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to refuse to allow these facts to be put before a jury would be, to a very large extent, to deprive the appellants of the opportunity of ever at any time setting up what appears to have been, if the appellants are right in their facts, a palpable fraud on the part of their agent and collusion on the part of the respondent. The question whether the amendment should have been allowed or not, is not, however, a matter for our decision at the present time, because, in view of the conclusion at which we have arrived, the amendment becomes unnecessary.

Appeal allowed. Order appealed from discharged. Respondent to pay the costs of the motion for a rule nisi and of the appeal. Costs of the first trial to be costs in the cause. Money paid into Court by the appellants as security for verdict and costs of the first trial to be repaid to appellants.

Solicitor for appellants, *H. C. E. Rich.*

Solicitors for respondent, *Shipway & Berne.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

LYSAGHT BROS. & CO. LTD. . . . APPELLANTS;

AND

FALK . . . . RESPONDENT (No. 2).

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *May* 26.

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

Attachment—Non-payment of costs of appeal—New trial—High Court Procedure Act 1903 (*No.* 7 *of* 1903), *sec.* 26 (*b*)—*Rules of the High Court* 1903, *Part I., Order XXXV., r.* 1.

An order for payment of the costs of an appeal is an order for the payment of money to some person within the meaning of *Rules of the High Court* 1903, Part I., Order XXXV., r. 1.

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Therefore, an order of the High Court for payment of the costs of an appeal from the Supreme Court of a State will not be enforced by attachment.

Nor will the payment of the costs of an appeal in which a new trial is ordered be made a condition precedent to the new trial.

MOTION for attachment.

The appellants were successful in an appeal to the High Court from a decision of the Supreme Court of New South Wales. The respondent had obtained a verdict against the appellants at *nisi prius*, and the appellants moved the Full Court for a rule *nisi* for a new trial: *Falk* v. *Lysaght* (1). This being refused, the appellants appealed to the High Court, and the appeal was allowed with costs, *ante* p. 421. The respondent, without paying the costs of the appeal, set down the action for trial, and gave the appellants notice of trial for 7th June, 1905.

This was a motion by the appellants to the High Court for a writ of attachment against the respondent for non-payment of the costs, or in the alternative for a direction that the payment of the costs should be made a condition precedent to the respondent being allowed to proceed to trial.

J. L. Campbell, for the appellants. Sec. 26 (*b*) of the *High Court Procedure Act* 1903 gives every person in whose favour a judgment of the High Court is given the same remedies for enforcing it against the property or person against whom it is given as are allowed by the laws of the State in which such person is resident to persons in whose favour a judgment of the Supreme Court of that State is given in like cases. It has been the practice in New South Wales to issue writs of attachment in such cases. The appellants are entitled to some security against loss by further unsuccessful proceedings on the part of the respondent.

[GRIFFITH C.J. — This seems an extraordinary application. All litigants are liable to the risk of having proceedings taken against them by impecunious persons.]

The right of a successful party to a writ of attachment for non-payment of costs in interlocutory proceedings is recognized by r. 270 of the Supreme Court Rules: *Rolin and Innes Sup. Ct.*

(1) (1904) 4 S.R. (N.S.W.), 665.

Prac., p. 412. An order of the Court of Appeal cannot be of less weight than that of a single Judge. [He referred to *Merritt* v. *Smith* (1); *Stockdale* v. *Hicks* (2); *Snow, Burney and Stringer, Ann. Prac.*, 1901, p. 608.]

[GRIFFITH C.J. referred to Rule 1, Order XXXV., of the *High Court Procedure Rules*.]

That is no limitation upon the right conferred by the Statute, in sec. 26.

The Statutes relating to the abolition of imprisonment for debt have no bearing upon attachment for non-payment of costs: *Evans* v. *Bear* (3); *Rolin and Innes, Sup. Ct. Prac.*, p. 287. The practice in New South Wales in such matters is similar to that in Chancery in England. [He referred to *In re Neal, Weston* v. *Neal* (4); *In re Wickham, Marony* v. *Taylor* (5).]

Shand and *A. Thomson*, for the respondent, were not called upon.

GRIFFITH C.J. As to the first branch of this application reliance is placed by the appellants upon sec. 26 of the *High Court Procedure Act* 1903, which is in these words: "Every person in whose favour a judgment of the High Court is given shall be entitled to the same remedies for enforcing it by execution or otherwise—(*a*) Against the property of the person against whom it is given; and (*b*) Subject to limitations which may be prescribed by any Rules of Court, against the person against whom it is given, as are allowed, by the laws of the State in which such property is situated or such person is resident, as the case may be, to persons in whose favour a judgment of the Supreme Court of the State is given in like cases." The Rules of Court made under that section are contained in Order XXXV. of Part I. Rule 1 deals with the question of attachment. It provides that "a judgment or order for the payment of money into Court or for the performance of a judgment, order, or writ, by which any person is required to do any act other than the payment of money to some person,

(1) 10 S.C.R. (N.S.W.), 230.
(2) 9 N.S.W. W.N., 78.
(3) L.R. 10 Ch., 76.
(4) 31 Ch. D., 437.
(5) 35 Ch. D., 272.

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may be enforced by writ of attachment." That is a plain statement that orders for the payment of money to a person cannot be enforced by writ of attachment. It is a limitation prescribed by the rule. It cannot be disputed that the order now in question is an order for the payment of money to some person. The point came before the Court of Appeal in England in the case of *Bates* v. *Bates* (1), and counsel did not attempt to argue it. Even if this case did not clearly fall within the limitation, I for my part should like to see an instance in which an order has been made that payment of the costs of a new trial motion by the unsuccessful party should be a condition precedent to his being allowed to proceed to trial. It is said that it is the usual practice to do so in New South Wales. I should like to see some distinct authority for that practice if it exists.

We think, therefore, that the motion must be dismissed with costs.

Campbell asked to be allowed to set off these costs against the costs due from the respondent to the appellants. There is no set-off allowed unless an order is made to that effect.

GRIFFITH C.J. I doubt the necessity for the order; but there should be a set-off.

Motion dismissed with costs. Set-off allowed.

Solicitor, for the appellants, *H. C. E. Rich.*

Solicitors, for the respondent, *Shipway & Berne.*

C. A. W.

(1) 14 P.D., 17.