[HIGH COURT OF AUSTRALIA.]

WRAGGE . . . . . APPELLANT;
DEFENDANT,

AND

SIMS COOPER AND COMPANY (AUSTRALIA) PROPRIETARY LIMITED . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 25, 26.

SYDNEY, *Nov.* 27.

Starke, Dixon, Evatt and McTiernan JJ.

Bill of Exchange—Promissory note—Consideration—Contract of Sale—Land in New South Wales—Payment by instalments—Default—Promissory note given to agent of vendor—Action by agent upon note—Conflict of laws—Note delivered and payable in Victoria—Proper law—Bills of Exchange Act 1909-1932 (*No.* 27 *of* 1909—*No.* 61 *of* 1932), *secs.* 32 (1), (2), 43 (1), 77—*Moratorium Act* 1930-1931 (*N.S.W.*) (*No.* 48 *of* 1930—*No.* 66 *of* 1931).

The appellant, who had agreed to buy certain land in New South Wales, made default in payment of interest on the outstanding balance of purchase money. After negotiations between the appellant and the vendor's agent, the former gave a promissory note, payable to the agent, for the amount due. The note was issued and payable in Victoria.

Held (1) that the governing law of the note was that of Victoria and, therefore, it was not affected by the *Moratorium Act* 1930-1931 (N.S.W.), and (2) that there was consideration to support the note so as to enable the agent to sue thereon.

Decision of the Supreme Court of Victoria (*Lowe* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

By an agreement in writing dated 26th October 1926 Agnes Marian Sims and Margaret Cooper agreed to sell to Thomas William Eric Wragge about 8,600 acres of land near Deniliquin in the State

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of New South Wales together with the station homestead erected thereon. The purchase price of the land was stated to be £5 per acre, less £1,000, the purchase price of the personalty sold. The deposit was fixed at 20 per cent of the purchase price, £1,000 of the deposit having been paid to the vendors at the date of the contract. The balance of the deposit was payable on 15th November 1926 to the vendors in Melbourne. An instalment of five per cent of the balance of the purchase money was payable in Melbourne at the expiration of the second, third, fourth and fifth years respectively from the date of possession, and the remaining sixty per cent was to be paid on 1st March 1934. The purchaser agreed to pay to the vendors at Melbourne, free of exchange, interest on so much of the purchase price as should for the time being remain unpaid at the rate of six per cent per annum computed from the date of delivery of possession and payable half-yearly on 1st March and 1st September. The contract also provided that no moratorium provision should apply to the agreement and that time should be deemed to be of the essence of the contract.

Clause 10 of the contract provided :—" No error or misdescription shall annul the sale and no claim for compensation shall be made or allowed if any of the fences do not actually agree with the boundary lines and if any dispute or difference shall arise between the vendors and the purchaser it shall be settled by arbitration under the Arbitration Act or Acts for the time being in force in the State of Victoria."

The purchaser paid the deposit and the first instalment of the purchase price payable at the end of the first two years. On 2nd August 1930 the purchaser wrote to " Messrs. Sims and Cooper " saying that he was unable to pay the interest due on 1st September but would pay it when his wool clip was sold. This letter was answered by the respondent company, which was a Victorian proprietary company, and which agreed to extend the time until 30th September 1930. Negotiations proceeded between the solicitors for the purchaser and the vendors and finally the purchaser executed four promissory notes to cover interest and insurance premiums due. Two of the promissory notes were met but two of them which were the subject matter of the present action were dishonoured. One of

the dishonoured notes was for £1,000 and the other was for £175. Each note was due on 4th December 1931 and was payable to the respondent, Sims Cooper & Co. (Australia) Pty. Ltd., which, as was found by the learned trial Judge, was at all material times, the agent of the vendors. The promissory notes were payable at the office of Younghusband Ltd. in Melbourne, and were handed over in Melbourne by the purchaser's solicitors to the respondent's solicitors. After the two notes were dishonoured the respondent company sued the maker upon them in the Supreme Court of Victoria.

The material defences were in substance (1) that there was no consideration moving from Sims Cooper & Co. in respect of the promise contained in the two promissory notes; (2) that the acceptance of the promissory notes extended the time of payment of the unpaid instalment and varied the provisions of the contract of sale accordingly; (3) that the notes were delivered by the defendant to the plaintiff upon the terms that neither of the notes was to take effect or be operative or enforceable until the fulfilment of certain conditions, which it is not material to set out.

Robertson, for the appellant. No consideration was at any time given for the notes. As between the immediate parties there was no consideration given sufficient to support an ordinary simple contract, nor an antecedent debt or liability between them, to comply with the *Bills of Exchange Act* 1909, sec. 32 (1) (*a*), (*b*). The evidence does not justify the finding that the respondent gave any undertaking to procure from the vendors their forbearance to take legal proceedings to enforce payment of the arrears of interest. The respondent company was the vendors' agent to collect the moneys under the contract of sale and negotiate with the purchaser with respect to the arrears unpaid. The company gave no such undertaking, and was bound, in law, to account to its principals for any payments whenever and howsoever received by it under the contract of sale. Being so bound, an undertaking to carry out its obligations would not constitute a legal consideration, nor, in itself, be sufficient to support the notes sued upon in this action. Parol evidence is not admissible to show that the respondent, the payee of the note, was not the principal but the agent merely for the vendors so as to

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render any antecedent debt or liability, as between the maker and the vendors, available to the respondent as a consideration for the notes (*Higgins* v. *Senior* (1); *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (2); *McGruther* v. *Pitcher* (3); *Fleming* v. *Bank of New Zealand* (4)). These cases show that the respondent cannot sue in its own right on the notes unless it has given or received consideration. The notes were delivered by the appellant to the respondent or its solicitors subject to certain conditions which were not fulfilled. Until these conditions were fulfilled no contractual obligations were to arise out of the promissory notes given. Their delivery was conditional only. Secondly, the proper governing law of the notes, in the circumstances of this case, was the same as that which governed the contract of sale of the land situate in the State of New South Wales. It followed that the *Moratorium Act* 1930-1931 (N.S.W.) applied, and no action lies on the personal covenant to pay interest or otherwise under the contract of sale. The *lex situs* governs that contract, unless the whole of the circumstances show that the parties intended some other law to apply (*Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Company Pty. Ltd.* (5)). The circumstances do not favour the application of any other law. The contract of sale was a "mortgage" within the meaning of the New South Wales Act. The action was, in substance, one to recover interest and other moneys secured by that contract and is not maintainable (*Levick* v. *Trevascus* (6)). Although the notes were given and made payable in Victoria, they were given in performance of an agreement governed by New South Wales law.

Smith, for the respondent. There was consideration for the promissory notes passing between the defendant, the maker of the promissory notes, and the plaintiff. The consideration arises in one of two ways:—The learned trial Judge found the circumstances raised an irresistable inference that, in consideration of the giving of the notes in question to the plaintiff, the plaintiff undertook that it would procure the vendors to forbear from taking legal action to recover the overdue arrears of interest during the currency of the

(1) (1841) 8 M. & W. 834; 151 E.R. 1278.
(2) (1915) A.C. 847.
(3) (1904) 2 Ch. 306.
(4) (1900) A.C. 577.
(5) (1933) 48 C.L.R. 565.
(6) (1919) V.L.R. 118, at p. 121.

promissory notes, and, in addition, would account for the payments received by it, under the promissory notes to the vendors when and as the plaintiff received such payment, and that these undertakings formed valuable consideration from the plaintiff to the defendant, and were sufficient to support the promissory notes sued on. Alternatively there is consideration moving from the vendors which entitles the company to sue on the promissory notes (*Cole* v. *Cresswell* (1)). The plaintiff company was managing agent for the vendor's property and the defendant was responsible for the wording of the note. As the company was the only party that appeared in the transaction it must be taken to have promised to pay the proceeds to the vendors. There was a warranty of authority to the respondent to receive the proceeds and pay them to the vendors. There is an agreement to obtain a forbearance and consideration is presumed. Either there was an undertaking to pay the proceeds to the vendors or the company was in the position of a trustee : there was a duty to account, which was undertaken at the request of the maker of the notes (*Cole* v. *Cresswell*). There is in the law of negotiable instruments a principle of identification of the agent, and that principle should here be applied for the purpose of showing that there was a consideration to support the notes as contracts (*De La Chaumette* v. *Bank of England* (2); *Kettle* v. *Dunster and Wakefield* (3)). Sec. 32 (2) of the *Bills of Exchange Act* is expressed in very general terms and is applicable to this case. The respondent was entitled to succeed (*Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd.* (4); *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (5)). The *Moratorium Act* 1930-1931 (N.S.W.) does not apply. The law which governs the promissory notes as contracts is that of Victoria and not that of New South Wales. The law governing the contract of sale does not enter into the matter. The contract of sale was governed by Victorian law as it provided for proceedings under the *Arbitration Act* of that State, but even if the proper law of the contract was that of New South Wales, the promissory notes were delivered and made payable in Victoria and are

(1) (1840) 9 L.J. Q.B. 117; 11 Ad. & El. 661; 113 E.R. 565.
(2) (1829) 9 B. & C. 208; 109 E.R. 78.
(3) (1927) 43 T.L.R. 770, at pp. 771, 772.
(4) (1919) A.C. 801.
(5) (1933) A.C. 70.

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governed by Victorian law (*Campbell* v. *Dent* (1); *Norske Atlas Insurance Co.* v. *London General Insurance Co.* (2)). [He also referred to *McCoubray* v. *Thomson* (3); *Bills of Exchange Act* 1909, secs. 32 (1), (2), 43 (1), 77.]

The following written judgments were delivered:—

NOV. 27.

STARKE J. Action was brought by the respondent against the appellant upon two promissory notes, dated 16th June 1931, for £1,000 and £175 respectively, made by the appellant and payable to the respondent or order on 1st December 1931. By an agreement dated 26th October 1926, Agnes Marian Sims and Margaret Cooper sold freehold land in New South Wales and certain chattels to the appellant, who agreed to pay the purchase money by instalments over several years, with interest thereon in the meantime. The respondent acted as the business agent of the vendors, Sims and Cooper, and collected for them any moneys due under the contract of sale. The sum of £1,175 was due and owing to the vendors for interest under this contract, and after protracted negotiation the appellant gave the respondent the promissory notes sued upon. The authority of the respondent to take payment in this form was not questioned. The notes were not given to the respondent for its own benefit, but in payment of moneys due to the vendors, its principals. The antecedent debt or liability of the appellant to the vendors was the consideration for the notes (see *Bills of Exchange Act* 1909, sec. 32 (1) (*b*)). The respondent gave none, and was but the agent of the vendors for the purpose of collection. It was in reality in the same position as if the notes had been given to the vendors and endorsed to it for the purpose of collection. In such a case, the respondent would have been the holder of the notes, and entitled to sue and recover upon them in its own name (*Bills of Exchange Act*, secs. 32 (2), 43 (1) (*a*)) in case of non-payment. The respondent here is the holder of the notes, and in my opinion its right is no less. It is as much within the consideration originally given for the notes as if they had actually been given to the vendors for an antecedent debt or liability and endorsed to it for collection.

(1) (1838) 2 Moo. P.C.C. 292, at pp. 302-307; 12 E.R. 1016, at pp. 1020-1022.
(2) (1927) 43 T.L.R. 541.
(3) (1868) Ir. R. 2 C.L. 226.

The notes were not paid on their due date, and the respondent is therefore entitled to recover upon them unless the *Moratorium Act* 1930-1931 of New South Wales affords a defence to the action.

The notes were given in respect of obligations arising under the contract of sale already mentioned. It was insisted that the governing law of that contract was the law of New South Wales, and that consequently the provisions of the *Moratorium Act* of New South Wales affected the promissory notes. But the transaction as to the notes, though arising by reason of the obligations undertaken under the contract of sale, created new obligations, which were negotiated in—and the notes themselves were made payable in—Victoria. The obligation of the appellant upon the notes is thus, in my opinion, governed by the law of Victoria and not by the law of New South Wales. The provisions of the *Moratorium Act* of New South Wales therefore do not affect the case.

The result is that the appeal should be dismissed.

Dixon J. The appellant, who is the defendant in the action, contracted in 1926 with Mrs. Sims and Mrs. Cooper to purchase from them some pastoral land near Deniliquin in New South Wales, together with some fixtures and plant, at a price payable in instalments extending until March 1934. Interest at 6 per cent per annum upon the unpaid balance of purchase money was made payable at Melbourne on 1st March and 1st September in each year. He was unable to pay the interest due on 1st September 1930 and 1st March 1931 and sought time from the vendors, who were represented in the transaction, at first by Mr. Cooper, their attorney under power, or by the respondent company, who acted as their agents, and then by a firm of solicitors in Melbourne. After some negotiations, it was agreed that the promissory notes should be given by the appellant for the arrears of interest and for some small amounts payable by the appellant under the contract of sale on other accounts. On 26th June 1931, in pursuance of this arrangement, the appellant's solicitors handed over in Melbourne to the solicitors acting for the vendors four promissory notes made by the appellant payable to the respondent company. Two of these were dishonoured, one for £1,000 and another for £175, both payable in Melbourne on 1st

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December 1931. The respondent company sued the appellant upon these two notes in the Supreme Court of Victoria and recovered judgment before *Lowe* J., from whose decision the present appeal is brought.

The appeal is supported upon three grounds, one of fact, two of law.

(1) The ground which depends upon fact is, in effect, that the appellant's solicitors had no authority to issue the notes except subject to a condition, and that the notes were issued, not absolutely, but conditionally or, alternatively, that if they were handed over unconditionally, the delivery was in excess of the authority given by the maker and they could not be considered as issued at all. The question of fact was examined fully during the argument for the appellant upon the hearing of the appeal and it is unnecessary now to say more about this ground than that I am satisfied that the issue of the notes was not conditional and was authorized.

(2) The appellant contended that the promissory notes were agreements by a purchaser for the payment of moneys secured by a contract of sale of real property in New South Wales and were, therefore, discharged by the operation of sub-secs. 6, 7 and 8 of sec. 25 of the *Moratorium Act* 1930-1931 (N.S.W.). No attempt was made on the part of the respondent to distinguish *Stock Motor Ploughs Ltd.* v. *Forsyth* (1) on the ground that the State law of remedies, not of discharge, was there in question. But, in a proceeding in the Supreme Court of Victoria to enforce an obligation, it cannot be considered as discharged by those provisions unless its proper law is that of New South Wales (*Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (2)). The Federal *Bills of Exchange Act* 1909-1932 treats the Commonwealth as one for the purposes of the conflict of laws (see sec. 77). Perhaps there is a logical difficulty in treating an obligation which arises under a Federal statute as having a governing law confined to a State. But, upon the assumption that the Federal statute, upon its true interpretation, permits State law to dissolve an antecedent liability which has accrued under the Federal law, it follows that some choice of law among the six States is necessitated in order to ascertain by

(1) (1932) 48 C.L.R. 128.

(2) (1933) 48 C.L.R. 565.

which law the obligation of the instrument may be destroyed. Whether the answer is found in an independent application of the rules of private international law, or in an implied intention of the Federal statute, the result must be the same. Because, if the *Bills of Exchange Act* 1909-1932 is taken to imply that a State law may dissolve the obligation of a bill of exchange, it must, I suppose, also be taken to imply that, in ascertaining which State law may do so, the principles of private international law shall be observed. According to the code the *lex loci contractus celebrati* is the governing law of each of the contracts on a bill of exchange (see par. (*b*) of sec. 77). But there is some reason to think that the common law selected the *lex loci solutionis*. (See *Dicey, Conflict of Laws*, 5th ed. (1932), pp. 707, 708, Comment on rule 172 (2).) In the present case the promissory notes were issued in Victoria and were payable in Victoria. Whichever be the test, therefore, the governing law would be Victorian. It was argued that the governing law of the notes must be that of the contract, and that they were governed by the law of New South Wales. I think the governing law of a negotiable instrument is not to be ascertained in this manner. It is a new and independent obligation. I am of opinion that the promissory notes sued on were not discharged by the *Moratorium Act* 1930-1931. Further, I think that it is unnecessary to inquire whether the original contract of sale is affected by sec. 25 of that Act, because, if the promissory notes were given in respect of a then existing debt arising under the provisions of that contract and a consideration was thus provided, the subsequent legislative discharge of that debt would not work a failure of consideration in the promissory notes.

(3) But the appellant maintains that the promissory notes were given without consideration moving from the payee and on this ground create no obligation between the payee and the maker. In fact they were given by the appellant as maker to the payee in respect of a pre-existing liability of the maker to the payee's principal. Sec. 32 (1) (*b*) of the code provides: "Valuable consideration for a bill may be constituted by—(*b*) an antecedent debt or liability." In *Currie* v. *Misa* (1), *Lush* J. gave the reason upon which a creditor's

(1) (1875) L.R. 10 Ex. 153, at pp. 163, 164.

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title rested to a bill given on account of a pre-existing debt, namely, "that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. This is precisely the effect which both parties intended the security to have, and the doctrine is as applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had given no security."

In the present case, the notes were delivered to the solicitors of the creditors by way of conditional payment of the liabilities, but they were made payable to the creditors' agent and not to the creditors. It is, of course, clear that, if, instead of being promissory notes, they had been bills of exchange drawn by the creditors, the vendors, upon the appellant in favour of the respondent as payee and accepted by the appellant, the consideration would have sufficed. Yet promissory notes are considered for most purposes as acceptances without a drawer. The difference, however, is that upon a bill drawer and drawee are immediate parties and acceptor and payee remote parties, while maker and payee on a promissory note are immediate parties. Does it follow that the consideration for the making of the note must always be provided by the payee, that he must suffer the detriment or, in other words, that it must move from him? In my opinion it does not. If the note is given so as to effect a conditional payment of a pre-existing liability of the maker, it is immaterial that it is made payable not to the creditor but, under his direction, to a stranger. Bills of exchange and promissory notes are not governed entirely by the rules of common law which prescribe the requisites for consideration for the formation of simple contracts. As a matter of history, the rights of the parties

to bills of exchange were referred to the custom of merchants. "It was clear that the doctrine of consideration could not be applied to these bills in the same manner as it was applied to ordinary simple contracts. For instance, an acceptor was liable to an original payee or an indorsee, though no consideration had moved from such payee or indorsee to the acceptor" (*Holdsworth, History of English Law*, vol. VIII., p. 168). The very notion of a past consideration or pre-existing liability seems at variance with the principle upon which it is required in simple contracts that the consideration shall move from the promisee, for that principle means that he must incur a detriment. That this requirement is absent in the case of bills of exchange and promissory notes is a matter to which attention is particularly called by the learned author in *Willis's Law of Negotiable Securities*, 4th ed. (1923), p. 61. He refers to it as "a peculiarity with respect to the consideration for a bill of exchange. If there be a consideration for it, it does not matter from whom it moves." He takes the well-known facts of *Tweddle* v. *Atkinson* (1), and illustrates the different position the plaintiff would have occupied if his father-in-law had made a promissory note in his favour in furtherance of the agreement between the two parents to give him money on his marriage. As it was, "the only person who could sue is the one father suing the other for the non-fulfilment of the promise. But now, then, let one father put down the cash and hand it on to his son. Let the other father give a promissory note for £200 to his son-in-law. Then the son-in-law can sue on the promissory note if dishonoured, although the consideration for the note did not move from him. He has got the promissory note with a consideration for it; and in the case of a promissory note or bill of exchange it does not matter from whom the consideration moves if there be an actual consideration for the note or bill." In *Stirling* v. *John* (2), the question was whether cheques given by a borrower payable to the servants of the moneylender were securities for money taken otherwise than in the moneylender's registered name. The Court of Appeal answered the question: Yes. *Atkin* L.J. expressly said (at p. 561): "They give to the payees a right to sue." It is to be noticed that drawer and payees were immediate parties. The debt

(1) (1861) 1 B. & S. 393; 121 E.R. 762. (2) (1923) 1 K.B. 557.

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was owing to their master, not to the payees. In fact the position was, in all respects material to the question, identical with the present. In *Lomas* v. *Bradshaw* (1), to an action by a payee of a promissory note against the maker, the latter included among his pleas one alleging that the note was given to the payee as treasurer of an association of persons, of which the maker was one, in respect of moneys payable by him to the society. Upon demurrer, judgment was given for the plaintiff, the payee. *Wilde* C.J. said (2): "I see no pretence for suggesting any want or failure of consideration, or any principle upon which the plaintiff is prevented from enforcing the security." (See too *Munroe* v. *Bordier* (3), where an additional plea of no consideration is rejected because, although it alleged the payees were agents, it did not negative a consideration from their principal.)

In my opinion, it is enough that a debt existed payable to the vendors and that, under their direction, the note taken in conditional payment of the debt was made payable to the payees who would receive payment on their account, being their agents.

I think the appeal should be dismissed with costs.

EVATT J. This is an appeal from the judgment of the Supreme Court of Victoria (*Lowe* J.), which gave judgment for the respondent in respect of the non-payment of the amount of two promissory notes for the sums of £1,000 and £175 respectively, together with the interest thereon. Each promissory note was dated June 16th, 1931, and each was made payable on December 1st, 1931, to the respondent at the office of Younghusband Ltd. in Melbourne in the State of Victoria.

It appears that, by an agreement made on October 26th, 1926, between Mesdames Sims and Cooper of Melbourne and the appellant, who resided in the State of New South Wales, the former sold to the appellant certain station property situated in New South Wales. The agreement provided for a purchase price of £5 per acre, the property comprising about 8,600 acres. A deposit of twenty per cent of the total purchase price was to be paid on November 15th,

(1) (1850) 9 C.B. 620; 137 E.R. 1034.
(2) (1850) 9 C.B., at p. 624; 137 E.R., at p. 1035.
(3) (1849) 8 C.B. 862, at pp. 874, 875; 137 E.R. 747, at pp. 752, 753.

1926, and a further five per cent of the purchase price on the expiration of two years after the date upon which the vendors gave possession to the appellant. Both these payments were duly paid. The agreement also provided for further payments, each of five per cent of the purchase price, at the expiration of three, four and five years respectively from the date of possession, and for payment of the balance of the purchase price (sixty per cent) on March 1st, 1934.

Under the agreement, the appellant was also to pay interest to the vendors at Melbourne upon so much of the purchase price as should for the time being remain unpaid, at the rate of 6 per cent payable half-yearly on March 1st and September 1st of each year.

On August 2nd, 1930, the appellant wrote to "Messrs. Sims and Cooper," asking for a concession in respect of the interest due on September 1st, 1930. The letter was answered by the respondent company, which is a Victorian proprietary company and which acted at all material times as agent for the vendors in relation to their contract of sale with the appellant. The respondent's letter, dated August 13th, 1930, stated that, "as requested, we will extend time of payment until 30th September."

Further correspondence took place between the appellant and the respondent. It clearly appears that the appellant regarded the respondent company as having full authority both to collect and postpone payments due to the vendors under the contract of sale. In February and March 1931, the correspondence evolved into correspondence between solicitors, until, finally, the two promissory notes which are the subject of the present action were executed by the appellant and delivered on June 16th, 1931. The sum represented by the two notes included an instalment of interest in arrear under the contract of sale, and other sums outstanding under the contract. The respondent was mentioned in each note as payee.

The contentions of the appellant are reducible to two. They may be stated thus:—(1) That there was no consideration moving from the respondent in respect to the appellant's promise to pay. (2) That the system of law which governed the transaction contained in or evidenced by the promissory notes, was that of New South Wales, that the amount of the two notes represented money payable under the contract of sale itself, that the contract was subject to New South

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Wales law and so to the New South Wales *Moratorium Act* 1930-1931, and that the respondent was no more entitled to sue the appellant in respect of the promissory notes than the vendors themselves would have been entitled to sue in pursuance of the terms of the contract of sale. The New South Wales *Moratorium Act* 1930-1931 (secs. 11 and 25) treats moneys payable under contracts for the sale of real property upon the same footing as mortgages.

With reference to the first point, *Lowe* J. said :—

> "Without expressing any final opinion upon the question whether a consideration existing between the vendors and the defendant, sufficient to support a promissory note, if given by the defendant to the vendors would be sufficient to support a promissory note given to the vendors' agent—the plaintiff—I am clear that on the facts there was consideration between the plaintiff itself and the defendant. That consideration, I think, consisted in this ; the circumstances, in my opinion, raised an irresistible inference that, in consideration of the giving of the notes in question to the plaintiff the plaintiff undertook that it would procure the vendors to forbear from taking legal action to recover the overdue arrears of interest during the currency of the promissory notes, and, in addition, would account for the payments received by it under the promissory notes to the vendors when and as the plaintiff received such payment. Those undertakings in my opinion form valuable consideration from the plaintiff to the defendant, and are sufficient in themselves to support the promissory notes which are sued upon in this action."

In *Cole* v. *Cresswell* (1), upon assumpsit on a promissory note by the payee against the maker, the defendant pleaded, as to part, that the note was delivered to the plaintiff for the purpose of the plaintiff's paying, for and on account of the defendant, certain debts owing by the defendant to divers persons, that the plaintiff promised to discharge such debts, and, having failed to do so, no consideration had been given by the plaintiff in respect to this part of the note. The plaintiff's replication to this plea as to part was in substance that the defendant made and delivered the promissory note to the plaintiff at the request of the defendant's creditors for the purpose of paying such debts so soon as the defendant paid the promissory note. The facts alleged in the replication were proved at the trial, and the jury found a verdict for the plaintiff. Upon a motion to get rid of the verdict or arrest the judgment so far as either was founded on the issue so joined, the defendant

(1) (1840) 11 Ad. & E. 661 ; 113 E.R. 565.

conceded that, if the plaintiff was a trustee for the creditors of the defendant, there would be consideration sufficient to support his suing upon the disputed part of the note. But it was contended that the plaintiff was only a trustee for the defendant himself.

In discharging the rule, Lord *Denman* C.J. said :—

"The terms proved were that they should be paid by the plaintiff upon receipt of the amount of the note from the defendant. The issue is therefore material, and is properly found for the plaintiff. Under the circumstances proved, the plaintiff was a trustee for payment of the defendant's debts, and this was a sufficient consideration for the note" (1).

And *Williams* J. said :—

"The plea shows a receipt of the note in trust for the defendant. The replication denies this, and changes the position of the parties by shewing a trust for the creditors, under which the plaintiff will be bound to pay to them part of the sum recovered. The rest is due to himself" (2).

It would appear that this case lays down, or at any rate proceeds upon, the principle that, so long as there is an antecedent debt of the maker of a note which furnishes consideration for its making, the person named in the note as payee may avail himself of such consideration if he is under a legal duty to the creditor to pay over his debt so soon as the note is paid.

In *Munroe* v. *Bordier* (3), after judgment for the plaintiffs upon demurrer, there was a motion for leave to enter a further plea to the first count of a declaration. The count alleged that the defendants made a bill of exchange upon a firm called de Warn & Co., delivered the bill to a London firm called Coates & Co., who delivered it to the plaintiffs, and that, upon due presentation for payment and protest &c., there was a failure to pay. The new plea, for which leave was asked, was that the defendants made the bill and delivered it to Coates & Co. on the faith of being paid the price and value of the bill, and that Coates & Co. delivered the bill to the plaintiffs, for the purpose only of collecting on behalf of a firm called Smith, Sumner & Co., the proceeds to be placed to the credit of such firm in account with the plaintiffs and not otherwise, and that the price and value of the bill was not paid to the defendants, and that, before the bill became due, the plaintiffs had notice that the actual

(1) (1840) 11 Ad. & E., at p. 664; 113 E.R., at p. 566.
(2) (1840) 11 Ad. & E., at p. 665; 113 E.R., at p. 567.
(3) (1849) 8 C.B. 862; 137 E.R. 747.

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price and value of the bill was not paid to the defendants. So the proposed plea amounted to an allegation that the plaintiffs gave no value or consideration for the bill.

In refusing the application, *Wilde* C.J. said :—

> " The plea now proposed to be added, is, in substance, a plea of no consideration also. If Coates and Co. were indebted to Smith and Co., and on account of that debt gave the bill to them, why should not Smith and Co., by their agents, the plaintiffs, sue on the bill ? This is an attempt to plead another bad plea of no consideration " (1).

In my opinion, these cases show that it is sufficient if a bill or a note is supported by valuable consideration, which of course includes an antecedent debt or liability (sec. 32 (1) (*b*), *Bills of Exchange Act* 1909), so long as the consideration in relation to which the promise is made moves either from a payee or from his principal. So that the payee of a note may bring action against the maker where the note has been made to enable the payee to use its proceeds for the purpose of discharging a debt owing to his principal.

The principle is the same in relation to bills. In his famous *Advice concerning Bills of Exchange* (ed. 1684), *Marius* said :—

> " Ordinarily there are four persons requisite to be employed in the taking up or remitting any parcel of money by exchange (besides the broker which doth procure the parcel) as namely, two at the place where the money is taken up, and two at the place where the money is payable. 1. The party which doth deliver the money by exchange (whom we used to call the deliverer or the giver and French le banquier), because there are which do keep a stock of money only to negotiate by exchange (as our usurers do to deliver money at interest) although these bankers will as well take up or deliver moneys by exchange according as they see it most advantageous unto them by the rise or fall of the price of moneys by exchange. 2. The taker or party which doth receive or take up moneys by exchange, and this party we usually call the drawer, because he may be said to be the chief occasion of the draft of those moneys from one place to another by virtue of his bill of exchange. 3. The party which is to repay the money or he upon whom the bill is drawn or to whom the bill of exchange is directed. And fourthly the party to whom the money is made payable or he to whom the bill is sent to get accepted and to receive the money when due according to the bill. So that by setting down these four parties, and what use there is of them in exchange of monies, it is apparent, that there must be a correspondency and familiar acquaintance held between the party which doth deliver monies by exchange, and he to whom the same is made payable ; and the party which doth take up monies by exchange, and he on whom the bill is drawn."

(1) (1849) 8 C.B., at p. 875 ; 137 E.R., at pp. 752, 753.

In *Marius's* description of the business, the money furnished by the party first "delivering the money by exchange" must have been regarded as having provided consideration sufficient to enable the party of the fourth part, "the party to whom the money is made payable," to receive payment of the bill. So long, at any rate, as there existed "a correspondency and familiar acquaintance held" between the "deliverer" or "giver" or "banquier" and the named payee. The non-appearance of the "deliverer" in a document which mentions only drawer, "drawee acceptor" and payee, whilst emphasizing the close nexus between drawer and "drawee acceptor," naturally tends to conceal the part played by the payee in the transaction. Of course if the whole truth is wanted, one must travel beyond the mere bill. It will then be found that the consideration which sustains the acceptor's promise to pay the amount of the bill to the payee is, very frequently, an antecedent liability of the drawer to some person corresponding to *Marius's* "deliverer" with whom the payee is in privity. Such a consideration, if accompanied by such a privity, always enabled the payee to bring suit against the drawer who chose to accept. In the case of a promissory note, the principle was not different and its application was, and is, more obvious.

The first ground of appeal therefore fails.

In dealing with the second ground, *Lowe* J. held that the proper law in relation to the contract evidenced by the promissory notes was that of the State of Victoria, and not that of the State of New South Wales. As will appear, my view is that the proper law of the contract of sale itself is that of New South Wales, so that it is not necessary to inquire what would be the proper law of the promissory note, if considered independently of the contract of sale.

Because of its general importance, one part of his Honor's judgment should now be mentioned. Dealing with the construction of sec. 25 (7) of the New South Wales *Moratorium Act*, he expressed the opinion that Parliament did not intend to affect rights which had already accrued before the coming into force of the sub-section. But this conclusion does not give effect to the principle of sec. 25. As soon as it came into operation, sec. 25 (7) rendered all covenants, agreements or stipulations of a certain character void for all purposes

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except the one purpose of enabling recourse to be had against the mortgaged property. Therefore, although a breach of such covenant, agreement or stipulation occurred prior to the passing of the sub-section, the mortgagee was, by the destruction of such covenant, agreement or stipulation so soon as that sub-section commenced, prevented from enforcing the contract or any of its terms. The one exception permitted was recourse to the security itself.

Apart from this incidental matter, there is no foundation for the appellant's attempt to secure a discharge of his liability by introducing the New South Wales *Moratorium Act*, because I hold that the governing law of the contract of sale itself should be held, by a Victorian Court, to be that of Victoria, and not that of New South Wales. Upon this part of the case, emphasis was placed by the appellant upon the recent decision of this Court in *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (1). In most respects, the original and substituted contracts of sale considered in that case were analogous to the present contract of sale between the appellant and the vendors. There is, however, one important difference, and, in my opinion, it is sufficiently significant to make the underlying law of this contract that of Victoria and not that of New South Wales.

Clause 10 of the agreement provided as follows :—

> " No error or misdescription shall annul the sale and no claim for compensation shall be made or allowed if any of the fences do not actually agree with the boundary lines and if any dispute or difference shall arise between the vendors and the purchaser it shall be settled by arbitration under the Arbitration Act or Acts for the time being in force in the State of Victoria."

This clause dealt with three things : (1) Annulment of the sale, (2) Compensation if fences do not agree with boundary, (3) Disputes or differences arising under the contract. I do not see how it is possible to limit the " dispute or difference " mentioned, to matters connected only with the two earlier parts of clause 10. It follows that the parties have expressly provided for the settlement of all disputes arising under their contract, by reference to the system of civil arbitration under the laws of the State of Victoria. This brings the case within the two decisions of the House of Lords in

(1) (1933) 48 C.L.R. 565.

Hamlyn & Co. v. *Talisker Distillery* (1) and *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co.* (2). Those cases tend to show that the inclusion of an English arbitration clause in a contract which possesses non-English elements or features will be seized upon by English Courts as evincing the intention of the parties that the governing or underlying law of the contract shall be that of England. I had occasion to discuss the principle of this rule both in *Barcelo* v. *Electrolytic Zinc Co. of Australasia* (3); and in *Merwin Pastoral Co. Pty. Ltd.* v. *Moolpa Pastoral Co. Pty. Ltd.* (4).

A Victorian Court should, in accordance with the decisions referred to, hold that the proper law of the present contract of sale was that of the State of Victoria itself. It follows that the appellant was not entitled to have recourse to the New South Wales *Moratorium Act*.

The appeal should be dismissed with costs.

McTIERNAN J. The appellant made two promissory notes, each dated 16th June 1931, and payable in Melbourne on 1st December 1931, whereby he promised to pay the sum of moneys therein mentioned to the respondent. The moneys thereby expressed to be payable to the respondent are interest and other moneys which the appellant as purchaser agreed to pay to the respondent's principals as vendors under the term of a contract of sale whereby he purchased certain freehold lands near Deniliquin, in New South Wales, and certain plant thereon used for working these lands as a station.

The appellant resisted the respondent's action upon the following grounds:—(1) There was no consideration for the notes moving from the respondent. (2) The *Moratorium Act* 1930-1931 of New South Wales operated to destroy any liability to which the appellant was subject under each of the notes. (3) The notes were delivered by the appellant to the respondent upon the terms that neither of them should be issued until the fulfilment of certain conditions which it is not necessary to set out.

Lowe J., who tried the action, found that there was consideration for each note moving from the respondent. The consideration

(1) (1894) A.C. 202.
(2) (1927) A.C. 604.
(3) (1932) 48 C.L.R. 391.
(4) (1933) 48 C.L.R. 565.

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which the learned Judge found was an undertaking by the respondent to procure its principals not to sue the appellant to recover the arrears of interest and other moneys due by the appellant to them under the contract for which the notes were given, during the currency of the notes, and to account to the vendors for the moneys paid to the respondent under the notes. This finding, with which I agree, renders it unnecessary to discuss the alternative submission made by Mr. *Smith* in his interesting argument that the appellant's indebtedness to the respondent's principals was sufficient to support the appellant's promise to pay their agent, the respondent, the moneys which were due to them. It is also unnecessary, in view of the above finding, to decide the question whether the governing law of the original contract of sale is the law of Victoria or of New South Wales, and the further question, which would flow from a decision that the law of the latter State governed the contract, whether the liability of the appellant to pay arrears of interest and other outstanding moneys is affected by the *Moratorium Act* 1930-1931 of New South Wales. It follows from the finding as to the consideration upon which the notes were founded that the liability of the appellant to pay these moneys rested upon an agreement outside the contract of sale, and that his promise to pay which is contained in each note was made in respect of a new and independent consideration. In this view the appellant's promise to pay these moneys is clearly unaffected by the *Moratorium Act* of New South Wales.

There is, in my opinion, upon the evidence, as *Lowe* J. said, an irresistible inference that the consideration for each note was an undertaking substantially in the terms which he found. The memorandum of agreement between the appellant and the vendors, which stated their address as care of the respondent, was signed for the vendors by their attorney, H. L. Cooper, who was also the attorney and secretary for the respondent, a director of it and manager of its business in Australia. The respondent company acted as the vendor's agent in connection with the subdivision of land near Deniliquin belonging to the vendors. The appellant purchased part of this land. The respondent company collected

the money paid by the appellant under the contract. When default occurred interviews and correspondence took place between him and the respondent by which further time to pay was sought and granted.

These interviews and correspondence were conducted by H. L. Cooper on behalf of the respondent. For example, on 2nd August 1930 the appellant, by letter addressed to Messrs. Sims & Cooper, stated his inability to pay the interest due on 1st September but would pay when his wool was sold, and that he hoped this "would meet with their approval." The respondent, by its reply of 13th August 1930, extended the time for payment until 30th September and enclosed an account of what was due under the contract. On 30th December 1930 the respondent wrote to the appellant asking his intentions with respect to his outstanding account under his contract with Mesdames A. M. Sims and M. Cooper. Again, on 4th February 1931, the respondent wrote to the appellant a letter containing the following statement: "To enable us to consider your application for extension in your outstanding accounts with us, it would be advisable for you to furnish a complete statement of your assets and liabilities." The appellant replied to the respondent on 19th February saying that he could not pay the interest due in September 1930 and that the best he could do was to pay £10, for which he forwarded a bank draft. Correspondence then ensued between solicitors representing the vendors and the appellant. It is obvious that the vendors' solicitors were acting directly under the instructions of the respondent. An examination of the evidence shows that it would have been a mere vain and futile proceeding for the appellant to give the promissory notes to the respondent if there was no promise on its part to obtain immunity for the appellant from legal proceedings for the recovery of the moneys represented by such promissory notes, or if it did not warrant that the appellant would be immune from such proceedings. I think that it must also be implied that the respondent undertook to pay the moneys mentioned in each note to the vendors when it received them. Without referring further to the evidence in detail, it is sufficient to say that it amply supports the finding of the learned Judge that the promissory notes are supported by the consideration which he found.

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As to the third ground of defence, I agree that it is not supported by the facts.

In my opinion, the judgment of *Lowe* J. should be affirmed and the appeal dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Malleson, Stewart, Stawell & Nankivell.*
Solicitors for the respondent, *Moule, Hamilton & Kiddle.*

H. D. W.

Cons *Buckfield & Repatriation Commission, Re* (1993) 29 ALD 884

[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
APPLICANT,

AND

THE AUSTRALIAN WOOLLEN MILLS LIMITED RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 27, 28; *Dec.* 8.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Injury—"Arising out of and in the course of the employment"—Fainting fit—Diabetic reaction—Machine with guard rails—Zone of special danger—Workers' Compensation Act 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *secs.* 6 (1), 7.

A worker was employed by a firm of wool carders, and, in the course of his duties, he walked along a passageway between some wool-carding machines. The passageway was protected by guard rails on either side of it. The worker, who suffered from diabetes had a fainting fit which was due to his diabetic condition and fell against the guard rails, and as a result sustained injury.

Held, that the injury arose out of and in the course of the employment within the meaning of the *Workers' Compensation Act* 1926-1929 (N.S.W.).