But in the present case the statute deliberately provides that if certain facts are established the defendant shall be convicted unless he satisfies the Magistrate of certain other matters. In this case the Magistrate says that the defendant did not satisfy him of those matters, and *Wade* J. held that in that event the Magistrate should have convicted the defendant, and I agree with him.

GAVAN DUFFY J. I agree.

STARKE J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *R. J. O'Halloran*, Tamworth, by *R. H. Levien*.

Solicitor for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

[HIGH COURT OF AUSTRALIA.]

CARTER . . . . . APPELLANT;
INFORMANT,

AND

E. W. ROACH AND J. B. MILTON PROPRIETARY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

MELBOURNE, *Oct.* 10, 11.

SYDNEY, *Nov.* 17.

Knox C.J., Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Industrial Arbitration—Agreement between parties to industrial dispute—Binding effect of agreement—Successor or assignee of party to agreement—Validity of Commonwealth statute—Commonwealth Conciliation and Arbitration Act 1904-1920 (*No.* 13 *of* 1904—*No.* 31 *of* 1920), *secs.* 24, 29 (*ba*)—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.), (xxxix.).

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Sec. 24 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1920 provides that "If an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, a memorandum of its terms shall be made in writing and certified by the President, and the memorandum when so certified shall be filed in the office of the Registrar, and unless otherwise ordered and subject as may be directed by the Court shall, as between the parties to the agreement, have the same effect as, and be deemed to be, an award for all purposes" &c. Sec. 29 provides that "The award of the Court shall be binding on . . . (*ba*) in the case of employers, any successor, or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party."

Held, by *Knox* C.J., *Gavan Duffy*, *Powers* and *Rich* JJ., that sec. 24 (1) does no more than provide that the terms of an agreement to which it relates shall be binding on the parties to it to the same extent, and enforceable against them in the same way, as if those terms had been terms of an award instead of merely terms of an agreement, and therefore that the provisions of sec. 29 (*ba*) do not apply to such an agreement.

Per Higgins and *Starke* JJ.: Inasmuch as the memorandum of agreement under sec. 24 (1) is, as between the parties to the agreement, to "have the same effect as, and to be deemed to be, an award for all purposes," the provisions of sec. 29 (*ba*) as to the binding effect of the award on assignees of the business of such parties apply to the agreement.

A question as to the validity of sec. 29 (*ba*) was raised by the respondent, but, in consequence of the view of the majority of the Court on the other question, a decision upon it became unnecessary.

APPEAL from a Court of Petty Sessions of Victoria.

In the Court of Petty Sessions at Melbourne constituted by a Police Magistrate, an information was heard on 6th May 1921, whereby Herbert Carter charged that E. W. Roach and J. B. Milton Proprietary Ltd., successor to Edward William Roach and to J. B. Milton & Co., "during the week ending 15th April 1921 . . . did have work done outside its factory contrary to the provisions of an industrial agreement made between the defendant and the Federated Clothing Trades of the Commonwealth of Australia as on 23rd May 1919 and certified on 21st October 1919." The Federated Clothing Trades of the Commonwealth of Australia was an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act*. An industrial dispute within the meaning of that Act having arisen between the organization and a number

of employers, including Edward William Roach and J. B. Milton & Co., an agreement in settlement of the dispute was entered into between the organization and a number of the respondents, including Edward William Roach and J. B. Milton & Co. This agreement was, on 21st October 1919, certified by the President of the Commonwealth Court of Conciliation and Arbitration pursuant to sec. 24 of the Act. One of the terms of the agreement was that "all work shall be done in the workshop provided and controlled by the employer except where a permit shall be given by the Registrar or Deputy Registrar." On 24th December 1919 a proprietary company was incorporated under the *Companies Act* 1915 (Vict.) called E. W. Roach and J. B. Milton Proprietary Ltd., and among its objects as stated in the memorandum of association were "to purchase or otherwise acquire the firm name, goodwill, stock, measurement forms, patterns, &c., of the business hitherto carried on by Edward William Roach at 340 Collins Street, Melbourne," and "to purchase or otherwise acquire and take over the business now carried on by the firm of J. B. Milton & Co. at 182 Collins Street, Melbourne, and also the goodwill thereof and the stock-in-trade, plant, chattels, goods and effects belonging to such firm or used in connection therewith." At the hearing, evidence was given that the defendant company had taken over the business of Edward William Roach and J. B. Milton & Co., that it had no permit for work to be done outside its workshops, and that certain work was done during the week in question outside the workshops. At the close of the informant's case counsel for the defendant company objected (1) that the defendant company was not a party to the agreement and was not bound by it, and (2) that sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1920 was *ultra vires* the Constitution. The Police Magistrate upheld the first objection and dismissed the information.

From that decision the informant, by way of order to review, appealed to the High Court.

The appeal was first argued on 3rd October 1921 before *Knox* C.J., *Higgins*, *Gavan Duffy*, *Rich* and *Starke* JJ., and was directed to be reargued. Arguments were now heard before the above-mentioned five Justices and *Powers* J.

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Robert Menzies, for the appellant. Sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act* is within the legislative power of the Federal Parliament conferred by sec. 51 (xxxv.) and (xxxix.) of the Constitution. The provision is a means of carrying out the power granted in pl. xxxv., and the Court will not control the Parliament in its choice of means. This provision is not open to the objection which, in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1), was held to invalidate the provision authorizing the making of a common rule; for in that case the attempt was to bind persons who had nothing to do with the dispute, while here the attempt is to bind persons who are privies to the parties to the dispute. The parties to a dispute could not bind those who were sought to be bound by the common rule, but the parties can bind their successors or assignees. So far as the decision in that case was founded on the reason that the Arbitration Court cannot award what the parties cannot agree to, the parties here might covenant for their successors and assignees. [Counsel referred to *Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (2); *Stemp* v. *Australian Glass Manufacturers Union* (3).] Sec. 24 (1) is within the conciliation power. It does no more than take up the result of an agreement between the parties and make it effectual by giving it force as if it were an award. It is a means for making conciliation and arbitration effective. [Counsel referred to *Australian Agricultural Co.* v. *Federated Engine-Drivers' and Firemen's Association of Australasia* (4).] The phrase "as between the parties to the agreement" does not limit the operation of the sub-section to the immediate parties to it. The sub-section contemplates that an agreement may be made between some of the parties as to all the matters in dispute or between all the parties as to some of those matters, and the intention is to make it clear that those who have not made an agreement are still subject to the arbitral power of the Court. That being so, the sub-section points out that the agreement only cuts out the parties to it. Sec. 29 (*ba*) is intended to apply to agreements. The fact that some of

(1) 11 C.L.R., 311.
(2) 27 C.L.R., 532, at pp. 537, 542, 546.
(3) 23 C.L.R., 226, at p. 245.
(4) 17 C.L.R., 261.

the provisions of the Act which relate to awards of the Court cannot be applied to agreements is not an answer. Such of them as can be so applied should be so applied. Without sec. 29 an agreement made by an organization would not be binding on its members.

Latham, for the respondent. Sec. 29 (*ba*) is beyond the powers of the Commonwealth Parliament. It does not of itself provide a means of exercising conciliation or arbitration, nor is it incidental to the exercise of the legislative power. It assumes a dispute to which the successor or assignee was not a party, and, therefore, it can be justified, if at all, only under the incidental power. Sec. 29 (*ba*) assumes that a dispute has been settled, and, therefore, that conciliation and arbitration have been completed, and it then provides that the settlement is to be binding upon parties who were not parties to the dispute. Any attempt to extend the area of an award beyond the parties to the dispute is invalid (*Whybrow's Case* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co.* (2)). An agreement by one party that his successors should be bound would be binding only between the parties to the agreement and not on the successors. If sec. 29 (*ba*) applied to an agreement, it would have the effect of making the provision that an agreement should bind successors a term of the agreement. But, apart from the question whether such a term would be industrial, an agreement for the settlement of a dispute on the term that one of the parties should agree that his successors would be bound would not be an agreement within sec. 24, unless that term had been part of the dispute (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co.*). Sec. 29 (*ba*) cannot be supported on the view that there may be a threatened or probable dispute with successors. There cannot be such a dispute, for the only disputes to which the Act applies are disputes the parties to which can be identified. [Counsel referred to *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (3); *National Phonograph Co. of Australia* v. *Menck* (4); *McGruther* v. *Pitcher* (5).] The effect of sec. 24 (1) is

(1) 11 C.L.R., 311.
(2) 8 C.L.R., 419.
(3) 27 C.L.R., 207, at p. 212.
(4) (1911) A.C., 336; 12 C.L.R., 15.
(5) (1904) 2 Ch., 306.

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that where there has been an agreement the parties are to be bound as to something to which they have not agreed and which has not been awarded against them. The sub-section is not within either the conciliation or the arbitration power, but it covers cases where there has been neither conciliation nor arbitration. The President has no discretion as to certifying to the agreement: if the conditions exist he must certify. On the construction of sec. 24 (1) the word "award" in it means an award of the Court, and by virtue of the last words of the sub-section the agreement is to be treated as an award of the Court for all purposes. Sec. 29 does not apply to agreements. In the case of an agreement the binding of the parties is brought about by the fact that they have agreed. In the case of an award it has no binding effect in itself, and sec. 29 was necessary to give it a binding effect. [Counsel referred to *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1); *Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (2).] Where an organization makes an agreement under sec. 24, it contracts on behalf of its members, for whom it is agent (*Waterside Workers' Federation of Australia* v. *Stewart* (3)), and sec. 29 is not needed for the purpose of making an agreement made by an organization binding on the members. The sub-sections of sec. 29, other than sub-sec. (*ba*), are impossible of application to agreements, and show that sec. 29 was not intended to apply to them.

Cur. adv. vult.

Nov. 17. The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, POWERS AND RICH JJ. The question we have to consider is whether a memorandum of agreement duly certified and filed under the provisions of sec. 24 (1) of the *Commonwealth Conciliation and Arbitration Act* is obnoxious to the provisions of sec. 29 (*ba*) of that statute. Two distinct contentions were made before us: first it was said that sec. 29 (*ba*) when properly construed did not extend to a memorandum of agreement under sec. 24, and next it was said that if sec. 29 (*ba*) did purport to extend to such a

(1) 25 C.L.R., 434, at p. 463. (2) 27 C.L.R., at p. 537.
(3) 27 C.L.R., 119, at p. 126.

memorandum it was invalid because not within the powers of the Parliament of the Commonwealth. We agree to the first contention, and therefore find it unnecessary to express any opinion as to the second. The relevant portion of sec. 24 is as follows: "(1) If an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, a memorandum of its terms shall be made in writing and certified by the President, and the memorandum when so certified shall be filed in the office of the Registrar, and unless otherwise ordered and subject as may be directed by the Court shall, as between the parties to the agreement, have the same effect as, and be deemed to be, an award for all purposes including the purposes of section thirty-eight." It is said for the appellant that the effect of these words is to put the parties to a filed and certified memorandum of agreement precisely in the same position as if they had proceeded to arbitration and had obtained an award in the terms of the memorandum of agreement; that for the purposes of the Act the memorandum is an award of the Court, and, being an award of the Court, is subject to all the provisions of the Act with respect to such awards so far as they reasonably and properly can be applied to a memorandum of agreement. Such a provision is contained in sec. 29 (*ba*), which enacts that the award of the Court shall be binding in the case of employers on any successor or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party, and therefore the memorandum of agreement is binding not only on the employers who are parties to it, but also on their successors, assignees and transmittees. We think that this argument is based on an inaccurate paraphrase of the provisions of sec. 24 (1). In our opinion the words "as between the parties to the agreement" in that section are equivalent to the words "so far as the reciprocal rights and obligations of the parties under the agreement are concerned," and the sub-section does no more than provide that the terms of the agreement shall be binding on the parties to the same extent, and enforceable against them in the same way, as if they had been terms of an award instead of merely terms of an agreement. We also think that the conclusion which the appellant draws from his premises is too narrow. If the

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memorandum is an award of the Court, then not merely some but all of the provisions of the statute which apply to awards must apply to filed memoranda—which leads to an absurdity, because it is conceded that many of such provisions cannot without absurdity be applied to a filed memorandum. It seems clear to us that if the sub-section has a larger meaning than that which we have attributed to it, it must mean that the word "award" when used in the statute shall include a certified and filed memorandum of agreement; and an examination of the provisions of the statute dealing with awards shows that it cannot have that meaning, for many of those provisions are admitted to be quite inapplicable to a memorandum of agreement. The appellant endeavours to make sec. 29 (*ba*) apply in the present case by giving an ambulatory meaning to the words "award of the Court." He says that sub-secs. (*a*) and (*b*) are not in their nature applicable to a filed memorandum, and the word "award" in the beginning of the section does not therefore include a filed memorandum for any of the purposes of those sub-sections; but sub-section (*ba*) is applicable to such a memorandum, and consequently the word "award" in the beginning of the section and the same word in sub-section (*ba*) do include such a memorandum. To us it seems clear that Parliament intended that one specific thing, which it called an "award of the Court," should be binding on all those enumerated in the various sub-sections, and that there is neither reason nor authority to justify us in adopting the distributive method suggested by the appellant. When we look at the history of sec. 24 (1) it becomes plain that Parliament did not consider that the sub-section had the meaning which is now attributed to it by the appellant. Before the passing of Act No. 31 of 1920 the sub-section ended with the words "shall, as between the parties to the agreement, have the same effect as, and be deemed to be, an award." Sec. 12 of that Act added the words "for all purposes including the purposes of section thirty-eight," which now stand at the end of the sub-section. If the words of the sub-section as it stood made a certified and filed memorandum an award *simpliciter*, there was no need for any alteration or addition: the word "award" wherever used in the statute would include a filed memorandum, and the words added could give no new force or

efficacy. If, on the other hand, the sub-section as it then stood did not have that effect, it cannot have it now, for the added words were apt, not to produce such an effect, but only to give the filed memorandum increased efficiency with respect to parties already bound by the agreement.

In our opinion the order *nisi* should be discharged.

Higgins J.

HIGGINS J. This is an appeal with respect to an information for a penalty for breach of an agreement certified and filed under sec. 24 (1). The defendant, a proprietary company, was not a party to the agreement, but was formed after the agreement was made and certified and filed, and it took over the businesses of two respondents to the dispute who had signed the agreement. Sec. 29 (*ba*) provides that an award of the Court shall be binding on, "in the case of employers, any successor, or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party"; and sec. 24 (1) provides that an agreement certified and filed "unless otherwise ordered and subject as may be directed by the Court shall, as between the parties to the agreement, *have the same effect as, and be deemed to be, an award for all purposes* including the purposes of section thirty-eight." I can see no escape from the conclusion that the provision contained in sec. 29 (*ba*) is to be applied to this agreement, so that the assignees of a party to an agreement filed are to be bound in the same way as the assignees of a party to a filed award.

No one contends that under sec. 24 (1), taken by itself, a filed agreement binds anyone but the parties to the dispute who are parties to the agreement; and no one contends that in sec. 29 the words "the award of the Court," taken by themselves, mean or include an agreement. But the missing link between the sections is found in the words of sec. 24 (1), providing that the agreement is to *have the same effect as and to be deemed to be an award*—as between the parties to the agreement—and *for all purposes*. Parties to an agreement cannot, of course, bind by the agreement those parties to the dispute who are not parties to the agreement. It is evident that the addition to the words of sec. 24 (1) made by the amending

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Act of 1920—"for all purposes including the purposes of section thirty-eight"—was made to clear away the doubts which had been frequently raised as to the applicability of such provisions as sec. 38 (*c*), (*d*) and (*o*) to agreements—I mean the provisions for fixing penalties, for imposing penalties, and for making variations. The amending Act of 1920 was passed on 11th October 1920, before the Full Court decided (9th December 1920) that the Court of Conciliation had power to vary its agreements as well as its awards (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co.* (1)). Probably the Act as it stood before 11th October 1920 had as full an effect on agreements as it has had since; but it surely is not unusual for a legislature to seek to remove all doubts on a subject by an amendment expressly declaring its intention and validating the existing practice.

For the purposes of this question, therefore, the paraphrase suggested for the words "as between the parties to the agreement" in sec. 24 (1)—the paraphrase "so far as the reciprocal rights and obligations of the parties under the agreement are concerned"—might well be accepted; but it takes the respondent company no further towards its goal. The question still remains, does not the provision in sec. 24 (1), that an agreement is to "have the same effect as, and be deemed to be, an award for all purposes," cause the provisions as to awards to fit like a cap on the agreement? I mean, of course, the provisions as to awards *made*, not awards in the course of the making—an agreement *made* and filed is to be deemed to be an award *made* and filed (secs. 28 (1), 38B, 40, 40A seem to refer to awards in the course of making). These words in sec. 24 (1) are, indeed, stronger than the words of an ordinary interpretation section, which usually (as in sec. 4) excepts any case "where otherwise clearly intended." I can see no difficulty in applying sec. 28 (2)—that an award is to continue after its fixed date—to agreements; or in applying secs. 30 and 31.

If (as seems to be assumed) sec. 29 (*a*) and (*b*) are idle, otiose, unnecessary as to agreements, that fact does not affect our duty to apply all other provisions of the Act as to awards, to agreements.

(1) 29 C.L.R., 106.

If there were an Act as to cattle and if horses are by the words of the Act to be deemed to be cattle, and if there are provisions as to horns, the fact that horses have no horns does not render the Act inapplicable to horses so far as it can be applied.

If the argument of the defendant be accepted, it would seem to follow that penalties cannot be imposed for breach of agreements, and that agreements cannot be varied by the Court under sec. 38 (*o*), or interpreted; that, in fact, the words inserted in sec. 24 by Parliament in 1920 are worse than nugatory. If the argument be accepted, it follows that the members of organizations are not bound by agreements made by the organizations under sec. 24 (sec. 29 (*d*)).

I am of opinion that in sec. 24 (1) the words "as between the parties to the agreement" were put in to distinguish between the parties to the dispute who are parties to the agreement and the parties to the dispute who are not parties to the agreement—to make a separation between parties on the same plane; and that Parliament, by sec. 29 (*ba*) and (*d*) and sec. 24 (1) combined, meant to bind assignees of a business as to which an agreement has been made as well as assignees of a business as to which an award has been made, and to bind all members of an organization bound by an agreement as well as all members of an organization bound by an award.

In my opinion the appeal should be allowed, and the order *nisi* made absolute.

STARKE J. The *Commonwealth Conciliation and Arbitration Act* 1904-1920 prescribes that an agreement certified and filed pursuant to sec. 24 of the Act shall, as between the parties to the agreement, have the same effect as, and be deemed to be, an award for all purposes including the purposes of sec. 38. On the one hand, it is said that this provision attracts to agreements filed under sec. 24 all the provisions of the Act relating to awards so far as the same are capable of application; whilst, on the other, it is said that any provisions so attracted must be confined in their application to the parties named in the agreement. The latter construction gives no effect to the words "for all purposes" added to sec. 24 in 1920 (see Act No. 31 of 1920, sec. 12). It renders, so far as I can see, all

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agreements quite ineffective as to members of organizations who are not actually named as parties to the agreement. They can neither take advantage of the agreement (*Mallinson* v. *Scottish Australian Investment Co.* (1)), nor can it be enforced against them. It does not run counter perhaps to the actual decision in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co.* (2), but the opinions given in that case trend in the opposite direction. But none of these considerations are decisive on the question of construction, and in the end the precise words of the enactment are the governing test.

The memorandum of the agreement when certified and filed "shall, *as between the parties to the agreement*, have the same effect as, and be deemed to be, an award for all purposes." The agreement is to be in the same position, in my opinion, as if the Court had made an award and limited its application to the parties named in the award. There is nothing in the Arbitration Act to prohibit such an award (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (3)). Clearly sec. 29, so far as applicable, would apply to such an award, and particularly the provisions of sec. 29 (*ba*). But the provisions of sec. 29 (*a*) and (*b*) would not be applicable to the award any more than they are to an agreement which is given the effect of an award under sec. 24.

If the provisions of sec. 29 (*ba*) can be applied to an award which is limited to certain parties in an industrial dispute, I can see no sound reason for refusing to apply it to an agreement which has the effect of an award between named parties. The truth is that the words "between the parties to the agreement" in sec. 24 indicate the extent of the settlement of the industrial dispute, and do not define the limit of the operation of the agreement. The words "shall have the same effect as, and be deemed to be, an award for all purposes" provide for the operation of the agreement, and are a statutory direction to carry out and execute the agreement in

(1) 28 C.L.R., 66. (2) 29 C.L.R., 106.
(3) 28 C.L.R., 1, at p. 9.

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the same manner as if it were an award in partial settlement of the industrial dispute.

As the majority of the Court are of a contrary opinion, it becomes unnecessary to consider whether sec. 29 (*ba*) is within the competence of Parliament.

Appeal dismissed with costs.

Solicitor for the appellant, *H. H. Hoare.*

Solicitors for the respondent, *Derham, Robertson & Derham.*

B. L.

[HIGH COURT OF AUSTRALIA.]

RYAN . . . . . PLAINTIFF;

AND

DAVIES BROTHERS LIMITED . . . DEFENDANT.

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MELBOURNE, *Oct.* 26, 27.

SYDNEY, *Nov.* 28.

KNOX C.J., HIGGINS and STARKE JJ.

Practice—High Court—Action of tort—Trial by jury—Judgment for defendant with costs—Death of plaintiff after institution of appeal—Right of personal representative to continue appeal—Actio personalis moritur cum personâ—Appeal as to costs—High Court Procedure Act 1903-1915 (*No.* 7 *of* 1903—*No.* 5 *of* 1915), *sec.* 39—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 27—*Rules of the High Court* 1911, *Part I., Order XII., rr.* 1, 4, 5; *Order LIV., r.* 1; *Order LVII., r.* 8; *Part II., Sec. V., r.* 1.

The right of the personal representative of a party to an action to continue an appeal of that party exists in actions in which the cause of action would not have survived the death of one of the parties.

Held, therefore, that where in an action in the High Court for libel tried before a jury a verdict had been given for the defendant and judgment for costs had been entered against the plaintiff who, after instituting an appeal to the Full Court, had died, the executor of the plaintiff was entitled to an order making him a party to the action and authorizing him to carry on and prosecute the appeal.

Twycross v. *Grant*, 4 C.P.D., 40, distinguished.