in full and explicit terms," "naming expressly." It would not be an abuse of language, if a sheriff's officer ask a claimant to "specify" what articles in a house are his property, to say, "I specify all the articles." Here the clause specifies any question that arises under the award.

Questions answered as follows:—

1. *Yes, on the basis that the plaint first validly came into existence on 24th November* 1911.
2. *Yes, so far as the Corporation is engaged in trading operations.*
3. *No.*

Solicitors, for the respondents, *Derham & Derham.*

Solicitor, for the Commonwealth, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

RANKIN . . . . . APPELLANT;
DEFENDANT,

AND

PALMER (OFFICIAL ASSIGNEE OF CROSS) . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—High Court—Dismissal of appeal for want of prosecution—Failure to set down appeal for hearing—Transcript, extension of time for lodging—Rules of the High Court 1911, *Part II., Sec. III., rr.* 15, 18.

Indemnity, action for—Principal and agent—Money received by agent and paid over to principal—Declaration of agents' right to indemnity—Order to pay the money to agent—Subsequent bankruptcy of agent—Official assignee—Rights of.

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Where an appellant to the High Court from the Supreme Court of a State, who has given notice of appeal and lodged the security, has by a slip failed to set down the appeal for hearing on the proper day, the appeal will not be dismissed for want of prosecution under the *Rules of the High Court* 1911, Part II., Sec. III., r. 15, when there is no reason to suppose that the appellant does not intend to prosecute the appeal, if the respondent has suffered no loss, and if the slip has had no effect by way of putting off the hearing of the appeal.

An order made *ex parte* for extending the time for lodging the transcript will not be set aside if the respondent is in no way aggrieved by it.

An agent on behalf of an undisclosed principal received several sums of money from several other persons on a consideration that had failed, and paid such money over to his principal.

Held, that the agent, although he was entitled to be indemnified by his principal in respect of such sums, was not entitled also to an order that the principal should pay over to him the total amount of such sums.

The agent, after judgment for him in an action against his principal to obtain the indemnity, became bankrupt, and the principal having appealed to the High Court against such judgment, the official assignee was made a party.

Held, that the official assignee was not entitled to any further relief than that to which the agent was entitled.

Decision of the Supreme Court of New South Wales (*Rich* J.) varied.

APPEAL from the Supreme Court of New South Wales.

In the year 1910 certain agreements were made between Christopher Smith Cross, James Ceerel Rankin and certain other parties, for the formation of a mining company to take over the assets of another mining company then in liquidation. As a consequence of these agreements a sum of £517 16s., representing payments of sixpence per share by shareholders of the old company in respect of applications by them for shares in the new company, was received by Cross as agent for Rankin, and was duly paid over to Rankin. The flotation of the new company having failed, the shareholders of the old company, who had paid the several sums last above mentioned, became entitled to repayment of them, and several of such shareholders having applied for repayment to Cross, he requested Rankin to repay them, but Rankin neglected or refused to do so.

Cross then brought an action in the Supreme Court against Rankin, asking for a declaration that the plaintiff was entitled to be indemnified by the defendant against all liability in respect of the sums above mentioned, that the defendant should be ordered to pay to the plaintiff, or to the shareholders of the old company, the above mentioned sums, and for an account of the moneys so received by the plaintiff.

The action was heard by *Rich* J., who, on 10th April 1912, made a decree declaring that the plaintiff was entitled to an indemnity, and ordering the defendant to pay to the plaintiff within 14 days the sum of £516 10s., and further ordering the defendant to pay the costs of the suit.

From this decision the defendant appealed to the High Court.

After the defendant had served the notice of appeal the plaintiff became bankrupt, and William Harrington Palmer was appointed the official assignee of his estate. Thereupon, on the application of Palmer, it was ordered that the suit should be revived, and that Palmer might carry on and prosecute the further proceedings in the suit.

On 30th April notice of the appeal was given, and on 5th June security was lodged. The time for setting down the appeal for hearing expired on 28th October, and it was not set down until 31st October. On 8th November the time for lodging and serving the transcript expired, and on 14th November an order was made *ex parte* by *Isaacs* J. extending the time for lodging the transcript until 25th November.

A motion was now made on behalf of the respondent to dismiss the appeal for want of prosecution, and to set aside the order for lodging the transcript.

Loxton K.C. (with him *Harriott*), for the respondent, in support of the motion. The appellant has not complied with the Rules of the High Court, and there are no grounds for granting him further latitude. [He referred to *Rules of the High Court* 1911, Part II., Sec. III., rr. 15, 18.]

Clive Teece, for the appellant, to oppose.

Loxton K.C., in reply.

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GRIFFITH C.J. delivered the judgment of the Court:—The rule upon which this application is founded was introduced for the purpose of doing justice, not injustice, between parties. If an appellant, having obtained a stay of proceedings by giving notice of appeal and lodging security, does not go on with diligence to prosecute the appeal, he might inflict hardship upon the respondent. But, when there is no reason to suppose that the appellant does not intend to prosecute the appeal, the mere fact that by a slip he has failed to set the appeal down for hearing on the proper day, that slip having no effect whatever by way of putting off the hearing of the appeal, it does not follow, although the appellant has made a slip, that a respondent, who has suffered no loss, should be allowed to set it up in order to gain some pecuniary advantage to himself.

In this case the appeal could not, under any circumstances, come on for hearing before these sittings. If the hearing is delayed at all, it will only be by the time occupied in hearing this motion. Under these circumstances the motion will be dismissed without costs.

There is another motion to set aside an order obtained *ex parte* to extend the time for lodging the transcript and to dispense with the printing of certain exhibits. There is no ground whatever for setting aside that order. The respondent is in no way aggrieved by it. The motion to set it aside should not have been made, and should be dismissed with costs.

Motions dismissed accordingly.

Dec. 12.

The appeal now came on for hearing.

Nicholas and *Clive Teece*, for the appellant. The appellant admits that the respondent is entitled to an indemnity, but there is no justification for the order that the appellant shall pay the money to the respondent. The *dicta* in *Lacey* v. *Hill* (1) relied on in support of the order to pay are not supported by authority. No order for payment will be made unless the liability in respect of which the right of indemnity exists has already arisen: *In re*

(1) L.R. 18 Eq., 182, at p. 191.

Richardson; *Ex parte Governors of St. Thomas's Hospital* (1); *Wolmershausen* v. *Gullick* (2); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3); *Cruse* v. *Paine* (4); *Seton on Decrees*, 6th ed., vol. III., p. 2360; *Stanley* v. *Wiseman* (5).

Knox K.C. (with him *Harriott*), for the respondent. The Court has jurisdiction to do what it thinks right to protect the respondent. Until the hearing of this appeal the right to an indemnity has been denied by the appellant. This is not merely the case of a debt, but it is one in which it is dishonest to keep the money, because it was paid for a consideration that has failed. An order has been made for payment in *Lacey* v. *Hill* (6); *Evans* v. *Wood* (7); *Hartas* v. *Ribbons* (8); and *Wooldridge* v. *Norris* (9).

Nicholas, in reply.

GRIFFITH C.J. This is a curious case. It may be described as, in effect, an action by an agent against an undisclosed principal for an indemnity in respect of claims that may be made upon the agent for money received by him on a consideration that has failed, and which he received on behalf of, and afterwards paid over to, his principal. The right to indemnity is not now disputed, although at the hearing before the learned Judge that appears to have been the substantial matter in dispute. The appellant was not then represented by counsel, and the form of the judgment was not discussed. The learned Judge—I think by inadvertence—after declaring the plaintiff's right to an indemnity—in which he was clearly right—went on to order that the full amount which the plaintiff had paid over to the defendant, and which the plaintiff might be called on to repay, should be paid to him by the defendant.

It is clear, however, that the plaintiff's only right is to indemnity, and the Court is bound to see that it does not prejudice the defendant by giving the plaintiff anything more. If the judgment stood in its present form, and the defendant paid the whole sum to the plaintiff, the plaintiff might not pay it to the

(1) (1911) 2 K.B., 705.
(2) (1893) 2 Ch., 514.
(3) 22 Ch. D., 561.
(4) L.R. 4 Ch., 441.
(5) 6 Qd. L.J., 84.
(6) L.R. 18 Eq., 182.
(7) L.R. 5 Eq., 9, at p. 15.
(8) 22 Q.B.D., 254.
(9) L.R. 6 Eq., 410.

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creditors, in which event the defendant as principal might have to pay the money over again. Such a result would be manifestly unfair. An undertaking by the plaintiff would not obviate this difficulty.

The principle governing such cases was fully discussed in the Court of Appeal in the recent case of *In re Richardson*; *Ex parte Governors of St. Thomas's Hospital* (1). In that case *Fletcher Moulton* L.J., after pointing out that at common law a person entitled to an indemnity could not avail himself of his right until he had actually paid the money, said (2):—"The rule in Chancery was somewhat different, and yet, to my mind, it emphasizes the fundamental principle that you must have paid before you have a right to indemnity, because the remedy which equity gave was a declaration of a right. You could file a bill against the principal debtor to make him pay the debt so that you would not be called upon to pay it, and then you obtained a declaration that you were entitled to an indemnity. You could in certain cases have a fund set aside in order that you might be indemnified, to avoid the necessity of your having to pay and then to sue for the money you had paid, which perhaps would not repair your loss and credit even if it discharged the debt. But I do not think that equity ever compelled a surety to pay money to the person to whom he was surety before the latter had actually paid. He might be ordered to set a fund aside, but I do not think that he could be ordered to pay. I do not know what were the cases to which Sir *George Jessel* vaguely referred in *Lacey* v. *Hill* (3), as cases where in the absence of the principal creditor the person who is to be indemnified might have the money paid over to him. I can find no such case, and I do not think any such decision would be in accordance with the spirit of the law. Therefore the position is that if the bankrupt has a right to indemnity, but the claim by the principal creditor has not been paid, there certainly would have been no right of action against the surety if bankruptcy had not ensued." In the same case *Buckley* L.J. pointed out (4) that "indemnity requires that the party to be indemnified shall never

(1) (1911) 2 K.B., 705.
(2) (1911) 2 K.B., 705, at p. 712.
(3) L.R. 18 Eq., 182.
(4) (1911) 2 K.B., 705, at p. 716.

be called upon to pay, and, according to my recollection, the judgments which have been pronounced in Courts of Equity upon rights of indemnity have assumed that form." He then referred to the judgment in *Cruse* v. *Paine* (1), a case in which the defendant was bound to indemnify the plaintiff against calls on shares which the plaintiff held as trustee for him, and quoted the decree, which was as follows:—"Declare that the defendants are . . . bound to procure the release or discharge of the . . . plaintiff's estate from the . . . calls . . . and let the defendants procure such release or discharge accordingly, either by payment of the said calls or otherwise, and indemnify his" (the plaintiff's) "estate against all such costs and charges as aforesaid."

In the present case the total amount that may possibly be claimed against Cross, the original plaintiff, is £516 10s. It is said to consist of small sums due to 86 different persons, the largest amount due to any one person being £57. If the defendant pays those amounts himself, the plaintiff, his agent, will suffer no loss. All that the plaintiff could ask was protection against being called upon to pay them.

If that had been brought to the notice of the learned Judge, I have no doubt that he would have made his decree in a different form.

I think, therefore, that the decree should be varied by omitting the direction to the defendant to pay the money to the plaintiff, and substituting a direction to the effect of that in *Cruse* v. *Paine* (1).

Since the decree, the plaintiff in the suit has become bankrupt, and the present respondent is the assignee of his estate, but that cannot affect the rights of the defendant as at the time when the decree was pronounced. The assignee is, of course, entitled, as representing the estate of Cross, to see that claims made against the estate shall be provided for by the defendant. He has offered an undertaking that, if the money is paid to him, he will distribute it in payment of these claims. But he is not entitled to payment any more than the bankrupt. His right is to an indemnity, but he has no right voluntarily to undertake the duty

(1) L.R. 4 Ch., 441.

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of seeing that the defendant shall pay his own debts, even to creditors with whom he may effect a settlement on other terms, or who do not wish to be paid.

Under the circumstances the proper order will be to vary the decree by omitting the direction to the defendant to pay the £516 10s., and substituting an order that the defendant do, within 14 days after written notice given to him at the address of his solicitor by the respondent of any demand heretofore made or hereafter to be made upon Cross or his estate in respect of the several payments of sixpence per share in the pleadings mentioned, procure the release or discharge of his estate from such claims either by payment or otherwise. Liberty to apply is already reserved.

Under the circumstances, as the appellant has obtained very substantial relief by his appeal, the Court would not be justified in ordering him to pay the costs of it, but he will not get his costs.

BARTON J. I concur.

ISAACS J. I concur.

Appeal allowed. Decree varied by omitting the direction to the defendant to pay the £516 10s., *and substituting an order that the defendant do, within* 14 *days after written notice given to him at the address of his solicitor by the respondent of any demand heretofore made or hereafter to be made upon Cross or his estate in respect of the several payments of sixpence per share in the pleadings mentioned, procure the release or discharge of his estate from such claims either by payment or otherwise.*

Solicitor, for the appellant, *J. M. Proctor.*

Solicitors, for the respondent, *Perkins, Stevenson & Co.*

B. L.