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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.

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Since under Order LIV., r. 1, of the *Rules of the High Court* 1911 the costs of a cause which is tried by a jury follow the event unless good cause is shown, sec. 27 of the *Judiciary Act* 1903-1920 does not prevent an appeal as to costs in such a cause.

An executor to whom probate is granted by a State Court derives his title from the will and not from the grant of probate, and, therefore, may be permitted to carry on an appeal instituted by his testator in an action in the High Court for a libel published in all the States.

SUMMONS referred to the Full Court of the High Court.

An action for libel was brought in the High Court by Thomas Joseph Ryan, who resided in Brisbane, Queensland, against Davies Bros. Ltd. of Hobart, Tasmania, proprietors and publishers of the *Mercury* newspaper. The action was tried in Melbourne in June 1921 by *Starke* J. and a jury of twelve men who found a verdict for the defendant. Upon that verdict judgment was on 16th June 1921 entered that "the plaintiff recover nothing against the defendant and that the defendant recover against the plaintiff its costs of this action (including the costs of discovery and of the shorthand notes of the proceedings) to be taxed." On 6th July 1921 the plaintiff gave notice of appeal to the Full Court from that judgment, asking that the verdict should be set aside, and the judgment set aside and reversed, and that a verdict and judgment should be entered for the plaintiff with costs to be assessed, or alternatively that a new trial should be had. The grounds of the appeal were substantially that the verdict was against evidence, that the trial Judge misdirected the jury in several respects, and that evidence was wrongly admitted and rejected. The plaintiff died on 1st August 1921, the appeal not then having been set down for hearing. By his will the plaintiff appointed the Public Curator of Queensland sole executor, and on 19th October 1921 probate of that will was duly granted to the Public Curator by the Supreme Court of Queensland. On 4th October 1921 the Public Curator took out a summons for an order that he be substituted for the plaintiff as appellant in the cause. The summons came on for hearing on 7th October before *Higgins* J. in Chambers, who amended the summons by adding an application that the appeal be set down for hearing, and referred the summons as so amended to the Full Court.

The summons now came on for hearing before the Full Court.

J. R. Macfarlan K.C. and *Owen Dixon*, for the applicant. Under sec. 39 (2) of the *High Court Procedure Act* the personal representative of a deceased party is entitled to appeal, and he cannot be in a worse position where an appeal has already been instituted than where it has not been instituted. Under Order XII., r. 1, of the *Rules of the High Court* a matter—which includes any proceeding in the Court (sec. 2 of the *High Court Procedure Act*), and therefore an appeal—is not abated by the death of one of the parties, and under r. 4 an order may be made that the applicant carry on the appeal. The maxim *Actio personalis moritur cum personâ* does not apply; for the cause of action has merged in the judgment, and it is of the judgment that the applicant complains, for it has to be satisfied out of the assets which he has to administer.

[KNOX C.J. referred to *Blakeway* v. *Patteshall* (1); *Twycross* v. *Grant* (2).

[STARKE J. referred to *Howard* v. *Howard* (3).]

The right of an executor to impeach a judgment of this kind is a matter of substantive right, and if the Rules stand in the way, or make no provision, the Court has inherent jurisdiction to give the proper relief. The true meaning of the rule *Actio personalis moritur cum personâ* is that in an action based on tort the right to damages does not pass to the personal representative of the person who had the right, and the liability to damages does not after the death of the person liable devolve upon the assets of that person. When, however, there is a judgment in such an action, the matter *transit in rem judicatam* and the assets of either party are bound, and, if one is dead, are bound in the hands of his personal representative. The latter has then a right to come as an ordinary debtor and say that the judgment is wrong. At common law every judgment might be challenged by the executor of the judgment debtor (*Day's Common Law Procedure Acts*, 2nd ed., p. 126; *Archbold's Common Law Procedure Act*, 5th ed., vol. II., p. 408; *R.* v. *Ayliffe and Freke* (4)). By a bill of exceptions

(1) (1894) 1 Q.B., 247.
(2) 4 C.P.D., 40.
(3) 30 L.R. Ir., 340, at p. 347.
(4) 1 Show., 13.

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and writ of error he could have the judgment reversed. That shows the existence of a substantive right in an executor to have such a judgment as that in the present case reversed. The applicant is in a position to be joined as a party upon the ground that he derives title from the will of the plaintiff. He relies on the grant of probate not as his title but only as proof of the will under which alone he derives title (*Meyappa Chetty* v. *Supramanian Chetty* (1); *Hughes* v. *West* (2)). If the Court be of opinion that the Rules do not cover the case, but that there is a right in the applicant independent of procedure to get rid of the judgment, directions should be given under Order LVII., r. 8. Independently of that, Order XII., r. 4, applies. That rule is to be taken into the Appeal Rules (*Rules of the High Court*, Part II., Sec. V., r. 1), and there it relates to the right of an appellant to appeal from a judgment (see *Williams* v. *Australian Mutual Provident Society* (3)). [Counsel also referred to *Haywood* v. *Faraker* (4).]

Bryant K.C. (with him *Reynolds*), for the defendant. The appeal was not set down for hearing within the time fixed by the Rules, and, as the defendant has a vested right in the judgment (*E. Ryan & Sons Ltd.* v. *Rounsevell* (5)), the Court will not enlarge the time for setting down in the absence of conduct on the part of the defendant giving the other side an equity to have the case set down. Some explanation of the delay is necessary (*Delph Singh* v. *Karbowsky* (6)). This Court has no jurisdiction under the Rules to make an order adding the applicant as a party and allowing him to prosecute an appeal, and if the making of such an order is a matter of discretion the Court should not make it, because the appeal is solely as to costs. When in an action for tort there is a verdict for the defendant on the issues of fact and a judgment with a consequential order for costs, there are two orders, one the order for judgment for the defendant and the other the order for costs. The executor is only interested in the order for costs. Rules 1, 2 and 8 of Order XII. show that those rules only apply during the pendency of the proceedings and prior to judgment. If a plaintiff fails in an

(1) (1916) 1 A.C., 603, at p. 608.
(2) 13 L.R. Ir., 224.
(3) 2 C.L.R., 385.
(4) (1915) W.N., 11.
(5) 10 C.L.R., 176.
(6) 18 C.L.R., 197.

action for tort and there is an order for costs made against him, there is no power to permit his executor to come in and object to the judgment. If this were not so, the reasoning in *Twycross* v. *Grant* (1) would have been unnecessary. In considering whether the executor may carry on an appeal the cause of action must be looked at, and if it does not survive the executor has not the right to carry on the appeal (*Finlay* v. *Chirney* (2)). [Counsel referred to *Davoren* v. *Wootton* (3); *Hatchard* v. *Mège* (4); *Doggett* v. *Eastern Counties Railway Co.* (5); *Williams on Executors*, 11th ed., pp. 608, 672.] After final judgment in an action for tort there cannot be a substitution of a plaintiff to carry on an appeal (*Attorney-General* v. *Birmingham Corporation* (6); *Arnison* v. *Smith* (7)). The executor cannot carry on the appeal because the cause of action is not his. He cannot attack the verdict because the cause of action has gone, and he cannot attack the order for costs because that is ancillary to the order which decided the issues (*Brown* v. *Feeney* (8); *Farrands* v. *Melbourne Corporation* (9)).

[HIGGINS J. referred to *Reid* v. *Cumming* (10).]

An executor who continues proceedings of his testator makes himself liable for costs *ab initio* (*Boynton* v. *Boynton* (11)). The Public Curator is a corporation sole, and execution cannot be levied against him.

Owen Dixon, in reply, referred to *Palmer* v. *Cohen* (12); *Kramer* v. *Waymark* (13); *Chitty's Archbold*, 9th ed., vol. II., p. 1444.

Cur. adv. vult.

THE COURT delivered the following written judgment:— Nov. 28.

The Hon. Thomas Joseph Ryan brought an action for libel in this Court against Davies Bros. Ltd., the printers and publishers of the newspaper called the Hobart *Mercury*. The action

(1) 4 C.P.D., 40.
(2) 20 Q.B.D., 494, at p. 498.
(3) (1900) 1 I.R., 273.
(4) 18 Q.B.D., 771.
(5) L.R. 6 Ch., 474.
(6) 15 Ch. D., 423.
(7) 40 Ch. D., 567.
(8) (1906) 1 K.B., 563.
(9) (1909) V.L.R., 531; 31 A.L.T., 78.
(10) 22 C.L.R., 147.
(11) 4 App. Cas., 733.
(12) 2 B. & Ad., 966.
(13) L.R. 1 Ex., 241.

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was tried in Melbourne in June 1921 by *Starke* J. with a jury of twelve men. A verdict was found for the defendant, and the judgment was that "the plaintiff recover nothing against the defendant and that the defendant recover against the plaintiff its costs of this action (including the costs of discovery and of the shorthand notes of the proceedings) to be taxed." These costs are not yet taxed, but it is beyond question that they will amount to a considerable sum in money. On 6th July 1921 Ryan gave notice of appeal, claiming an order setting aside the verdict and reversing the judgment, and an order that verdict and judgment be entered for him for damages to be assessed or for a new trial. Substantially the grounds of appeal are that the verdict was against evidence, that the trial Judge misdirected the jury in several respects and that evidence was wrongly admitted and rejected. Ryan died on 1st August 1921, but the appeal had not been set down for hearing at the time of his death. Ryan left a will by which he appointed the Public Curator of Queensland sole executor, and probate of this will was duly granted on 19th October 1921 to the Curator by the proper authority in Queensland. On 4th October 1921 the Curator took out a summons in Chambers, intituled in the action, for an order that he be substituted for Ryan as the appellant in the cause; and this summons, as amended by adding an application that the appeal be set down for hearing, was referred on 7th October by *Higgins* J. to the Full Court. It was admitted that the appeal ought to have been set down ten days at least before 26th September (*Rules of the High Court*, Part II., Sec. I., r. 9). The principal question for our decision is whether the proceedings upon the notice of appeal given by Ryan can be continued by his executor.

As a general rule the death of a party pending appeal does not destroy and end the appeal. It may be continued by appropriate proceedings. It was argued, however, that the right of an executor to continue an appeal of his testator cannot apply to cases in which the original cause of action on which the action was brought would not have survived the death of a party to the action. *Actio personalis moritur cum personâ*, or the right of action for tort is put an end to by the death of either party (*Pollock on Torts*, 10th ed., p.

64; *United Collieries Ltd.* v. *Simpson* (1)). The fallacy in the argument resides, in our opinion, in the assumption that an obligation upon a judgment in respect of an *actio personalis* remains impressed with the character of the original cause of action or wrong. The maxim is not, as has been said, a very rational part of the law, but the extension now suggested is opposed to both reason and authority. This can be demonstrated more easily in the case of an action in which judgment has been entered for the plaintiff. The right of action for the original wrong has merged in the judgment, and a new, higher and different obligation has been created by the judgment (*King* v. *Hoare* (2)). The right under the judgment has never been treated as an *actio personalis* or a right of action based upon the original wrong. The right to enforce the judgment survives to the personal representative of the deceased (*Williams on Executors*, 9th ed., vol. II., p. 1614; *Whitacres* v. *Onsley* (3); *Farrands* v. *Melbourne Corporation* (4)), and also the right to maintain that judgment to a Court of final appeal (see *Carr* v. *Rischer* (5); *Lewis* v. *St. Louis and Iron Mountain Railroad Co.* (6)). The obligation upon the judgment is thus at once beyond the limits of the doctrine expressed in the maxim already referred to, because according to that doctrine the right of action is put an end to by the death of either party. If the obligation on the judgment survives for the benefit of the representative of the plaintiff, the burden of discharging that obligation falls upon the defendant and his representative. And the defendant and his representative must have the right of attacking and destroying the judgment by appeal or other legal process.

We can now turn to the present case. An action for tort was brought wherein judgment was entered for the defendant and it was adjudged that the defendant recover against the plaintiff its costs of action. The plaintiff appealed, but died pending his appeal. The obligation created by the judgment to pay the costs does not end with the death of the plaintiff. It survives to the defendant and can be enforced against the plaintiff's representative. It is an

(1) (1909) A.C., 383, at p. 391.
(2) 13 M. & W., 494, at p. 504.
(3) Dyer, 322.
(4) (1909) V.L.R., 531; 31 A.L.T., 78.
(5) 119 N.Y., 117.
(6) 21 Am. Rep., 385.

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obligation which the plaintiff's representative must discharge out of the assets of his testator.

If this obligation survives the death of either party to the original action, then it cannot be an *actio personalis* within the doctrine expressed by the maxim already mentioned. But, says the defendant, even if the verdict and judgment be erroneous, still the original cause of action cannot be restored by reversal of the judgment nor can a new trial be had. The plaintiff is dead; and, if his original cause of action cannot be treated as merged in a judgment which is reversed, then that original cause of action must necessarily have ended also with the death of the plaintiff, and cannot survive to his representative. All this is true and may be admitted. Yet it does not meet the point that an erroneous judgment of the Court (for this is the hypothesis upon which the argument proceeds) casts an obligation upon the representative of the plaintiff to pay a sum of money for costs out of the assets in his hands.

An old case, *R.* v. *Ayliffe and Freke* (1), nearly covers the position. Ayliffe was attainted and executed for treason. Freke, as his executor, brought a writ of error. "All the Court" (including *Holt* C.J.) "held that . . . the executor being injured by an erroneous attainder, might bring the writ of error: though by some it is necessary to aver a personal estate, for otherwise he is no ways damnified; whereas an heir is, though there be nothing descended to him, because of the corruption of blood." The attainder of Ayliffe forfeited his goods and deprived the executor of what would otherwise have come to his hands as assets of Ayliffe's estate. Consequently the executor could bring his writ of error.

The costs ordered to be paid by the plaintiff in the present case were not, of course, assets in his estate, but the order leads to the depletion of those assets in the hands of the executor.

Twycross v. *Grant* (2) was relied upon as an authority to the contrary. An action was there brought to recover moneys from the promoters of a public company because a prospectus omitted to disclose certain facts, contrary to the provisions of the *Companies Act* of 1867. Judgment was pronounced for the plaintiff for £700, and the defendant took an appeal to the House of Lords. Before

(1) 1 Show., 13. (2) 4 C.P.D., 40.

this appeal came on for hearing, the plaintiff died and his administratrix applied for and obtained an order that she "be made a party to the action, and that she be at liberty to carry on and prosecute the same against the defendants." A summons was taken out to set aside this order, but was dismissed because the original cause of action was one that survived to the representative of the plaintiff. The reasoning upon which *Twycross's Case* was based is, so it is argued, quite unnecessary if the view of the Curator is correct. It would have been sufficient to say that the judgment for the plaintiff for £700 created a new, higher and different obligation which survived to his personal representative. The case turns probably upon the state of the record and the precise application made by the administratrix. The judgment in favour of the plaintiff had not been entered up when the plaintiff died. This was subsequently done under a *nunc pro tunc* order (1). The application of the administratrix was that she be made a party *to the action* and to carry on and prosecute *the same* (2). So apparently the object of the administratrix's proceedings was to obtain a judgment and then enforce it. And to obtain a judgment it seems probable that her advisers thought that she must show that the original cause of action survived to her (see per *Field* J. (3)). But whether they were right in this view or not is immaterial for our purposes. It explains the action taken in the case, and in no way contravenes the view we take in this case.

We ought to refer to sec. 27 of the *Judiciary Act* and say that the costs awarded in this case were not in the discretion of the Court. Under Order LIV., r. 1, these costs followed the event unless for good cause the trial Judge otherwise ordered. There is therefore nothing to prevent an appeal as to costs in any action tried with a jury. We refer also to sec. 39 of the *High Court Procedure Act* for the purpose of pointing out that the section does not cover this case, for the appeal had been instituted by Ryan. But we express no further opinion upon the construction or operation of that section.

Another contention of the learned counsel for the defendant is untenable. It was that the executor of the plaintiff, who has only

(1) 27 W.R., 87.
(2) 4 C.P.D., at p. 41.
(3) 4 C.P.D., at p. 42.

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proved his testator's will in Queensland, could not be allowed to continue the appeal. No doubt the action was brought in respect of libel published in every State of Australia. The executor, however, takes his title from the will of the testator and not from the probate. It is true that authentication of the will by probate or some similar grant in the State in which he desires to collect assets and do other acts is required. At the moment he has assets in Queensland, and has proved the will there. Those assets are liable to satisfy the judgment which he asserts is erroneous. Consequently, to protect those assets he must be admitted to continue the appeal.

The only other question is the form of order that this Court should make. The combined effect of Order XII., r. 4, and Appeal Rules, Sec. V., r. 1, enables the Court to mould the form to suit the circumstances of the case.

Order that the Public Curator of Queensland as executor of the will of Thomas Joseph Ryan be made a party to the action and to the appeal instituted herein and that the said appeal be carried on and prosecuted by the said Public Curator as such executor in like manner as such appeal might have been carried on and prosecuted by the said Thomas Joseph Ryan if he had not died. Order that the Public Curator as such executor have liberty to set down the appeal for hearing ten days at least before the first sitting of this Court in Melbourne in the year 1922 *for the hearing of appeals. Order that the costs of this summons and of the argument before the Full Court be costs in the appeal. Certify for counsel in Chambers.*

Solicitors for the applicant, *Frank Brennan & Rundle.*

Solicitors for the defendant, *Dobson, Mitchell & Allport*, Hobart, by *Moule, Hamilton & Kiddle.*

B. L.