[HIGH COURT OF AUSTRALIA.]

THE COMMERCIAL BANK OF AUSTRALIA, LIMITED . . . . . } APPELLANTS;

AND

THE COLONIAL FINANCE, MORTGAGE, INVESTMENT AND GUARANTEE CORPORATION, LTD. AND OTHERS } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 9, 10, 11, 18.

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

Principal and surety—Continuing guarantee—Default of principal debtor to pay portion of debt on demand—Liability of surety—Interest—Statute of Limitations—Notice to surety.

By the terms of a continuing guarantee of a customer's overdraft with a bank, the guarantors undertook to pay all advances and debts owing or to become owing by the customer to the bank "to the extent of £12,500 and interest on the same respectively in case the customer should make default in payment thereof respectively or of any part thereof respectively." On two occasions the bank made demands upon the customer, one for payment of a portion of the overdraft and the other for interest upon the overdraft, and the customer failed to pay.

Held, that the result of the default by the customer to pay a portion of the principal debt on demand was that a cause of action arose against the guarantors, not for the whole amount of the guarantee, but for the amount as to which the customer had made default, and therefore that the Statute of Limitations began to run against the bank as to that portion of the indebtedness only, and the guarantee continued as security to the bank for the balance.

Held, also, that, as against the sureties, the Statute ran as regards interest as well as principal of the sums demanded.

The principles which regulate the right of a surety to notice of default discussed.

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Decision of *Walker* J. *In re The Colonial Finance, Mortgage, Investment and Guarantee Corporation, Limited*, (1906) 6 S.R. (N.S.W.), 6, varied.

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APPEAL from a decision of *Walker* J. on an application by a liquidator for directions.

On 2nd March 1892, six directors of the respondent corporation guaranteed the corporation's overdraft with the appellant bank to the extent of £12,500, and the corporation mortgaged its uncalled capital to the guarantors to secure them against loss. The material portions of the guarantee were as follows: "In consideration of advances heretofore or now made or which may hereafter be made &c. and in consideration of your forbearance to call for immediate payment of advance (if any) already made &c. We (jointly and severally) undertake to pay you all such advances and all debts now owing or payable or hereafter to become owing or payable" (by the respondent corporation to the appellant bank &c.) "to the extent of £12,500 and interest on the same respectively . . . in case the said customer" (the respondent corporation) "shall make default in payment thereof respectively or of any part thereof respectively on demand and . . . declare that this guarantee shall be a continuing guarantee and shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times hereafter of any sum or sums of money for the time being due upon the general balance of the account of the said customer with you but shall extend to cover and be a security for every and all future sum and sums of money at any time due to you thereon notwithstanding any such payment or liquidation . . . . that you may grant to the said customer or its representatives &c. time or other indulgence and take any security from and compound with the said customer or its representatives &c. and may release any security already held or which may hereafter be obtained by you &c. without discharging or satisfying any liability hereunder and that all . . . payments received from the said customer or its representatives &c. shall be taken and applied as payments in gross and that this guarantee shall apply to and secure any ultimate balance that shall remain due to you the said bank &c. and . . . that this guarantee shall remain in force until cancelled by our written

authority the amount then due owing or payable or for which the said customer shall be liable to your bank whether arrived at maturity or not to be subject to this guarantee and secured thereby" &c. This was signed by the six directors, five of whom, with the executors of the sixth David Wilson who died in the interval, were respondents in this appeal.

On 14th December 1892 the manager of the appellant bank wrote to the manager of the respondent corporation a letter in the following terms:—"I have again to call attention to the unsatisfactory state of your 'No. 2' account, and to request that the overdraft may be either liquidated or very considerably reduced before the end of the year. It was part of the agreement between your corporation and this bank that the full proceeds of the call made in July last would be placed to the credit of this account. I am aware that a sum of £2,000 has not been so applied, but has been used in meeting your company's engagements. Be good enough to arrange for the transfer of this sum before the end of the year." The request contained in this letter was not complied with.

On 30th June 1893 a further letter was written by the manager of the appellant bank to the respondent corporation stating that the sum of £87 2s. 6d. was due for interest, and concluding with the words:—"Kindly provide for this before close of business if possible." This amount was not paid.

In August 1904 the respondent corporation went into voluntary liquidation, and on 25th August four of the guarantors assigned to the appellants the benefit of their charge upon the uncalled capital. As the result of a call made in the winding up the liquidator had in hand a sum of £3,000, and applied to *Walker* J. for directions as to what claim if any the appellants had upon this fund by virtue of the charge assigned to them by the guarantors. His Honor held that the letter of 14th December 1892 was a demand for payment of £2,000, and that, upon default in payment by the corporation, a liability arose on the part of the guarantors to pay the full amount secured by the guarantee, and that the *Statute of Limitations* began to run against the bank from that date and, no action having been brought within the period allowed by law, the claim of the bank was barred.

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From this decision the present appeal was brought.

Gordon K.C. (*Rich* with him), for the appellant bank. Even if the principal debt is statute barred as against the guarantors, it still exists as a debt by the corporation to the bank, as there was a running account all the time. Interest is still owing on the advances and the guarantors are liable for that as well as future interest: *Parr's Banking Co. Ltd.* v. *Yates* (1); *Paget's Law of Banking*, 1904 ed., p. 312.

[GRIFFITH C.J. referred to *Carter* v. *White* (2); and *Hartland* v. *Jukes* (3).]

The Statute did not begin to run, as no proper demand was made within the meaning of the guarantee. A demand must be peremptory and unconditional, and such as will entitle the creditor to bring an action at once for failure to comply with it. The letters were mere requests to pay, and under the circumstances of the case cannot be treated as peremptory demands to pay: *Morrell* v. *Cowan* (4); *Mowatt* v. *Lord Londesborough* (5); and *Blair* v. *Cordner* (6), depended upon the particular circumstances in each case, and are not applicable here.

Even if either letter was a demand, the failure to comply with it did not set the Statute running in respect of the whole amount guaranteed, but only in respect of the amount demanded. The proper construction of the guarantee is that the liability of the guarantors was to continue as long as the liability of the debtor remained for any portion of the amount guaranteed.

Dr. Sly K.C. and *R. K. Manning*, for all the respondents except two. Although the total indebtedness of the corporation may still exist, after an absolute demand for any portion of the amount due a cause of action immediately arises against the guarantors for the whole amount. Upon the true construction of the guarantee a demand is merely a request for payment.

[GRIFFITH C.J.—Does the Statute begin to run before the guarantors have had notice of default? He referred to *Vyse* v. *Wakefield* (7); *Makin v. Watkinson* (8).]

(1) (1898) 2 Q.B., 460.
(2) 25 Ch. D., 666.
(3) 1 H. & C., 667.
(4) 7 Ch. D., 151, at p. 155.
(5) 3 El. & Bl., 307; 4 El. & Bl., 1.
(6) 19 Q.B.D., 516.
(7) 6 M. & W., 442.
(8) L.R. 6 Ex., 25.

Notice to the guarantors is not necessary: *Nares* v. *Rowles* (1); *Stothert* v. *Goodfellow* (2); *In re Lockey* (3); *Goring* v. *Edmonds* (4).

No demand was necessary. Non-payment of the debt when due is default. The cause of action against the guarantors accrued within a reasonable time after the creditor first became entitled to sue the debtor: *Henton* v. *Paddison* (5). The guarantee continues as long as advances are being made, and for six years from the date of each advance: *De Colyar on Guarantees*, 3rd ed., p. 242; *Coles* v. *Pack* (6); *Rowlatt on Principal and Surety*, 1899 ed., p. 68; *Kirby* v. *Duke of Marlborough* (7); *Nicholson* v. *Paget* (8). *Parr's Banking Co. Ltd.* v. *Yates* (9), is in point. The question of demand did not arise in that case. *Hartland* v. *Jukes* (10) is not an authority to the contrary, because the guarantee in question in that case specifically provided for a demand, otherwise it would not have been necessary.

The charge given by the directors to the guarantors was *ultrâ vires* as it was not given by a quorum of directors other than those interested: *In re Greymouth Point Elizabeth Railway and Coal Co. Ltd.*; *Yuill* v. *Greymouth Point Elizabeth Railway and Coal Co. Ltd.* (11).

[GRIFFITH C.J.—If the giving of a charge is not an act *ultrâ vires* the company, the presumption, in the absence of evidence to the contrary, is that it was rightly done.]

The appellants are not entitled to claim interest at all, even for the six years during which the Statute ran. Interest was merely accessory to and fell with the principal debt. There was no separate covenant in the guarantee providing for interest, as there was in *Parr's Banking Co. Ltd.* v. *Yates* (9). The general principle therefore applies: *Brooms' Legal Maxims*, 7th ed., p. 376; *Hollis* v. *Palmer* (12); *Florence* v. *Drayson* (13); *Florence* v. *Jenings* (14). Apart from that, the liquidation has destroyed the

(1) 14 East., 510.
(2) 1 N. & M., 202.
(3) 1 Ph., 509.
(4) 6 Bing., 94.
(5) 68 L.T., 405.
(6) L.R. 5 C.P., 65.
(7) 2 M. & S., 18.
(8) 1 C. & M., 68.
(9) (1898) 2 Q.B., 460.
(10) 1 H. & C., 667.
(11) (1904) 1 Ch., 32.
(12) 2 Bing. N.C., 713.
(13) 1 C.B.N.S., 584.
(14) 2 C.B.N.S., 454.

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right to claim interest, because after that there cannot be default. Interest ceases at the date of the receiving order: *Companies Act* 1899, sec. 264; *In re Bonacino, ex parte Discount Banking Company* (1); *In re London, Windsor and Greenwich Hotels Co.*; *Quartermaine's Case* (2).

Bignold, for the remaining two respondents, the executors of David Wilson, adopted the argument of counsel for the other respondents.

Gordon K.C., in reply, referred to *Albert* v. *Grosvenor Investment Company Ltd.* (3); *Williams* v. *Stern* (4); *Makin* v. *Watkinson* (5).

[GRIFFITH C.J. referred to *Hughes* v. *Metropolitan Railway Co.* (6).]

Cur. adv. vult.

GRIFFITH C.J. This was a motion made in the voluntary winding up of the respondent corporation, to determine the question whether the appellants were entitled to be paid by the liquidator the proceeds of the last call made in the winding up. The question arises in this way. In March 1892 the corporation was indebted to the bank in the sum of £12,500 by way of overdraft and the bank wished for security for that sum. The then directors of the corporation executed a guarantee for that sum, dated 2nd March, which was in these terms. [His Honor read the material portion of the deed, as set out above, and continued.] The usual conditions were inserted that the creditors might give time to the principal debtor without discharging the sureties. On the same day the corporation executed a deed by which they charged in favour of the guarantors certain specific real property, the condition being that it should be as security for the repayment on demand of all moneys which the guarantors should be called upon to pay under the guarantee with interest and the usual charges. On 13th December 1892, the same year, by a deed annexed to the deed last mentioned the corporation assigned to the directors

(1) 1 Manson, 59.
(2) (1892) 1 Ch., 639.
(3) L.R. 3 Q.B., 123
(4) 5 Q.B.D., 409.
(5) L.R. 6 Ex., 25.
(6) 2 App. Cas., 439.

all the uncalled capital of the corporation, and all calls on any shares in the corporation absolutely as security for the repayment on demand of all moneys secured or intended to be secured by the deed of 2nd March 1892, that is, such moneys as the guarantors might be called upon to pay under the guarantee. By a deed dated 25th August 1904, the survivors of the mortgagees of the calls in the last deed assigned all their interest under that security to the bank. The question now relates to a fund which represents the last call made in the winding up, and the bank claim to be entitled to that fund under the assignment of the mortgage of December 1892 by the deed of 25th August 1904. The liquidator, representing the creditors of the corporation, claims that the security of December 1892 is exhausted by the operation of the *Statute of Limitations* in the events which have happened, that consequently the guarantors can never be called upon to pay anything under the guarantee, that the terms of the charge are therefore exhausted, and that the assignment of it to the bank of 25th August 1904 did not transfer to the bank any right to receive these moneys.

I refer again for a moment to the terms of the guarantee of 2nd March 1892. The condition on which the guarantors were required to pay was "in case the said customer shall make default in payment thereof respectively or of any part thereof respectively." Before the learned Judge in the Court below it was contended that two letters, written by the bank to the debtors in 1892 and 1893 respectively, amounted to demands within the meaning of the guarantee, that these demands were not complied with, and that thereupon the liability of the guarantors arose for the whole amount secured by the guarantee, that the Statute then began to run, and therefore the guarantors are discharged. The question discussed before the learned Judge was whether these letters did or did not amount to a demand. It appears to have been taken for granted that if they were a demand then, upon the failure by the debtors to pay the amounts demanded, the liability of the guarantors for the full amount guaranteed arose, and the Statute began to run; and the learned Judge applied his mind to this question. The first demand was in a letter of 14th December 1892, which ran as follows. [His Honor read the letter

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and continued.] I quite agree with the learned Judge in thinking that that letter is a demand for the payment of £2,000, and for the reasons which His Honor gave, to which it is not necessary to refer in particular. It is not disputed that the debtors made default in payment of that sum.

The other letter was written on 30th June 1893 addressed to the manager of the respondent corporation. [His Honor read the material portion of the letter and continued.] That amount was not paid. I agree with His Honor that it is not necessary to decide whether that was a demand or not; but I have no hesitation in saying that I think it was a demand to pay at once. I agree, therefore, with the learned Judge in the conclusion to which he came on the matters argued before him. It follows that an immediate liability arose on the part of the guarantors to pay the amounts, whatever they were, in respect of which the debtors had made default, subject to another question that was not raised before the learned Judge, and was not discussed very fully before us.

The question, as to the extent of the liability which then arose on the part of the guarantors, which is I think the whole question in this case, turns upon the construction of this particular guarantee. The promise by the guarantors was to pay in case the customer made default in payment on demand. It was urged before us that on a contract of that sort the guarantors are entitled to have notice of the happening of the condition on which their liability arises. The doctrine is stated by Lord *Abinger* C.B. in the case of *Vyse* v. *Wakefield* (1):—"The rule to be collected from the cases seems to be this, that where a party stipulates to do a thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject; and if there are any to be found which deviate from this principle, it is quite time they should be overruled."

(1) 6 M. & W., 442, at p. 452.

The doctrine there stated has ever since that time prevailed. It was said that, applying that rule, where the obligation of the guarantors, as here, was only to pay when the debtor had made default in payment, and when the question whether a demand had been made or not was a matter peculiarly within the knowledge of the creditor, then the creditor ought to bring it to the knowledge of the guarantor. As authority for this contention the cases of *Hartland* v. *Jukes* (1), and *In re Brown's Estate, Brown* v. *Brown* (2) were referred to. Both of these were cases in which demand was held to be necessary before the surety could be sued, but they depended on the terms of the particular documents there in question. According to the facts as represented to us, the question whether a notice was required or not before the liability of the guarantors arose in the present case is a purely abstract question, because, in the view which I take of the other questions in the case, there is no fund to which it can apply. It is, therefore, not necessary or desirable to express any definite opinion whether that doctrine applies to a guarantee as wide in its terms as this, or to guarantees in general. I will deal with the case on the assumption that no notice was required to be given to the guarantors. Then it is clear that on the dates 14th December 1892 and 30th June 1893 the debtors made default in payment of the sums demanded. What was the consequence of that default as regards the guarantors depends upon the terms of the guarantee. The contention for the corporation is that, upon the default in payment of any part of the sum guaranteed, though only a part of that sum is asked for and wanted, nevertheless the whole amount becomes instantly due as against the guarantors, and the Statute begins to run. In construing a guarantee it is necessary to bear in mind that the object of the guarantee, so far as the creditor is concerned, is to give him a guarantee that the debt owing by the debtor will be paid, and it is *primâ facie* intended that the liability on the guarantee shall continue as long as the debt is owing. As regards the guarantors, they do not undertake to pay the debt absolutely as a debt of their own, but to pay what the debtor fails to pay, and the condition on which the obligation depends must depend on the terms of the

(1) 1 H. & C., 667.

(2) (1893) 2 Ch., 300.

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bargain. In the present case—to refer to the words of the guarantee once more—the condition is "in case the said customer shall make default in payment" of the £12,500 with interest "respectively or of any part thereof respectively on demand." And it appears to me that, having regard to the main object of the guarantee, and to this language, that can only be held to import an obligation that whenever the debtors fail to pay any part of the debt on demand the guarantors will pay it for them.

The contrary contention amounts to this: The debtors are asked to pay a certain sum, and that is all that is asked for. It is not paid immediately. It is contended that thereupon, on failure of the debtors to pay that sum immediately on demand, though the debtors may have subsequently done what they were asked, yet, as at that moment the guarantors could have been sued for the whole debt, the Statute began to run. In my opinion, on the construction of this guarantee, upon default in payment of any portion of the debt, the only right of action that arises as against the guarantors is for that portion as to which default has been made. Any other construction would defeat the object of the guarantee, which was that the guarantee should continue until the debt was paid, and would result in what was probably never intended by either party, that a peremptory demand of any part of the debt should give a right of action against the guarantors for payment, not only of that particular sum which the debtor was asked to pay and did not pay, but for the whole amount of the indebtedness, with a consequent obligation on the part of the creditor to enforce his claim within the statutory period, at the risk of losing his right of recourse to the guarantee altogether.

For these reasons I think the Statute did not begin to run against the guarantors for the whole debt at that time, but only as to the sum of £2,000 demanded on 14th December 1892, and as to the sum of £87 2s. 6d. demanded on 30th June 1893. But, so far as the present debt is to be attributed to those two sums and interest upon them, it is to be taken to be discharged, so far as regards the guarantors, and, therefore, as there is no longer any liability on the part of the guarantors in respect of those two sums, the bank is not entitled to hold its security to protect them

against loss in respect of them. Whether they can recover them from the principal debtor or not depends upon other circumstances which it is not necessary to consider.

I think that if the attention of the learned Judge had been drawn to these considerations he would probably have come to the same conclusion as I have with regard to them. I agree with him in the conclusion to which he came on the matters that were argued before him. But that conclusion did not dispose of the case.

I think it ought to be declared that the bank is entitled to be paid out of the sum in Court a sum equal to the amount due and owing by the corporation to the appellants, except such part thereof, if any, as represents the amount, if any, of the two several sums still remaining unpaid, of £2,000 and £87 2s. 6d., payment whereof respectively was demanded by the bank on 14th December 1892 and 30th June 1893 with interest thereon respectively, with a direction for the ascertainment and payment out of the fund of the amount to which the appellants are entitled under the foregoing declaration, liberty being reserved to apply as to such part, if any, of the debt now owing as represents the two sums before mentioned or any part thereof or interest thereon.

BARTON J. I have come to the same conclusion, and have nothing to add.

O'CONNOR J. I am also of the same opinion. The question involved is whether the appellant bank has a charge over the funds in the hands of the liquidator. Now, that depends upon whether the liability of the guarantors for the amount advanced has been put an end to by the *Statute of Limitations*. That, again, depends upon whether at the end of December 1892 any cause of action, and, if any, what cause of action, arose against the guarantors at the suit of the bank. I agree with Mr. Justice *Walker's* conclusion that the letter of the 14th December 1892 amounted to a demand for £2,000; it is not necessary to consider whether the subsequent letter demanding interest on that sum amounted to a demand or not, because the question of the liability

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of the fund in question is really settled by the letter of the 14th December. It is clear that that was a demand, and also that there was a default on that demand. I need not discuss here the various considerations upon which Mr. Gordon's argument turns. It is only necessary to say that there was a demand, that it was not complied with, and there was therefore a default within the meaning of the guarantee. The real question is what was the consequence of the default; was it the creating of a cause of action against the guarantors for the amount demanded by the bank at that date with interest, or did it give rise to a liability on the part of the guarantors for the whole amount secured by the guarantee. That depends entirely upon the construction of the guarantee. On the hearing before *Walker* J. it was taken that the only question for consideration was whether or not there had been a demand followed by default. It was assumed that if there had been such demand and default a cause of action accrued for the whole amount of the advances made, then amounting to £12,500. But is that assumption justified? The question really at issue is whether the liability which arose on 30th December was a liability for the whole £12,500, or whether it was only for £2,000. In considering that question it becomes necessary to examine the terms of the guarantee. Now, if there is any doubt as to the meaning of the words used in such a contract, regard must be had to the objects and purposes of the contract and the surrounding circumstances. The object and purpose of a guarantee is that the guarantor shall pay such portion of the debt due from the principal debtor to the creditor as the debtor shall fail to pay. In other words, it is a contract of indemnity. As a general rule there is nothing in the nature of a penalty provided for in a guarantee. There is generally merely an undertaking that for so much of the debt as the principal does not pay the guarantor shall be liable. Now the portion of the guarantee upon the construction of which the difficulty arises is in a very few words. After the preliminary statement of consideration the guarantee proceeds: "We jointly and severally undertake to pay you." [His Honor read the passage already set out, and continued:]—In my opinion, £12,500 merely expresses the limit of the liability, and is only used for that purpose.

Then, as to the words "interest on the same respectively." If the sum referred to in that passage is £12,500 one can hardly understand the reason for inserting the word "respectively." "In case the said customer shall make default in payment thereof respectively or of any part thereof respectively on demand." That is the event upon the happening of which the liability of the guarantors is to arise.

It is contended on the one hand that the meaning of that provision is that, whenever there is default in the payment of any of the moneys advanced, the liability arises to repay the whole of the advances up to the extent of £12,500. But it appears to me that that reading does not give effect to every portion of the passage which I have read. The use of the word "respectively" in the two portions of the guarantee to which I have referred clearly implies that when the event, on the happening of which payment is to be made, occurs, payment becomes due respectively of all the debts in respect of which demand and default have occurred, and not in respect of the whole amount owing at that time, up to the limit of the guarantee. The liability therefore which arose on 30th December was a liability to pay, not the whole amount owing by the principal debtor to the bank, but only the amount which was demanded, £2,000 with interest. That being so, the liability in regard to the rest of the moneys advanced and remaining due is a debt as to which the security stands good. It becomes unnecessary to consider the question of interest discussed in Dr. Sly's argument; I need only say this in regard to it. The decision in *Parr's Banking Co.* v. *Yates* (1) was based on the particular words of the guarantee in that case. Parties may make their contract in any form they think fit. The guarantee in that case was made in such a form that it was clear that the interest was not merely accessory to the principal, but that the liability in respect of it might be treated as a separate liability. The form of the guarantee here is different in that respect, and is such that the interest is to be attached to the principal; if the debt is not owing, then the interest is not owing either.

With regard to the other question which has been touched

(1) (1898) 2 Q.B., 460.

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upon by my learned brother the Chief Justice, but which it is unnecessary for us to decide, I only wish to add that it appears to me the principle to be applied is that stated by Lord *Abinger* in *Vyse* v. *Wakefield* (1), and repeated and adopted by *Martin* B. in *Makins* v. *Watkinson* (2) in the following words: "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it." I am not deciding the point, but I think it may fairly be contended that, as the position of a guarantor in relation to the creditor is such that he can stipulate for full knowledge and information as to when a demand is made on the debtor and as to whether it is complied with or not, the principle stated above by Lord *Abinger* should apply. That question, however, must be left entirely open for a future decision.

I entirely concur in the opinion of the Chief Justice and in the reasons he has given for the conclusion at which he has arrived, and also as to the particular form which the order is to take in this case.

GRIFFITH C.J. With respect to the costs all parties should have their costs out of the fund.

As to the liquidator he should have his costs as between solicitor and client paid out of the fund.

Order accordingly.

Solicitors, for the appellants, *Norton Smith & Co.*

Solicitors, for the respondent corporation, *Crichton Smith & Monaghan.*

Solicitor, for respondents executors of David Wilson, *W. Sands.*

C. A. W.

(1) 6 M. & W., 442, at p. 452.

(2) L.R. 6 Ex., 25, at p. 30.