H. C. OF A. 1906.

THE FEDERATED AMALGAMATED GOVERNMENT RAILWAY AND TRAMWAY SERVICE ASSOCIATION v. THE NEW SOUTH WALES RAILWAY TRAFFIC EMPLOYES ASSOCIATION.

Solicitors, for respondents, *Brown & Beeby*, Sydney.

Solicitors, for interveners, *Crown Solicitors for the Commonwealth, the State of New South Wales, and the State of Victoria.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McLAUGHLIN . . . . . APPELLANT;
DEFENDANT,

AND

DAILY TELEGRAPH NEWSPAPER COMPANY LIMITED . . . . . RESPONDENTS.
PLAINTIFFS.

H. C. OF A. 1906.

SYDNEY, *Nov.* 29, 30. *Dec.* 3, 4, 10.

Griffith C.J., Barton and Isaacs, JJ.

Company—Decree for rectification of share register of company—Interpretation—Submission by plaintiff to indemnify company—Intention of parties and Court when making decree—Principal and surety—Suit by company to enforce lien—Counterclaim—Costs.

In a suit for rectification of their share register the respondent company were ordered to rectify by restoring the appellant's name to the register as holder of certain shares that had been transferred by the appellant's wife, acting under an invalid power of attorney, the appellant, by his counsel, making an undertaking or submission, which was embodied in the decree, to indemnify the respondents to the extent of all moneys received by his wife as the proceeds of the sales of the shares and against any loss that the respondents might sustain or liability they might incur to persons other than the appellant by reason of obedience to the decree.

The respondents, in execution of the decree, cancelled the registration in the names of the transferrees and restored the appellant's name as holder of the shares in question. The result was that, in respect of the shares of one of the transferrees, the defendants in obeying the decree incurred a loss within the meaning of the submission of a sum exceeding the total amount received by the appellant's wife for the sale of all the shares, and the wife was left liable to the other transferrees for the amount of the purchase money paid to her in respect of the shares transferred to them.

In a suit by the company to enforce the submission, claiming a lien under their articles of association on the shares to the amount alleged to be due in respect of the recovery of the shares and asking for an order for the sale of the shares to give effect to the lien, the appellant counterclaimed for a modification of the submission, or, in the alternative, an indemnity to the extent of all moneys he might be called upon to pay the transferrees.

Held, that it was not open to the appellant at that stage to deny the authority of his counsel to make the submission in question ;

That, in construing the submission, regard should be had, not only to its actual words, but also to the context, the subject matter, the intention of the parties, and the facts as they were present to the minds of the parties and the Court at the date of the decree ;

That its effect, when so regarded, was that the appellant thereby became surety to the extent specified for any person to whom the respondents might have been entitled to have recourse, but on the assumption that he would have the benefit of the moneys his wife had received to indemnify himself against the liability he so undertook ; and, therefore, that as the respondents had by their action put the transferrees in a position to claim repayment of the purchase moneys from the wife, and to that extent diminished the fund on which the appellant relied to protect himself, the appellant was entitled to be relieved of his indemnity to the extent of the purchase money received by his wife in respect of any of the shares as to which the respondents' action had left him or his wife liable for the purchase money.

Judgment of *Walker* J., *Daily Telegraph Newspaper Co, Ltd.* v. *McLaughlin*, (1906) 6 S.R. (N.S.W.), 519, varied, and cause remitted to the Supreme Court.

APPEAL from a decision of *Walker* J.

The appellant during the year 1900 became insane, and while in that condition executed a power of attorney purporting to confer upon his wife full control of his business and property. Acting under the power of attorney the appellant's wife sold to different persons a number of shares standing in the appellant's name in the respondent company's register. Proceedings were subsequently taken in lunacy, and the appellant was declared insane and incapable of managing his affairs, and a committee of his estate appointed. Later the appellant recovered his sanity and a superseding order was made by the Court, restoring to him the control of his estate. After his recovery the appellant discovered that the shares referred to had been sold, and instituted a suit in equity asking for a declaration that the power of

H. C. OF A. 1906.

McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

attorney was invalid and that he was entitled to have the register of the respondent company rectified by inserting his name as the holder of 118 original shares which had been sold, and also 39 new shares to which he would have been entitled as the holder of the 118 original shares. At the hearing of the suit the point was taken by the respondents that, inasmuch as the shares claimed by the appellant had passed into the hands of other persons who were not parties to the suit, the register could not be amended as sought. The claim was thereupon amended to a claim for an equivalent number of similar shares, instead of the particular shares that had been transferred.

The suit was dismissed with costs: *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1), but on appeal to the High Court that decision was reversed, and the respondents were directed, *inter alia*, to rectify their register by inserting the name of the appellant as the holder of 118 original shares and 39 new shares. The appellant submitted by his counsel to indemnify the respondents, to the extent of all moneys received by the appellant's wife, purporting to act as his attorney, as proceeds of the shares in question, against any loss which they might sustain, or any liability which they might incur to other persons by reason of obedience to the decree, and this submission was embodied in the judgment: *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (2).

The respondents accordingly, being unable to come to any compromise with the appellant, rectified their register, and inserted the name of the appellant as the holder of the specific 118 original shares and of the 39 new shares issued in respect of them, and demanded from the transferrees the scrip certificates held by them for these shares, and prepared for issue to the appellant scrip certificates for the original shares, and all the new shares issued in respect of them, which at that time amounted to 82, and stood in the register in the appellant's name. One of the transferrees, a Mr. Cohen, refused to return the scrip on the ground that he was not a purchaser direct from Mrs. McLaughlin but was a *bonâ fide* transferree from a sharebroker named Vivian, The respondents then instituted a suit against the transferree for

(1) (1904) 4 S.R. (N.S.W.), 84.

(2) 1 C.L.R., 243, at p. 281.

an order directing him to deliver up to them the scrip for 50 original and 32 new shares, and repay all dividends, and that the register might be rectified by striking out the name of the transferree as the holder of these shares. The transferree filed a counterclaim for damages to the extent of the amount spent by him in purchasing shares to replace the 82 shares in question, £4,920. The result was a decree in favour of the transferree, the respondents being ordered to pay him the damages counterclaimed, and the transferree to hand over the scrip. The respondents paid the amount, and then instituted this suit against the appellant.

Walker J., before whom the suit came on for hearing, found in favour of the plaintiff company and made a decree as prayed, with costs: *Daily Telegraph Newspaper Co. Ltd.* v. *McLaughlin* (1).

From this decision the present appeal was brought by the defendant.

Dr. Cullen K.C. (*Rich* and *Watt* with him), for the appellant. If the appellant is liable at all, he is only liable in this suit to the extent of the money received by Mrs. McLaughlin in respect of the shares transferred to Cohen, because his liability in respect of the balance of the shares still continues. Moreover the evidence shows that his estate never got the benefit of these moneys at all. Again, the loss was not suffered by the respondents in obedience to the decree. Shares could have been given to the appellant without going into the market to buy them. New shares could have been issued fully paid up in accordance with the articles of association without infringing the *Companies Act* 1899. The willingness of the appellant to forego his rights under the decree, and accept such shares in substitution would have been a sufficient consideration to found a contract capable of registration under the *Companies Act*. [He referred to the *Companies Act* (No. 40 of 1899), secs. 5, 55; *Oliver* v. *Bank of England* (2); *Sloman* v. *Bank of England* (3); *Barton* v. *London and North Western Railway Co.* (4); *Spargo's Case* (5); *Ferrao's Case* (6); *Ooregum Gold Mining Co. of India*

(1) (1906) 6 S.R. (N.S.W.), 519.
(2) (1901) 1 Ch., 652.
(3) 14 Sim., 475.
(4) 24 Q.B.D., 77.
(5) L.R. 8 Ch., 407.
(6) L.R. 9 Ch., 355.

H. C. OF A. 1906.

McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

v. *Roper* (1); *Larocque* v. *Beauchemin* (2); *North Sydney Investment and Tramway Company* v. *Higgins* (3); *Palmer, Company Precedents*, 8th ed., pp. 270, 283.]

[GRIFFITH C.J.—It does not follow that the company acted unreasonably in not doing so. It would have required a special resolution. Moreover they could not have done it without the appellant's consent, and he refused the offer.]

They could, at any rate, have minimised the loss by issuing fully paid shares and charging the appellant with the £10 per share which the articles required, instead of rushing into the market and adopting the most expensive way of carrying out the decree. The appellant never approved of this step being taken. The respondents could have proceeded against Vivian. It was their mistake in suing Cohen which led to the loss being incurred. [He referred to *Sheffield Corporation* v. *Barclay* (4); *Starkey* v. *Bank of England* (5); *Attorney-General* v. *Odell* (6).]

The respondents should not have retained the appellant's scrip. They are therefore not entitled to the costs of the proceedings below. If the appellant has to pay the amount claimed, he ought to be indemnified against claims by the other transferrees; if not, he will incur a greater liability than the High Court intended. If the Court sees that the carrying out of the decree will have this effect, it has power to modify it. It was never contemplated by anybody that the appellant should have to account for a greater amount than he actually received from the sale of the shares. [He referred to *Ainsworth* v. *Wilding* (7); *Lawrie* v. *Lees* (8).]

Langer Owen K.C. (*Maughan* with him), for the respondents. The evidence establishes beyond question that the proceeds of the sale of these shares were received by the appellant, in the sense intended by the High Court when making the decree, and the loss sustained by the respondents in respect of the recovery of these shares was the result of reasonable obedience to the decree. The company were not bound to go into the open market to buy

(1) (1892) A.C., 125.
(2) (1897) A.C., 358.
(3) (1899) A.C., 263.
(4) (1905) A.C., 392.
(5) (1903) A.C., 114.
(6) (1906) 2 Ch., 47.
(7) (1896) 1 Ch., 673.
(8) 7 App. Cas., 19.

shares as that would have resulted in a still greater loss. The appellant refused to accept new shares under the only conditions upon which the company's articles allowed them to be issued. The suggested registering of a contract was not open, as there would have been no contract in fact; it would have been issuing shares for nothing, which is *ultra vires*. The respondents could not have issued the new shares and charged the appellant with the £10 a share, because that would have been to make him a shareholder against his will. Sec. 55 of the *Companies Act* 1899 was not intended to give new powers of issuing shares, but to specify the cases in which a company could take other than cash payment for such issue: *Ooregum Gold Mining Company of India* v. *Roper* (1). The mere obedience to the decree would not have been a consideration: *Anon. Case* (2). There was, therefore, no course open to the respondents but that which they adopted.

The amount claimed is not subject to any reduction by reason of the possibility of other claims being made against the appellant. The indemnity is not distributable. This is purely a question of construction of the decree, and there is nothing in the terms of it to suggest such an interpretation. There is no hardship, because the appellant would not concur in any other practicable suggestion for minimising the loss, and in the absence of agreement the parties must fall back on their strict legal rights under the document. This is in effect a suit by a lienor against a lienee. There was no counter indemnity, and the Judge was bound to construe the decree literally. There is nothing to show that the appellant misunderstood the effect of the submission, and, even if there were, the misunderstanding must be shown to be mutual before the party who sets it up can be allowed to take advantage of it. [He referred to *Powell* v. *Smith* (3); *Stewart* v. *Kennedy* (4).] It is premature for the appellant to ask for a substantive order now. The respondents are in the position of mortgagees seeking to enforce a mortgage, and the mortgagor is asking to be protected against a liability which is altogether contingent. It may be that none of the other transferrees will sue

(1) (1892) A.C., 125, at p. 133.
(2) Cowp., 128.
(3) L.R., 14, Eq., 85.
(4) 15 App. Cas., 108.

H. C. OF A. 1906.

McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

him, and if they do they may not succeed. On the other hand, the appellant, if he knew that he was protected against loss, might not trouble to defend the actions.

[ISAACS J. referred to *In re Ottos Kopje Diamond Mines Ltd.* (1).]

The Court cannot tell whether the respondents should have sued Vivian or not, because the point was not raised on the pleadings, and even if they had sued and recovered against him, he would have been able to sue Mrs. McLaughlin.

The respondents are entitled to the costs of enforcing their security unless they have done something inequitable, unreasonable or vexatious: *Cotterell* v. *Stratton* (2); *Bank of New South Wales* v. *O'Connor* (3). Even if the Court thinks the appellant entitled to succeed on the counterclaim the costs should be reserved until it is known whether anything is due to the other transferrees.

Dr Cullen K.C., in reply, referred, on the main point, to *Rees* v. *Berrington* (4); *Holme* v. *Brunskill* (5); and, on the question of costs, to *Hall* v. *Heward* (6); *Kinnaird* v. *Trollope* (7).

[ISAACS J. referred to *Taylor* v. *Bank of New South Wales* (8).]

Cur. adv. vult.

The judgment of the Court was delivered by

Dec. 10.

GRIFFITH C.J. This was an action brought by the respondents against the appellant to enforce a submission given by the appellant in this Court on the hearing and determination of an appeal from a decision of the Supreme Court of New South Wales in an action brought by him against the respondents. That was a suit to compel the respondents to restore the appellant's name to the register of the company in respect of a number of fully paid-up shares held by him, in respect of which his name had been taken off the register and those of other persons entered as the holders, by virtue of certain transfers executed by the appellant's

(1) (1893) 1 Ch., 618.
(2) L.R. 8 Ch., 295.
(3) 14 App. Cas., 273.
(4) II. Wh. & T. L.C. in Eq., 7th ed., p. 580.
(5) II. Wh. & T. L.C. in Eq., 7th ed., p. 581; 3 Q.B.D., 495.
(6) 32 Ch. D., 430.
(7) 42 Ch. D., 610.
(8) 11 App. Cas., 596.

wife under the supposed authority of a power of attorney executed by him. This Court held that the power of attorney was invalid, and, reversing the decision of the Supreme Court, made a decree declaring that the transfers of shares by Mrs. McLaughlin, assuming to act as the agent of the appellant under the power of attorney, were invalid. In the judgment was embodied an undertaking or submission by the appellant to indemnify the company to the extent of all moneys received by his wife as the proceeds of the sale of the said shares, and against any loss that the company might sustain or liability they might incur to persons other than the then plaintiff by reason of obedience to the judgment. And the Court proceeded to order that the company should rectify their register by restoring the plaintiff's name as holder of the shares in question and further relief. The only parties to that suit were the present appellant and respondents. The transferrees were not made parties, and, that being the frame of the suit, the Court could not make any specific order as to the particular shares transferred, but they made an order which gave effect to the rights of the parties as between themselves, and ordered the then defendants to restore the plaintiff to the rights of which he had been deprived. This decree having been made, the company proceeded to obey it. There had been several transfers executed by Mrs. McLaughlin, the total amount of the money accruing from the sales being £4,603. Several of the transferrees took transfers direct from her. But one of them, a Mr. Cohen, purchased from one Vivian, a stockbroker, who was the original transferree from her. All the others had taken transfers direct. The company then, in execution of the decree, cancelled the registration in all cases, and restored the appellant's name as a member of the company in respect of the shares he had originally held. They then brought a suit against Cohen to obtain from him the share certificates in respect of the shares entered in his name. He counterclaimed for damages for breach of the implied representation made by the issue of the share certificate on the faith of which he had bought the shares. On that counterclaim he recovered £4,920.

Nothing turns on the question of the costs of that action. Some

H. C. OF A. 1906.

McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

of the other transferrees who had no claim against the company, as of course the company had made no representation to them, have brought actions against the appellant, and in one case against his wife, and these actions are now pending. The respondents then commenced this suit against the appellant to enforce the undertaking which was embodied in the judgment of the High Court, as given by the appellant, and further to enforce payment of the debt alleged to be due to them by virtue of the undertaking by giving effect to a lien which arises under the articles of association of the company. The 18th article provides that the company shall have a first and paramount lien upon every share of each member, for securing to the company the payment of all debts and liabilities of such member solely or jointly with any person to the company, whether the period for the payment or discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends from time to time declared in respect of such shares.

Article 19 provides that for the purpose of enforcing the charge the directors may sell the shares, with other provisions to which it is not necessary to refer.

The appellant in this action set up several defences, and also made a counterclaim. First he denied the authority of his counsel to make the submission and asked the Court to disregard it. It is not necessary to say more on that than that the undertaking was given by his counsel, and accepted by the defendants, and it is too late now to attempt to get rid of it. Then he said that it was an implied term of the submission that the company should get the shares back free from all claims by the transferrees. As a matter of fact, apart from any question of construction, that probably was an implied term; but I will deal with that question later. Then he contended that the submission was distributive, so that a separate obligation on his part to indemnify the company arose with respect to each parcel of the shares, and limited the liability with respect to that parcel, so that the only obligation that he would incur with respect to the shares transferred to Cohen was limited to the amount of the purchase money received by Mrs. McLaughlin in respect of those shares. He further said that the loss which the company sus-

tained by reason of Cohen's claim was not the natural consequence of obedience to the decree of the Court, and that the company could have obeyed the judgment in a manner less onerous to him or not onerous at all, namely, by increasing the capital of the company and issuing fully paid up shares to him out of the new issue. Also he counterclaimed that the respondents be asked to agree to modify the judgment or alter the terms of the submission, and in the alternative he claimed an indemnity for any moneys he might be called upon to repay to the transferrees.

I will deal first with the question of the loss which the company say they have sustained by reason of obedience to the decree of this Court, and with the appellant's contention that, instead of buying the shares from Cohen under such circumstances that they were bound to give him their full market value, which they had done, they should have issued to him new shares fully paid up. The first observation I have to make on that is that that would not have been a compliance with the judgment of the Court, but a departure from it, because what the plaintiff established his right to in the suit was the right to a specific number of shares forming part of a total issue of 5,000, and if he received a similar number of shares out of a larger total number he would not have been getting the same thing. The difference in value would certainly not have been very great, but it was not the same thing. It therefore could not have been done without his consent, nor without the authority of a general meeting of the shareholders in the company. The company, however, made an offer to do that subject to an obligation on his part to pay the nominal price of £10 per share, though each share was then worth much more. But the appellant, taking up the position that he was not bound by the undertaking, refused the offer, and said he would not accept any shares unless they were issued to him free from any obligation. It seems plain that in any event the company could not have issued new shares free from obligation. Possibly some method might have been devised to carry out the arrangement suggested, if lawful, as to which we express no opinion, and if assented to by the company in general meeting, but not so as to avoid a liability to pay the equivalent of £10

H. C. OF A. 1906.

McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

per share in one way or another. But he absolutely repudiated any liability to pay anything for the shares. It might, perhaps, have been paid under an arrangement to have it in some way taken off again in reduction of the amount to which the appellant was liable under the indemnity. But in the absence of any agreement the parties fell back on their legal rights. The company then had to get shares in some way in order to obey the decree. It was admitted that the amount paid to Cohen did not exceed the fair market value of the shares. That is, therefore, a loss within the meaning of the submission, and constitutes a debt under the submission, and it is not disputed that if it be a debt they are entitled to maintain this action so as to enforce their lien to the extent of that debt.

I will deal next with the contention that that obligation is distributive, so that the loss sustained by reason of the purchase of Cohen's shares is limited to the amount of the purchase money received by Mrs. McLaughlin in respect of those shares. There is really very little to say on that subject. It will be observed that the loss is treated in the undertaking as one sum total, any loss which the company may sustain; and the limit of the liability is also treated in the undertaking as one total sum: [His Honor read the terms of the undertaking, as already set out.] So that the construction suggested is not exactly the literal one. The appellant contends, and with some force, that a contrary construction to that which he suggests will lead to manifest injustice. He or his wife would be liable to repay all the money to the transferrees, although it had been already applied for the benefit of the company under the indemnity, and so he would have to pay for the shares twice over. That is no doubt so, and that result would be so contrary to the apparent intention of the parties that the Court would be unwilling to adopt a construction which would lead to such a result, a result so far from the intention of the parties as embodied in an undertaking given on one side and accepted on the other. That is a construction which is unnatural, and we do not see any sufficient reason for adopting it.

Another construction suggested, and which would produce the same result, is that in the submission to indemnify the respondents "to the extent of all moneys received by the said

A. A. McLaughlin as the proceeds of the sale of the said shares" the word "received" should be construed as "received and retained," or as if the words "and which she is not liable to repay" were added. For the purpose of construction regard must be had not only to the words of the submission itself but also to the context (which includes the whole of the judgment), to the subject matter, and to the facts as they were present to the minds of the parties and the Court at the date of the judgment.

So regarded, there is, in our opinion, much to be said in favour of this construction, and if there were no other way open to do justice we should be prepared to adopt it. But it is not necessary to depart from the literal meaning of the submission, as I will proceed to show.

The foundation of the relief given to the appellant was the adjudication that the transfers of the shares in question by the appellant's wife in supposed execution of the power of attorney were invalid. That adjudication, it is true, was only made as between the parties to the suit, but as between them it was established as an incontrovertible fact. It followed, as between those parties, that as a matter of law, the transferrees were, under the circumstances, entitled, at the least, to recover the purchase money from the appellant's wife as upon a total failure of consideration. They might or might not have been entitled to more extensive relief. This conclusion, therefore, was also established by the judgment as between the parties. It was uncertain whether the transferrees could have recovered the purchase money from the appellant himself. Possibly some of them could and others could not. Under these circumstances the appellant, in effect, undertook as between himself and the respondents to assume the liability of his wife to the extent of the purchase money actually received by her, and to that extent, although not in terms out of that fund, to indemnify the respondents against any loss which they might sustain by reason of obedience to the judgment. It equally followed from the adjudication of the Court that the respondents had a claim against the appellant's wife in respect of the representation made by her to them that the power of attorney, on the

H. C. OF A. 1906.

McLAUGHLIN DAILY v. TELEGRAPH NEWSPAPER CO. LTD.

faith of which they acted, was valid. In effect, therefore, the appellant voluntarily constituted himself a surety to the extent specified for any person to whom the respondents might have been entitled to have recourse, and on the other hand this liability was undertaken on the assumption that he on his part had and would retain the benefit of the money which his wife had received, to which he would consequently be able to have recourse to indemnify himself against the liability incurred by him under his own indemnity. For this purpose he and his wife were treated as one. All this is involved in the judgment itself. Now, if a principal debtor, in respect of a debt for which a surety is liable, does anything by which the right of the surety to have recourse to any property, to which he is entitled to have recourse by way of indemnity, is impaired, the surety is discharged to the extent by which that right is so impaired: *Pearl* v. *Deacon* (1). If, therefore, the respondents by the manner in which they gave effect to the judgment of the Court voluntarily did any act by which the right of the appellant to recoup himself out of the fund in question was impaired, to that extent he is discharged from his undertaking to indemnify them. What then are the relevant facts? The respondents, by cancelling the registration of the transferrees in question under such circumstances that the transferrees had no redress against them, put the latter in a position to claim repayment of the purchase money from the appellant's wife, whose liabilities the appellant had as between himself and the respondents assumed, and to that extent diminished the fund on which he relied to protect himself. For the reasons already given we do not think that the respondents can dispute either the liability of Mrs. McLaughlin or the liability of the appellant to make these repayments.

For these reasons we are of opinion that, upon the literal construction of the judgment, and upon the application of recognized rules of equity to the facts, the appellant is entitled to be relieved from his indemnity to the extent of the purchase money received by Mrs. McLaughlin in respect of any of the shares as to which the respondents have left the appellant or his wife liable to pay the purchase money to the purchasers.

(1) 24 Beav., 186; 1 DeG. & J., 461.

Thus we arrive at a conclusion which is in harmony both with law and with the plain demands of justice. It is, however, claimed by both parties that each should be at liberty to dispute for his own benefit the appellant's liability to repay the purchase money. The appellant claims that, so far as he can defeat the demands of the transferrees against himself and his wife, he is entitled to retain the money. The respondents claim that they should be allowed to intervene to defeat those demands, and so to lessen the amount by which the fund representing the purchase money has been or will be diminished. So far as regards the respondent's contention, I have already pointed out that, as between them and the appellant, the facts as they have been conclusively determined show that either the appellant or his wife is liable to repay the purchase money. If, therefore, the appellant chooses to discharge what, as between the present parties, has been determined to be a legal obligation, and what in any event is an honourable one, whether it could or could not be defeated on grounds open as between the appellant or his wife and the transferrees, the respondents cannot complain. This disposes of their contention. On the other hand, if the appellant and his wife by any means succeed in escaping from this obligation, the result will be that, *pro tanto*, the fund to which he is entitled to have recourse, and to the extent of which he has undertaken to indemnify the respondents, will not have been diminished by reason of the respondents' acts. Although, therefore, he and his wife are at liberty to avail themselves of any such defences, their success will enure for the benefit of the respondents and not of the appellant. A reasonable time should be allowed to the appellant to make the repayments or secure them to the satisfaction of the transferrees. We think that three months will be a reasonable time to allow for that purpose, but leave should be given to apply to the Supreme Court for an extension in any particular case.

For the reasons which I have given we think that the declaration of the plaintiffs' right to indemnity must be limited to the balance of the sum of £4,603 9s. 5d. after deduction of any sums of money which the appellant may so pay, or may secure to the satisfaction of the transferrees within that period.

H. C. OF A. 1906.

McLAUGHLIN v. DAILY TELEGRAPH NEWSPAPER CO. LTD.

With respect to the question of costs, the suit was in effect a suit by lienees to enforce a lien. They were entitled to maintain and succeed in the suit. On the other hand the defendant counterclaimed for a cross indemnity or diminution of responsibility to which he was entitled and which the plaintiffs disputed. Each party, therefore, has succeeded in part, and strictly a rigid way of disposing of the case would be to give the plaintiffs their costs of the suit and the defendant his costs of the counterclaim. But under the circumstances we think justice will be done by omitting all reference to costs from the judgment.

To give effect to these conclusions the judgment should be varied by prefixing to the declaration of the defendant's obligation to indemnify the plaintiffs a declaration that the defendant is entitled to deduct from the £4,603 9s. 5d., being the amount received by Mrs. McLaughlin as the proceeds of the sale of the shares in question, a sum equal to any sum or sums which he shall have paid to or secured for the benefit of the several transferrees in repayment of the purchase money paid by them respectively. This will be followed by a direction for an inquiry as to the amount which shall have been so paid or secured to the satisfaction of the transferrees within three months from this date or such further time as the Supreme Court may allow, the balance to be certified. The declarations in the judgment appealed from will be varied by substituting the words "the amount of the balance so certified" for "the said sum of £4,603 9s. 5d." wherever those words occur, and all reference to costs will be omitted.

Judgment appealed from varied accordingly. Cause remitted to the Supreme Court to do what is proper to give effect to this judgment.

Solicitor, for the appellant, *J. McLaughlin.*
Solicitors, for the respondents, *Lawrence & Lawrence.*

C. A. W.