In the High Court
of Australia

Mia Mia Pastoral
Company Limited
-v-
Boyle

Reasons for judgment:—
Knox C.J.,
Isaacs, J.,
Higgins, J.

MIA MIA PASTORAL COMPANY LIMITED V BOYLE. 53/1921

10th May 1922

Judgment. Knox C.J.

The appellant sued the respondent for money alleged to be due on covenants contained in two instruments of mortgage given by the defendant to Alfred and Emanuel Abrahams and transferred by them to the appellant. The grounds of defence were :-

(1) That the covenants sued on were inserted in the instruments of mortgage by mistake.

(2) That the defendant executed the said instruments as surety for R.M.Boyle and Ellen Boyle and was discharged from liability by the said A & E Abrahams having given time to the principal debtor R.M.Boyle.

(3) That it was a term of the said instruments that the total amount to be advanced to the principal debtors should not exceed £15000 and that by reason of the advances having exceeded that sum the defendant was either (a) released from all liability or (b) liable only for the sum for which he would have been liable if there had been no such breach or (c) that the total amount of the debt for which he became liable was £15000.

On the trial of the action McMillan C.J. found that the defendant was a surety under the instruments sued on and directed accounts to be taken to ascertain the amounts due from the defendant to the plaintiff on such instruments and that judgment be entered for the plaintiff for the amount certified to be due on the taking of such accounts, and reserved the question of costs. The judgment also contained a declaration that on payment by defendant to plaintiff of the amount found due and of all costs of the action which the Court might order to be paid to the plaintiff, the defendant

should be entitled to the collateral securities held by the plaintiff to further secure payment of the amount due from the defendant to the plaintiff under the instruments sued on.

The defendant appealed to the Full Court of Western Australia from this judgment. On the appeal the Full Court varied the judgment of the Chief Justice by inserting declarations

(1) that the total liability of the defendant for principal moneys was £15000 less the proceeds of certain securities the proceeds whereof had or ought to have been received by the said A & E Abrahams a n d

(2) that all interest which was not paid by the defendant within the period prescribed in the securities sued on and which by reason thereof became or as a fact was capitalised formed part of the principal moneys advanced and was included in the limitation of the liability of the defendant and (3) that on payment by defendant of the amount certified to be due on the taking of the account thereby ordered and of such costs of the action as the Court might order to be paid by him the defendant should be entitled to all the securities held by the plaintiff to further secure payment of the amount(if any) so certified to be due from the defendant to the plaintiff under the mortgages sued on less such securities as had been realised as therein before mentioned and the proceeds whereof had been or ought to have been applied in reduction of the liability of the defendant.

The plaintiff then appealed to this Court and it becomes necessary for us to consider what judgment should have been entered by the Supreme Court in Full Court.

The questions argued before us were :-

(1) Whether the covenants for payment by defendant were inserted in the instruments of mortgage by mistake.

(2) Whether the defendant was a principal debtor or a surety.

(3) Whether if the defendant was a surety he was released from liability by reason of time having been given to the principal debtor without the consent of the defendant.

(4) Whether the liability of the defendant under this covenant was limited to £15000 including arrears of interest which had been capitalised in accordance with the terms of the securities.

I propose to deal with these question in the order in which they are stated above.

1. Mistake. The learned Chief Justice found that the defendant had failed to make out this ground of defence. Having had the advantage of seeing the witnesses in the box and of hearing them give their evidence he came to the conclusion that no mutual mistake had been proved. On this point I need say no more than that I agree that in order to succeed on this ground it was necessary for the defendant to make out a case of mutual mistake and that in my opinion he wholly failed to do so.

2. Principal debtor or surety. I think it is clear on the face of the documents sued on that defendant although he made himself personally and in a sense primarily liable thereunder was a surety for R.M. and Ellen Boyle. The contention that he was a principal debtor and not a surety is in my opinion quite untenable - "Whoever is liable to pay the debt of another is a surety" - per Jessel M.R. Imperial Bank v London and St Katherine's Dock Co. (5 Ch. D at p. 200)

3. The giving of time to the principal debtors. Assuming that there was a binding agreement between A & E Abrahams and the principal debtors R.M. & Ellem Boyle to give time for payment - as to which I feel considerable doubt - I think it is abundantly clear from the evidence that the transaction was entered into with the consent of the defen-

dant . McMillan C.J. believed the evidence given in support of this view and was in a better position to estimate its value than we can be. I see no reason to doubt that his decision on this point was correct.

4. Limitation of Liability of Defendant. The decision on this question depends entirely on the construction of the instruments sued on. The memorandum of mortgage under the Land Act (Ex. B & G.) contains the following recitals viz:- "Whereas Richard Michael Boyle of "Maywood" Greenhills in the State of Western Australia Farmer and Ellen Boyle of the same place his wife have applied to Alfred Abrahams & Emanuel Abrahams both of Benevuta Drummond Street Carlton in the State of Victoria Merchants to at the time of the execution thereof advance to them the sum of £12,700 and ALSO to at their absolute discretion make the said Richard Michael Boyle and Ellen Boyle further advances so that the total sum to be advanced including the said sum of £12,700 shall not exceed £15,000 AND WHEREAS THomas William Boyle of Greenhills aforesaid Farmer and Richard Boyle the younger have requested the said Alfred Abrahams and Emanuel Abrahams to make such present advance and to (at their absolute discretion) make to the said Richard Michael Boyle & Ellen Boyle further advances so that the whole sum to be so advanced shall not exceed £15,000 AND WHEREAS the said Alfred Abrahams and Emanual Abrahams have agreed to make a present advance of £12,700 and to at their absolute discretion make such further advances as before provided upon the execution by the said Thomas William Boyle & Richard Boyle Jr. of this Mortgage."

These recitals are followed by a covenant by the defendant & his brother R Boyle Jr to pay on demand "the said principal sum of £12,700 also all moneys which may now or at any time during the continuance of

"this security and at the time of such demand be due to the said Mortgagees in respect of principal moneys or further advances mentioned in this or any other securities which now are or may hereafter be held by the said Mortgagees collateral hereto all which further advances shall include advances made to us the Mortgagors or the said Richard Michael Boyle and Ellen Boyle either prior to or subsequent to the date of these presents ~~"and all sums which the Mortgagees may have paid or may be liable to pay"~~ . . . . . and "all further and other sum or sums of money which the Mortgagors or the said Richard Michael Boyle and Ellen Boyle may at the time of demand made upon them by the Mortgagees owe or be indebted to the mortgagees for money paid by the Mortgagees to for on on account of the Mortgagors or the said Richard Michael Boyle or Ellen Boyle or for money lent and advanced by the Mortgagees to the Mortgagors" . .

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and "all other sums of money which may be owing under these presents or for any cause or on any account whatsoever".

This instrument also contained a covenant by the mortgagors to ~~pay~~ pay insterest at the rate of £10-6- per cent (reducable to ~~£8-4/-~~ per cent on punctual payment) on the principal moneys thereby secured with a proviso that in the event of interest not being paid on due date or within seven days thereafter "the said interest moneys shall become part of the principal moneys hereby ~~received~~ secured & the mortgagors will pay interest thereon at the rate therein provided".
There is no substantial difference between these provisions & the corresponding provisions contained in the mortgage under the Transfer of Land Act.

The evidence in the supreme Court showed that no interest was ever paid by the defendant, and it appears from the particulars attached to the Statement of Claim that the unpaid interest was from time to time charged against the defendant and interest calculated on the debit balance from time to time including the amount so charged in respect of unpaid interest.

McMillan C.J. on this part of the case expressed the opinion that the amounts charged against the defendant in respect of unpaid interest were not further advances within the meaning of the instrument of mortgage and held that the defendant was liable on the security (which was expressed to be a continuing security) for advances up to £15000 and for whatever interest he had admitted to pay

In the Full Court Burnside J held that the fact of carrying the amount of unpaid interest to the debit of capital had the effect of extinguishing it as interest and that the amount so transferred must be taken for the purposes of the account as he thought it in fact was an advance by the mortgagee to pay interest. Northmore J. held that the limitation of the liability of the defendant must be treated as inclusive of capitalised interest. Draper J. in effect agreed with the opi ion expressed by Burnside J.

In my opinion the decision of the learned Chief Justice on this point was correct. I share his difficulty in understanding how the defendant who has failed to pay interest and has allowed it to be added on to the principal money can escape his liability in respect

of the amount of interest unpaid merely because the mortgage provides that unpaid interest shall become part of the principal moneys secured and the mortgagor shall be liable to pay interest thereon. The contention for the defendant amounts in effect to this - that default by the mortgagor in payment of interest diminishes the total amount which he can be called upon to pay under the security, for if he paid the interest at due dates he would be liable to pay the amount of moneys advanced not exceeding £15000 in addition to the interest already paid - but if he paid no interest he could not in any event be liable to pay more than £15000 in all. This is truly a surprising result of a covenant intended to benefit the mortgagee by enabling him to capitalize interest unpaid at due date and intended also to penalize the mortgagor for making default in payment of interest. But apart from this consideration I think it is clear that the transfer of an amount of unpaid interest to debit of capital account is in no proper sense of the word an advance of that amount, to R.M. and Ellen Boyle and the limitation of liability to £15000 applied only to advances to them while the covenants for payment in the securities given extended to all advances made to the mortgagors(i.e. the defendant and R. Boyle Jr) and all other sums of money which might be owing by them for any cause or upon any account whatsoever. In my opinion the limitation of liability to £15000 does not include the amount representing interest which has

been capitalised but extends only to advances properly so called. I think the order that should have been made by the Supreme Court and should now be made by this Court is that an account be taken of what is due by the defendant to the plaintiff for principal and interest on the securities sued on, further consideration and all questions of costs other than the costs of the appeal to the Supreme Court in Full Court and of this appeal being reserved. The order will be prefaced with a declaration that the compound interest added to the principal by virtue of the instruments of mortgage ought not to be treated as advances to R.M. and Ellen Boyle within the meaning of the provision limiting such advances to £15000.

In my opinion any declaration as to the right of the defendant to obtain the securities collateral or otherwise held by the plaintiff would be premature at the present stage of the proceedings.

When the account has been taken and the amount of the defendants liability has been ascertained it will be time enough to deal with other questions which may arise.

Costs. The defendant should pay the costs of the appeal to the Full Court and of this appeal.

MIA MIA PASTORAL COY.

V

BOYLE.

JUDGMENT. ... MR JUSTICE ISAACS

Mia Mia Pastoral Company.

v

B o y l e.

Judgment. ... Isaacs J.

The case is somewhat complicated, and the issues need to be disentang-
-led.

The claim was simple enough.

The present appellants, as transferrees, from two persons named, Abra-
-hams, mortgagees, sued Thomas William Boyle the respondent, upon a
covenant in each of two mortgages for £9,875/1/11 moneys advanced
by the original mortgagees to Richard Michael Boyle and Ellen Boyle,
the parents of the respondent.

The respondent pleaded a defence and a counter-claim. In his defence
he set up (1) mistake, that is, that the covenants for personal lia-
-bility were inserted in the mortgages by mistake, the intention bei
merely to mortgage the defendant's land for his parents' debt, and
to make himself personally liable; (2) that he was not a principal
debtor in any way but a surety only, and, as some of the securities
once held from the parents as principal debtors were parted with, the
value should be allowed to him; (3) discharge by reason of time
having been given to the principal debtor, the father: (4) that a
condition of the mortgage was broken, namely, that not more than

than £15,000, should be advanced to the parents, and that this worked a release, and, (5) failure of consideration to the extent of £12,700, agreed to be advanced to the parents and not advanced. The counterclaim claimed alternatively the rights of a surety.

The reply inter alia joined issue as to the mistake, denied giving time, averred knowledge and confirmation of any forbearance, and alleged that the mortgages were continuing securities, denied a breach of the condition as to £15,000, and said, if there were any excess the defendant knew and consented.

McMillan C.J., tried the case without a jury. He heard the oral testimony of the Abrahams, of the respondent, of his father, and other members of his family, and of other persons connected with the transactions in controversy.

He found as facts:-

(1) The transfer of the mortgages to the appellant.

(2) That the alleged mistake did not exist.

(3) That whatever was done with respect to giving time was done with the consent of the respondent.

He held:-

That the respondent was liable for £15,000 principal actually advanced notwithstanding interest had conventionally become principal by virtue of the agreement with the respondent.

And the learned Chief Justice ordered an account under the two mortgages, adding a declaration that defendant on payment, is entitled on payment to transfer of securities.

He reserved further consideration and gave liberty to apply.

On the respondent's appeal to the Full Court of three judges, varying views were taken. On the question of mistake, two judges agreed with the Chief Justice, as to consent, two judges (not the same two) agreed with the Chief Justice, and all agreed with His Honor that the present respondent was liable for the full amount of principal advanced up to £15,000, notwithstanding some interest had, by agreement, been con-verted into principal.

The Full Court, however, unanimously, as I understand, held that the respondent was not a principal debtor but surety only, and was entit-led to be treated throughout as such and not as principal debtor. They altered the word "collateral" to "all", and this raised a great doubt in the minds of the appellants' advisers, as to their position with regard to any securities or the proceeds of securities said to have been realised or otherwise dealt with. For instance, Draper J., thought the liability was reduced to a limit of £3,000, by the arrange-ment of March 1916, and, further reduced, by the realisation of securities, to which the respondent would have otherwise been entitled on payment of his indebtedness.

On this appeal, all these points were discussed, and also another poi- arising as to the Stamp Act. It was contended for the respondents that the deeds being stamped only up to £15,000, violated the Stamp Act, because, they said, according to the appellants' case, the amount secured was more.

It is therefore plain that the case is full of complications. But some of them disappear at once. Thus, the contention as to mistake is disposed of by the fact that not only does the burden of establishing it lie heavily on the respondent, but so far as it rests on oral testimony, the learned Chief Justice, who heard and saw the witnesses gave credence to the appellants' witnesses, and, as there was abundance of evidence the finding cannot be shaken. It is a case where it depends, not merely on inference from established facts, but on the acceptance or rejection of the testimony itself. It is not necessary to consider the position in this connection of the appellant, as a bona fide purchaser and transferee of the registered mortgages; it might be, that without restoration, or even with restoration to its position, the defence would be untenable in any case.

The instrument recites an application by the parents to the lenders for an advance of £12,700, and also further advances so as not to exceed in all £15,000, but there is no recital of any agreement to act on that request. Then comes the recital of a request by the respondent and his brother, Richard, to advance the money to the parents " so that the whole sum to be so advanced shall not exceed £15,000," and the agreements of the lenders" upon the execution by the said" respondent and his brother "of this mortgage", then follows a recital by the obligors that in consideration of £12,700 "at our "request" now advanced to the parents and any further sums advanced to the parents "or to us the mortgagors", or the security thereof,

or on the security of the hereinafter mentioned securities or obli-
-gations(which include a mortgage by the parents), the respondent and
his brother mortgage their land and agree (1) to pay on demand the
£12,700 and other moneys due &c; (2) to pay interest at the rate men-
-tioned(I omit for the moment the important provision about capitali-
-sation of interest), and then follow various other covenants.
As to the question of forbearance or extension of time,towards the
parents,the law is definitely settled (Egbert v National Bank,1918.A.C
atp.908/909). But the evidence raises some interesting questions of
fact, which,however, in the presence of the circumstance that what-
-ever was done, was done, with the consent of the respondent, become
immaterial.
The question of consent stands in precisely the same position for
appellate purposes as the question of mistake.
That renders an account necessary. And until that account is taken,
all but one of the other questions raised are premature - some of them
may be irrelevant.
It is,however, important to determine at once the question of the
capitalisation of interest, and its effect on the limit of the res-
-pondent's liability.
It arises on the proviso to the second covenant, which provides in
the first place for simple interest. The proviso is in these terms:-
" Provided further that in the event of the interest moneys not being
duly paid on the respective days appointed for payment thereof or

" within seven days thereof, as ~~xxxxxxxxxx~~ hereinbefore provided
" the said interest moneys shall become part of the principal moneys
" thereby secured, and the mortgagor will pay interest thereon, at the
" rate firstly hereinbefore, provided such interest to be computed from
" the days wherein such interest should have been paid as aforesaid".

~~The~~ contention of the respondent is, that, if he neglects to pay in-
-terest for seven days, it becomes conventionally principal, and
stands in the same position as actual principal advanced, and as soon
as the total amount of "principal" actual and conventional reaches
£15,000, it can never be worse for the mortgagor. Delay is then a
benefit to him for interest accumulating, once it has raised the
principal to the agreed limit, dies in birth. As Draper J., justly
says:- " the importance of this question will arise when the accou
"are taken". But, it is necessary to determine it now.

I cannot agree with the view as presented. The limit of £15,000, is
the limit of the lender's advance to the parents. The proviso re-
-ferred to does not create a liability to be discharged by the par-
-ents, but by the respondent and his brother, personally, and by t
not merely primarily ,but,so far as appears exclusively.

The mortgage is intended to secure:-

(1) principal moneys(first covenant)

and

(2) interest(second covenant).

The "principal moneys" ~~xxxxxxxxxxxxxxxxxxxx~~ consist as stated in
the first covenant of:-

(a) £12,700,

(b) principal moneys on further advances - the latter being further advances either (i) " to us the mortgagors" or, (ii) to the parents &c.

Therefore the principal moneys secured by the mortgage are not confined to the moneys advanced to,or, owing by the parents. But the limit of £15,000, as expressed in the recital(the only place it appears) is confined to the advances to the parents.

The second covenant begins thus:-

" That so long as any principal moneys shall remain secured "by these presents, we, the mortgagors, will pay interest "thereon &c".

And after provisions, not unusual as to simple interest, comes the proviso quoted.

Assuming the limit of liability for principal moneys advanced to the parents to be £15,000, what is there to prevent the capitalised in--terest, being by agreement, an additional amount of "the principal "moneys hereby secured", that is an amount undertaken by the respon--dent,personally, in addition to any principal owing by the parents? Nothing so far as I can see. That was his agreement,namely, conven--tionally to treat overdue interest as an advance of principal to the respondent and his brother, and there is no necessity to attri--bute to it, the quality of self-destruction which the argument referred to demands.

That proviso, creates a distinct personal liability, arising from the personal failure, to perform the primary obligation of paying interest as agreed, and is in addition, to any other obligation to be found in the instrument. And the account should be taken on the basis that this obligation exists.

MIA MIA PASTORAL COMPANY LIMITED v. BOYLE

JUDGMENT HIGGINS J.

This action is brought against T.W. Boyle on two mortgage covenants in respect of advances to R.M. Boyle and Ellen his wife. One covenant, that in a mortgage made under the Transfer of Land Act, is made by T.W. Boyle and two of his brothers, and is expressed to be joint and several; the other covenant, that ~~on~~ in a mortgage made under the Land Act, is made by T.W. Boyle and one of his brothers, and is not expressed to be several as well as joint; but no objection has been taken, no application has been made, as to the non-joinder. The mortgages were transferred to the plaintiff company on the 5th & 6th November 1918, and it is not contended that the plaintiff cannot sue the defendant on the covenants.

The first objection raised by the defendant is that the covenants were inserted in the mortgages by mistake. The mistake as stated in the particulars is that "the intention of all parties concerned was that the land should be mortgaged, but was not to make the sons liable for the debt of their parents or any part thereof". Assuming, in favour of the defendant, that this means mutual mistake of the mortgagee and the mortgagor, it merely means that both parties misunderstood what they signed, and meant to sign, and, at the most, there would be a claim for rectification; and there is no claim for rectification. It is not even alleged that the words of the covenants were put in by mistake; and a mere mistake as to the legal effect of words used is not such a mistake as Courts of Equity will rectify (see Powell v. Smith L.R. 14 Eq. 85; Willesford v. Watson ib. 577). In my opinion, this defence as to mistake is ~~demurrable~~ not sound in law. But it is satisfactory to find that no injustice is being done in fact; for the learned Judge who tried the case and saw the witnesses came to the conclusion that there was certainly no mistake on the part of the mortgagees or of their solicitor. They "wanted the personal security from the beginning especially of Tom Boyle (the defendant) because he was the soundest"... "The point was stressed from the beginning that all were to be liable". This evidence was not contradicted by the defendant, who merely says that he did not read the documents or ask any one to explain. Besides, as pointed out by my

brother Isaacs, a covenant to pay is implied in every mortgage under the Transfer of Land Act, unless expressly negatived; and the defendant would apparently have to prove an express agreement that such a covenant was to be expressly negatived. This objection clearly fails.

The next objection relates to the amount for which the defendant by his covenants made himself personally liable. One mortgage - that under the Transfer of Land Act - recites that R.M. Boyle & Ellen his wife had applied to the mortgagees to advance them £12,700 "and also at their absolute discretion to make . . . further advances so that the total sum to be advanced including the said sum of £12,700 shall not exceed £15,000."; that the mortgagees had agreed to do so on the execution of this mortgage; and that the three brothers, in consideration of £12,700 so lent "and also in consideration of any further sum or sums of money which the said mortgagees may at their absolute discretion lend and advance . . . . . so that the sum hereby secured together with the present advance shall not exceed the sum of £15,000", covenant to pay on demand the said sum of £12,700, also all further and other sums of money which the brothers may at the time of the demand owe to the mortgagees for money paid by the mortgagees to or on account of the brothers or the parents or for money lent or advanced by the mortgagees . . . . . and all other sums of money which may be owing under these presents for any cause or upon any account whatsoever". The other mortgage does not so specifically indicate a £15,000 limit to the liability of the brothers for the purposes of their covenant; but we are relieved of the necessity of deciding, as to either mortgage, how far the very wide terms of this covenant are affected by the recitals; for counsel for the plaintiff admits, on behalf of his client, that he wants the words of the recitals to be read into the covenants so as to limit the liability of the defendant to advances up to £15,000. But the defendant insists on a further limitation. There is a provision in the mortgages (cl. 2) "that in the event of the interest moneys not being duly paid on the respective days appointed for payment thereof . . . . . the said interest moneys shall become part of the principal moneys hereby secured and the mortgagors shall pay interest thereon . . . . . ; and the defendant argues that the interest on being so compounded with the principal should be treated as being money "advanced" within the meaning ofthe recitals. In my

opinion, this argument is wrong. The further advances referred to in the recitals are advances made at "absolute discretion", do not include interest automatically added to the principal. They mean what men call "new money", available for the business - not existing burdens made more burdensome by being added to the principal of the debt. In Webster's dictionary, "advance" is defined as "a furnishing of something before an equivalent is received (as money or goods) towards a capital or stock or on loan; the money or goods so furnished; money or value supplied beforehand". The argument was rejected in principle in the recent case of Attorney-general v. South Wales Electric Power Co. (1920 1 K.B. 552). There a company unable to pay interest on debenture stock issued deferred warrants in payment, which bore interest themselves; and the amount of these warrants was held to be neither "loan capital" nor borrowed money, so as to incur liability for stamp duty. As the M. R. said (p. 555), "You do not borrow money by postponing the payment of your debt and agreeing to pay interest on it". In my opinion, the interest added to the principal for compounding is not to be treated as part of the £15,000 limit of "advances".

Then, by paragraph 10 A of the defence, the point is raised that the plaintiff, as creditor, agreed with the principal debtors (R.M. Boyle and his wife) to give them time, and that therefore the defendant as surety is discharged. I concur with the view of the law on this subject, as expressed by the learned Chief Justice of Western Australia. Even though the covenants of the defendant are direct covenants with the mortgagees, and though there is no suretyship mentioned in the mortgages, the plaintiff, having notice that the defendant was in fact mere surety for his parents, the ordinary rule as to creditor giving time to the principal debtor is applicable. The rule leads to extraordinary results sometimes, but it is too well established to be ignored. The defendant relies on a document dated the 15th April 1916, signed by R.M. Boyle and his wife only. It was as follows --

"To Messrs Alfred and Emanuel Abrahams.

In consideration of your forbearing to immediately call up the money owing by us the undersigned Richard Michael Boyle of Greenhills farmer and Ellen Boyle his wife to you and secured inter alia by mortgage dated

the 25th September 1913 registered No 7438/1912 [a mortgage given by the principal debtors]. And in further consideration of your agreeing to our selling the Greenhills farm to our sons G.J.Boyle and R.Boyle we do hereby undertake and agree to pay to you on demand all expenses heretofore or in the future incurred by you from time to time in visiting and inspecting the property included in your mortgage including the wages or salary paid by you to your representative Mr Bogg for all such time that he may be engaged in visiting and inspecting the farm and during such time as he may remain at Greenhills and district for the purpose of checking and ensuring the delivery of our crop to you including all hotel and travelling expenses and the expenses incurred in the upkeep of the motor used by Mr Bogg all which moneys we authorize and direct you to retain out of the first proceeds of the crop or sheep delivered by us to you Dated &c. (signed) R.M.Boyle Ellen Boyle".

Now, on the face of the document, the only promise is a promise of the Boyles - in effect, a promise to pay certain expenses connected with an inspection on the part of one Bogg. As Lord Herschell said in Rouse v. Bradford Banking Co. (1894 A.C. 586, 594), "It is of course obvious that time is only given within the meaning of the rule . . . . if there is a binding agreement arrived at for good consideration". There is no promise here to give time, or any promise on the part of the mortgagees; but there are two considerations expressed for the Boyles' promise. The second consideration is admittedly a past consideration - that the mortgagees had agreed to the sale of the Greenhills farm; the first consideration is forbearance to immediately call up the money - forbearance which may be either in the past or in the future. There is nothing in the document itself that necessarily binds the company to give a moment's further delay. The document was drawn up by the mortgagees after a conversation with the Boyles, was sent to the Boyles, and returned to the mortgagees signed by R.M.Boyle and wife. I very much doubt whether there is to be implied here any promise on the part of the mortgagees to give time; but even if there is, there is abundant evidence to support the finding of the trial Judge that what was done was done with the consent of the surety, the defendant.

Certain questions have been discussed as to the effect of our decision on the sufficiency of the stamp under the Western Australian law; but these questions do not really arise until the accounts have been taken, and the amount covered by the mortgages ascertained.

I concur in the order as proposed by the Chief Justice.

Hy B. Higgins J

1 May 1922