1921.

Mr. Flannery: Q. The valuation of stock as at 31st May, 1921, is in the balance sheet?—A. Yes.

Q. What basis is that valuation made up on?—A. On the basis of the figures supplied by Johnstone in March, 1921.

Q. I want the basis of the March values—you were with him in March, 1921?—A. Yes.

Q. Were the values estimates or were they costs plus charges?
20 A. Costs plus charges.

Q. Had costs for this class of goods fallen between December, 1920, and May, 1921?—A. Yes, considerably.

Q. When did the fall in values begin?—A. Towards the latter end of 1920, when the slump came and it continued in May, 1921, and fell again after that.

Q. With the exception of the bank and your father, are there any other creditors of the York Street business?—A. Yes, there is a sum of about £290—that is to Montgomery and Sprodd.

Q. Have you arranged with them?—(Question objected to; question
30 allowed).—A. Yes, I have.

Q. The item of stock is given as £15,000 odd. Can you divide that into stock on the premises and stock in bond?—A. The stock sheets of 31st May will show the correct division.

Cross-examination.

Mr. Loxton: Q. When did you first think that you were a partner in this business with Johnstone?

(Question objected to: objection overruled.)

Q. When was it you first took up the attitude that you were a partner with Mr. Johnstone, in respect of any business?—A. I never took up the
4) attitude that I was.

Q. Do you now take it up?—A. I have been informed by my legal advisers that it is so.

Q. That is, since these proceedings commenced?—A. Yes.

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Q. You never registered under the Firms Act as a partnership?—
A. No.

Q. You would have done that if you had considered yourself a partner with Johnstone?—*A.* I might, or I might not.

Q. Before the Registrar, you disclaimed having any interest in the business beyond merely financing it?—*A.* Yes.

Q. Then, you believed that you had no other interest in the business other than financing it?—*A.* Yes.

Q. Was not this the position of things, that Johnstone said that his name was to appear in connection with this business because it was his 10
business. Didn't he say that specifically?—*A.* Yes.

Q. And you acceded to that?—*A.* Yes.

Q. You never discussed with Johnstone what was to happen if the business were carried on at a loss?—*A.* No.

Q. It is suggested that certain names appeared on the business premises. Did not the names appear in such a way that there was nothing to indicate that you and he were associated in business?—*A.* I could not say that.

Q. There was simply your name on a certain space, and his name appeared lower down with no connection between the two names?—
A. There was no "and" between the two names. On the second floor 20
going up there was written "R. W. Carey. A. E. Johnstone, Indentors
and Importers."

Q. Was there any connection between the name of Carey and that of Johnstone?—*A.* No, simply one name above the other.

Q. You did not mean to suggest by that that you and he were in partnership?—*A.* No.

Q. You told the Registrar that all you were doing was financing the business?—*A.* I cannot remember that I did.

Q. Will you say you did not?—*A.* No.

Q. If you said it, would it be true?—*A.* Yes. 30

Q. I will read the questions to you (p. 87, l. 4)—"Was there any reason why the business was to be carried on in Johnstone's name?—
A. Yes, Johnstone said he would not allow my name in it as it was his business." Did you say that before the Registrar?—*A.* If it is there, I said it, and if I said it, it was true.

Q. Then were you asked "You were only financing it," and did you reply "Yes"?—*A.* If it is there I said it, and it is true.

Q. Can't you recollect whether you were asked that question and answered it that way?—*A.* No.

Q. You recognise the importance of that question, don't you?—
A. I suppose I do. 40

Q. You recognised it at the time it was put to you?—*A.* I suppose so.

Q. You knew that you were being examined as to your transactions with the bankrupt and the relationship in which you stood towards him?—
A. Yes.

- Q. You knew that it was important to know whether you were a partner in the business?—A. Yes.
- Q. You knew it was important for the Official Assignee to know to what extent you were interested in the business?—A. Yes.
- Q. Bearing that in mind, do you still say that you don't recollect whether you answered yes to the question as to whether you were only financing the business?—A. I do not remember.
- Q. Well, is it not a fact that you were only financing that business of A. E. Johnstone?—A. It is.
- 10 Q. Do you remember being asked this question, "During that time you took an active part in the business" (that time being up till quite recently before then) "only so far as keeping the books"?—A. Yes, I remember.
- Q. And do you remember giving the answer?—A. Yes.
- Q. So that the only active part that you took in the business was keeping the books?—A. Yes.
- Q. The position was this, that so far as the bankrupt was concerned, the debt that he owed in respect of the financing was the debt to you?—A. Yes.
- 20 Q. That came to about £18,000?—A. Yes.
- Q. So far as the Commonwealth Bank was concerned, you owed the bank?—A. The business owed the bank.
- Q. Is it not a fact that so far as the bank was concerned, you owed the bank money; that so far as your father was concerned, you owed your father the money; and that the bankrupt owed the £18,000 to you. Is not that the position?—A. So far as my father was concerned, the business owed the money.
- Q. Do you remember these questions (p. 89, l. 21): "You say that Johnstone owed you about £18,000 at the end of last month?—A. Yes, that is so." I may take it that was a true answer?—A. Yes.
- 30 Q. The next question was "Including money which he owed your father." Do you remember that question?—A. Yes.
- Q. And your answer was "I owed the money to my father"?—A. Yes, I think it was. That was true.
- Q. "That was money borrowed from your father and put into this business?—A. Yes." That was true?—A. Yes.
- Q. Was this put to you (p. 89, l. 44), "Johnstone according to you, did not owe the bank anything," and your answer was "Nothing at all"?—A. Yes, that is true.
- 40 Q. Was this put to you, "You owed the bank money, and he owed you money," and you answered "Yes"?—A. Yes. That was a true answer.
- Q. Then the question was, "He did not owe your father any money," and the answer was "Yes"?—A. Yes, and that was true.
- Q. The next question, "You borrowed money from your father"?—A. Yes.

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Q. And your answer was, "He was responsible for it"?—*A.* Yes, that answer was given.

Q. "To you, not to your father." Do you remember that question?—*A.* I cannot say that I do.

Q. And the answer "That is right." Was not that question and answer given?—*A.* Yes, I think so—and it was true.

Q. Was this question and answer put and given—"The £18,000 represented a debt due to you which included the amount you owed the bank and your father and other amounts you had put into the business and had not been repaid," and the answer was "Yes." Is that so?— 10

A. Yes.

Q. Do you know that agreement of the 30th April, 1917, which has been put in evidence?—*A.* Yes.

Q. Was that prepared by a solicitor?—*A.* Yes, it was prepared by Messrs. Rawlinson & Hamilton.

Q. And I suppose you carefully considered the terms of it before you signed it?—*A.* Yes.

Q. And may I take it that it correctly represents the actual agreement between you and Mr. Johnstone?—*A.* Yes.

Q. And, when instructions were first given for it to be drawn up, I 20 suppose you contemplated that all you would be called upon to advance would be £200?—*A.* Yes.

Q. And before it was executed, you contemplated and he contemplated that you would be expected to advance possibly up to £1,000?—*A.* That is right.

Q. And that was the condition of things when it was actually executed in the first instance?—*A.* Yes.

Q. Subsequently—on the 16th May or thereabouts—you had a conversation with the bankrupt?—*A.* Yes.

Q. Do you say that anything was said at that conversation which 30 involved your being liable to find a larger amount than £1,000?—*A.* Yes, I do.

Q. You are clear about that?—*A.* Yes.

Q. You say positively that at that interview there was something said?—*A.* Yes.

Q. By virtue of which you considered you would be liable to find more than £1,000?—*A.* Yes.

Q. Will you repeat what was said with reference to your being under an obligation to find more than £1,000?—*A.* We were ordering a large amount of goods—much greater than the capital would cover—and Mr. 40 Johnstone suggested that we should get some more money into the business. That is all that took place.

Q. That is, that reference was made to the fact that you were ordering a large amount of goods, and that there was a need for more money?—*A.* Yes. I spoke to Mr. Johnstone about it and he suggested that we should get some more money—and we did get some more money.

Q. That was all that was said? I want to be clear about that. You are not giving the gist and possibly are omitting something very important? All that passed between you was that there was a large amount of goods being bought and more money was needed?—A. Yes.

Q. And that was all? You are clear about that?—A. Yes.

Q. So I may take it that your getting half instead of one-third was not dependent upon your finding further moneys?—A. No, it was depending.

Q. What was said then? Because what you have just indicated does not show that?—A. We had a general discussion about the business.

10 Q. I will give you an opportunity of repeating it again. I am drawing your attention to what I possibly may suggest to His Honour afterwards is an inaccuracy so far as your memory is concerned. I want to give you an opportunity of supplementing what you said. You do say there was something said at that conversation which indicated that the amount you were to get was to be increased because you were to be under an obligation of finding a large amount of money?—A. I do.

Q. Tell His Honour what it was?—A. The conversation was that I did not agree to find more money unless I got a bigger interest in the profits of the business, and he agreed to that.

20 Q. Is that all that was said, or was anything else said?—A. I was then to come into the business and take an active interest in the business as far as keeping the books was concerned.

Q. May I take this, that there was nothing said about how much more money you were to find?—A. Not over and above the £500.

Q. You have not said a word about £500?—A. I said before that he arranged with me to approach my father and get £500.

Q. So that you were to get a half share of the profits for merely finding £500, is that so?—A. I was getting a third before.

30 Q. It was to be increased from one-third to a half because you were to get your father to advance another £500?—A. And I was to come in and take an active interest in the business and keep the books.

Q. So far you were to be under no obligation to find more than £500, and that you proposed to find through your father? Is that all?—A. And to come in and keep the books.

Q. Whatever the overdraft might be, you were to discharge your liability and be entitled to a half share if you could prove that the overdraft or advance had been increased from £1,000 to £1,500?—A. The overdraft would not be increased at all.

40 Q. I used the term overdraft at first, then I spoke of it as an advance. Is that all that you were to do in order to get a half share? You were to take an active part in the management of the business and you were to be liable to make an advance of £1,500 in lieu of £1,000—is that so?—A. Yes.

Q. Are you quite clear about that?—A. Yes.

Q. Have you always had that recollection, that your share in the business, that your share in the profits was to be increased because of your increasing your liability as to the advance?—A. I have had the

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recollection of that, and the keeping of the books and taking an active interest in the business.

Q. I want to know if you always had a recollection that you were to have your share in the profits increased to the extent you have indicated, conditionally upon your increasing your advance of £1,000 to £1,500—have you?—*A.* Yes.

Q. Did you say a word about that before the Registrar in Bankruptcy?—*A.* I don't think I did.

Q. Why did not you?—*A.* I was not asked the question.

Q. Were you not asked this question (page 86, l. 31): "*Q.* What were you to get by way of profit?—*A.* In the first place a third and he two-thirds. Afterwards the agreement was altered and I was to get half and he half on condition that I came in and kept the books in the business and gave up my time." Do you remember that question being put to you and that answer being given?—*A.* Yes.

Q. I suppose you recognise that there is no indicating there of your being under liability to find further moneys?—*A.* No.

Q. Then this question was put to you: "Was that all that was agreed to?" and you replied: "As far as I remember." Was that true?—*A.* Yes.

Q. So I may take it then that you did not remember that you were to take on a further liability in respect of advances that you made?—*A.* Not at that time.

Q. I put it to you, was not the position this, and see if I cannot refresh your memory. That an agreement was drawn up and an alteration was made in respect of the £200 and initialled?—*A.* Yes.

Q. The next thing that happens is this, the agreement is altered to this extent, and to this extent only, that your share will be half?—*A.* That is true.

Q. And the document was then altered and initialled?—*A.* Yes. 30
(*Mr. Loxton calls for counterpart of this agreement. Produced.*)

Q. I want you to look at this document. You see this document I now produce to you has the same alteration on the first page as the one that has already been put in evidence?—*A.* Yes.

Q. That is simply the £200 is struck out and £1,000 put in. On the other side of the page the alteration one-half is put in instead of the word third and one-half is put in instead of two-thirds, and is initialled by you and by Mr. Johnstone?—*A.* Yes.

(*Above document, counterpart of Exhibit B tendered and marked Exhibit 22.*)

Q. When that alteration was made on that second page, the alteration from one-third to one-half, did not you intend that that document as then altered should be the actual agreement between you and Mr. Johnstone?—*A.* Yes. 40

Q. Do you remember my friend examining you with regard to a certain slip in the bankrupt's handwriting, giving particulars of three cheques

which he said he had paid into his account and in respect of which he gave you a cheque to be paid into the Commonwealth Bank account?—*A.* Yes.

Q. Correct me if I am wrong. Did you not say to my friend Mr. Flannery that the reason why Johnstone adopted that course of action was in order to boost his account with the bank?—*A.* That is true.

Q. What did you understand by the term “boost his account with the bank?”—*A.* To make his account larger in turnover.

Q. What bank did you understand him to be referring to?—*A.* I could not tell you; he had two or three banks.

10 *Q.* At all events it was not the Commonwealth?—*A.* No.

Q. You knew it was his banking account?—*A.* Yes.

Q. So you clearly understood from him—correct me if I am drawing the wrong inference—that he was adopting this course in order to make the bankers believe that he had a bigger turnover than he actually had?—*A.* Yes.

Q. And you assented to that?—*A.* I did.

Q. And in respect of the bills, when he asked you to allow certain bills to be discounted with his bank you did it with a view of giving him an appearance of being in better credit than he actually was?—*A.* He wanted
20 to get into a better position and I agreed to it.

Q. He gave you to understand that that was what he wanted?—*A.* Yes.

Q. That he did want the bank at which those bills would be discounted to be under the impression that he had a bigger business than you suggest he had?—*A.* Yes.

Q. You knew as a matter of fact if the business was his it was a perfectly honest transaction?—*A.* Yes.

Q. Assuming that business to be his own business, there would be
30 nothing dishonest in his allowing certain of his cheques in connection with that business to go through his banking account, or certain of the bills to be discounted at any particular bank that he was dealing with—there would be nothing dishonest, would there?—*A.* No.

Q. I suppose you would concede this, that if this business was not his business, but was your business, or a business in which he was only a partner, you would be a party to a deception of the bank?—*A.* No, because the bank does not recognise me in the matter at all.

Q. You say that it was in order that the bank might think he had a bigger turnover than he actually had?—*A.* Yes.

Q. And I suppose you will concede this. If they were bills in con-
40 nection with his own business they would not indicate to the bank that he had a larger turnover than he actually had; but if they were bills in respect of a business that he was only a partner in the bank would be misled to the extent in which you were interested in these bills?—*A.* Yes.

Q. Now, which do you say was done; the honest course or the dishonest course?—*A.* It was not dishonest as far as I was concerned.

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Q. You still adhere to your statement made to my friend, that you, being a partner in the business—that is your attitude now—that you, being a partner in the business, consciously allowed the bankrupt to make use of the paper that I have spoken of in the way he did?—A. Would you repeat that again?

Q. I think I have already put it in form, and I do not want to take up the time of the court unnecessarily. I think you told my friend that you prepared the balance-sheets from time to time?—A. Yes.

Q. And prepared a balance-sheet as late as the 31st May, 1921?—
A. That is true.

Q. Now, is it not a fact that up to and including the balance-sheet of the 31st May, 1921, you never showed any appropriation of any loss to yourself?—A. There was no loss. There was no balance-sheet made up showing a loss, with the exception of March and May, 1921.

Q. I am asking you about March and May, 1921. Is it not a fact that up to and including the balance sheet of 31st March, 1921, you never showed any appropriation of any portion of any loss to yourself?—A. There was not any loss up till December, 1920.

Q. I am asking you subsequently to that; I am asking you to March, 1921. I will ask you as far as May, 1921?—A. Yes, there was a loss then.

Q. You prepared the balance-sheet for May, 1921?—A. Yes.

Q. There was a loss in connection with that business, whoever it belonged to, at the date?—A. Yes.

Q. And you prepared the balance-sheet?—A. Yes.

Q. Now, is it not a fact that up to and including the balance-sheet of 31st March, 1921, you never showed any appropriation of any portion of any loss to yourself?—A. Not up to that date.

(Mr. Loxton calls for balance-sheet of March 31st, 1921. He alters his request to balance-sheet of 31st May, 1921. Book containing copy of balance-sheet produced.)

Q. These entries are in your handwriting, at folio 237 of ledger B, are they not?—A. Yes.

Q. And those entries at folios 92 are in your handwriting?—
A. Yes.

Q. And they purport to show the result of the transactions for the five months ended 31st May, 1921?—A. Yes.

Q. When was that balance-sheet actually made up that is disclosed in those two pages, folio 237 and folio 92?—A. Sometime between the 31st May and the time of the bankruptcy of Mr. Johnstone.

Q. So that we may take it it was subsequently to the 31st May?—
A. Yes.

Q. I want to draw your attention to this fact. You see there the loss is £1,365/16/-. You arrive at that by taking into consideration the profit and loss account and trading account. We get here, on folio 92, the result of the trading account, which shows a loss of £1,151/16/11. Having regard to the profit and loss account the actual loss is £1,365/16/4. When

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you prepared that balance-sheet you intended to correctly represent the position of the business of A. E. Johnstone? Now I ask you if as a matter of fact you considered yourself as sharing in that loss, as liable to contribute to that loss, why you did not show it?—A. It is shown.

Q. As of that date?—A. As the 1st June.

Q. Where do you show it on the 1st June?—A. £647/6/8 and £35/11/6 added together is half my part of the loss.

Q. When was that entry made?—A. Early in June.

10 Q. Is it not a fact that it was made after this balance-sheet shown on pages 237 and 92?—A. It could not have been made until we struck the balance.

Q. Was not it made a considerable time afterwards?—A. No.

Q. I understand you to say that it could not be made before the balance-sheet was struck?—A. Yes.

Q. Now, I want to refer to some entries in your book that Mr. Flannery examined you upon yesterday, where you drew His Honour's attention to your being charged with certain losses as far back as 31st May?—A. I do not understand what you mean.

20 Q. To your drawing His Honour's attention to the fact that there was an appropriation of certain losses to you. I want you to turn up that book.—A. (*Witness looks at page 87 of Journal.*)

Q. On folio 87 the date 31st May, does not represent the date on which you actually entered the appropriation and these payments?—A. It is the date at the end of the month.

Q. That entry that appears on folio 87 of the journal was not in fact entered in that book until some time after the 31st May?—A. That is so.

30 Q. And it would be subsequent to the date on which you prepared and made up this balance-sheet that is shown on folio 237 and folio 92 of Ledger B?—A. It would be the same day.

Q. And this balance-sheet you say may have been made any time between the 31st May and the sequestration of the bankrupt's estate?—A. Yes.

Q. You remember your telling my friend in answer to his question this morning when examining you, about a conversation you had with the bankrupt about the 26th or 27th May—do you remember that?—A. Yes.

Q. When he was explaining how it was that he had appropriated certain cheques?—A. Yes.

40 Q. Do you mind repeating what he said to you then by way of excuse?—A. He said that he paid the money into his own account and used the funds.

Q. What did he give by way of excuse for doing that?—A. He did not give any excuse.

Q. Did not you say this when you were examined by my friend this morning: "He told me that he was in difficulties and that he had done so-and-so." Did not you say that?—A. I don't think so. I might have,

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No. 14.
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No. 14.
Randal W.
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Cross-exa-
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continued.

Q. Did not you this morning say that when that discussion took place on or about the 26th or 27th May he told you that he was in difficulties and had paid these moneys into his account?—A. I said he had paid the moneys into his account and that he was in difficulties.

Q. And how did you know he was in difficulties?—A. Because he told me so.

Q. When did he tell you so?—A. At that time.

Q. So that on that occasion he told you that he was in difficulties?—A. Yes.

Q. And I suppose you understood from him that that was the reason why he used these moneys in this particular way?—A. I did. 10

Q. And of course the difficulty must have been pretty considerable, you would understand, from the fact that he uses £1,200 in breach of agreement with you?—A. Yes.

Q. You gathered from what he said that he was in very great difficulties?—A. Yes.

Q. And was it subsequent to that that you consulted your solicitor?—A. Yes, I think it was.

Q. And I suppose you told your solicitor of the facts, did you not, in connection with the business? (*Objected to.*) 20

Q. I think you said that that letter of 31st May, 1921 (Exhibit C) that has been put in evidence was prepared by your solicitor?—A. That is true.

Q. And I suppose you read it?—A. Yes.

Q. And you understood it?—A. Yes.

Q. And I suppose it correctly represented to your mind what the actual transaction was?—A. Yes.

Q. And I suppose the same thing may be said about the letter of 1st June?—A. What is the letter of 1st June?

Q. I will read you both of them? (*Reads letter of 31st May.*) The answers you have given apply to that particular document?—A. Yes. 30

Q. And the same answers apply to the document I am now going to read to you (*reads letter of 1st June, 1921*)—the same answers apply to that one?—A. Yes.

Q. That is, it was prepared by your solicitor, that you read it, that you understood the contents of it, that you understood it at the time to correctly represent the transaction?—A. Yes.

Q. You see in that letter "agreement of 30th April, 1917," you there refer to the agreement that has been put in evidence as altered and as initialled?—A. Yes.

Q. That is the document that has been put in evidence by Mr. Flannery to-day?—A. Yes (*Exhibit 22*). 40

Q. Which differs from the one originally executed, by the alteration of one-third to one-half?—A. Yes.

Q. Having got that document, did you collect any of the book debts?—A. I did.

Q. How much did you receive?—A. Very little.

Q. How much?—A. About £300 I should think.

Q. And those are debts that will be shown in the books of account that have been produced and given in evidence?—A. Yes.

Q. How long before the 26th May, roughly speaking, was it that you were first told by Bankrupt that creditors were pressing?—A. I should think about a week or ten days.

Q. What took place on that occasion?—A. I saw him served with a writ.

10 Q. By whom?—A. I think it was Fennell & Co. that served the writ, but I could not say.

Q. You understood it was a writ by a creditor?—A. Yes.

Q. What took place?—A. I asked him what the writ was for. He told me then that he was in difficulties.

Q. What else did you say?—A. I asked him what the position was with regard to the business carried on in York Street, and he said he did not think that it would be interfered with in any way, and then I told him that he must hand the business over to me.

20 Q. Did he tell you about whether he was paying any of the creditors in part or whole, or anything of that sort?—A. No, I don't think so.

Q. He just referred generally to difficulties?—A. Yes.

Q. With regard to a number of entries that have been put into these books my friend has referred to, I suppose you will admit this, leaving out of consideration, of course, that entry that you made some time subsequently to the 31st March, where you appropriate losses and shares to yourself and Mr. Johnstone, I suppose you will admit that in order properly to carry out the terms of the agreement of April, 1917, or May, 1917, whichever it ought to be called by reason of the alteration, you would have to have entered all those debits and all those credits for the purpose of ascertaining what share of the profits you were entitled to under the agreement?—A. You mean as far as the ledgers are concerned?

39 Q. Yes, and so far as every book you produced is concerned?—A. Yes.

(Mr. Loxton tenders balance-sheet of 31st May, Marked Ex. Z.)

(Mr. Flannery calls for letter of 7th June, 1921, respondent to Bankrupt. Not produced.)

(Mr. Flannery tenders balance-sheet of 31st March, 1921. Marked Exhibit 23.)

Re-examination.

40 Mr. Flannery: Q. The moneys lent, assuming they were advances, do not appear at all in those ledgers?—A. They do; they appear as Mr. Carey's.

Q. No other advances appeared in the books of the firm as advances?—A. The Commonwealth Bank shows it.

Q. Did Mr. Johnstone raise any objection to your name appearing on the York Street business?—A. None whatever.

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Re-exa-
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continued.

Q. Do you remember these questions being asked you (*Page 87, l. 3*) in the examination before the Registrar: "Q. Do you remember the date in 1917, some time in March . . . with his business." What business were you talking of then?—A. The business at York Street.

Q. In March, 1917, was there a business in York Street?—A. No.

Q. The business in York Street did not begin until May?—A. No.

Q. And when you went to York Street your name was put up?—

A. Yes.

Q. Your name was not put up in the Strand?—A. No.

Q. The entries in the books, were those made in the ordinary course 10 of business; the ones my friend has been referring to?—A. Yes.

Q. The entry in the journal, dated 31st May, you made after the striking of the balance. Is that the ordinary course of business?—A. Yes.

Q. Is there anything in the possible suggestion that you antedated entries?—A. No.

Q. Your books were kept in accordance with the ordinary principles of bookkeeping?—A. Yes.

(*Mr. Flannery again calls for letter of 7th June, 1921, respondent to Bankrupt. Mr. Loxton objects to producing it as being subsequent to the transaction he is impugning. Mr. Flannery tenders it on respondent's 20 evidence before the Registrar, Page 94.*)

Mr. Flannery: Q. After the 1st June, did you see the Bankrupt?—

A. Yes.

Q. What did he say? (*Mr. Loxton objects as being subsequent to the transaction. After argument the document was marked as Exhibit 24, subject to objection, which may be taken on the general argument.*)

Q. Have a look at that document. In whose handwriting is it?—

A. Mr. Johnstone's.

Q. When did you get that?—A. I got this after the letter of 1st 30 June.

Q. And before the letter of 7th June?—A. Yes.

Q. Did you have a conversation with Mr. Johnstone?—A. Yes, Mr. Johnstone said that he would not take my release, and that he wanted a release in those terms.

(*Above document made part of Exhibit 24.*)

Mr. Loxton: Q. So far as the goods received in connection with this business were concerned, Mr. Johnstone received them, did he not?—

A. Yes, into the business in York Street?

Q. Yes, he actually received them, that was his duty?—A. Yes, 40 practically in all cases.

Q. He would receive them and check them?—A. Yes.

Q. You would have nothing to do with that part of the business?—

A. Occasionally I would receive goods and check them.

Q. You stated in your evidence before the Registrar that he was away on one or two occasions ill. Apart from an odd occasion, would not he receive and check the stock?—A. Yes.

Q. When you took the stock for the purpose of your balance-sheet, how were the items and the amounts enumerated?—A. At what date?

Q. At any date. Was a different plan adopted at one time from any other time?—A. Up till December, 1920, Mr. Johnstone always took the stock and put the prices on the stock and extended them, and I checked the extension.

Q. That is, he did everything?—A. Yes, in connection with that. In March, I took the stock, he put the valuation on.

10 Q. What do you mean by you took the stock? You satisfied yourself that each item was there?—A. Yes.

Q. And he gave you certain figures as representing the value?—A. Yes.

Q. And then you recorded the parcel with the amount he gave you? In preparing the balance-sheet for 31st March is not this the position? You looked at each item of stock and identified it as an article that had to be taken into consideration in the stock?—A. Yes.

Q. He then told you what figure to set opposite to that particular item?—A. Yes.

Q. And then ultimately those amounts he had given you were added up and you arrived at the figure in your balance-sheet?—A. Yes.

20 Q. And I suppose in bringing in your balance-sheet you intended that to be a correct statement?—A. Yes.

Q. And I suppose the same thing took place on the 31st May?—A. No.

Q. What took place on the 31st May?—A. I took the stock and I took the valuations that Mr. Johnstone had put on the previous stock sheet in March, 1921.

Q. That is, you did not check the matter further than this, that you ascertained with respect to each particular item the price Mr. Johnstone had fixed on the 31st?—A. Yes.

30 Q. Then in arriving at these debit balances, you show in the balance-sheet of 31st March, 1921, that is, a balance of £746/4/2 and £1,365/16/4, you had regard to the fact that there had been a depreciation in values?—A. Yes.

Mr. Flannery: Q. How is the depreciation shown in the balance sheet?—A. In the price of the goods at per yard or at per feet, as the case may be.

Q. What depreciation has been allowed for?—A. At the present time or at that time?

Q. At that time?—A. None whatever.

Q. No depreciation was allowed for in striking the balance?—A. No.

40 Q. But as a matter of fact there has in fact been a depreciation in value?—A. Yes, a tremendous depreciation.

Q. The depreciation in value is not shown in the balance-sheet?—A. Not in the slightest.

(This witness was recalled, see p. 49.)

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No. 14.
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No. 15.

Evidence of William Oswald Montgomery.

Sworn and examined as under :

Mr. Mason : Q. You are a member of the firm of Montgomery and Sprodd?—A. Yes.

Q. And they are indentors, carrying on business in Sydney?—A. Yes, and Melbourne.

Q. For a number of years you had large transactions with the business of 36 York Street?—A. Yes.

Q. Do you remember having a conversation with Mr. Johnstone in 1921?—A. Yes, I had several.

Q. Do you recollect when you left for England?—A. Yes.

Q. When was that?—A. In April, 1921.

Q. Do you recollect a conversation shortly before that?—A. I do.

Q. Where did that take place?—A. In my own office.

Q. Who were present?—A. My partner from Melbourne and Mr. Lyell from Manchester.

Q. Mr. Lyell is not in New South Wales now?—A. No, he is in England.

Q. Tell His Honour what the conversation was? (*Objected to as being irrelevant. Question allowed.*) 20

Q. What was the conversation?—A. He called in to see me really because Mr. Lyell was there from Manchester. He told us that he was going to start in business for himself in a very short while. He did not specify any particular date, but he wanted to know if we would let him have goods on credit, and Mr. Lyell informed him that he would not. He went away rather chagrined, so much so, that he did not even say good-bye to us.

Q. Was Mr. Carey's name mentioned?—A. Yes, it was.

Q. What was said with regard to Mr. Carey's name?—A. He said he was sick of the whole business with Carey and that he was going to start for himself, that in the nature of things he did not want us to mention anything of it to anybody else at the time. 30

Q. What firm did Mr. Lyell belong to?—A. Baker, Butterworth & Co., Manchester.

Q. They have supplied many thousand pounds worth of goods through your firm to the York Street business?—A. Well, mainly direct to the York Street business.

Q. You know the goods that were supplied?—A. Yes.

Q. Was there any fall in value of those goods? (*Objected to by Mr. Loxton, he submits that the evidence is only material that evidence be given as to the identity of the particular goods.*) 40

Mr. Mason : Q. Take the end of 1920, silk goods, crepes and cotton?—A. I am afraid I am not very conversant with silk goods.

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No. 15.
William O.
Mont-
gomery.
Examina-
tion.

Q. What were the goods that were supplied through the English firm?—A. Cotton goods.

Q. Towards the end of 1920 was there any slump in prices of cotton goods. (*Mr. Loxton objects, as being irrelevant, submits that the evidence is not sufficiently connected with the material His Honour has to deal with to make it admissible.*)

Q. Assuming cotton goods were bought from the firm you represent in England, that you have mentioned, assuming they were bought in 1920, would they have increased or decreased in value in 1921? (*Objected to by*
10 *Mr. Loxton as being irrelevant. His Honour intimates that as far as he can go is to allow Mr. Mason to ask the witness whether there was a general fall in prices in cotton goods in 1921 below the ruling prices in 1920: and that that evidence will be quite immaterial unless Mr. Mason afterwards carries the matter a great deal further.*)

Mr. Mason: Q. Was there or was there not a fall in 1921 in the price of cotton goods purchased in 1920?—A. There was a distinct fall.

Q. When did that fall manifest itself?—A. About September 1920, I think it began, and it has continued to the present minute.

Q. To what extent had there been a drop by May 31st, 1921?—A. It is
20 rather difficult to answer specifically a question like that, broadly, because it varies with different articles.

Q. But with cotton goods?—A. It would vary with different items even in cotton goods.

Q. What would it average?—A. If I may be permitted to give an idea of the things we were dealing in with Mr. Carey?

Q. Do you know what those lines were?—A. Certainly.

Q. What was the average drop in those lines (*Mr. Loxton raises the same objection as previously*)?—A. By May of last year I should
30 say the drop would be 25 per cent., perhaps a bit more than that, on the lines I have mentioned.

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No. 15.
William O.
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tion—con-
tinued.

No. 16.

Further Evidence of Randal Westropp Carey (*recalled*).

Mr. Flannery: Q. Were any stock bought in December, 1919, in stock
December, 1920?—A. There may have been.

Respondent's Case closed.

Counsel addressed at 2.35 p.m.

(At 4 p.m. the further hearing was adjourned till Monday, 18th Septem-
ber, 1922.)

No. 16.
Randal W.
Carey (*re-
called*).
Examina-
tion.

Reasons for Judgment.

REASONS FOR JUDGMENT.

No. 17.
Reasons for
Judgment.
Street, C.J.

STREET, C.J. :—The Bankrupt carried on business in Sydney as an indenter and importer, and on the 30th April, 1917, the respondent, Mr. Carey, entered into an agreement with him. In that agreement the bankrupt was described as the borrower and Mr. Carey as the lender, and the agreement, after reciting that the bankrupt required additional capital to enable him to extend his business, and that the lender had agreed to advance to him certain sums of money, then went on to provide how the money so borrowed should be applied in the purchase of goods, and what provision should be made by the sale of those goods for the repayment of the amounts from time to time advanced. It also provided that Mr. Carey should receive one-third of the profits, but it expressly provided that it should not constitute the parties, partners *inter se*. Pursuant to the agreement moneys were advanced, and, as the business grew, further moneys were advanced and an alteration was made under which Mr. Carey undertook a more active part in connection with it than appears to have been at first contemplated and received one-half of the profits. Afterwards matters were not so prosperous, and, eventually, Mr. Carey found that the bankrupt was carrying on another business elsewhere in the City and that he was in serious financial difficulties. In those circumstances he looked about to protect himself, and, acting on the advice of his solicitors, he entered into an agreement with the bankrupt under which the bankrupt, on the 31st May, 1921, signed a document in these terms : “ In consideration of your giving me a release for the sum of £18,999/16/3, 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 receiving that document, Mr. Carey released the bankrupt from all obligations arising out of the agreement, to which I have referred. Some three weeks or so later the bankrupt sequestrated his estate and, as appears from the evidence of his official assignee his assets, outside those which were transferred to Mr. Carey under the circumstances to which I have just referred, amounted to some £500. His proved creditors, outside the creditors in respect of the goods purchased for the business carried on at York Street, represent debts amounting in all to a sum of £3,700. The official assignee examined Mr. Carey under Section 30 for the purpose of obtaining what information he could in respect of the transactions between him and the bankrupt, and Mr. Carey, amongst other things, was asked how he came to enter into business relations with the bankrupt. The following questions were put to him :—

“ Q. Something must have been said, what were you and he to do?—A. Johnstone was to buy goods and sell them and I was to find the money to pay for them.

“ Q. You suggested you should join him in making money ?

—A. I do not think so.”

Then a little later on :

“ Q. Up till quite recently you and he occupied the same office ?—A. Yes, quite so.

“ Q. During that time you took an active part in the business ?

—A. Only so far as keeping the books.

“ Q. Did not you do anything else ?—A. No.”

Later on he said that he used not to open the bankrupt's letters, but that each used to open his own, and towards the close of his examination, after he had given evidence about the difficulties that the bankrupt was getting into, he gave these answers :

“ Q. Tell the Court exactly how the business came to become yours, what led up to it ?—A. I got nervous as to what was going on in the Clarence Street business. Johnstone had a writ against him and I consulted my solicitors and they drew up a document.

“ Q. Up to then had you said nothing to Johnstone about acquiring the business ?—A. I told him he would have to hand the business over to me.”

20 On that evidence it is apparent that his attitude was that he was not a partner of the bankrupt, but that he was merely advancing money for the purpose of financing a business in respect of which he did not acquire any proprietary interest until he took it over at the end of May, 1921, in exchange for the release which he gave to the bankrupt. That being so, the official assignee took out this notice of motion, claiming to set aside the transfer upon the ground that the transaction took place shortly before the bankruptcy, when the bankrupt was in insolvent circumstances, and at a time when to the knowledge of Mr. Carey there were other creditors who would be prejudicially affected by it. It was claimed that as the
30 transfer was a transfer of practically the whole of the bankrupt's property and as to the knowledge of Mr. Carey, the bankrupt had other creditors the transaction could not be said to have been entered into with that degree of good faith which would be required under the Bankruptcy Act to protect it. To that claim the only answer made is that on the true interpretation of the dealings between the parties their relations were not those of borrower and lender, but those of co-contractors with a joint interest in the profits to be made and a joint interest in the goods out of which those profits were to be earned. Mr. Flannery admitted that the only question the Court had to consider was what were the rights which
40 their contract gave them. He referred to *Walker v. Hirsch*, 27 Ch. D. 460 and he quoted from the judgment of Cotton L.J. (at p. 468). The learned Lord Justice said :

“ Very different questions arise when we come to the question which exists here, where the parties are between themselves partners. I have used the word “partners,” but really what we have to

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consider when we are considering questions as between the parties themselves, and not as between strangers and one of the parties or all of them, is really this: What rights had the contract entered into in fact given one of the parties against the other? And that is the whole question when the matter arises as between those who are alleged to be—I will use now the ambiguous term—“Partners.” Therefore, what we really have to consider is this, what on the contract between the parties are the rights which that contract has *inter se* given to one as against the other.”

Lindley, L.J. in the course of his judgment said at p. 473 :

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“Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words; their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered.”

Well, as Mr. Flannery said, the substantial question here is, who was the owner of these goods? That depends upon the rights of the parties under their agreement. He contended that if the document were scrutinised closely it would be seen that on its true interpretation it did not create the relation of borrower and lender, but created some other relation, and he contended that in view of its terms, and in view of the dealings between the parties afterwards many of which were more consistent with a partnership than with any other relation, the true inference to be drawn was that as they were to share the profits in an agreed upon proportion they were to be entitled to the goods, out of which those profits were to be entitled to the goods, out of which those profits were to be made in the same proportion. Well, if that was the true agreement between the parties the official assignee must stand or fall by it, but the question is one of fact, and if that were the true agreement between the parties, no one would know it better than Mr. Carey; and I am not doing him any injustice in saying that he heard of that suggestion for the first time after he took legal advice in respect of this notice of motion. He impressed me as a witness who desired to give his evidence straightforwardly and honestly to the best of his recollection. In cross-examination he was asked :

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“When was it you first took up the attitude that you were a partner with Mr. Johnstone in this business?—A. I never took up the attitude that I was.

“Q. Do you now take it up?—A. I have been informed by my legal advisers that it is so.

“Q. That is since these legal proceedings commenced,?—
—A. Yes.”

40

Then he was asked :

“Q. Before the Registrar you disclaimed having any interest in the business beyond merely financing it?—A. Yes.

“Q. Was not this the position of things, that Johnstone said that his name was to appear in connection with this business

because it was his business. Did not he say that specifically?

—A. Yes.

“Q. And you acceded to that?—A. Yes.”

Then again he was asked whether he had not said before the Registrar that Johnstone would not allow his, Mr. Carey's name in it, as it was his, Johnstone's business, and his answer is “If it is there, I said it, and if I said it it is true.” Later on he was asked :

“Q. Well, is it not a fact that you were only financing that business of A. E. Johnstone?—A. It is.”

10 In the face of that evidence and in the face of the fact that Mr. Carey acted on that belief and dealt with the bankrupt on that footing, it seems to me impossible now to set up a claim of joint ownership in the goods. Mr. Flannery asked that the release and transfer might be set aside on the ground that the parties were partners at the relevant dates, and that Mr. Carey acted in ignorance of his true rights. But, as I say, his true rights depended on the nature of the agreement entered into between him and the bankrupt. None knew better than the parties themselves what that agreement was and no better interpretation of its meaning could be relied upon than the manner in which they interpreted it and acted on it

20 in their dealings with one another. Mr. Carey showed clearly by his actions, when affairs were in a critical condition, that he recognised the bankrupt as the owner of the goods, and knew that if he wanted to acquire them he could only do so by arrangement with the bankrupt. In the agreement for a release and transfer the business is referred to by the bankrupt as “my business,” and the amount advanced by Mr. Carey is spoken of as an amount due by the bankrupt to him. It is referred to as “the amount due by me to you for goods purchased for my business.”

In those circumstances I think that the defence set up fails and I think that the official assignee is entitled to the order for which he asks.

30 I declare that the sale to the respondent of the goods and property in question was void as against the official assignee and I order the respondent to pay to him the value of the said goods and property seized, as at the date of seizure, but subject to deductions in respect of any security over the same validly created before the bankruptcy by the bankrupt or any person having authority on his behalf.

I direct a reference to the Registrar to ascertain such value subject to such deductions as aforesaid, and I order the respondent to pay costs of this motion.

40 I should like to add that, though my decision is against Mr. Carey, I entirely concur in what has been said as to the manner in which he gave his evidence. I think he gave his evidence very fairly. Whether the facts were for him or against him, he made no attempt to depart from the truth.

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No. 17.
Reasons for
Judgment.
Street, C.J.
—continued.

In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).

No. 18.

Order.

Re ALFRED EDWIN JOHNSTONE - - - - Bankrupt

Ex parte THE OFFICAL ASSIGNEE.

RANDAL WESTROPP CAREY - - - - Respondent.

No. 18.
Order,
18th Sept-
ember 1922.

MONDAY, the Eighteenth day of September, in the year of our Lord one thousand nine hundred and twenty-two.

UPON MOTION made the Thirteenth Fourteenth and Fifteenth days of September instant and this day before the Honourable Philip Whistler Street Judge in Bankruptcy on behalf of the Official Assignee of the Estate of the abovenamed ALFRED EDWIN JOHNSTONE Bankrupt WHERE- 10
UPON AND UPON READING the Notice of Motion dated the Second day of June last and the Memorandum of Appearance of the abovenamed Respondent filed herein on the Seventh day of June last AND UPON HEARING the oral evidence of William Harrington Palmer, John Fennell, Sakuzo Jimbo, Stanley Mathews Wreford, Robert Richardson Alison, Charles Robertson Swan, William Anderson, John Thomas Higgins and Charles Horacius Field called on behalf of the said Official Assignee and of the Respondent and William Oswald Montgomery called on behalf of the said Respondent AND UPON READING the Exhibits put in evidence 20
by the parties hereto respectively AND UPON HEARING what was alleged by Mr. Loxton of King's Counsel and by Mr. Reginald K. Manning of Counsel for the said Official Assignee and by Mr. Flannery of King's Counsel and Mr. Mason of Counsel for the said Respondent THIS COURT DOTH DECLARE void as against the said Official Assignee the sale handing over delivery assignment and transfer by the said Bankrupt to the said Respondent of the lease fixtures stock-in-trade books debts and all other assets of the said Bankrupt of or in connection with a certain business carried on by the said Bankrupt in York Street Sydney AND THIS COURT DOTH ORDER that it be referred to the Registrar in Bankruptcy 30
to inquire and ascertain the nature and value as of the date of the said sale handing over delivery assignment and transfer of the said lease fixtures stock-in-trade book debts and other assets so sold handed over delivered assigned and transferred as aforesaid subject to deduction in respect of any security over the same or the proceeds of the sale thereof which has been validly given before the bankruptcy herein to the Commonwealth Bank of Australia by the Bankrupt or by any person having authority on his behalf AND THIS COURT DOTH FURTHER ORDER that the said Respondent do within fourteen days after service on him or his Solicitors Messieurs Rawlinson and Hamilton of an office copy of the Certificate of the Registrar in Bankruptcy of the amount of the value of the said lease fixtures stock-in-trade book debts and other assets subject to such deduction as aforesaid pay the said amount thereof to the said Official 40

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Assignee AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Honourable Court to tax and certify the costs of the said Official Assignee of the said Motion up to and including this Order and that such costs when so taxed and certified as aforesaid be paid by the said Respondent to the said Official Assignee or to his Solicitor Mr. G. W. Ash within fourteen days after service on the said Respondent or his Solicitors Messieurs Rawlinson and Hamilton of an office copy of the Certificate of such Taxation AND THIS COURT DOTH FURTHER ORDER that the costs of the reference hereinbefore directed
 10 and all further questions and further costs be reserved and that all parties are to be at liberty to apply as they may be advised AND THIS COURT DOTH FURTHER ORDER that the Exhibits put in evidence by the parties hereto respectively may be handed out to the parties by whom the same were produced or to their respective Solicitors the parties hereto respectively undertaking to return the same to this Court if required for the purposes of appeal.

*In the
 Supreme
 Court of
 New South
 Wales
 (in Bank-
 ruptcy).*

No. 18.
 Order,
 18th Sept-
 ember 1922
 —continued.

By the Court,
 N. C. LOCKHART,
 Registrar in Bankruptcy.

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No. 19.

Notice of Appeal.

TAKE NOTICE that the appellant herein appeals to the High Court of Australia from the whole of the decree or order of the Supreme Court of New South Wales in its Bankruptcy Jurisdiction made by the Honourable Philip Whistler Street on the 18th day of September 1922 in the application No. 22469 of 1922 in which the present respondent was the applicant and the present appellant was the respondent upon the following amongst other grounds namely :—

*In the
 High
 Court of
 Australia,
 New South
 Wales
 Registry.*

No. 19.
 Notice of
 Appeal,
 7th October
 1922.

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(1) That His Honour should have held that there was no sufficient signed agreement in writing between the appellant and the bankrupt Alfred Edwin Johnstone to comply with section 2 (3) (d) of the Partnership Act 1892.

(2) That His Honour was in error in holding that the business carried on in York Street Sydney and all the assets thereof were the sole property of the said bankrupt.

(3) That His Honour was in error in holding that the appellant had no interest or rights of any kind in the said business or any of the assets thereof.

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(4) That His Honour was in error in holding that the appellant's position in regard to the said business and the said assets was merely that of an unsecured lender of moneys to the said bankrupt.

In the
High
Court of
Australia,
New South
Wales
Registry.

No. 19.
Notice of
Appeal,
7th October
1922—con-
tinued.

(5) That His Honour was in error in holding that no partnership existed between the present appellant and the said bankrupt.

(6) That His Honour was in error in ordering the appellant to pay to the respondent the value of the lease fixtures stock-in-trade book debts and other assets of the said business or of any of them.

(7) That His Honour was in error in declaring void as against the respondent the sale and transfer by the said bankrupt to the appellant of the lease fixtures stock-in-trade book debts and other assets of the business carried on in York Street Sydney.

(8) That His Honour should have dismissed the said application with costs. 10

DATED this seventh day of October, 1922.

H. H. MASON,
Counsel for the Appellant.

No. 20.
Order,
31st July
1923.

No. 20.

Order.

IN THE HIGH COURT OF AUSTRALIA,
NEW SOUTH WALES REGISTRY.

No. 31 of 1922.

ON APPEAL from the Supreme Court of New South Wales in its Bankruptcy Jurisdiction. 20

Between

RANDAL WESTROPP CAREY (*Respondent*) - - - - *Appellant*

and

WILLIAM HARRINGTON PALMER (*Applicant*) - - - - *Respondent*.

Before Their Honours the Chief Justice and Mr. Justice Isaacs and Mr. Justice Starke.

Tuesday the thirty-first day of July in the year of our Lord one thousand nine hundred and twenty-three.

WHEREAS by Notice of Motion filed on the second day of June one thousand nine hundred and twenty-two the Respondent commenced proceedings in the Supreme Court of New South Wales in its Bankruptcy Jurisdiction against the Appellant for an order declaring void as against the Respondent as Official Assignee of the Estate of Alfred Edwin Johnstone bankrupt the sale handing over delivery assignment and transfer by the said Bankrupt to the Appellant of the lease fixtures stock-in-trade book debts and all other assets of the said bankrupt of or in connection with a certain business carried on by the said Bankrupt in York Street Sydney 30

31 7 1923

and for an order directing the Appellant to pay to the Respondent the value as of the date of the said sale and delivery or as of such other date as the said Court should direct of the said lease fixtures stock-in-trade book debts and all other assets and for an order referring it to the Registrar in Bankruptcy to inquire and ascertain the nature and value of the said lease fixtures stock-in-trade book debts and other assets and for an order directing the Appellant to pay to the Respondent the costs of the said motion. AND WHEREAS the said Motion came on to be heard before the Honourable Philip Whistler Street Judge in Bankruptcy on the thirteenth

10 fourteenth fifteenth and eighteenth days of September one thousand nine hundred and twenty-two AND WHEREAS on the eighteenth day of September one thousand nine hundred and twenty-two the said Supreme Court did (*inter alia*) adjudge and declare void as against the Respondent the sale handing over delivery assignment and transfer by the said Bankrupt to the Appellant of the lease fixtures stock-in-trade book debts and all other assets of the said Bankrupt of or in connection with the said business carried on by the said Bankrupt in York Street Sydney and did further order that it be referred to the Registrar in Bankruptcy to inquire and ascertain the nature and value as of the date of the said sale handing over

20 delivery assignment and transfer of the said lease fixtures stock-in-trade book debts and other assets so sold handed over delivered assigned and transferred as aforesaid subject to deduction in respect of any security over the same or the proceeds of the sale thereof which had been validly given before the bankruptcy of the said Bankrupt to the Commonwealth Bank of Australia by the said Bankrupt or by any person having authority on his behalf AND WHEREAS on the seventh day of October one thousand nine hundred and twenty-two the Appellant filed a Notice of Appeal in this Court against the whole of the said Decree or Order AND the said Appeal coming on to be heard before this Court on the twenty seventh and thirtieth

30 days of July one thousand nine hundred and twenty three and this day WHEREUPON AND UPON READING the certified copy of the documents transmitted by the Registrar in Bankruptcy of the said Supreme Court to the New South Wales Registry of this Court AND UPON HEARING what was alleged by Mr. Flannery K.C. and Mr. H. H. Mason of Counsel for the Appellant and by Mr. Loxton K.C. and Mr. R. K. Manning of Counsel for the Respondent THIS COURT BY CONSENT DOTH ORDER that the said Decree or Order of the eighteenth day of September One thousand nine hundred and twenty-two be varied by inserting therein the following words after the words "having authority on his behalf—"

40 "And subject also to deduction (if any) in respect of any security lien or charge (if any) to which the said Respondent is entitled under Clause 3 of the Agreement of 30th April 1917" AND THIS COURT DOTH BY CONSENT FURTHER ORDER that this matter be referred back to the Supreme Court of New South Wales in its Bankruptcy Jurisdiction to determine whether the Appellant is entitled to any such security lien or charge and if so for what amount and that the costs of such reference

In the
High
Court of
Australia,
New South
Wales
Registry.

No. 20.
Order,
31st July
1923—con-
tinued.

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*In the
High
Court of
Australia,
New South
Wales
Registry.*

No. 20.
Order,
31st July,
1923—*con-
tinued.*

be in the discretion of the said Supreme Court AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the said Decree or Order of the eighteenth day of September One thousand nine hundred and twenty-two be otherwise affirmed and that this Appeal be and the same is hereby dismissed with costs AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Respondent of and incidental to this Appeal and that such costs when so taxed and certified be paid by the appellant to the Respondent or to Mr. G. W. Ash his Solicitor AND THIS COURT DOTH DECLARE that the Respondent is entitled to be paid such costs out of the money lodged in the said Supreme Court as security for such costs so far as the same shall extend and that the balance (if any) of such moneys should be paid to the Appellant or to Messieurs Rawlinson and Hamilton his Solicitors. 10

ARTHUR G. SADDINGTON,
District Registrar (L.S.).

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

No. 21.
Randal W.
Carey.
Examina-
tion.

No. 21.

Evidence of Randal Westropp Carey.

IN THE SUPREME COURT OF
NEW SOUTH WALES
IN BANKRUPTCY.

Coram : Street, C.J., in Eq.
Tuesday, 18th December, 1923.

20

Re ALFRED EDWIN JOHNSTONE—*ex parte* The Official Assignee.
RANDAL WESTROPP CAREY, Respondent.

Notice under Sec. 134—re-entered.

Mr. Loxton, K.C., and Mr. R. K. Manning appeared for the Official Assignee.

Mr. Flannery, K.C., and Mr. Mason appeared for the Respondent.

Mr. Flannery : *Q.* I want you to look at Ex. J. (*handed to witness*)—that is the list of the goods which you took over from the bankrupt in 1921?—*A.* Yes.

Q. And the values set opposite to them are cost plus charges?—*A.* Yes. 30

Q. Those goods were taken over in 1921 after you had made the agreement of the 31st May 1921?—*A.* The agreement with Mr. Johnstone?

Q. The agreement with the bankrupt?—*A.* Yes.

Q. The goods that are in that list, were any of those goods bought as far back as 1917?—*A.* Oh no, none of these.

Q. Or were they in the possession of Johnstone as far back as 1917?
—*A.* No.

Q. The goods which you took over from the Strand, were they all disposed of in 1917?—A. Yes, within three months of the time we took them over.

Q. And you took them over when—about the middle of the year I think?—A. About May I think it was; the last of them was disposed of in August.

Q. Those goods that are enumerated in J. were the agreements to purchase them made prior to September, 1920?—A. Yes.

10 Q. Can you give us the date when they were all paid for?—A. I think they had all been paid for speaking from memory, it is a good few years ago now, before the end of 1920.

Q. Can you make certain of that by looking at any book?—A. Yes.

Q. Which book would you want to look at?—A. Give me the cash book—(handed to witness). The last lot were paid for on December 10th, 1920.

Q. The costs and charges for all these goods were paid for out of the Commonwealth Bank Account?—A. Yes.

Q. And the payments consisted of meeting your draft or paying your cheque?—A. Yes, my cheques.

20 Q. You have totalled up in that J. the total amount of the costs and charges for those particular goods?—A. Yes, £15,151 9s. 11d.

Q. And J. is made up from your cost book and your stock sheets?—A. Yes.

Q. When was the advance of £1,000 first exceeded?—A. December 1918.

Q. What are you looking at?—A. The Commonwealth Bank Account.

Q. Kept in your ledger?—A. Kept in the ledger, folio 11, Ledger B.

30 Q. When was the first time you expended that sum of money?—A. That is the first time. The position was that I arranged for an overdraft of £1,000 and that is the first time according to that ledger. It may have exceeded it during the month, but it would take a long time to chase it up to find out whether it did, but at the end of the month there it shows a debit balance of over £1,000.

Q. Wouldn't your pass book show it—(handed to witness)?—A. No, there is nothing in this one that would show it. That account was always worked on an overdraft.

Q. Very well, you look at ledger, Exhibit B, and you say that the first time the debit exceeded at the end of the month £1,000 was in 1918?—A. Yes, December 1918.

40 Q. After 1918 the arrangement about paying into the Commonwealth Bank and paying out from the Commonwealth Bank continued as before?—A. Just the same.

Cross-examination.

Mr. Loxton: Q. Up till this period in 1918 when you say that the £1,000 was exceeded, how had you been finding the money—by drawing on this account, part of Exhibit 12?—A. Yes.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

No. 21.
Randal W.
Carey.
Examina-
tion—con-
tinued.

Cross-exa-
mination.

*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

No. 21.
Randal W.
Carey,
Cross-exa-
mination—
continued.

Q. Was that an account you operated upon, that was up to and including the time that this £1,000 had been exceeded, was that an over-drawn account?—*A.* All the time.

Q. Did you give any security in respect of that overdraft?—*A.* Oh yes, I had to give security for it.

Q. Up to and including the withdrawal of the whole £1,000?—*A.* Yes.

Q. What security did you give?—*A.* I gave shares in a public company.

Q. That is property of your own?—*A.* Yes.

No. 22.
Order,
19th Dec-
ember 1923.

No. 22.

10

Order.

IN THE SUPREME COURT OF
NEW SOUTH WALES.
IN BANKRUPTCY.

No. 22468.

Re ALFRED EDWIN JOHNSTONE Bankrupt

Ex parte The Official Assignee.

RANDAL WESTROPP CAREY, *Respondent.*

Wednesday the Nineteenth day of December One thousand nine hundred and twenty-three.

Upon the Motion herein coming on to be further considered on the 20 Eighteenth day of December instant and this day before the Honourable Philip Whistler Street Judge in Bankruptcy pursuant to an Order made by the High Court of Australia on the thirty-first day of July last in a Matter No. 31 of 1922 on appeal from this Court in its Bankruptcy Jurisdiction between the abovenamed Randal Westropp Carey Appellant and William Harrington Palmer Respondent whereby it was referred back to this Court to determine whether the above named Randal Westropp Carey is entitled to any security lien or charge under Clause 3 of the Agree-
ment of the Thirtieth day of April one thousand nine hundred and seventeen and being Exhibit No. 22 put in evidence herein and if so for what amount 30
AND WHEREBY IT WAS FURTHER ORDERED that the cost of such reference should be in the discretion of this Court AND UPON READING the Order made herein on the Eighteenth day of September One thousand nine hundred and twenty-two and the evidence both oral and written therein referred to and the said Order of the High Court of Australia dated the thirty-first day of July last AND UPON HEARING the oral evidence of the Respondent AND UPON HEARING what was alleged by Mr. Flannery of King's Counsel and by Mr. Mason of Counsel for the said Randal Westropp Carey and by Mr. Loxton of King's Counsel

and by Mr. Reginald K. Manning of Counsel for the Official Assignee of the Estate of the abovenamed Bankrupt THIS COURT DOTH DECLARE that the abovenamed Randal Westropp Carey is not entitled to any security lien or charge under Clause (3) of the said Agreement of the said thirtieth day of April One thousand nine hundred and seventeen over or on the lease fixtures stock-in-trade book debts and other assets in the said Order dated the Eighteenth day of September one thousand nine hundred and twenty-two mentioned or any portion thereof AND THIS COURT DOTH ORDER that the application of the abovenamed Randal Westropp Carey to be entitled to such security lien or charge be and the same is hereby dismissed AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Honourable Court to tax the costs of the Official Assignee of and incidental to such application and reference and of this Order and that such costs when so taxed and certified as aforesaid be paid by the said Randal Westropp Carey to the said Official Assignee within fourteen days after service on the said Randal Westropp Carey or his Solicitors Messrs. Rawlinson & Hamilton of an office copy of the Certificate of such Taxation AND THIS COURT DOTH FURTHER ORDER that all parties are to be at liberty to apply as they may be advised.

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*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*
No. 22.
Order,
19th Dec-
ember 1923
—continued.

By the Court

(L.S.)

HAROLD A. RICH
Chief Clerk in Bankruptcy.

No. 23.

Reasons for Judgment.

Coram : Street, C.J. in Eq.

Wednesday, 19th December, 1923.

No. 23.
Reasons for
Judgment.
Street, C.J.

STREET, C.J. : When this motion was last before this Court a reference was directed to the Registrar in Bankruptcy to inquire and ascertain the nature and value of certain property handed over by the bankrupt to the respondent subject to a deduction in respect of any security which might have been given to the Commonwealth Bank. On appeal to the High Court that tribunal directed that the order should be varied by inserting in it a direction for a reference to determine whether the appellant was entitled to any security lien or charge in respect of clause 3 of the agreement of the 30th April, 1917, between the parties with a view to the deduction of the amount if any in respect of any such security. Mr. Loxton contends that all that was intended was that the Court should determine what the position was in respect of the original sum of £1,000 advanced by Mr. Carey to the Bank. I cannot believe that that was intended. As Mr. Flannery has said, if that was all that the High Court meant it would have been idle to direct any such reference. I think that what the High

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*In the
Supreme
Court of
New South
Wales
(in Bank-
ruptcy).*

No. 23.
Reasons for
Judgment.
Street, C.J.
—continued.

Court intended was that the matter should be referred back to this Court to determine whether the Respondent was entitled to any security over the property in question under the terms of that agreement, and having regard to the subsequent course of dealing between the parties. The question is assuming that the parties continued to deal with one another on the basis of that agreement, was it intended that the goods which were bought should be a security to Mr. Carey for any money which he might have advanced for the purpose of purchasing them. That is a question of the construction of the agreement and the intention of the parties.

The agreement does not in terms provide that any such charge should be created, and on its true construction I do not think that that interpretation can fairly be put upon it. As I read it all that was intended was that Mr. Carey should advance money to the bankrupt, that the bankrupt should purchase goods with that money, that he should sell them, and that, having sold them, he should then hand the proceeds over to Mr. Carey in order that Mr. Carey might recoup himself for the amount of any advance and might divide what was left between them and in the proportions agreed upon. If the intention of the parties at the time that agreement was entered into had been that Mr. Carey should have any charge over the goods in the hands of the bankrupt I think that would have been so expressed. I do not think it would have been left so much at large as it has been. On the fair reading of the document I think that all that was contemplated and intended by the parties was that the proceeds of sale should be handed to Mr. Carey and that he should be entitled to pay himself out of those proceeds, and I do not think that the documents can be construed as giving him any charge or security over the goods before realisation.

The matter does not rest, however, solely upon the words of the agreement. The question is one of intention, and one is entitled to see how the parties acted under their agreement. If their intention was that Mr. Carey should have any security over the goods it is quite apparent that he knew nothing about it himself, otherwise I cannot conceive that he would have afterwards entered into an agreement with the bankrupt for the purchase of the goods on the terms of releasing the bankrupt from any liability that he might be under in respect of the agreement entered into between them. If the goods were already charged for Mr. Carey's benefit with the amount of any advances that he might have made, and if he so understood the situation it is inconceivable to me that he would have entered into any such agreement with the bankrupt or that at a later stage he would have sought to assert a partnership as he did. On this ground therefore that Mr. Carey's conduct is inconsistent with an intention to create any such charge as that for which he contends, and on the further ground that on a fair reading of the agreement it does not lead to the conclusion that the parties had any such intention, I think that the motion fails and that it must be dismissed with costs.

E. W. STREET,
Associate.

No. 24.

Notice of Appeal.

TAKE NOTICE that the Appellant herein appeals to the High Court of Australia from the whole of the decree or order of the Supreme Court of New South Wales in its Bankruptcy Jurisdiction made by the Honourable Philip Whistler Street on the 19th day of December 1923 in the application No. 22468 of 1922 in which the present respondent was the applicant and the present appellant was the respondent upon the following amongst other grounds namely :—

- 10 (1) That His Honour was in error in deciding that the appellant was not entitled to any security lien or charge.
 (2) That His Honour should have held that the appellant was entitled to such security lien or charge.
 (3) That His Honour was in error in dismissing the claim of the appellant to such security lien or charge and in ordering the appellant to pay the costs.

Dated this seventh day of January 1924.

H. H. MASON,
 Counsel for the Appellant.

In the
 High
 Court of
 Australia,
 New South
 Wales
 Registry.

No. 24.
 Notice of
 Appeal,
 7th Janu-
 ary 1924.

20

No. 25.

Order dispensing with printing of Record, 4th March, 1924.

(Not printed.)

No. 25.

No. 26.

Registrar's Certificate as to contents of Record, 13th March, 1924.

(Not printed.)

No. 26.

IN THE HIGH COURT OF AUSTRALIA.
NEW SOUTH WALES REGISTRY.

No. 4 of 1924.

On Appeal from the Supreme Court of New South Wales in its Bankruptcy
Jurisdiction.

Between RANDAL WESTROPP CAREY (*Respondent*) - *Appellant*
and

WILLIAM HARRINGTON PALMER (*Applicant*) - *Respondent*. 10

Before their Honours the Chief Justice and Mr. Justice Isaacs and
Mr. Justice Starke.

Tuesday the tenth day of June in the year of Our Lord One thousand
nine hundred and twenty-four.

WHEREAS by an Order of this Court made on the thirty-first day
of July One thousand nine hundred and twenty-three in an Appeal from
the Supreme Court of New South Wales in its Bankruptcy Jurisdiction it
was by consent ordered that the Decree or Order of the Supreme Court of
the eighteenth day of September One thousand nine hundred and twenty
two be varied by inserting therein after the words "having authority on 20
his behalf" the following words "And subject also to deduction (if any)
in respect of any security lien or charge (if any) to which the said Respondent
is entitled under Clause 3 of the Agreement of 30th April 1917" and it was
by consent referred back to the said Supreme Court to determine whether
the above-named Appellant was entitled to any such security lien or charge
and if so for what amount and it was ordered that the costs of such reference
should be in the discretion of the said Supreme Court And it was by
consent further ordered that the said Decree or Order of the eighteenth day
of September One thousand nine hundred and twenty two should be other-
wise affirmed and that the Appeal therefrom should be and was dismissed 30
with costs AND WHEREAS the said reference came on to be heard before
the Honourable Philip Whistler Street Judge in Bankruptcy on the
eighteenth and nineteenth days of December last AND WHEREAS on
the said nineteenth day of December last the said Supreme Court did
declare that the appellant was not entitled to any security lien or charge
under the said agreement and the said Supreme Court did order that the
appellant was not entitled to any such security lien or charge and that the
appellant should pay the costs of the respondent of the said reference
AND WHEREAS on the seventh day of January One thousand nine
hundred and twenty-four the appellant filed a Notice of Appeal against 40
the whole of the said last mentioned order AND the said appeal coming
on to be heard before this Court on the third fourth and seventh days of

April last WHEREUPON AND UPON READING the certified copy of the documents transmitted by the Registrar in Bankruptcy of the said Supreme Court to the New South Wales Registry of this Court AND UPON HEARING what was alleged by Mr. Maughan K.C. and Mr. H. H. Mason of Counsel for the Appellant and by Mr. Loxton K.C. and Mr. Davidson of Counsel for the Respondent THIS COURT DID ORDER that the said Appeal should stand for judgment AND the same standing in the paper this day for judgment accordingly THIS COURT DOTH ORDER that the said Appeal be and the same is hereby allowed AND THIS COURT

10 DOTH DECLARE that the appellant is entitled to a lien or security under Clause 3 of the said agreement of the thirtieth day of April One thousand nine hundred and seventeen over and on the moneys the proceeds of goods purchased by means of advances made by the appellant to secure to the appellant such advances as are still unpaid and also one half of the gross profits in accordance with clause 6 of the said agreement AND THIS COURT DOTH FURTHER ORDER that this matter be remitted to the Supreme Court of New South Wales in its Bankruptcy Jurisdiction to be further dealt with in accordance with this order AND THIS COURT

20 DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the appellant of and incidental to this Appeal AND that such costs when so taxed and certified and the costs of the appellant incurred in the said Supreme Court be paid by the respondent to the appellant AND THIS COURT DOTH FURTHER DECLARE that the sum of fifty pounds paid into the said Supreme Court by the appellant by way of security for the costs of this Appeal together with interest accrued due thereon (if any) be paid out of Court to the appellant or to Messieurs Rawlinson and Hamilton his Solicitors.

By the Court,

ARTHUR G. SADDINGTON,

District Registrar.

(L.S.)

No. 28.

Reasons for Judgment.

(a) SIR ADRIAN KNOX, C.J. :—Upon a previous appeal in this matter this Court on the 31st 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.

40 The learned Judge in Bankruptcy having enquired into the matter held that the Appellant R. W. 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

*In the
High
Court of
Australia,
New South
Wales
Registry.*

No. 27.
Order,
10th June
1924—con-
tinued.

No. 28.
Reasons for
Judgment.
(a) Sir
Adrian
Knox, C.J.

*In the
High
Court of
Australia,
New South
Wales
Registry.*

No. 28.
Reasons for
Judgment.
(a) Sir
Adrian
Knox, C.J.

—continued

question on this Appeal is whether that decision was right. The relevant facts may be briefly stated as follows:—The Bankrupt A. E. 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 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 the 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. 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.

10 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 realise 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 provision of the Bills of Sale
20 Act requiring registration. (*See Malick v. Lloyd* 16 C.L.R. 483.)

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
30 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 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
40 to the opinion expressed by my brother Gavan Duffy and myself in *Commissioner of Stamp Duties v. Jolliffe* (28 C.L.R. at p. 181) 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

*In the
High
Court of
Australia,
New South
Wales
Registry.*

No. 28.
Reasons for
Judgment.

(a) Sir
Adrian
Knox, C.J.
—continued.

the document of the 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.

No. 28.
Reasons for
Judgment.
(a) Sir Ad-
rian Knox,
C.J.—con-
tinued.

(b) Isaacs,
J.

(b) ISAACS, J. :—The question is whether the Appellant under Clause 3 10
of the agreement of April 30th, 1917 has any "security lien or charge"
on the goods the subject matter of the agreement of May 31st, 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). 20

Learned Counsel for the Appellant maintained that as prior to 20
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 survived
notwithstanding the bankruptcy of Johnstone, 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 bank-
ruptcy, and not whether the remedy of injunction or specific performance
would have been available to the Appellant as against Johnstone, before 30
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 40
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* (10 H.L.C., p. 191) though much older as Lord Macnaghten says in *Tailby v. Official Receiver* (13 A.C., at p. 523) applies and the Official Assignee became entitled to the goods but subject to the trust or interest in favour of Carey.

Lind's Case (1915, 2 Ch. p. 345) is the latest 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, viz., that the agreement of May 31st, 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 section 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 rendered, 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 May 30th, 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

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No. 28.

Reasons for
Judgment.

(b) Isaacs,
J.—con-
tinued.

elementary notions of justice and honesty that unless coerced by some supreme authority—unknown to me so far—I must decline to sanction it by any approval of mine. *Gunsbourg's Case* (1920, 2 K.B. 426) might be usefully read though more for the reasoning than the decision.

In my opinion the Appeal should succeed.

No. 28.

Reasons for
Judgment.

(b) Isaacs, J.
—continued

(c) Starke,
J.

(c) 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”? (*Re Lind*, 1915, 2 Ch. 345 at p. 364). It provides for advances to Johnstone for the purchase of goods or stock for the purpose of his business as an indenter, 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 came 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.” (*Re Lind supra, Collyer v. Isaacs*, 19 Ch. D, 351). It is not disputed that the goods came into existence long before the date of Johnstone’s bankruptcy. 10

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*, 13 A.C. 543). And I agree with my brother Isaacs, and for the reasons assigned 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. 30

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. 40

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*, 16 C.L.R. 483.

No. 29.

Order in Council granting special leave to appeal to His Majesty in Council. (*Extract.*)

*In the
Privy
Council.*

AT THE COURT AT BUCKINGHAM PALACE.

The 6th day of February, 1925.

PRESENT

THE KING'S MOST EXCELLENT MAJESTY.

* * * * *

WHEREAS there was this day read at the Board a Report from the
Judicial Committee of the Privy Council, dated the 22nd day of December,
10 1924 in the words following viz. :—

No. 29.
Order in
Council,
granting
special leave
to appeal to
His Majesty
in Council,
6th Febru-
ary 1925.
(*Extract.*)

“WHEREAS by virtue of His late Majesty King Edward the
Seventh's Order in Council of the 18th day of October, 1909,
there was referred unto this Committee a humble Petition of
William Harrington Palmer in the matter of an Appeal from the
High Court of Australia New South Wales Registry between the
Petitioner Appellant and Randal Westropp Carey Respondent
setting forth (amongst other things).

* * * * *

20 “The Lords of the Committee in obedience to His late
Majesty's said Order in Council have taken the humble Petition
into consideration and having heard Counsel in support thereof,
Their Lordships do this day agree humbly to report to Your
Majesty as their opinion that leave ought to be granted to the
Petitioner to enter and prosecute his Appeal against the Judgment
of the High Court of Australia dated the 10th day of June, 1924
upon depositing in the Registry of the Privy Council the sum of
£400 as security for costs :

30 “And Their Lordships do further report to Your Majesty
that the proper Officer of the said High Court ought to be directed
to transmit to the Registrar of the Privy Council without delay an
authenticated copy under seal of the Record proper to be laid
before Your Majesty on the hearing of the Appeal upon payment
by the Petitioner of the usual fees for the same.”

HIS MAJESTY having taken the said Report into consideration was
pleased by and with the advice of His Privy Council to approve thereof
and to order as it is hereby ordered that the same be punctually observed,
obeyed and carried into execution.

40 Whereof the Governor-General Lieutenant-Governor or Officer ad-
ministering the Government of the Commonwealth of Australia for the time
being and all other persons whom it may concern are to take notice and
govern themselves accordingly.

M. P. A. HANKEY.

EXHIBITS.

Exhibits.

" B. "

Agreement,
R. W. Carey
with A. E.
Johnstone,
30th April
1917.

" B. "—Agreement, A. E. Johnstone and R. W. Carey.

Duty Stamp 1/—.

AGREEMENT made this 30th day of April one thousand nine hundred and seventeen BETWEEN ALFRED EDWIN JOHNSTONE of Sydney in the State of New South Wales Indentor (hereinafter called the Borrower) of the one part and RANDAL WESTROPP CAREY of Sydney aforesaid Merchant (hereinafter called the Lender) of the other part 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 borrower various sums of money in the aggregate not to exceed the sum of one thousand pounds ~~two hundred 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:—

10

T. R.
A. E. J.
R. W. C.

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 and which will be applied exclusively for such purchases as aforesaid.

20

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.

30

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

* sic Qy.

*third

*two-thirds

one-half of the gross profits pay to the borrower the remaining ~~one-half~~ 40 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.

IN WITNESS whereof the parties hereto have hereunto set their hands the day and year first before written.

SIGNED by the said ALFRED EDWIN JOHNSTONE in the presence of:—

B. F. MORRIS.

10 SIGNED by the said RANDAL WESTROPP CAREY in the presence of:—

THOS. RAWLINSON.

ALFRED E. JOHNSTONE.

R. W. CAREY.

Exhibits.

“ B.”

Agreement,
R. W. Carey
with A. E.
Johnstone,
30th April
1917—*con-
tinued.*

No. 22.—Counterpart of Exhibit “ B,” Agreement Carey and Johnstone.

Duty Stamp 1/- 30/4/17.

AGREEMENT made this 30th day of April one thousand nine hundred and seventeen BETWEEN ALFRED EDWIN JOHNSTONE of Sydney in the State of New South Wales Indentor (hereinafter called the Borrower) of the one part and RANDAL WESTROPP CAREY of Sydney aforesaid Merchant (hereinafter called the Lender) of the other part 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 borrower various sums of money in the aggregate not to exceed the sum of ~~two hundred~~ 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

30 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 and which will be applied exclusively for such purchases 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 in to the credit of the lender at the Head Office of the Commonwealth Bank in Sydney.

40 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.

No. 22.
Counter-
part of Ex-
hibit “ B.”
Agreement,
Carey with
Johnstone,
30th April
1917.

T. R.
R. W. C.
A. E. J.

No. 22.
Counter-
part of Ex-
hibit "B."
Agreement,
Carey with
Johnstone,
30th April
1917—con-
tinued.
A. E. J.
R. W. C.
A. E. J.
R. W. C.

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

half
the amount so advanced by him as aforesaid together with one-third of
one-half

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.

IN WITNESS whereof the parties hereto have hereunto set their hands the day and year first before written.

SIGNED by the said ALFRED
EDWIN JOHNSTONE in the presence ALFRED E. JOHNSTONE
of

B. F. MORRIS.

SIGNED by the said RANDAL
WESTROPP CAREY in the presence R. W. CAREY.
of

THOS. RAWLINSON.

10

20

No. 1.
Lease, F. H.
Read to
A. E. John-
stone and
R. W. Carey,
7th May
1917.

No. 1.—Lease, F. H. Read to A. E. Johnstone and R. W. Carey (*abstracted*); Letter, Johnstone and Carey to F. H. Read.

LEASE dated 7th May 1917 between Frank Herman Read (Lessor) and A. E. Johnson and R. W. Carey (Lessee) of premises situated at 36 York Street known as back portion of the second floor including the use of three electric lights only from 7th May 1917 for one year at a rental of £9/6/4 per month with option of renewal from 7th May 1918 to 15th November 1920.

ALSO letter 7th March 1918 signed by Alfred E. Johnstone and R. W. Carey to F. H. Read as follows:—

Dear Sir,—

We beg to advise that we intend to exercise the option that exists in our Lease of renewal till 15th November 1920.

Yours faithfully,

ALFRED E. JOHNSTONE. 40
R. W. CAREY.

No. 9.—Folio 170 (Carey, senr. a/c) Ledger B.

Exhibits.

CAREY—JOHN RANDAL.

No. 9.
Folio 170
(Carey,
Senr. a/c),
Ledger B.

DEPOSIT A/c.

1918						1917			
July	1	To Cash	C29	£30	0	0	Nov. 30	By balce.	
					120	0		old ledger	170 £1000 0 0
Oct.	3	" "	"	35	30	0			
		" "	"		120	0			
		" "	"						1919
							Jan. 13	By cheque	C42 2000 0 0
10 Jan.	2	" "	"	42	30	0	Aug. 25	" "	62 1000 0 0
		" "	"		120	0			
April	2	" "	"	48	30	0			1920
		" "	"		120	0	Aug. 11	" "	5 5000 0 0
July	4	" "	"	57	75	0			
Aug.	2	" "	"	60	75	0			
Sep.	18	" "	"	64	600	0			
Oct.	1	" "	"	67	150	0			

No. 3.—Policy of Insurance on goods (*abstracted*).

POLICY OF INSURANCE in the Triton Insurance Company Limited
20 to R. W. Carey and A. E. Johnstone dated 31st January 1919 over
merchandise contained in building 11 Macquarie Place for £1855.

No. 3.
Policy of
Insurance,
31st Janu-
ary 1919.

No. 15.—Letter, A. E. Johnstone to R. W. Carey.

36 York Street,
Sydney, Feb. 9, 1919.

Dear Randal,

I have a discount account at the London Bank and I wish to make use of it, please keep me two or three bills for that purpose, more especially those payable on that bank and oblige,

Yours faithfully,

JOHNNIE.

No. 15.
Letter,
A. E. John-
stone to
R. W. Carey,
9th Febru-
ary 1919.

Exhibits.

No. 16.—Letter, A. E. Johnstone to R. W. Carey.

Sydney June 16 1919.

No. 16.
Letter,
A. E. John-
stone to
R. W. Carey,
16th June
1919.

Dear Randal,

Please endorse the enclosed P/Ns also sign the enclosed 4 cheques, everything is alright, do not come back on any account until there is no risk of infection and until you are quite strong again, above all do not worry about anything, money is coming in well and I want one of those cheques for Frasers bill tomorrow. Sales to date over £1600.

Not another yard of silk to sell out of all that is coming, I sold the last on the Post Office steps 8 o'clock Friday night. Kind regards to all. 10
Will I send you over some fish or oysters.

Yours faithfully,

JOHNNIE.

Mrs. Gray phoned me after I wrote this. Gray did not turn up this morning, I suppose he is sick too.

Fraser's bill due tomorrow £1561 will be met easily enough, so will Suzuki's on the 26th but cannot tell exactly how much more will come in until to-morrow afternoon,

No. 21.

No. 21.—Letter, A. E. Johnstone to R. W. Carey.

Sydney June 17, 1919.

Letter,
A. E. John-
stone to
R. W. Carey,
17th June
1919.

Dear Randal,

In yours of the 16th inst. you speak of returning in a couple of days. I am very much against your doing so, and if you return before next Monday at least or until the epidemic has left your house even if it takes weeks I will not remain on the premises and will walk out when you come in, I can take no risks just now. I am surprised to get the cheques back crossed. If I wanted them crossed I think I am quite capable of doing it for myself. I am not altogether a child neither am I going to clear out.

Yours faithfully,

30

ALFRED E. JOHNSTONE.

You speak of being careful of the finance. Liabilities have to be met that is all that I am doing.

No. 20.—Letter, A. E. Johnstone to R. W. Carey and Telegram in Reply.

Sydney, Aug. 5 1919,
36 York St.
Sydney.

Exhibits.

No. 20.
Letter,
A. E. Johnstone to
R. W. Carey,
5th August
1919.

Mr. R. W. Carey,
Dear Sir,

Following on our conversation over the results of the last half year's balance sheet, I beg to state that the following are my terms for a continuance of the arrangement between us—That for my labor and saving of expense I draw the sum of £4 weekly from the start of our arrangement also that I draw 1% one per cent. on the gross turnover to make up to me any loss which may be made on account of lack of financial facilities. All cheques in future to be paid for goods are to be mine and not those of R. W. Carey.

There are a few other small matters which can be adjusted but the previous paragraph is the main one, and I expect a telegram to the Great Northern Newcastle tomorrow saying plainly I agree or I do not agree and I will then know my position and will place no further orders on joint account if you are not satisfied with my terms.

Yours faithfully,

ALFRED E. JOHNSTONE.

20

TELEGRAM.

Address A. E. Johnstone,
Gt. Northern Hotel,
Newcastle.

Telegram in
reply,
6th August
1919.

Your terms too hard I cannot agree.

From—CAREY.

“ F.”—Indent from Messrs. R. W. Carey (A. E. Johnstone).

Phone : City 10090.

Aberdeen House, 204 Clarence Street,
Sydney 30th September 1919.

“ F.”
Indent from
Messrs.
R. W. Carey
(A. E. Johnstone),
30th September 1919.

30 Order No.

Indent from Messrs. R. W. Carey (A. E. Johnstone)
36 York Street, Sydney.

JOHN FENNELL & CO. LTD.

Manufacturers' Agents and Indent Merchants,
Sydney.

Dear Sir,

We have indented on your behalf the following goods to come forward per.....

Price is based on present duty and should said duty be altered prior to delivery it is understood that you are to be credited or debited with the difference as the case may be.

40

Exhibits.

" F. "

Indent from
Messrs.
R. W. Carey
(A. E. John-
stone),
30th Sept-
ember 1919
—continued.

Freights based on present rates, and should the said freights be altered prior to delivery it is understood that you are to be credited or debited with the difference as the case may be.

The sale is subject to strikes, war, accidents, fire and other unavoidable causes of delay.

Goods whether contracted to be delivered in instalments or not may be delivered in instalments or smaller instalments respectively and in such cases every delivery shall be considered as separate and paid for accordingly.

The sellers under this contract do not guarantee deliveries owing to freights and other difficulties beyond their control but will do their utmost in accordance with shipments stated. In the event of vessel or vessels carrying goods under this contract being lost the sellers are not to be held responsible for the delivery of such portion as is lost.

The sellers may cover or declare war risk, if any, at buyers' expense at any time prior to arrival at destination.

Rejections to constitute delivery.

No claim to be entertained unless made in writing within seven days after delivery.

Number	Quantity	Description.	Price	£ s. d.	20
MOME	PIECES	GEORGETTES 40in. × 50in. yds.			
6	15	White @	£15/14/6	per piece	
6	7	Black @	15/14/6	" "	
6	5	Navy @	15/14/6	" "	
6	5	Shell Pink @	15/14/6	" "	
		Colors Black and Navy plus	16/6	" "	
		„ Shell Pink plus	8/3	" "	
MOME	PIECES	CREPE DE CHINE 40in. × 50in.			
8	10	White @	£15/18/9	per piece	
8	5	Black @	15/18/9	" "	30
9	10	White @	17/14/9	" "	
9	5	Black @	17/14/9	" "	
10	10	White @	19/ 7/-	" "	
10	5	Black @	19/ 7/-	" "	
12	10	White @	23/13/-	" "	
12	5	Black @	23/13/-	" "	
		Colors Black and Navy plus	/16/6	" "	

Above prices C.I.F. Sydney.

Firm freight.

Exchange 2/3.

Shipment, October, November.

Terms.—Cash against documents on arrival boat carrying goods.

Please sign duplicate and return.

(Sgd.) A. E. JOHNSTONE.
R. W. CAREY.

“H,” “L,” “M,” “N,” “O,” “Q,” “R,” “T,” “V,” “W,” “X,” “Y” Exhibits.
(Abstracted).

Abstract of Proofs of Debts.

Proofs of Debts of 25 Creditors for £3708/1/2 as follows:—

YANO & JOKO
(Ex. “H”)

The amount of eleven Promissory
Notes made by the Bankrupt as
follows:—

	Date of Note	Due date	Amount	Abstract of proofs of debts.
10	(1) 20th April, 1921	23rd May, 1921	£420 16 8	“H,” “L,” “M,” “N,” “O,” “Q,” “R,” “T,” “V,” “W,” “X” and “Y.”
	(2) 21st „ „	24th „ „	57 10 0	
	(3) 20th „ „	23rd „ „	20 0 0	
	(4) 20th „ „	23rd „ „	36 17 6	
	(5) 22nd „ „	25th „ „	25 0 0	
	(6) 26th „ „	29th „ „	80 0 0	
	(7) 29th „ „	1st June „	119 19 9	
	(8) 27th „ „	30th May „	190 0 0	
	(9) 7th May „	10th June „	422 18 4	
	(10) 9th „ „	12th „ „	21 5 0	
	(11) 11th „ „	14th „ „	291 13 4	
20		TOTAL	£1686 0 7	

DAVID JONES LTD.
(Ex. “L”)

£35/1/5 for goods sold and delivered
between 26th February and 28th
April, 1921.

GEORGE WOLLASTON

£21/1/9 for goods sold and delivered.

NETTLETON, SON & CO.

£22/3/2 for goods sold and delivered
between 24th June and 20th July,
1920.

JOSEPH HANDEL CUTLER

£26/13/ for goods sold and delivered
27th January, 1921.

30 PRESBYTERIAN LADIES’
COLLEGE

£85/9/4, School fees.

CHARLES EDWARD GRIEVES

£5/18/10 for goods sold and delivered,
April 20th, 1921.

BEARD WATSON & CO. LTD.

£22 for goods sold and delivered,
February and April, 1920.

JOHN PATRICK SHANAHAN

£81/17/, Promissory Note dated 17th
March, 1921, due 20th June, 1921.

40

£50 and int. 9/—, Promissory Note
dated 23rd March, 1921, due 27th
April, 1921.

£79/12/— and int. 8/2, Promissory
Note dated 17th March, 1921, due
20th May, 1921.

Exhibits.

“ H,” “ L,”
 “ M,” “ N,”
 “ O,” “ Q,”
 “ R,” “ T,”
 “ V,” “ W,”
 “ X ” and
 “ Y.”

Abstract of
 proofs of
 debts—*con-
 tinued.*

ARTHUR THOMAS PITTAR	£100 and int. 9/10, Promissory Note dated 18th February, 1921, due 21st May, 1921.	
PERDRIAU RUBBER CO. LTD.	£10/10/ for rent to 21st June, 1921.	
DEPUTY FEDERAL COMMISSIONER OF TAXATION.	£1/15/ for goods sold and delivered, 24th March, 1921.	
F. LASSETTER & CO. LTD.	£232/17/11, Income Tax, 1915-1922. £23/5/4, Penalty and further tax. Total, £256/3/3.	
COMMISSIONER OF TAXATION	£27/6/11, goods sold and delivered March 31st, 1921, to 25th May, 1921.	10
DUNLOP RUBBER CO. OF AUSTRALIA LTD.	£140/15/10, Income Tax, 19th May, 1921.	
NATIONAL BANK OF AUSTRALASIA LTD. (Ex. “ M ”)	£3/8/-, goods sold and delivered April, 1921.	
	£21/12/9 the amount of Promissory Note dated 18th April, 1921, made by M. J. O’Grady, payable one month after date to the Bankrupt or his order, discounted by the Bank and dishonoured.	20
	£102/9/6, Promissory Note dated 18th April, 1921, made by M. J. O’Grady, payable one month after date, and discounted by the Bank and dishonoured.	
	£119/2/10, Promissory Note dated 11th April, 1921, made by M. J. O’Grady, payable three months after date to the Bankrupt or his order, and discounted by the Bank.	30
	£162/13/6, Promissory Note dated 21st March, 1921, made by M. J. O’Grady, payable four months after date to the Bankrupt or his order, and discounted by the Bank.	
	£100/15/, Promissory Note, dated 2nd May, 1921, made by M. J. O’Grady, payable three months after date to the Bankrupt or his order and discounted by the said Bank.	40
TOTAL..	£485 0 10	

	Value of Security	£172 19 11	Exhibits.
	Balance	£312 0 11	—
	£450/8/1 for goods sold and delivered on the 15th March, 1921.		“ H,” “ L,” “ M,” “ N,” “ O,” “ Q,”
	£109/15/6 for goods sold and delivered between 19th March, 1917, and 15th April, 1919.		“ R,” “ T,” “ V,” “ W,” “ X,” and “ Y.”
	£133/0/4, Promissory Note, 23rd March, 1921, payable 26th July, 1921.		Abstract of proofs of debts—con- tinued.
10	ENGLISH, SCOTTISH AND AUSTRALIAN BANK LTD. (Ex. “ Q ”)		
	BEBARFALD’S LTD. (Ex. “ R ”)	£47/11/ for goods sold and delivered. April 18th to May 10th, 1921.	
	HILLWOOD & SULLIVAN (Ex. “ T ”)	£15/9/6, Professional Fees, 30th November, 1920, to 16th June, 1921.	
	METROPOLITAN BUSINESS COLLEGE (Ex. “ V ”)	£6, Tuition fees, January to July, 1921.	
20	D. & W. MURRAY LTD. (Ex. “ W ”)	£12/7/6 for goods sold and delivered between 21st April and 27th April, 1921.	
	ISHERWOOD & BARTLETT PROPRIETARY LTD. (Ex. “ X ”)	£1/17/3 for goods sold and delivered on the 2nd May, 1921.	
	MERCHANTS LTD. (Ex. “ Y ”)	£21/15/4 for goods sold and delivered between 3rd March and 10th May, 1921.	

No. 10.—Letter, A. E. Johnstone and R. W. Carey to J. R. Carey.

30 J. R. Carey, Esq.
Milson’s Point.

36 York Street,
Sydney 9th August 1920.

Dear Sir

We hereby agree that in consideration of your advancing to us the sum of five thousand pounds (£5000) for three months from date that no further purchase of goods will be made until our stock is reduced to under seven thousand pounds (£7000). The abovementioned sum to bear interest at the rate of ten per cent. per annum.

Yours faithfully,

ALFRED E. JOHNSTONE
R. W. CAREY

No. 10.
Letter,
A. E. John-
stone and
R. W. Carey
to J. R.
Carey,
9th August
1920.

Exhibits.

“ P.”
18 Carters’
documents
(abstracted),
April–May
1921.

“ P.”—18 Carters’ Documents (*abstracted*).

Date.	Name and Abbreviated Address on Document of Person to whom sold.	Amount
19th April, 1921	A. E. Johnstone, Clarence Street	£36 17 6
19th “ ”	“ ” “	20 0 0
20th “ ”	“ ” “	420 16 8
5th May “ ”	“ ” “	422 18 4
20th “ ”	“ ” “	57 10 0
20th “ ”	“ ” “	80 0 0
21st “ ”	“ ” “	25 0 0
27th “ ”	“ ” “	184 7 0
26th April, 1921	“ York Street	5 12 6
29th “ ”	“ ” “	119 19 9
29th “ ”	“ ” “	12 3 9
6th May “ ”	“ ” “	291 13 4
9th “ ”	“ ” “	21 5 0
20th April, 1921	Not stated	Not stated
27th “ ”	“ ” “	“ ” “
6th May, “ ”	“ ” “	“ ” “
11th “ ”	“ ” “	“ ” “

“ D.”
Cheque of
A. E. John-
stone,
26th May
1921.

“ D.”—Cheque of A. E. Johnstone.

No. D017078. May 26 1921

THE NATIONAL BANK OF AUSTRALASIA LIMITED Duty
with which is amalgamated THE COLONIAL BANK OF Stamp Can-
AUSTRALASIA LIMITED. celled.

York Street, Sydney.
(corner York and King Streets)

PAY 509 or Bearer.
the sum of TWO HUNDRED POUNDS 30

£200:0:0 ALFRED E. JOHNSTONE.

(On back of cheque) “ ~~Present-again~~ ”
“ refer to drawer ”

"Z."—Balance Sheet.

BALANCE SHEET at 13th May, 1921.

			Exhibits.		
			"Z."		
			Balance Sheet dated		
			31st May 1921.		
Sundry Creditors	£229	8 6	Sundry Debtors.....	£1507	10 0
J. R. Carey	7500	0 0	A. E. Johnstone ...	71	17 5
R. W. Carey	3308	4 1	Bills Receivable	1055	11 1
Bank A/c	8179	11 10	Suspense A/c	64	10 6
			Stock	15,151	19 1
			Balance	1,365	16 4
	£19,217	4 5		£19,217	4 5

10

TRADING ACCOUNT.

Stock at 31/12/20...	£17,435	2 4	Stock at 31/5/21 ..	£15,151	19 1
Purchases	46	6 8	Sales	1,177	13 0
			Balance	1,151	16 11
	£17,481	9 0		£17,481	9 0

PROFIT AND LOSS ACCOUNT.

Freight & Cartage	£6	4 1	Interest	£109	9 2
Insurance	107	6 1			
Rent	82	2 3			
Stationery.....	2	0 10			
20 Discount.....	32	9 0			
General Expenses.....	16	2 3			
Wages.....	52	5 0			
Stamps	14	11 4			
Travelling Expenses...	2	2 6			
Commission A/c	8	5 3	Balance Profit and		
Balance Trading A/c .	1151	16 11	Loss.....	1,365	16 4
	£1475	5 6		£1475	5 6

Exhibits.

"C."—Sale note and Acceptance.

"C."
Sale Note,
dated
31st May
1921.

36 York Street,
Sydney 31st May, 1921.

A. E. Johnstone
Indenter Importer & Warehouseman
Mr. Randal W. Carey,
Wollstonecraft,

Dear Sir,

In consideration of your giving me a release for the sum of £18,990/16/3 (eighteen thousand nine hundred and ninety pounds sixteen shillings and threepence) 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. 10

Acceptance,
dated
1st June
1921.

"Briarcourt,"
Wollstonecraft,
1st June, 1921.

Mr. A. E. Johnstone,
36 York Street, Sydney.

20

Dear Sir,

In consideration of the sale and delivery to me of the stock-in-trade and tenants fixtures in premises No. 36 York Street Sydney I hereby release and discharge you from all moneys due by you to me under our agreement of 30th April, 1917.

R. W. CAREY.

"E."
Invoice of
goods,
1st June
1921.

STATEMENT

"E."—Invoice of goods.

Phone : City 10090
Aberdeen House,
204 Clarence Street,
Sydney, 1st June 1921.

30

Mr. A. E. Johnstone,
36 York St., SYDNEY.

Dr. to JOHN FENNELL & CO. LTD.
Indent Merchants and Manufacturers' Agents.

1921 To a/c rendered.
May 26 To 60 days' Promissory Note due
26/5/21 returned unpaid .

Nett. £422:10:0

Representing goods supplied on
March 24th 1921.

40

TERMS : Nett Cash 7 days from
date of delivery.

“S.”—Authority signed by A. E. Johnstone.

36 York Street,
Sydney, 1st June, 1921.

The bearer is hereby authorised to collect all amounts due to me in connection with my business at 36 York Street.

ALFRED E. JOHNSTONE.

Exhibits.

“S.”

Authority
signed by
A. E. John-
stone,
1st June
1921.

No. 24.—Letter, R. W. Carey to A. E. Johnstone.

“ Briarcourt,”
Wollstonecraft,
7th June, 1921.

10

Mr. A. E. Johnstone,
36 York Street,
Sydney.

No. 24.
Letter,
R. W. Carey
to A. E.
Johnstone,
7th June
1921.

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 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 abovementioned 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 £8182/12/2 but to personally undertake all liability therefor.

Yours faithfully,

R. W. CAREY.

30

“A.”—Evidence of R. W. Carey before the Registrar in Bankruptcy.

Thursday the 30th day of June, 1921.

Re ALFRED EDWIN JOHNSTONE.

R. W. Carey being duly sworn, was examined by Mr. Manning of Counsel for the Official Assignee, and saith as follows:—
(Mr. Wickham for Witness.)

Q. What is your full name?—A. Randolph Westropp Carey.

Q. What is your occupation?—A. Company Director and

“A.”
Evidence of
R. W. Carey
before
Registrar
in Bank-
ruptcy,
30th June
1921.

Exhibits.
 "A."
 Evidence of
 R. W. Carey
 before
 Registrar
 in Bank-
 ruptcy,
 30th June
 1921—con-
 tinued.

Q. You know the bankrupt, Alfred Edwin Johnstone?—A. Yes.

Q. How long have you known him?—A. Since 1917.

Q. That was in business. Did you know him before you knew him in business?—A. Slightly.

Q. The first business transactions with him were in 1917?—A. Yes.

Q. He was then carrying on business in the Strand Arcade?—A. I couldn't say for certain, but I understand he was.

Q. What was the first business transaction you had with him?—A. It was in connection with an agreement I made with him.

Q. Who suggested that—you or he?—A. I did. 10

Q. What did you suggest to him?—A. I wrote him a letter and asked him to come and see me. He came, and we came to an agreement.

Q. You asked him to come and see you and you opened the business?—A. Quite so.

Q. Tell the Court what took place at that interview?—A. I don't remember it exactly, but the substance of it was : I had left Arthur Cox and Company as an employee, though I still remained a Director and I wrote to Johnstone and asked him if he wasn't doing anything to call and see me. He called and saw me and I asked him if he wanted financing in his business and he said yes, and I had an agreement drawn up. 20

Q. Something must have been said : What were you and he to do?—A. Johnstone was to buy goods and sell them and I was to find the money to pay for them.

Q. You suggested you should join him in making money?—A. I don't think so.

Q. Wasn't there something to that effect?—A. I don't think so.

Q. You say an agreement was drawn up?—A. Yes.

Q. He was to buy goods and sell them?—A. Yes.

Q. Who was to pay for them?—A. I was to pay for them. 30

Q. What were you to get by way of profit?—A. In the first place a third and he two-thirds. Afterwards the agreement was altered and I was to get half and he half on condition I came in and kept the books in the business and gave up my time.

Q. Was that all that was agreed to?—A. As far as I remember.

Q. Was anything said about who was to bear the loss if the business were not profitable?—A. No.

Q. Was that discussed at all?—A. No.

Q. As to what was to happen if the business wasn't profitable?—A. No. 40

Q. Was anything said about the name?—A. He was to trade under the name of A. E. Johnstone. I wasn't in it.

Q. Your name has appeared on the door?—A. Yes, apart from Johnstone's.

Q. On the same plate?—A. Yes.

Q. A. E. Johnstone and R. W. Carey?—A. The other way about.

Q. Your name was on top?—A. Yes.

- Q. That has been so since 1917 when he went to York Street?—A. That is so.
- Q. Do you remember the date in 1917?—A. Some time in March.
- Q. Was there any reason why the business was to be carried on in Johnstone's name?—A. Yes. Johnstone said he wouldn't allow my name in it as it was his business.
- Q. You were only financing it?—A. Yes.
- Q. The business was moved to York Street?—A. Yes.
- 10 Q. You moved to York Street?—A. I had an office in Vickery's Chambers, and when he moved I went up there.
- Q. Up till quite recently you and he occupied the same office?—A. Yes—quite so.
- Q. During that time you took an active part in the business?—A. Only as far as keeping the books.
- Q. Didn't you do anything else?—A. No.
- Q. What about orders?—A. Johnstone placed all orders.
- Q. Weren't they discussed with you at all?—A. Oh, yes.
- Q. What part did you take in connection with orders as between yourself and Mr. Johnstone?—A. All orders were discussed with me.
- 20 Q. Before the orders were given?—A. Before the orders were placed.
- Q. In whose name were they placed?—A. In some cases in Johnstone's and in some cases in my name.
- Q. And in some cases in the name of both?—A. Not that I remember.
- Q. Why were they in your name when it was Johnstone's business?—A. In some cases, Mr. Manning, the people from whom the goods were ordered wouldn't grant credit to Mr. Johnstone.
- Q. In whose name was the banking account?—A. Mine.
- Q. It was at the Commonwealth Bank?—A. Yes.
- 30 Q. That remained the banking account of the business right up to a short time ago?—A. Right up to now.
- Q. All cheques on this account were drawn by you?—A. Yes.
- Q. Johnstone had no authority to sign cheques on that account?—A. None whatever.
- Q. The takings of the business were paid into this account?—A. Up to quite recently. There was a matter of £1,200 not paid into the account.
- Q. When was that?—A. From last October up to to-day's date.
- Q. Apart from that until recently all takings were paid into this account?—A. Yes.
- 40 Q. After they ceased to be paid into this account where were they paid?—A. I couldn't tell you, but I suppose into Johnstone's private account.
- Q. Didn't he feed your banking account from his private account?—A. In some cases.
- Q. You have received cheques from him from the National or London Banks?—A. Yes.
- Q. And paid them into your Commonwealth Bank account?—A. Yes.

Exhibits.
 "A."
 Evidence of
 R. W. Carey
 before
 Registrar
 in Bank-
 ruptcy,
 30th June
 1921—con-
 tinued.

Exhibits.
 "A."
 Evidence of
 R. W. Carey
 before
 Registrar
 in Bank-
 ruptcy,
 30th June
 1921—con-
 tinued.

Q. With regard to the correspondence, Mr. Carey, did you see that?

—A. I saw the bulk of it.

Q. I don't say you saw every letter, but generally speaking you saw the correspondence, in and out?—A. Yes.

Q. Letters received and written?—A. The bulk I did, but I don't think I saw it all.

Q. Used you to sign letters?—A. Never for Johnstone.

Q. You never signed business letters?—A. Yes.

Q. When Johnstone was away you looked after the business?—A. Yes.

Q. You interviewed clients?—A. Yes.

Q. And discussed business matters?—A. Just so.

Q. You discussed matters as if it was your own business?—A. I couldn't say that.

Q. You interviewed people?—A. Yes.

Q. And looked after matters while Johnstone was away?—A. Yes.

Q. If people came to see Johnstone while you were there you would take part in the discussion?—A. In some cases.

Q. With regard to the business letters sent there, who opened those letters?—A. Johnstone opened his own and I opened mine.

Q. Did you ever open Johnstone's business letters?—A. None what-
 ever.

Q. This business was started in 1917; and has been carried on for four years. Was Mr. Johnstone away for any lengthy periods of time during that four years?—A. Never for more than a week or ten days.

Q. And you would be there looking after the business for him?—A. Yes. I made a mistake—he was laid up with the influenza for three weeks.

Q. Whatever the cause of his absence you would look after the business while he was away?—A. Yes.

Q. I take it then you would look after letters addressed to him—ordinary correspondence?—A. No, I wouldn't. Johnstone was never away for more than a week or ten days and letters would await his coming back. Once when he was three weeks away I took his letters over to the house to him.

Q. During this period was there any division of profits?—A. Every six months—on numerous occasions. A balance sheet was made out for every month with the exception of the last six months.

Q. Have you those balance sheets in Court?—A. No.

Q. You say they were made out every month—are they all in existence now?—A. Oh, yes—with the exception of the last six months—from December to the present month they were only made out in March and May.

Q. Have you got the one in March?—A. Yes.

Q. In York Street?—A. Yes.

(Mr. Wickham undertakes to produce the balance sheets to the Official Assignee.)

Mr. Wickham: Q. Are the books cumbersome?—A. The private ledger is not, but the trading ledger is fairly cumbersome. Exhibits.

Mr. Manning: Q. I want the books which will enable the Official Assignee or his clerk to see what the liabilities of the business were during this year?—A. Well, one ledger will show you that. "A." Evidence of R. W. Carey before Registrar in Bankruptcy, 30th June 1921—continued.

Q. Mr. Carey, how much altogether have you advanced in connection with this business?—A. In what way? At the present time how much have I advanced?

Q. Up to the end of last month?—A. Over £18,000. The business 10 owes me £18,000.

Q. What is the bank overdraft?—A. £8,000 odd.

Q. How do you make up the other £10,000?—A. £3,300 in profits due to me and £7,000 owing to my father.

Q. Profits which had been allowed to remain in the business?—A. Yes.

Q. What have Johnstone's drawings been?—A. £5,500 since 1917.

Q. Do your books show the amount of profits you and Johnstone drew up to last month?—A. Yes.

Q. Have those books been audited from time to time?—A. No. I 20 am a chartered accountant myself.

Q. You say, Mr. Carey, that Johnstone owed you about £18,000 at the end of last month?—A. Yes.

Q. Including money he owed your father?—A. I owed the money to my father.

Q. That was money borrowed from your father and put into this business?—A. Yes.

Q. The goods used to be bought on credit?—A. In some cases on credit and in some cases for cash.

Q. In some cases when credit was given were promissory notes given? 30 —A. Only in one case.

Q. What case was that?—A. Montgomery and Sprodd. English credit was all on draft.

Q. They drew on you?—A. Absolutely.

Q. Were any ever dishonored?—A. Yes, I think two were dishonored on account of late arrival of the goods.

Q. When was that?—A. About last November.

Q. You refused to accept delivery?—A. Yes.

Q. What happened with regard to those?—A. They have never said anything more about it.

Q. Taking the end of last month—May—in addition to the £18,000 40 owing to you what amount was owing by this business?—A. About £229 to one unsecured creditor, about £500 to father, and I should think £300 in interest to the bank.

Q. Johnstone, according to you, didn't owe the bank anything?—A. Nothing at all.

Q. You owed the bank money and he owed you money?—A. Yes.

- Exhibits. *Q.* He didn't owe your father any money?—*A.* Yes.
- *Q.* You borrowed money from your father?—*A.* He was responsible
- “*A.*” for it.
- Evidence of *Q.* To you, not to your father?—*A.* That is right.
- R. W. Carey *Q.* The £18,000 represented a debt due to you which included the
- before amounts you owed the bank and your father and other amounts you had
- Registrar put into the business and had not been repaid?—*A.* Yes.
- in Bank- *Q.* Apart from that, what money was owed at the end of last month?
- ruptey, —*A.* Nothing, except £272 (?) for unsecured creditor in one amount.
- 30th June *Q.* How long did Johnstone remain in this business in York Street? 10
- 1921—*con-* —*A.* Right up to the end of last month.
- tinued.* *Q.* Do you remember him opening a business in Clarence Street?
- A.* I didn't know anything about the business in Clarence Street.
- Q.* Did you hear he had gone into it?—*A.* At the end of March or the
- beginning of April I heard people ringing up and asking about goods which
- I knew were not in 36 York Street. There was no stock of the kind in
- York Street.
- Q.* What happened then?—*A.* Well, I began to smell a rat. I spoke
- to Johnstone and asked him about it and asked him if he was mixing up
- the two businesses and he said it had nothing at all to do with York 20
- Street.
- Q.* Was that when you first heard?—*A.* Yes.
- Q.* He told you he had a business in Clarence Street?—*A.* Yes.
- Q.* Did he tell you how long he had been carrying it on?—*A.* No.
- Q.* Did he tell you what the nature of the business?—*A.* No. I took
- it, it was the same class of business as the York Street business.
- Q.* Soft goods?—*A.* Yes.
- Q.* What else did he tell you?—*A.* He told me he had taken legal
- advice and that he had a perfect right to carry on the other business.
- Q.* Was there any discussion?—*A.* I told him that I didn't think he 30
- had any right.
- Q.* To carry on for himself?—*A.* Yes.
- Q.* Did you suggest that you should have a share in the business?—
- A.* Certainly not.
- Q.* Was there no suggestion as to where you came in?—*A.* Yes, I
- did say “Where do I come in?”
- Q.* And when you asked him what interest you had in the business?
- A.* He said “Nothing at all.”
- Q.* What else did he say about that business. Did he tell you where
- he got the goods from?—*A.* He did not. 40
- Q.* Don't you remember discussing it?—*A.* Towards the end of April
- or the beginning of May he said he had got a lot of credit goods from Yano
- and Joko.
- Q.* Did he tell you how much?—*A.* No.
- Q.* They, to your knowledge, were Japanese merchants out here?
- A.* Yes, we had done a lot of business at York Street with them—
- running into £20,000.

Q. Did he tell you how much business he had done with this firm at Clarence Street?—A. No.

Q. Do you remember him telling you that he owed them money and that they were pressing him?—A. Yes, towards the end of May.

Q. About what day?—A. Well, I couldn't remember.

Q. Try and fix the date?—A. I don't remember that, but it was some time in May.

Q. What did he say about this Japanese firm Yano and Joko?—A. Well, towards the end of May he said they were pressing him for money, but I couldn't say what date it was.

Q. What did you say to that?—A. I asked him what about the business in York Street. I asked him was it protected and he said Yes, they couldn't come down on the business in York Street. That he had always told them it had nothing to do with the business in Clarence Street.

Q. At the time he told you that he was carrying on the business in Clarence Street?—A. Yes, he was there at that time.

Q. What else did he say—that you wouldn't be liable and had nothing to do with the business in Clarence Street?—A. Yes.

Q. You were getting anxious?—A. Yes.

Q. You thought you might be liable for various debts?—A. Yes.

Q. Did he say or did you ask him about other debts he owed?—A. I couldn't say that.

Q. Do you remember Fennell's name being mentioned?—A. That was mentioned when he got a writ for £200. I think it was. I think it was on the Thursday before the last day in May when he got the writ. The Thursday or Friday.

Q. Had he told you about Fennell and Company before he told you about the writ?—A. No, he didn't—that I remember.

Q. Did he tell you he had dishonored a promissory note he had given to Fennell?—A. I can't remember that.

Q. Were any other names mentioned in connection with the Clarence Street business?—A. None whatever to my knowledge, only the Japanese firm and Fennell and Company.

Q. You were getting anxious about the liabilities contracted by him in Clarence Street—did he tell you what the liabilities were?—A. No, he did not.

Q. He gave no indication—except that he owed the Japanese house; didn't he say how much he owed them?—A. No.

Q. He told you they were pressing him?—A. Yes, towards the end of May.

Q. He told you, didn't he, that they were pressing him and he could not carry on the business?—A. I wouldn't say he said that, Mr. Manning.

Q. Will you swear he didn't?—A. I wouldn't swear he didn't.

Q. If Mr. Johnstone says he did?—A. I have no recollection of it.

Q. You have no recollection?—A. No.

Exhibits.

“A.”
Evidence of
R. W. Carey
before
Registrar
in Bank-
ruptcy,
30th June
1921—con-
tinued.

- Exhibits. Q. Now when you had these conversations with him, you were
 "A." anxious about your position in respect of the Clarence Street business?
 Evidence of —A. Yes.
 R. W. Carey Q. The conversations took place at the York Street house?—A. Yes,
 before I believe the conversation took place at the York Street house or in the
 Registrar street with Johnstone.
 in Bank- Q. At that time you have told the Court the York Street business was
 ruptcy, his?—A. Yes.
 30th June Q. And not yours?—A. No.
 1921—con- Q. Has the York Street business become yours?—A. Yes, I take it, 10
 tinued. it has.
 Q. When did it become yours—how long after this conversation in
 which the Clarence Street business was mentioned?—A. I should say
 eight or nine days.
 Q. Tell the Court exactly how the business came to become yours—
 what led up to it?—A. I got nervous as to what was going on in the
 Clarence Street business. Johnstone had a writ against him, and I
 consulted my solicitors and they drew up a document.
 Q. I can't ask you what you told your solicitors. Up to the date
 you consulted your solicitors had you had any conversation with Johnstone 20
 about it?—A. In what way?
 Q. You were proceeding to tell us how you acquired the business?
 A. I consulted my solicitors.
 Q. Up to then had you said nothing to Johnstone about acquiring the
 business?—A. I told him he would have to hand the business over to me.
 Q. After consulting your solicitors?—A. Yes.
 Q. Rawlinson and Hamilton?—A. Yes.
 Q. You consulted Rawlinson and Hamilton and got certain advice?
 —A. Yes.
 Q. You were going on to say you drew up an agreement?—A. Yes. 30
 Q. Was this document drawn up before or after you said to Johnstone
 that he would have to hand the business over to you?—A. Before, I
 think.
 Q. You saw Rawlinson and Hamilton and got their advice?—A. Yes.
 Q. Then you saw Johnstone?—A. Yes.
 Q. Tell the Court what took place?—A. I asked him to write me a
 certain letter which he wrote.
 Q. You had told him you had seen your solicitors?—A. Yes.
 Q. I want the whole conversation?—A. That is the conversation. I
 said I had seen my solicitors and this was the document I wanted him 40
 to sign because I was afraid of being drawn into the Clarence Street
 business.
 Q. I want the whole conversation—you were afraid of being drawn
 into the Clarence Street business?—A. Yes, and I gave him the document
 to sign and he signed it and handed it to me.

The Registrar: *Q.* The solicitors drafted a letter for you—did you write it out?—*A.* Rawlinson and Hamilton wrote it out and I typed it for them and Johnstone signed it.

Mr. Manning: *Q.* There is one thing I want to get cleared up. Did you have the conversation with Johnstone when you said he would have to sign this, before or after you had the document from Rawlinson and Hamilton?—*A.* I asked him to hand over the business before and told him I would get a document made up by my solicitors and he agreed.

Q. You said because you were getting anxious about the Clarence Street business?—*A.* Yes, that is so.

Q. Did you give any other reason?—*A.* No. Because he always told me I had no interest in it and wasn't responsible for any debts. As a matter of fact I didn't know until quite recently that he had any business in Clarence Street.

Q. About the 18th April?—*A.* When he opened the business?

Q. He was carrying on business considerably before that?—*A.* He must have been.

Q. In Clarence Street?—*A.* I couldn't say he was carrying on business in Clarence Street. It was during March that people were ringing up on the telephone and asking for things we didn't have in stock.

The Registrar: *Q.* You don't know when he opened?—*A.* No, sir.

Q. But it was considerably before the 18th April?—*A.* I should imagine so.

Q. Because you recollect . . . ?—*A.* People ringing up on the 'phone and asking for supplies of goods which I knew we didn't have in stock in York Street and that is how I came to know at all about the other business.

Q. He didn't disclose the fact that there was any other business until you taxed him with it?—*A.* No.

Mr. Manning: *Q.* When you wanted him to hand over the business was there anything said as to what he was to hand it over for?—*A.* Nothing at all . . . He was to hand it over on condition that I was to give him a full release.

Q. That was prepared?—*A.* Yes.

Q. What were you to get?—*A.* I was to get a very bad debt.

Q. What were you to get?—*A.* Stock-in-trade.

Q. Plant?—*A.* Yes.

Q. Book debts?—*A.* Yes.

Q. As a matter of fact you have collected book debts since?—*A.* Yes—there are very few to collect.

Q. What do they come to altogether?—*A.* I couldn't say.

Q. You claim those as your property?—*A.* I claim them as part of the business.

Q. And I suppose the goodwill—I take it what you had handed over to you in consideration of releasing his debt, was the whole of the business assets connected with 36 York Street?—*A.* Yes.

Exhibits.

"A."

Evidence of
R. W. Carey
before
Registrar
in Bank-
ruptcy,
30th June
1921—con-
tinued.

Exhibits. Q. Mr. Carey—this is a letter of the 1st June—is that your signature?
 “A.” —A. Yes—that is the first release and he wouldn’t accept it.

Evidence of R. W. Carey before Registrar in Bankruptcy, 30th June 1921—continued. Q. That is your signature to the letter of the 1st June?—A. Yes.
 Q. That you handed over to him?—A. Yes.
 Q. At the same time did he hand over anything to you?—A. He handed over a document asking me . . .
 (Mr. Wickham says he will produce document.)
 Q. (Handing document to witness.) Do you know whether you recognise that as a copy of it?—A. Yes—I should think that would be a copy.
 (Copy of letter of 31st May m.f.i. No. 3.) 10
 Q. Well, you notice one is dated 31st May and the other 1st June?
 —A. Yes.
 Q. You signed the one of the 1st June?—A. Yes.
 Q. Would that be the day both documents were handed over?—A. No, I should say the one of the 31st May was signed by Johnstone on that date and the other by me on the 1st June.
 Q. Were they exchanged on the same day?—A. I don’t think so.
 Q. Didn’t you get them both drawn up by Mr. Rawlinson?—A. I don’t remember whether they were both drawn up the same day or one the day after. 20
 Q. You don’t remember whether you exchanged documents with Johnstone on the one day?—A. I shouldn’t think so.
 Q. You think his document was handed over earlier—you think the day before?—A. I think so, yes.
 Q. You said he wouldn’t accept your release?—A. He said he would consult a solicitor, which he did.
 Q. When did he say that?—A. On the 1st June, when I handed over the release of 1st June. He said he would consult a solicitor and I presume he did so. He brought back a typewritten release and I consulted Rawlinson and Hamilton and they wouldn’t allow me to sign. 30
 Q. Had he signed the document then?—A. Yes.
 Q. And handed it over?—A. Yes.
 Q. Was that agreement given up when he refused on the 1st June to abide by it?—A. No. I shouldn’t think so. He wanted to get a release and to satisfy himself he was perfectly clear of the 36 York Street business.
 Q. Then he saw a solicitor and this other document of the 7th June was signed by you wasn’t it?—A. Yes.
 (Document of 7th June, m.f.i. No. 4.)
 Q. During the time this business had been running at York Street under the original agreement whatever it was, had he paid anything off the indebtedness to you or was the indebtedness greatly increased?—A. The indebtedness was greatly increased. 40
 Q. He never paid anything off from time to time—Not specially payments off by way of goods sold, but payments out of his private moneys?—A. He always drew up to the last degree.

Q. So far as you knew did he have any assets outside?—A. I knew he bought a property at Medlow.

Q. What is the value of that?—A. I couldn't say. I couldn't tell you.

Q. Did he tell you what the value was?—A. He did at one time, but I couldn't say what it was. From what he told me I should think it was worth £1200 to £1400.

Q. You never saw the property?—A. No.

Q. Did he tell you what other property he had?—A. No. I have been to his house at Neutral Bay. He has told me the furniture there belonged to his wife, I understood he was only renting the place.

Q. You didn't know of any other property than the Medlow property—the furniture was his wife's?—A. At Neutral Bay.

Q. How about Medlow Bath?—A. So far as I knew he owned it.

Q. Do you remember him telling you he tried to borrow money?—A. Yes, lately.

Q. When was that?—A. In March or April.

Q. He told you he couldn't do it?—A. Yes.

Q. Did he tell you what amount he tried to borrow?—A. No, but I believe he wanted £700.

Q. He told you he couldn't borrow it?—A. Yes.

Q. Did he tell you where he tried to borrow the money?—A. I don't think he did.

Q. When he told you, Mr. Carey, that he couldn't pay this indebtedness to this firm of Yano and Joko and you were getting frightened, you had no reason to believe he had any other free assets?—A. Well, he told me he had stock in Clarence Street at the end of May. I didn't know what it was, as I never saw the stock. I couldn't take you to where it is now.

Q. Apart from stock in trade round there you had no reason to suppose that he had any other assets when you had this conversation in May last?—A. He was supposed to have £1100 in the business but he didn't have it.

Q. How do you mean "supposed to have it in"?—A. He was supposed to have paid it in.

Q. But he had not?—A. No. As a matter of fact his account at 36 York Street is overdrawn about £37.

Q. I may take it then that apart from the Clarence Street assets and the Medlow Bath property you didn't know of any assets of his?—A. None whatever.

Q. You had no reason to suppose he had any assets?—A. No.

Q. Did you know what debts he owed apart from the business debts?—A. No.

Q. Do you know if he owed any debts apart from the business debts?—A. I couldn't say. I don't know.

Q. You were saying something just now about £1100 he didn't pay into the banking account?—A. £1200.

Exhibits.

"A."

Evidence of
R. W. Carey
before
Registrar
in Bank-
ruptcy,
30th June
1921—con-
tinued.

Should be
£79.

Exhibits.
 "A."
 Evidence of
 R. W. Carey
 before
 Registrar
 in Bank-
 ruptcy,
 30th June
 1921—con-
 tinued.

Q. What was that?—A. Money received from various sundry debtors and never paid into my account. He paid it into his own account and used the money.

Q. The money was from his debtors and belonged to his business?—A. Yes.

Q. Do you suggest it was your business?—A. Not for a moment, but the money was to be paid into my account, and I was to operate on that account.

Q. This money wasn't paid in?—A. No.

Q. How do you know that—from the books?—A. From Mr. Johnstone's words. He said he collected the money and didn't pay it in. 10

Q. You afterwards got money from the National Bank?—A. Small amounts.

Q. Totalling up to a pretty large amount?—A. When?

Q. At the end of the payments out of the National Bank?—A. At times Johnstone received cheques and paid them into his account and gave me cheques for the money received. Whatever cheques he gave me were paid into the Commonwealth Bank.

Q. I take it last year there were very heavy losses in connection with the York Street business?—A. Not last year. There were very heavy losses since January. Last year was profitable. There were heavy losses in connection with silk, but the business showed a profit of £1600. 20

Q. And this year?—A. There are very heavy losses.

The Registrar: Q. Principally in cotton goods?—A. Yes, and in silks.

Q. What was that from?—A. Drop in the market.

Mr. Manning: Q. Do you remember telling him not to buy any more goods until the stock had been reduced to £7000?—A. Oh, yes.

Q. Do you remember refusing to allow him to open another business at York Street?—A. I refused to allow any goods to come into York Street. 30

Q. Whether goods in connection with the business or another business?—A. Yes,

Q. Was he suggesting he should open another business?—A. No, he suggested trading from there as a separate account.

Q. You objected to that?—A. Yes.

Q. Was that just before April?—A. I think, speaking from memory, that was the latter end of February.

Q. Had he then told you he wanted to open a separate business?—A. No. 40

Q. He was suggesting it, as you objected?—A. Evidently.

Q. Do you know whether that was the business he afterwards opened in Clarence Street?—A. I couldn't say. I don't know about the Clarence Street business,

Q. The lease of the York Street premises was in the names of Johnstone and yourself?—A. It was in Johnstone's name in the beginning. As a matter of fact the landlord wouldn't allow Johnstone to have the lease.

Q. It was taken in the names of both?—A. Yes.

Q. What about the lease now. Do I understand you have the lease?
—A. Yes, Johnstone has handed the lease over to me. I have the lease now.

Q. That is part of what you got in consideration of releasing this debt?
—A. Yes.

10 Q. Apparently the document says nothing whatever about it?—but that was the understanding?—A. Yes.

Q. There is one other question. You said just now that sometimes orders were in your name and sometimes in Johnstone's, but never in the name of the two of you?—A. Not that I can remember.

Q. There is one here—it is not a recent one, I admit—to John Fennell and Company (*showing witness m.f.i., No. 2*)?—A. That is true. The draft was drawn at sight and cheque given by me for the draft.

Q. Do you remember if there were any others?—A. There may have been; I couldn't say.

20 (Witness Retired.)

SWORN by the Deponent on the day first above mentioned at Sydney before me

F. H. SALUSBURY,
Registrar in Bankruptcy.

R. W. CAREY.

“U.”—Letter, Appellant's solicitor to Respondent's solicitors, and reply.

8th March 1922.

Messrs. Rawlinson & Hamilton,
Solicitors,
30 91 Phillip Street,
Sydney.

Dear Sirs,

Re A. E. Johnstone, Bankrupt, and Carey.

I am instructed to inform you that Mr. Palmer and the creditors are not content to further delay the exercise of their rights and remedies against Mr. Carey and Counsel has now settled the necessary Notice of Motion for Orders against Mr. Carey under Sec. 134 of the Bankruptcy Act.

40 Before, however, filing same I am instructed to enquire whether Mr. Carey is prepared to pay the amount asked for in my letter to you of the 9th August last.

Yours truly,

G. W. ASH.

Exhibits.

“A.”

Evidence of R. W. Carey before Registrar in Bankruptcy, 30th June 1921—continued.

“U.”

Letter, Appellant's Solicitor to Respondent's Solicitors, 8th March 1922.

10th March, 1922.

Exhibits.

—
"U."
Letter,
Respon-
dent's Soli-
citors to
Appellant's
Solicitor,
10th March
1922.

G. W. Ash, Esq.,
Solicitor,
Pitt Street,
Sydney.

Dear Sir,

Re Carey & Palmer.

We are in receipt of your letter of 8th inst., and in reply our Client is not prepared to admit that Mr. Palmer as Official Assignee of A. E. Johnstone's Estate has any claim against him.

10

Yours truly,

RAWLINSON & HAMILTON.

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.

RECORD OF PROCEEDINGS.

BLAKE & REDDEN,

17, Victoria Street, S.W.1,

for the Appellant.

RODGERS, GILBERT & RODGERS,

4, Walbrook, E.C.4,

for the Respondent.

Jack served up female Bull

30,1926

To Messrs Blake & Redden

CAVEN vs. C. P. R. Co

Hon. R. B. Bennett K.C's fees

Retainer

Settling Case

Consultation

Brief

Consultation

Refresher

R. B. Bennett
