[HIGH COURT OF AUSTRALIA.]

HOLDEN AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

BLACK AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *August* 24, 25. *October* 2.

Griffith C.J., Barton and O'Connor JJ

Administration bond — Sureties, rights and liabilities of — Breach of duty by administrator—Duty of administrator to invest and secure shares of infants—Action quia timet—Covenant to administer—Acceptance of money paid into Court—Parties—Costs.

The duty of an administrator of an intestate estate to invest and secure the shares of next of kin who are infants, is analogous to the obligation to pay next of kin who are *sui juris*.

The sureties to an administration bond are entitled to enforce this duty by action against the administrator as principal debtor, and the next of kin as creditors, in the same way as in the case of other sureties for the payment of money, when the time for payment has arrived.

Mathews v. *Saurin*, 31 L.R. Ir., 181, followed.

Neither the fact that the sureties have taken a covenant from the administrator to duly administer according to law, nor that the sureties, in an action against the administrator for breach of duty and on the covenant, have accepted money paid into Court in satisfaction of past breaches, deprives the sureties of their right to this specific relief.

In such an action by sureties against the administrator and infant next of kin, the Court may properly order the administrator to set aside and secure the shares of infants in the personalty, direct accounts and inquiries for the purpose of ascertaining the amounts of those shares, and direct the administrator to keep and file proper accounts of the estate.

The infants' costs of such an action should be paid by the plaintiffs, with or without an order that they be recovered over against the administrator.

Semble, in such an action the Court has no jurisdiction to order the costs of any of the parties to be paid out of the estate.

Judgment of the Full Court, *Holden* v. *Black*, (1905) V.L.R., 326; 26 A.L.T., 205, reversed; judgment of *à Beckett* J., restored with variations as to costs.

APPEAL from the Supreme Court of Victoria.

David Black, a farmer, died on 28th July, 1897, intestate, leaving him surviving his widow, Kate Black, and three infant children.

On 21st September, 1897, administration was granted to the widow, and the plaintiffs, James Holden and David Webster, became sureties for her proper administration of the estate, and with her executed an administration bond in the ordinary form in the sum of £2766 15s.

On 23rd April, 1898, Mrs. Black entered into a deed of covenant with Messrs. Holden and Webster by which she covenanted that she would realize certain of the assets and out of the proceeds pay and discharge the liabilities of the estate; that she would deposit the title deeds of the lands in the name of the deceased and such other deeds as might be issued in substitution thereof in the Bank of New South Wales, Benalla, in the joint names of herself, Holden and Webster, to be held on their joint account until the estate was fully administered; that all dealings relating to the said deeds or lands should be effected only after obtaining the authority of Mrs. Black, and Messrs. Holden and Webster; that she would at all times until the estate was fully administered fulfil in all respects the conditions of the administration bond, and, in case of any breach thereof, would, out of her share of the estate, indemnify Messrs. Holden and Webster from any loss accruing thereby; and that any business of any kind in connection with the estate requiring legal skill should be done by Mr. Gilbert Archer, of Benalla, or any other solicitor as might be acting for the estate for the time being named by Messrs. Holden and Webster. Letters of administration were issued to Mrs. Black on the 4th May, 1898.

An action was brought by Messrs. Holden and Webster against Mrs. Black and the three infant children, and by the statement of claim it was alleged that Mrs. Black had been guilty of certain breaches of trust and neglect of her duty as administratrix, and of breaches of her covenant of 23rd April, 1898; that, by reason of Mrs. Black's conduct, the plaintiffs had already been occasioned considerable loss and expense in endeavouring to procure Mrs. Black to remedy such breaches of duty, and to prevent the continuance thereof, and to secure themselves against loss or damage

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therefrom; and that, unless there should be granted some such relief as was claimed, the estate would not be administered according to law, the estate and the interests therein of the infant defendants would be in jeopardy and would be exposed to improper risks, the plaintiffs as sureties would continue to be under a personal risk of loss and injury through continued or repeated breaches by Mrs. Black of her duties as such administratrix and of her covenant with the plaintiffs, and such loss or injury, unless prevented or restrained, would be irreparable.

The plaintiffs claimed:—

"(*a*) A declaration that the defendant Kate Black has not administered, and is not administering, the estate of the intestate in accordance with law, and has been guilty of breaches of her duty as administratrix and of her covenant with the plaintiffs.

"(*b*) An injunction restraining the continuance by the said defendant of such breaches of duty and breaches of covenant.

"(*c*) £45 damages from the said defendant in respect of such breaches of covenant as already committed as aforesaid.

"And also such relief of the nature hereinafter specified as to the Court may seem proper to secure the proper administration of the said estate, or to remedy or prevent the wrong or risk hereinbefore complained of, that is to say:—

"(*d*) Administration of the said estate by or under the direction of the Court.

"(*e*) The appointment of a receiver or of a person to discharge the duties of administrator or trustee of the said estate in place of the said defendant Kate Black.

"(*f*) Or such other declarations orders or directions as to the Court may seem sufficient or proper for the protection of the plaintiffs from any liability to the infant defendants in respect of such matters as aforesaid."

By her defence, the defendant Mrs. Black denied the alleged breaches of her duty as administratrix and of the covenant, and (paragraph 13) said that, if she had committed any breach of the covenant, the plaintiffs had suffered no loss or injury thereby, and were entitled to nominal damages only in respect thereof, and that she brought into Court the sum of one shilling, and said that the same was sufficient to satisfy the plaintiffs' claim in respect of any such breach.

In their reply the plaintiffs said :—As to paragraph 13 of the defence, and treating it as pleading a payment into Court of the sum of one shilling in respect of so much only of their claim as is for damages for breach of the covenant entered into by this defendant, they say that they accept such sum in satisfaction of the claim in respect of which it is so paid in.

The infant defendants submitted their rights and interests to the protection of the Court.

The action was tried before *à Beckett* J., and the facts proved and found are sufficiently set out in the judgment of *Griffith* C.J., hereunder.

à Beckett J., gave judgment according to the following minutes :—

"It appearing that the following declarations as to the dealings of the defendant Kate Black with the estate of the intestate will be for the benefit of the defendants, declare as follows :—

"(*a*) That the carrying on of the farming business by the said defendant was beneficial to the estate of the intestate, and that no accounts should be directed in respect thereof.

"(*b*) That the house in Benalla purchased by the said defendant should be deemed to form part of the intestate's estate, subject to the direction hereinafter contained with respect thereto.

"(*c*) That no accounts should be taken in respect of past dealings with the estate, and that the infant defendants having been properly maintained and educated, all income to which the infant defendants were entitled up to the date of this judgment, should be deemed to have been properly applied by the defendant Kate Black.

"(*d*) The defendant Kate Black not seeking any inquiries as to the moneys of her own not derived from the estate of the intestate paid into the bank account kept by her after the intestate's death, all moneys which have been paid into the said account shall be considered as belonging to the estate of the said intestate.

"(*e*) All investments made by the said Kate Black since the death of the intestate shall be deemed to have been investments of money of the estate.

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"(*f*) The said Kate Black is not entitled to any reward in the form of commission or of salary for her management of the business which was carried on by her.

"(*g*) Should any loss of the estate arise by reason of the security given by Murray being a deficient security for the sum of £450 advanced thereon, the defendant Kate Black shall be personally liable to make good the loss arising from lending on such insufficient security.

"And this Court doth order that on the distribution of the estate of the intestate, as between the defendant Kate Black and the infant defendants, she shall take as part of her share, at the price of £260, the house at Benalla purchased by her.

"Order that the defendant Kate Black, in addition to any other accounts which may be required to show her dealings with the *corpus* of the estate, do keep a proper account of all sums hereafter to be received, as income of the trust estate and all disbursements chargeable against such income, so that the net amount of the two-thirds share of the income to which the infants will be entitled may be ascertained therefrom, and that she do permit the plaintiffs, or any proper person authorized by them, from time to time to inspect such accounts.

"Refer to tax the costs of the plaintiffs and of the defendants, including discovery. Order the defendant Kate Black to pay the plaintiffs' costs and the infant defendants' costs and retain her own costs out of the estate of the intestate. Liberty to apply."

On appeal to the Full Court (*Madden* C.J., *Holroyd* and *Hood* JJ.,) judgment was ordered to be entered for the defendants with costs: *Holden* v. *Black* (1).

The plaintiffs now appealed to the High Court.

Duffy K.C., and *Weigall*, for the appellants. This is not an administration suit, but an action by which the plaintiffs seek to be protected, and, if administration be in the opinion of the Court the proper remedy, the plaintiffs are willing that it should be ordered. The plaintiffs however do not desire an administration.

[GRIFFITH C.J.—Do the plaintiffs want an injunction now?]

They want what the Court thinks is the proper remedy, and

(1) (1905) V.L.R., 326; 26 A.L.T., 205.

they are satisfied with the judgment of *à Beckett* J. The appellants are entitled to relief under the circumstances of this case. The Court in its equitable jurisdiction will interpose before any actual injury has been suffered on the principle of a bill *quia timet, e.g.*, a surety may compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not, and a covenantee may obtain relief in similar circumstances: *Mitford on Pleading*, p. 171, cited with approval in *Wooldridge* v. *Norris* (1). See also *Story's Equity Jurisprudence*, 1st English ed., secs. 825, 827; 13th ed., secs. 730, 850; *Lindley on Partnership*, 6th ed., p. 378. A surety may put the creditor in motion against the debtor, and, if the creditor does an act by which he is prevented from complying with the request of the surety, the surety is discharged. *Newton* v *Chorlton* (2). The creditors in this case being infants, the only method of obtaining relief is by coming to the Court, and bringing the infants there as well. The reason of this principle is that "it is unreasonable that a man should always have a cloud hanging over him:" *Snell's Principles of Equity*, 11th ed., 504. See also *Antrobus* v. *Davidson* (3); *Hobbs* v. *Wayet* (4); *Becher-vaise* v. *Lewis* (5); *Mathews* v. *Saurin* (6); *Lloyd* v. *Dimmack* (7); *Lord Ranelaugh* v. *Hayes* (8); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (9). It is the duty of a surety to look after his principal: *In re Wakefield* (10); *In re Carpenter* (11); *In re Lockey* (12); *Wright* v. *Simpson* (13). The Court is at liberty to mould the relief in any way it thinks fit. An entirely different remedy is open to the appellants on the covenant, but they do not require it if they are sufficiently protected as sureties. If the appellants are not entitled to succeed as sureties, they are entitled to have the bond carried out: *Wooldridge* v. *Norris* (1). The payment into Court has nothing to do with the right of the appellants to bring an action *quia timet.*

(1) L.R., 6 Eq., 410.
(2) 10 Ha., 646, at p. 652.
(3) 3 Mer., 569.
(4) 36 Ch. D., 256.
(5) L.R., 7 C.P., 372.
(6) 31 L.R., Ir., 181, at p. 189.
(7) 7 Ch. D., 398.
(8) 1 Vern., 189.
(9) 22 Ch. D., 561.
(10) 6 V.L.R. (I.P. & M.), 96; 2 A.L.T., 42.
(11) 20 V.L.R., 159.
(12) 1 Ph., 509.
(13) 6 Ves., 714, at p. 734.

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They also referred to *Harris* v. *Boots, Cash Chemists (Southern) Ltd.* (1).

Isaacs A.G., and *Guest*, for the respondent Kate Black. In all the cases cited for the appellants a loss had accrued, and there was an existing liability upon the surety. That is clearly shown in *Mathews* v. *Saurin* (2). Here the consideration of any actual loss has been eliminated by the acceptance of the money paid into Court. The administratrix is liable under the bond in respect only of the estate as left by the intestate. She is also liable to the infant respondents as trustee, but with that liability the surety is not concerned. There is no duty upon the administratrix under the bond to keep accounts, although there may be as trustee of the infants. The only way the children could recover on the bond would be by having the bond assigned, and the Court will in its discretion refuse to assign the bond unless some actual damage has been sustained: *In re Carpenter* (3); *s.c., sub. nom., Mulholland* v. *Smith* (4); *In re Steele* (5). The issue has been taken whether there was or was not any loss, but it was found that there was no loss. That being so, the appellants were not entitled to bring their action. In *Scott* v. *Wilson* (6) it was held that a surety was not entitled to an order for administration though the administrator had not administered for many years. The surety upon entering into the bond must look only to the administrator. He has no right to sue the beneficiaries, and there is no relation between him and them.

[GRIFFITH C.J.—There is the ordinary relation of surety and creditor between them.]

But the beneficiaries have nothing to do with the bond. The surety is neither a creditor nor a legatee, and therefore is not entited to bring this administration action: *Subraya Chetty* v. *A. S. Rajammal* (7). The mere fact that the administrator keeps land unsold during the infancy of the beneficiaries gives no right to the surety to sue. The trusts which the administrator undertakes are contained in sec. 8 of the *Administration and Probate*

(1) (1904) 2 Ch., 376.
(2) 31 L.R., Ir., 181, at p. 187.
(3) 20 V.L.R., 159.
(4) 20 V.L.R., 403.
(5) 23 V.L.R., 146; 19 A.L.T., 136.
(6) 2 Q.L.J., 26.
(7) 14 Madras L.J.R., 482.

Act 1890, referring back to the *Statute of Distributions* (22 & 23 Car. II., c. 10), sec. 8. See *Williams on Executors*, 10th ed., vol. II., pp. 1137, 1229. As to the duties of an administrator, see *Dobbs* v. *Brain* (1). The administration lasts until the estate is administered, and the surety is liable until then. There is no obligation upon the administrator to administer within any particular time: *Story's Equity Jurisprudence*, 1st English ed., secs. 327, 639. The only statutory provision as to the time of payment is that the administrator cannot be called on to pay anything until a year has elapsed since the grant of administration. The administrator cannot get a discharge from infants, except by paying their money into Court, and he must wait until they are of age: *Williams on Executors*, 10th ed., p. 1137; *Cooper* v. *Thornton* (2); *Rotheram* v. *Fanshaw* (3). An executor or administrator has been compelled to secure the shares of beneficiaries where he was on the brink of insolvency, and there was imminent danger of loss. See also *Robbins and Maw on the Devolution of Real Estate*, pp. 329, 332. But, by not setting aside or securing the shares of infants, an administrator does not commit a breach of the bond, although he may be guilty of a breach of his duty as trustee: *Pitt* v. *Woodham* (4). That case emphasises the proposition that the administrator is only liable for the property of the intestate. He may have to account for profits as trustee, but not as administrator. A surety can only sue if there is a breach of duty causing loss, or rendering the danger of loss imminent. If the right were larger than that, the surety could sue the day after the bond was given: *Fletcher* v. *Bealey* (5); *Padwick* v. *Stanley* (6). The action *quia timet* lies only where the creditor has a present right to sue and refuses to do so: *Snell's Principles of Equity*, 11th ed., p. 583; *Thomson's Compendium*, p. 572. In *Lord Ranelaugh* v. *Hayes* (7) the "cloud" is described. There must be a sum of money payable. In *Antrobus* v. *Davidson* (8), as in the present case, it was uncertain whether there was any loss. The surety must be able to say what the amount of his liability is. The case of *Wooldridge* v. *Norris*

(1) (1892) 2 Q.B., 207.
(2) 3 Bro. C.C., 96.
(3) 3 Atk., 628.
(4) 1 Hag., Ecc., 247.
(5) 28 Ch. D., 688.
(6) 9 Ha., 627.
(7) 1 Vern., 189.
(8) 3 Mer., 569.

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(1) turns on the construction of a particular covenant. The Court will not grant redress to a surety except in respect of present liability. There must be some liability defined and ascertained: *Ex parte Snowdon* (2). In *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3), there was no imminent danger of loss, and no redress was given. On the other hand, in *Hobbs* v. *Wayet* (4), and *Wolmershausen* v. *Gullick* (5), where there was imminent danger of loss redress was given. See also *Campbell* v. *Macomb* (6); *In re Lockey* (7); *Re Denekin, Peters* v. *Tanchereau* (8); *Perpetual Trustee Co.* v. *Dobbyns* (9). *Mathews* v. *Saurin* (10) is in this respondent's favour in that it shows that the surety must prove a particular liability—an actual accrued debt—on his part to the creditor. Although the appellants might have been entitled to their costs up to the time of payment into Court, if they had stopped there, having gone on with an unfounded claim, it is within the discretion of the Court whether they should get even those costs. The covenant to indemnify does not add anything to the appellants' rights except that Mrs. Black has by it pledged her one-third share of the estate. [They also referred to *Nisbet* v. *Smith* (11); *Underhill on Trusts*, 6th ed., p. 371; *Lewin on Trusts*, 11th ed., p. 1134; *Trusts Act* 1896, sec. 18.]

Vasey and *Cohen*, for the infant respondents. The infants were strangers to this matter as it was launched. They are not creditors in respect of the administration bond. That bond was given to the Court, and the Court will not allow it to be assigned unless there is a breach which has caused loss. The action should have been dismissed as against the infants with costs, and under no circumstances should they have been made liable for the costs of the appellants. Having been made respondents to the appeal to the Full Court, the infants were entitled to appear and ask to have the order as to costs altered: *East India Co.* v. *Robertson* (12); *In re New Callao* (13). There is no reason why the infants should

(1) L.R., 6 Eq., 410.
(2) 17 Ch. D., 44.
(3) 22 Ch. D., 561.
(4) 36 Ch. D., 256.
(5) (1893) 2 Ch., 514.
(6) 4 Johnson Ch. Rep. (New York), 534.
(7) 1 Ph., 509.
(8) 72 L.T., 220.
(9) 15 N.S.W. L.R., Eq., 106.
(10) 31 L.R., Ir., 181.
(11) 2 Bro. C.C., 579, at p. 581.
(12) 12 Moo. P.C.C., 400.
(13) 22 Ch. D., 484, at p. 494.

be bound by an order made in an action like the present. [They also referred to *In re Dean* (1); *In re McMillan* (2); *Re Butters* (3); *Rowlatt on Principal and Surety*, p. 180; *In re Hargreaves, Dicks* v. *Hare* (4); *Montgomeries' Brewery Co.* v. *Blyth* (5); *Bartlett* v. *Wood* (6).]

Weigall in reply. The administratrix, not having done her duty as administratrix, has broken her contract with the sureties. Equity will then allow the sureties to intervene at once, and prevent a continuance of the breach: *Rowlatt on Principal and Surety*, p. 139. To the extent of the bond the surety is liable for any breach of duty by the administratrix as to the property of the intestate or its increase: *Williams on Executors*, 10th ed., vol. II., p. 1279; *Dobbs* v. *Brain* (7). The duty of the administratrix as to the shares of infants is to get those shares ready for distribution. Having done so, she then holds the shares as trustee for the children. But not having got the shares of the infants set apart, she has committed a breach of her bond. The only effect of accepting the money paid into Court is that the appellants were entitled to have their costs taxed, and go on as to the other relief claimed. It has no effect as to the claim for an injunction. The respondent Mrs. Black should have paid the whole of the appellants' costs of the action, and those costs include the costs of the infants. Mrs. Black could not have appealed as to costs because she was only given liberty to pay her costs out of the estate. Although the infants might have appealed as to costs, they did not.

Cur. adv. vult.

The judgment of the Court was read by

October 2.

GRIFFITH C.J. The following statement of facts is taken from the judgment of *à Beckett* J.:—

"David Black, a farmer, died intestate in July, 1897, leaving a widow and three young children.

(1) 11 V.L.R., 761; 7 A.L.T., 88.
(2) 15 V.L.R., 671; 11 A.L.T., 69.
(3) 9 A.L.T., 49.
(4) 44 Ch. D., 236.
(5) 26 V.L.R., 24; 22 A.L.T., 45.
(6) 9 W.R., 817.
(7) (1892) 2 Q.B., 207, at p. 212.

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"The widow obtained administration, and the plaintiffs, at her request, and as an act of friendship, became her sureties.

"They at the same time required her to enter into a deed of covenant with them, binding her to certain specified action in relation to the estate, and by which she agreed with them to fulfil in all respects the conditions of the bond she had entered into as administratrix.

"The estate consisted of land valued at £1,562 10s. and personalty valued at £1,204, some of which consisted of live stock. The widow carried on a farming business for about two years.

"She lent some money belonging to the estate on improper security, but the loan was repaid.

"She bought a house in Benalla for £260, when she wound up the farming business, in which she and the infants resided.

"She did not keep proper accounts of her receipts and payments.

"She did not file her fifteen months' account within the required period, and, when she did file it, it was made up imperfectly from the best materials available, and was not a full statement of dealings with the estate.

"She kept only one banking account, into which she paid all large sums received, and upon which she drew for all purposes of her own or of her children or of the estate.

"Her conduct was honest in motive and beneficial in result, but did not fulfil strictly her obligations as administratrix.

"About June, 1903, the sureties took alarm from some proceedings against other sureties who had become involved in heavy liabilities, and they sought to make their own position secure by getting the administratrix to adopt a more regular mode of administration and satisfy them as to past transactions.

"One item inserted in her fifteen months' account was £468, which she treated as paid to herself for salary.

"They applied to her for information as to this and other matters but did not obtain any. She referred them to her solicitor, and a correspondence began which continued from June until November, 1903.

"It appeared that the item £468 was inserted at the suggestion of the solicitor whom the sureties had asked her to employ, and

that she did not intend to make any claim to it. Unfortunately other matters were not so satisfactorily disposed of, and in November the plaintiffs brought an action against the administratrix and her children, asking for a declaration that the administratrix had been guilty of breaches of her duty as administratrix, and of her covenant with them, seeking £45 damages, and an injunction against further breaches, and administration of the estate by the Court so far as might be necessary to secure proper administration of the estate.

"The administratrix put in a defence denying that she had committed any breaches of trust, and submitting that the statement of claim disclosed no cause of action, or equity to any relief. She paid one shilling into Court in answer to the claim for damages. She also offered to take over the house purchased as an application of part of her share in the estate."

The only other facts necessary to be stated are that the plaintiffs accepted the shilling in satisfaction of their claim for damages for breach of covenant; that none of the land had been sold, and no appropriation had been made of the shares of the infant children in the personalty, nor had those shares been invested. Sec. 18 of the Act No. 1421 (*Trusts Amendment Act*) which applies to administrators, provides that when property is held by trustees for an infant the trustees may pay the whole or part of the income to the infant's parent or guardian, or apply it for the infant's maintenance, education or benefit, and shall accumulate the residue at compound interest by investing it in authorized securities. This section manifestly assumes that the property of the infant, to which its provisions are to apply, has been ascertained.

The defendants contended that the action would not lie, but *à Beckett* J. thought that, having regard to the deed executed by the administratrix, and the irregularities that had occurred, and the position of the plaintiffs as sureties, they were entitled to invoke the aid of the Court to have the position of the estate ascertained, and to secure the due performance of her duties by the administratrix, although no loss had as yet happened. His Honor accordingly made a series of declarations, such as might be properly made in an administration suit, and the effect of which

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may be summarized as a settlement of the accounts of the administratrix up to the date of the judgment. They included a declaration that a piece of land alleged to have been purchased in whole or part with moneys of the estate formed part of the estate. He further ordered the defendant, the administratrix, to keep proper accounts in future, and to permit the plaintiffs to inspect them, and to pay the costs of the other parties, with liberty to deduct them and to pay her own costs out of the estate.

On appeal to the Full Court this judgment was reversed, and the action was dismissed with costs, but the learned Judges were not unanimous in their reasons. *Madden* C.J. thought the action was, first, for damages for breach of covenant, secondly, for an injunction, and, thirdly, for administration of the estate by the Court. So far as regarded the claim for damages, he pointed out that it was disposed of by the payment into Court and acceptance of the sum paid in. With regard to the claim for an injunction he pointed out that the covenant was an affirmative covenant, and he thought that the case was not one in which the Court should exercise its discretion by granting an injunction. So far as the suit was to be regarded as a suit for administration, he said that it had not been contended that sureties to an administration bond have a right to have a decree made for administration of the estate, and he apparently thought that it followed that the declarations made by the learned Judge of first instance were inappropriate. *Holroyd* J. treated the matter as concluded by the claim for damages and the acceptance by the plaintiffs of the nominal sum paid into Court, but he was strongly inclined to think that, apart from the deed, the plaintiffs would have been entitled to invoke the aid of the Court. He thought that the acceptance of the sum paid into Court was an acknowledgment that at the commencement of the action either no loss had accrued to the estate for which the administratrix or her sureties would be responsible, or that any such loss had been made good. He agreed that the plaintiffs were not justified in instituting an administration suit in their own right, or in asking for directions which could only be properly granted in such a suit with the object of preventing possible future breaches of trust. But this was what he thought the plaintiffs had done, treating the administration

as ancillary to the covenant. He thought with regret that the learned Judge had no authority to make a decree which would absolve the plaintiffs from past liability and provide for the estate being properly administered. He was therefore of opinion that the suit was improperly instituted. He was also of opinion that under no circumstances should any costs have been allowed to come out of the infants' share of the estate. *Hood* J. concurred in allowing the appeal, but gave no reasons for his judgment. No costs of the appeal were given to the infants.

From this judgment the plaintiffs have appealed to this Court, and the infants have given notice of cross-appeal as to their costs of the appeal to the Full Court. The plaintiffs did not contend before us that sureties to an administration bond are entitled to institute a suit for administration of the estate. But it was contended that they have the same rights as other sureties in like cases, and that the facts showed a case entitling them, as such, to immediate relief against the administratrix. It was contended also that their claim to relief under the covenant, whether by way of damages or injunction, was a distinct cause of action, and that their right to relief as sureties could not be affected by their success or non-success, or the extent of their success, in respect of it. In our opinion this latter contention is well founded, and we cannot help thinking that, if *Holroyd* J. had not attached so much importance to the argument founded on the contrary contention, he would have agreed with the judgment of *àBeckett* J. It is necessary, therefore, to consider what are the rights of sureties against their principal when the time has arrived for the performance by the principal of the duty of which they have undertaken to guarantee the performance. The condition of the bond is that the administratrix "shall well and truly collect and administer according to law" the property lands and hereditaments goods chattels and credits of the deceased which shall come to her possession, and make and deposit within three months at the office of the Master in Equity a proper inventory, and shall within fifteen months make and deposit a true and just account of her administration as to her receipts and disbursements, and as to what portion of the estate is retained and what portion is uncollected. So far as the lands

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are concerned, it may be taken, for the purposes of this case, that they are held upon a discretionary trust for sale. No question therefore arises as to the real estate. But as to the personal estate it is clear that the administratrix had made default in filing a proper account, and that, although the prescribed time had long passed, she had not set apart or invested the infants' shares, although she had realised the whole of the property and discharged all the debts.

There can be no doubt that at the time when this action was brought the infants might by their next friend have instituted an action to have the estate administered and their shares ascertained and set apart and invested. The time had come when this duty of the administratrix ought to have been performed, and the obligation to appropriate their shares and make them secure was an existing obligation capable of immediate enforcement, and for default in the performance of which the sureties were liable. Nor can there be any doubt that the administratrix had, under the circumstances, become a trustee for the infants, or that their shares were trust money in her hands, or that it was *primâ facie* a breach of trust to keep them in her hands uninvested.

In our opinion, this obligation of the administratrix to appropriate and secure the shares was as much an immediate one as the obligation under a bond to pay a specific sum of money on an appointed day. If the next of kin had been *sui juris*, it is clear that no distinction could be drawn between the cases. And we cannot see any sound reason for holding that the fact that they were infants establishes any valid distinction. The duty of the administratrix to invest and secure the shares was exactly analogous to the obligation to pay next of kin who are *sui juris*. This then being the position and duty of the administratrix, what were the rights of the plaintiffs as sureties for her?

It is in our opinion established by authority that, when a debt is due and the creditor does not call upon the debtor for payment, the surety may bring his suit against the creditor and the debtor, and compel the latter to make payment of the debt; for, as Lord Keeper *North* said in *Lord Ranelaugh* v. *Hayes* (1): "It is unreasonable that a man should have such a cloud hang

(1) 1 Vern., 190.

over him." *Mitford on Pleading*, p. 148; *Story's Equity Jurisprudence*, 13th ed., vol. II., sec. 845; *Story's Equity Jurisprudence*, 1st English ed., sec. 639. In *Wolmershausen* v. *Gullick* (1), all the cases on the subject of the rights of a surety to indemnity from his principal were reviewed by *Wright* J. In that case the creditor was not a party to the action. But the case of *Mathews* v. *Saurin* (2), in which a surety brought his action against the creditor and the principal debtor to compel the latter to discharge his debt and succeeded, is exactly in point. In that case *Porter* M.R. denied, and we think rightly, the qualification supposed to have been suggested by *Turner* V.C. in *Padwick* v. *Stanley* (3), that the surety could not sue unless the principal creditor has refused to do so. It follows that in the present case the plaintiffs were *primâ facie* entitled to bring an action against the administratrix, as the principal debtor, and the next of kin, as soon as the time had arrived at which the shares of the latter ought to have been ascertained, and to ask for a judgment that the shares should be set apart and secured, so as to relieve them from further liability. It is contended, however, that by taking the express covenant from the administratrix, or, at any rate, by suing upon it and recovering damages for past breaches, they disentitled themselves to take this course. But why? An express promise by a surety to do what he is by law bound to do, may give an additional cause of action, but cannot diminish his obligation to do that which he was originally bound to do, and is now doubly bound to do. Nor can the satisfaction of a claim for past breaches discharge a person from a continuing obligation. The objection that an action for administration of the estate cannot be brought by the sureties is in our judgment equally inconclusive. If the nature of the obligation of the principal debtor is such that the amount which he ought to pay the creditor, the time for payment having arrived, cannot be ascertained without taking an account or making inquiries, the taking of the account and the making of the inquiries are incidental to the right of relief. And the fact that similar accounts or inquiries might be directed in a suit brought by other persons for different relief is no reason why the surety should

(1) (1893) 2 Ch., 514. (2) 31 L.R., Ir., 181. (3) 9 Ha., 627.

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not get the relief to which he is entitled. The observations of Lord *Cottenham* L.C. in *Re Lockey* (1), suggest that it is the duty of sureties for official administrators to see that their principals perform their duty. They are clearly responsible for their default, and it would be a singular state of the law if they could not enforce the duty for the performance of which they are responsible.

The only other reason that was urged against the plaintiffs' right to bring their action was that the bond could not be put in suit against them without the leave of the Court, and that the Court would not assign it for that purpose without proof of actual loss, which might never arise. But, when the time is past at which the money ought to have been paid or secured, there is a default already committed, and the sureties are not bound to wait until they are protected by Statutes of Limitation before taking steps to relieve themselves from the contingent liability, in the hope that their principal will some day perform the obligation which he ought to have performed already.

For these reasons we are of opinion that the action was properly brought by the plaintiffs; and, although the precise form of their claim to relief may have been inexactly stated, this is no reason for denying them such relief as they were entitled to. The learned Judge might, therefore, at the trial have properly ordered the defendant, the administratrix, to set aside and secure for the benefit of the infant next of kin the shares of the personalty to which they were entitled in distribution, and might have directed all necessary accounts and inquiries for the purpose of ascertaining the amount of the shares. We think that he might further have directed the administratrix, in accordance with the terms of the bond, to file proper accounts showing the true condition of the estate and the investments by which it was represented. The judgment actually pronounced did not proceed exactly upon these lines, and, perhaps, did not give the plaintiffs all that they were strictly entitled to. But the declarations which it contained were such as it was within the competence of the Court to make in a suit to which all the persons beneficially interested were parties. The Attorney-General, indeed, disclaimed any desire to offer objections to the judgment on merely formal grounds, and admitted

(1) 1 Ph., 509.

that the declarations were on the whole beneficial to his client. And the order to keep proper accounts in future was justified both by the express covenant and by the obligation to be implied from the administration bond. So far, therefore, as the substance of the judgment of *à Beckett* J. is concerned, we are of opinion that the appeal to the Full Court should have been dismissed.

A more serious difficulty arises with regard to the costs. In *Wright* v. *Simpson* (1) it is said that relief of the kind sought in this suit may be obtained by a surety if he will indemnify the creditor against the expenses of the suit. We do not regard this dictum as establishing a rule of law but rather a principle of fairness. For the creditor is not in default. He has obtained the benefit of a surety to guarantee the debt due by the principal debtor. If it is not paid, both the principal and the surety are in default, and one or other or both of them ought *primâ facie* to indemnify him against the costs of a litigation not occasioned by any fault of his. In the case of infant creditors the argument is not less convincing. Again: *à Beckett* J. ordered the administratrix to pay the costs of all parties out of the estate, thus casting two-thirds of the costs upon the infants' shares. In making this order he was actuated by the consideration that the action had on the whole been for the benefit of the estate, and he felt justified in following the analogy of the rules adopted in administration actions, in which it is common to give costs out of the estate. The present, however, is not an administration action, and we doubt the power of the Court to order payment of costs out of a fund which it is not administering. The case of the costs of probate actions, which are often ordered to be paid out of the personal estate, is anomalous, and the practice ought not, in our opinion, to be extended to a new class of actions. For both reasons we agree with *Holroyd* J. in his opinion that the costs of the action ought not to have been ordered to be paid out of the estate, and we think that this is a matter of principle on which an appeal will lie. See *In re Mills' Estate* (2). In our opinion the costs of the infants ought to have been ordered to be paid in the first instance by the plaintiffs, with or without an order that they might recover them over from the defendant administratrix,

(1) 6 Ves., 714.

(2) 34 Ch. D., 24.

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which would be a matter in the discretion of the Court. The costs of the plaintiffs and the defendant administratrix were also a matter in the discretion of the Court so far as directing by which of them those costs should be paid or borne.

With regard to the costs of the appeal to the Full Court, we are of opinion that, while affirming the judgment on the merits, the Full Court ought to have varied it by omitting the direction that the costs of all parties should be paid out of the estate, and we think that this in itself was a point of sufficient importance to have justified the administratrix as the protector of the interests of the infants, in appealing from the judgment on this point. It is true that she did not appeal on that ground, but it was open on the appeal, and she ought to have succeeded on it, in which event she would have obtained so substantial a variation of the judgment as to justify an order that the appellants and respondents should bear their own costs of the appeal. We think that the infants, although they did not appeal, were properly represented on the hearing of the appeal, and should have had their costs paid by the same hands as the costs of the action.

With respect to those costs, having regard to the view taken of the facts by the learned Judge of first instance, in whose discretion the costs were, and to all the circumstances of the case, we think that neither of the litigating parties should have been ordered to pay the costs of the other, but we think that the defendant administratrix should have been ordered to pay to the plaintiffs the amount of the infants' costs payable by them. It is not, however, under the present practice necessary to have recourse to this circuitous proceeding: *Rudow* v. *Great Britain Mutual Life Assurance Society* (1). The proper order, therefore, to be made, unless the parties insist upon the matter being remitted to *à Beckett* J. for the exercise of his discretion, will be to discharge the order appealed from, and to restore the judgment of *à Beckett* J. varied by omitting the direction as to costs and substituting a direction that the defendant administratrix pay the infant defendants' costs of the action. She must also pay their costs of the appeal to the Full Court. The respondent

(1) 17 Ch. D., 600.

administratrix must pay the costs of the appellants and of the infant defendants of this appeal.

Isaacs pointed out that a sum of £269 of the personal property of administratrix had been paid by her into the estate account, and had been with her consent included in a declaration, that it, with other moneys so paid, should be considered as belonging to the estate, and asked that this declaration might be varied so as to enable her to apply that sum in payment of the costs ordered to be paid by her.

Vasey for the infant respondents.

Per curiam. The judgment will be also varied by excepting the sum of £269 from the declaration.

Appeal allowed with costs. Judgment of à Beckett J. restored with certain variations.

Solicitors, for appellants, *Crawford, Ussher & Thompson*, Melbourne.

Solicitors, for respondent Kate Black, *Lamrock, Brown & Hall*, Melbourne.

Solicitor, for infant respondents, *Eales*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

GEORGE ALEXANDER DARBYSHIRE AND OTHERS . . . . . } APPELLANTS;

PLAINTIFFS,

AND

ELIZABETH WHITE DARBYSHIRE AND OTHERS . . . . . } RESPONDENTS.

DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *August* 18, 21, 22, 28.

Griffith C.J., Barton and O'Connor JJ.

Registration of Deeds—6 Geo. IV. No. 22 (N.S.W.), secs. 1, 4 [Real Property Act 1890 (Victoria) (No. 1136), sec. 4]—Memorial—Signature by party before all particulars inserted in memorial—Validity of registration—Sufficiency of