[HIGH COURT OF AUSTRALIA.]

RALPH HENRY REIS AND ALBERT REIS (TRADING AS REIS BROS.) PLAINTIFFS, } APPELLANTS;

AND

EDMUND WILLIAM CARLING AND COURTNEY CARLING (TRADING AS E. W. CARLING AND CO.) DEFENDANTS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1908.

BRISBANE, *April* 30, 31.

SYDNEY, *May* 21.

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

Interest on Judgments—Practice—Judgment with costs—Interest—Judicature Act 1900 (*Qd.*), (64 *Vict. No.* 6), *sec.* 3—*Judicature Rules* 1900—*Order XLVII., Rule* 17, *Schedule I., Part VI.*

The English Act 1 & 2 Vict. c. 110, secs. 17, has not been adopted in Queensland.

Order XLI., Rule 14, of the Rules contained in the Schedule to the *Judicature Act* of 1876 provided that every writ of execution for the recovery of money should be indorsed with a direction to levy interest on the money sought to be recovered from the time when the judgment or order was entered or made. Under the Forms prescribed for giving effect to that Rule interest on costs was to be computed from the date of the certificate of taxation. Under the Rules of 1900 and the Forms prescribed for writs of execution interest upon costs is to be computed from the date of entry of judgment, and not from the date of the certificate of taxation.

Held: (1) The Rules and Forms of 1900 are *intra vires*, being only such a modification or amendment of the former Rule as was authorized by sec. 3 of the *Judicature Act* 1900. But—

(2) The Rule does not confer any independent right to recover interest on a judgment debt. In the absence of any statutory provision conferring such right, the right to interest is incident to the right to issue execution; and, therefore, where the judgment debtor by reason of prompt payment of the debt prevents the issue of a writ of execution, no right to interest accrues.

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Decision of the Supreme Court: (*Reis Bros.* v. *Carling & Co.*, 1908 St. R. Qd., 76), reversed.

APPEAL by special leave from a decision of the Full Court of Queensland dismissing a motion for a stay of proceedings.

An action between the parties was tried in May and June 1905, and judgment was entered on 11th August in the same year. The costs under this judgment were not taxed for some time, and it was not until 29th August 1907 that the taxing officer, after review, gave his certificate.

On 3rd September 1907 Reis Bros. paid a cheque for the amount certified to Carling & Co., who gave a receipt expressly reserving to themselves the right to claim interest on costs and to issue execution for the same if necessary. The defendants subsequently demanded interest from the date of judgment until payment. The plaintiffs refused to comply with this demand, and took out a summons in Chambers to stay further proceedings. The application coming on before *Cooper* C.J., he referred it for hearing to the Full Court, who dismissed the application: *Reis Bros.* v. *Carling & Co.* (1).

Shand and *Graham*, for the appellants. The respondents claim under Order XLVII., rr. 13 and 17 and the Forms in Schedule I., Part VI. It is not now pressed that these rules are *ultra vires* (*Judicature Act* 1900, 64 Vict. No. 6, sec. 3.) At common law interest was only allowed on a judgment debt when an action was brought on the judgment: *Gaunt* v. *Taylor* (2). 1 & 2 Vict. c. 110, sec. 17, declared that every judgment debt should carry interest from the time of entering up the judgment. This section, though adopted in other States of the Commonwealth, was not adopted in Queensland. On the common law side after the passing of this Act interest was held to run from the time of the entry of the incipitur, and not merely from the final completion of the judgment after taxation of costs: *Newton* v. *Grand Junction Railway Co.* (3). A contrary practice obtained in equity: *Attorney-General* v. *Lord Carrington* (4).

(1) 1908 St. R. Qd., 76.
(2) 3 Myl. & K., 302.
(3) 16 M. & W., 139.
(4) 6 Beav., 454.

But, whatever the rules as now made under sec. 3 of the *Judicature Act* 1900 may mean, and they certainly are very ambiguous, there can be no doubt that interest will only run when a writ of execution has been issued; and even when such a writ has been issued the time from which it runs is very doubtful. See Order XLII., r. 16, of the English Rules of 1883, and Appendix H., Form 1, and *Pyman & Co.* v. *Burt* (1). The form of the writ of *fieri facias* (Schedule I., Part VI., Form 3) shows that the judgment debt is to be treated separately from the costs upon which interest is to run from the —— day of ——. The ambiguity which appears in that Form again occurs in Forms Nos. 7 and 11 (writ of elegit) as to the meaning of "date aforesaid." On general equitable grounds it would be hard on a party, who is ready and willing to pay the costs as soon as he is informed of the amount, to have to pay interest thereon for a long period because taxation has been delayed.

[They referred to 24 Vict. No. 8 (N.S.W.); No. 9 of 1845 (S.A.); 31 Vict. No. 8 (W.A.); *Supreme Court Act* 1890 (Vict.), 54 Vict. No. 1142; *Payne and Woolcock's Queensland Statutes*, p. 1837; Rules of Court of 26th May 1863 (Qd.); *Harding's Supreme Court Practice*, p. 698; English Rules 1883, Order XLII., r. 16; Queensland Rules 1900, Order XLIV., r. 2; Order LXVII., rr. 46, 47 and 48; *In re North Sydney Investment and Tramway Co. Limited* (2); *Rolfe and the Bank of Australasia* v. *Flower, Salting & Co.* (3).]

Macgregor, for the respondents. 1 & 2 Vict. c. 110, sec. 17, has admittedly never been adopted in Queensland, but there is no ambiguity in the words "from the date aforesaid" in Form 3 of Part VI., Schedule I. to the Rules of 1900. If the appellants' contention as to the construction to be put upon Form 3 is correct, then no provision has been made for the case where a fixed sum is allowed for costs. On the other hand, a reading of the "date aforesaid," as meaning the date of judgment covers that case as well as the case where costs are left to be taxed. Forms 3, 7, 9 and 11 in the Schedule show a clear

(1) 1884 W.N., 100; Cab. & E., 207.
(2) 7 B.C. (N.S.W.), 18, 53; 18 N.S.W. L.R. (Eq.), 50.
(3) L.R. 1 P.C., 27.

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intention to make interest run from date of judgment. Since the *Judicature Act* costs have become part of the judgment. [He referred to *Boswell* v. *Coaks* (1); *The Jones Brothers* (2); *Pyman & Co.* v. *Burt* (3); *Taylor* v. *Roe* (4); *Garnett* v. *Bradley* (5); *Schroeder* v. *Clough* (6); *Landowners West of England and South Wales Land Drainage and Inclosure Co.* v. *Ashford* (7); *In re London Wharfage and Warehousing Co.* (8); *Ashworth* v. *English Card Clothing Co. Ltd. (No. 2)* (9).]

Shand, in reply. The cases cited for the respondents are of no assistance, inasmuch as they are either decided on the Act 1 & 2 Vict. c. 110, sec. 17, or after the English Rules of 1883 had come into force.

Cur. adv. vult.

May 21.

The following judgments were read:—

GRIFFITH C.J. At common law a judgment did not carry interest: *Gaunt* v. *Taylor* (10). By the English Act, 1 & 2 Vict. c. 110, it was provided (sec. 17) that "every judgment debt shall carry interest at the rate of £4 per centum per annum from the time of entering up the judgment . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." Sec. 18 provided that decrees and orders of Courts of Equity, rules of Courts of Common Law, and orders in Bankruptcy and Lunacy, whereby any money or costs should be made payable to any person should have the effect of judgments at common law, that the person to whom the same should be payable should be deemed a judgment creditor, and should have all the remedies of a judgment creditor. Upon the construction of this Act it was held by the Court of Common Pleas that interest on costs ran from the entry of the incipitur of judgment: *Fisher* v. *Dudding* (11). This decision was approved and followed by the Court of Exchequer in the case of *Newton*

(1) 57 L.J. Ch., 101; 36 W.R., 65.
(2) 37 L.T., 164, note (*b*).
(3) 1884 W.N., 100; Cab. & E., 207.
(4) (1894) 1 Ch., 413.
(5) 3 App. Cas., 944.
(6) 46 L.J.C.P., 365; 35 L.T., 850.
(7) 16 Ch. D., 411.
(8) 54 L.J. Ch., 1137; 33 W.R., 836.
(9) (1904) 1 Ch., 704.
(10) 3 Myl. & K., 302.
(11) 3 Scott N.R., 516; 3 M. & G., 238; 10 L.J. N.S., 323.

v. *The Grand Junction Railway Co.* (1). In the Court of Chancery, on the other hand, it was held that interest did not run on costs until the amount had been ascertained by taxation: *Attorney-General* v. *Lord Carrington* (2), a case in which *Fisher* v. *Dudding* (3) was not cited.

From this time the practice of the Court of Chancery and that of the Courts of Common Law appear to have been divergent. Accordingly the forms of *fieri facias* prescribed by the *Regulæ Generales* of Hilary Term 1853 directed the sheriff to levy the sum of "£ (*the amount of all the moneys recovered by the judgment*) . . . together with interest upon the said sum at the rate of £4 per centum per annum from the . . . day of . . . on which day the judgment aforesaid was entered up." The Consolidated General Orders in Chancery of 1860 (Order XXIX., Rule 6) prescribed forms of writs of *fieri facias*, of which the writ appropriate to the recovery of costs directed that interest should be levied from the date of the certificate of taxation. Both these forms were prescribed in order to give effect to the provisions of the Act 1 & 2 Vict. c. 119, sec. 17, as they had been interpreted by the Courts of Common Law and Chancery respectively.

In the year 1863 similar provisions were made by Rules of Court in Queensland. By *Regulæ Generales* of 26th May 1863 the form of writ of *fieri facias* on an execution upon a judgment was prescribed in the same form as by the English Rules of Hilary Term 1853, except that the rate of interest was directed to be £8 per cent. By the General Orders in Equity of 21st August 1863 (Order XXVIII., Rule 6) the form of *fieri facias* was prescribed in terms corresponding to that in the English Consolidated General Order of 1860, except that the rate of interest was left blank. It was evidently assumed that in Queensland, as in England, a judgment debt carried costs. In fact, however, the provisions of the Act 1 & 2 Vict. c. 110, sec. 17, have never been adopted in Queensland, although some provisions of that Act, including secs. 14, 15, 16 and 18, were adopted by the *Common Law Practice Act* 1867, secs. 49, 50, 48, 19.

(1) 16 M. & W., 139.
(2) 6 Beav., 454.
(3) 3 Scott N.R., 516; 3 M. & G., 238; 10 L.J. N.S., 323.

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Apparently, therefore, the Rules of Court and General Orders of 1863, so far as they purported to authorize the recovery under a writ of *fieri facias* of interest on a judgment debt and costs, were *ultra vires*.

Thus matters stood till the passing of the *Judicature Act* 1876 40 Vict. No. 6, which contained a Schedule of Rules and Forms. Order XLI., Rule 14 was as follows: "Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff . . . to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of £8 per cent. per annum from the time when the judgment was entered up."

The form of writ of *fieri facias* was also given, which corresponded with that prescribed by the General Orders of 1863 as to the date at which interest on costs was to be levied. A similar form was contained in the Schedule to the English *Judicature Act* 1875 (Appendix F, Form 1).

Under this rule and the Form interest on costs ran from the date of the certificate of taxation: *Schroeder* v. *Clough* (1). As the rule and Form were incorporated in the Statute, no objection could be taken to the validity of the direction to levy interest, whatever might have been said as to the Rules and Orders of 1863. By the English Rules of 1883 a new form of writ of *fieri facias* was substituted, the effect of which was that interest on costs ran from the date of the judgment: *Pyman & Co.* v. *Burt* (2). In *Boswell* v. *Coaks* (3) it was held by the Court of Appeal that this new rule applied to a case in which judgment was given before, but the costs were not taxed till after, the Rules of 1883 came into operation. The Court treated the change as relating to a matter of practice or procedure, and not of substantive right, so that the alteration applied to pending cases. The right to interest on the costs having been given by the Statute of 1 & 2 Vict. c. 110, the substantive effect of the alteration in the Form was to direct that a judgment for costs should in all cases be entered *nunc pro tunc* notwithstanding

(1) 35 L.T., 850.

(2) (1884) W.N., 100.

(3) 36 W.R., 65; 57 L.J. Ch., 101.

delay in taxation. This might reasonably be regarded as a matter of practice.

By the Act 64 Vict. No. 6 (Queensland, 1900) it was declared that the authority of the Judges of the Supreme Court to make Rules of Court under the *Judicature Act* extended to making by way of re-enactment or amendment, any rule to the same purport and effect as any rule contained in the Schedule to that Act, with or without modifications or amendments. Applying this general provision to the particular case of Order XLI., r. 14, the Judges were authorized to re-enact that rule with or without modifications or amendments. By the Rules of the Supreme Court 1900, Order XLI., r. 14 was re-enacted (Order XLVII., r. 17), with the alteration of the rate on interest from 8 per cent. to 5 per cent. The forms of writ of *fieri facias* were also altered. The new form for use by a plaintiff (Schedule I., Part VI., Form 3) first directed the sheriff to levy the judgment debt "and also interest thereon at the rate of £ per cent. per annum from the (*date of judgment or order*) which said sum and interest were lately . . . by a judgment . . . bearing date . . . adjudged . . . to be paid . . . together with certain costs in the said judgment . . . mentioned and which costs have been taxed and allowed at the sum of £ as appears by the Certificate of the Taxing Officer . . . filed the . . . day of . . . : And further to levy the said sum of £ " (the costs) "together with interest thereon at the rate of £ per cent. per annum from the date aforesaid."

It may be noted in passing that the recital that the interest on the judgment debt was awarded by the judgment itself appears to be erroneous, and to be founded upon a notion that interest ran by law upon a judgment debt.

The form of *fieri facias* for costs only (Form 1) was in substantially the same terms.

The appellants contend that under this Form interest on costs is to be calculated from the date of the certificate and not from the date of the entry of judgment. The utmost that can be said for the contention is that the words are capable of that construction. In two other forms of writs of execution, however (9 and 11) in the same Schedule interest on costs is directed in plain

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terms to be computed from the date of the judgment or order. No reason can be suggested why a different rule should apply to different writs of execution. I think, therefore, that the writs, Forms 3 and 7, should be construed as contended for by the respondents and as held by the Supreme Court.

It was at first contended that, so construed, the rule prescribing the Forms was *ultra vires*, as imposing a new pecuniary liability upon individuals. In my opinion, however, the alteration was a modification or amendment authorized by the Act of 1900, since, as already pointed out, its only substantial effect was to make the addition of a memorandum of the amount of costs upon a judgment already entered equivalent to an entry of judgment for the costs *nunc pro tunc*, which might well be justified under the rule that a suitor is not to be prejudiced by delay on the part of the Court. These appear to have been the only points pressed before the Supreme Court, and I agree with their conclusions upon all of them.

But there is another aspect of the case arising upon the language of Order XLVII., r. 17, which Rule is the sole foundation of the respondents' right to recover interest. Mr. *Shand* contended that in the circumstances of this case that Rule has no application. The costs in question are costs which were awarded upon a judgment for the defendants in an action, but were not taxed until more than two years had elapsed from the judgment. A few days after taxation the appellants paid the amount as certified by the taxing officer, and the respondents' solicitors gave a receipt containing the following passage: "The defendants' claim for interest on costs and their right to issue execution for the same if necessary are hereby expressly reserved." The appellants contend that the only effect of the Rule is to authorize interest to be levied by execution in cases where the party can and does have recourse to that remedy, and that it has not the effect of making the judgment itself carry interest, so that if the judgment creditor, by reason of prompt payment of the judgment debt, has no occasion to issue execution, no right to interest accrues. It is, I think, clear that if an action were brought on the judgment interest could not be claimed as a debt founded upon the Rule. In England, on the other hand, it could be claimed

as a debt founded upon the Statute. The question seems, then, to resolve itself into this: Were the appellants entitled to tender the amount of the judgment debt without interest before execution actually issued? I can find no ground for answering this question in the negative. I think, therefore, that the respondents were never entitled to issue execution, and that on this ground, which does not appear to have been presented to the Supreme Court, the appellants were entitled to the stay of proceedings asked for.

BARTON J. I concur.

O'CONNOR J. In this case the defendants had a judgment which carried costs. For reasons which are immaterial in the present appeal the taxation was delayed, and the date of the Taxing Officer's Certificate was over a year later than the date of entry of judgment. It is to be taken for the purposes of our decision that the judgment was duly entered in accordance with the Rules and Forms now in force in the Supreme Court of Queensland so as to have entitled the defendants to issue a writ of execution under Rule 17 of Order XLVII. if the plaintiffs had failed to pay the amount adjudged to be due. Before the issue of execution the plaintiffs paid to the defendants the amount of taxed costs appearing by the judgment to have been certified by the Taxing Officer together with interest from the date of the certificate to the date of payment. The defendants received the amount without prejudice to their rights under the judgment, but contended that, in addition to interest from date of certificate, they were entitled to interest on the costs from the date of entry of judgment, and, as they threatened to issue execution for that amount, the plaintiffs, denying any further liability, applied to the Court for a stay of proceedings.

It is admitted that, if the defendants' contention is good, the application properly failed, and that, if it is not, the application should have been granted. The Supreme Court, upholding the defendants' contention, refused the application. It is against that decision that the plaintiffs have appealed, and they base their case on three grounds. The first is that the writ of *fieri facias*

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in the form prescribed under the Rules (Schedule I., Part VI., Form 3) on the face of it authorizes levy for interest on costs from the date of the certificate and not from the date of entry of judgment. The question turns on the meaning of the words "date aforesaid" in the seventh last line of the Form. Does "date aforesaid" refer to the date of the certificate, which is the date last mentioned, or does it refer to the "date of judgment" described in those words in the earlier part of the form?

No doubt the expression "date aforesaid," having regard to its context, is ambiguous. It is capable of being interpreted either as the plaintiffs or as the defendants contend. The real meaning must be ascertained by a consideration of the rest of the Form and by a comparison of its provisions with the other forms of writ in the Schedule. It is, I think, quite clear that in Forms 7, 9 and 11 authority is given to levy for interest on costs from the date of entering judgment. It would appear unlikely that the Judges intended by these Rules to authorize the levy of interest for different periods according as the judgment was executed by writ of *fieri facias*, or by one or other of the forms of writ referred to. A construction which would bring all forms into conformity in this respect would be certainly more likely to give effect to the intention of the makers of the Rules.

In view of these considerations I think that the interpretation suggested by Mr. *Macgregor* in argument may well be adopted. He contends that in the form of *fieri facias* writ the date mentioned in connection with the Taxing Master's certificate is not the date when the certificate was given, but the date on which it was filed with the sheriff, which may or may not coincide, and that it is referred to in the form merely for the purposes of identification, in the same way as in Judge's orders, documents referred to are usually identified, and that the expression "date aforesaid" should not be taken as referring to the date of filing the certificate when it may with equal correctness grammatically be referred to date of entry of judgment, particularly as the Form is framed for the purpose of exercising the power given by Rule 17 of Order XLVII., which authorizes the indorsement of a writ to levy interest "from the time when the judgment was entered." This construction is not only reasonable, but it brings the four forms

of writ which I have mentioned into harmony. For these reasons I have come to the conclusion that effect will be best given to the true meaning of the Form and Rules by reading the form of writ of *fieri facias* as authorizing the levy of interest from the date of entry of judgment and not from the date of the certificate.

The second objection involves the interpretation of sec. 3 of the *Judicature Act* 1900. There is embodied in the *Judicature Act* 1876, as a Schedule, a system of Rules of Procedure with Forms. In the form of writ of *fieri facias* interest upon costs under a judgment runs from the date of the Taxing Officer's certificate. Section 17 empowers the Judges to make further or additional Rules, and the *Judicature Act* 1900 enlarges that power by declaring that the authority of the Judges to make Rules of Court under the original Act "extends to making by way of re-enactment or otherwise any rule to the same purport and effect as any rule contained in the Schedule to the Act with or without modification or amendment." The matter to be determined is whether it is within the powers of the Judges as so extended to alter the form of writ of *fieri facias* from being a direction to levy interest on costs from the date of the Taxing Officer's certificate into a direction to levy such interest from the date of entry of judgment in the action.

Rule 14 of the rules in the Schedule to the *Judicature Act* 1876 provides that every writ of execution for the recovery of money shall be indorsed with a direction to the Sheriff to levy for interest on the judgment from the time when the judgment was entered up; judgment in that connection including the judgment for costs. Within the limits of that direction a form of writ might have been framed dating the interest on costs from the entering of judgment. The form actually prescribed in the Schedule did not go to the full extent of that power. It directed interest for the purposes of the levy to run from the date of the Taxing Officer's certificate. In the new rules, prepared by the Judges under the authority of the *Judicature Act* 1900, the rule under the 1876 Act, Rule 17 of Order XLVII., reproduces verbatim the rule of 1876 to which I have referred, but in the form for carrying it into effect the directions to levy go to the full extent

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of the rule and authorize the levy for interest upon costs from the date of entering judgment. Thus, while altering the form of the writ, not going beyond the limits of the direction contained in the statutory rule.

I am of opinion that the alteration of the Form amounts to no more than a re-enactment of the old rule " with a modification," to quote the words of the Statute, which is well within the power conferred. The judgment of *Cotton* L.J. in *Boswell* v. *Coaks* (1) supports the view that such a change of form may well be regarded as only a change in the mode of procedure by which the Court directs its judgment to be made effective.

These were the only grounds argued before the Queensland Supreme Court, and if there had been no other grounds taken I should have come to the conclusion that the appellants' application had been properly refused. But the third objection to the respondents' further proceeding raises an important question. At common law a judgment debt did not carry interest, and the only way of recovering interest on such a debt was by action on the judgment. In England that defect was remedied by 1 & 2 Vict. c. 110, s. 17, which provided that every judgment debt should carry interest at the rate named in the Statute from the time of entering up judgment, and that there might be a levy for the recovery of such interest under a writ of execution on the judgment. The Act also authorized all Courts to frame writs in such forms as they should think fit for carrying that provision of the Statute into effect. In pursuance of that Act the Courts of Common Law issued a form of writ directing levy of all interest recoverable on the judgment debt, including interest on costs, from date of entry of judgment, but the Court of Chancery, acting under the same provisions, issued a writ in the form of a writ of *fieri facias* directing that the interest on costs should run from the date of the Taxing Master's certificate. " That is how it happened," says *Lindley* L.J. in *Boswell* v. *Coaks* (2), " that interest on costs ran in the Court of Chancery from the allocatur and not from date of entry of the incipitur." Such continued to be the practice in

(1) 57 L.J. Ch., 101 ; 36 W.R., 65. (2) 36 W.R., 65, at p. 66.

the Courts of Common Law and Chancery respectively until the passing of the first English *Judicature Act*. In Queensland no Statute was ever passed making interest payable on a judgment debt, so that the old rules of practice in the Supreme Court of that State authorizing the issue of writs at Common Law and in Equity as in the English Common Law and Chancery Courts respectively, do not appear to have had any statutory foundation. In 1876 the Queensland *Judicature Act* was passed, and then, for the first time, a statutory right was given to a successful suitor in respect of interest on a judgment. The right, however, was not given as in the English Act, 1 & 2 Vict. c. 110, which enacts that the judgment shall carry interest. The sole provision relating to the recovery of interest is that contained in Order XLI., r. 14 of the Schedule, and the forms of writ for carrying that rule into effect. No right of action is given in respect of interest on the judgment, and interest becomes part of the judgment under one set of circumstances only, that is, when a writ of execution to recover the moneys due on the judgment is issued. Then the writ may be indorsed with the claim to recover interest on the judgment, and the amount levied may include interest accordingly. As the form of judgment included the costs, interest on the latter is by this procedure recoverable. The Rules and Form now under consideration follow the same procedure with the exception of the modification of the writ of *fieri facias* already alluded to.

Such being the only provision in force for the recovery of the interest in question, the appellants contend that, as the whole amount of the judgment debt in this case has been paid and execution cannot be issued except to recover moneys due on a judgment, the writ cannot issue. In my opinion, that contention must prevail. The intention of the legislature of Queensland as expressed by their enactment clearly was not to make interest on a judgment a judgment debt payable by the judgment debtor as part of that debt, but to make it recoverable only in cases where the creditor was driven to put in force his remedy by execution and as incidental to the exercise of that remedy.

As the respondents were not entitled to issue the writ or to proceed further upon the judgment, it follows that proceedings on the judgment ought to have been stayed as asked by the

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appellants. In my opinion, therefore, the appeal must be allowed and all further proceedings on the judgment must be stayed.

Appeal allowed.

Solicitors, for the appellants, *Atthow & McGregor.*
Solicitors, for the respondents, *Flower & Hart.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

DWYER . . . . . APPELLANT;
PLAINTIFF,

AND

THE RAILWAY COMMISSIONERS OF NEW SOUTH WALES . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *May* 5.

GRIFFITH C.J., BARTON and O'CONNOR JJ.

Practice—New Trial—Memorandum not signed by counsel who appeared at the trial—Plaintiff applying in person for rule nisi—Regulæ Generales of the Supreme Court (N.S.W.), rr. 150, 151.

Rule 150 of the Supreme Court of New South Wales provides that any party who intends to move for a new trial must within a certain time after the trial file a memorandum of such intention, which by Rule 151 must state, *inter alia*, the grounds of the application, and, where the party had counsel at the trial, must be signed by one of such counsel.

A plaintiff, who appeared at the trial by counsel, was nonsuited. Counsel's retainer being then withdrawn, the plaintiff, intending to apply for a new trial, filed a memorandum for a rule *nisi*, which was not signed by counsel, and appeared in person in support of his application. The Supreme Court refused to entertain the application on the ground that the memorandum did not comply with Rule 151.