

MIDDLETON, J., in a written judgment, said that the action was brought to recover damages alleged to have been sustained by the flooding of the plaintiff's land occasioned by certain works constructed by the defendants. The judgment of the trial Judge, as varied by the Appellate Division, directed a reference to fix the amount of the damages sustained, and the payment of costs, up to and including the judgment, forthwith after taxation. See 44 O.L.R. 43, 53.

After the pronouncement of this judgment, the plaintiff died, and Jeanette Smith applied, in the proper Surrogate Court, for probate of the plaintiff's will, in which she was named executrix. Probate had not been granted, but, on the 7th April, 1919, a *præcipe* order issued under the provisions of Rule 301, upon the application of Jeanette Smith, as executrix of the plaintiff, giving her leave to continue the action.

The costs of the action had been taxed and allowed at the sum of \$1,295.

Jeanette Smith, as executrix, on the 19th April, issued a writ of *fi. fa.* for these costs, and placed it in the hands of the sheriff for execution. In the meantime a motion had been made by the defendants to set aside and discharge the order, on the ground that its issue was irregular because the plaintiff by revivor had not obtained letters probate, and that she was unable to give a discharge to the defendants for the costs of the action.

Upon the argument of the appeal, there was a misconception as to the meaning and the inter-relation of Rules 301 and 566. Under Rule 301, where there is a transmission of interest by reason of death, an order to continue the action may be obtained on *præcipe*; and the operation of this Rule is not confined to the case of death before judgment, but extends to all cases in which it is necessary to continue the action: e.g., for the purpose of prosecuting a reference which has been ordered: *Chambers v. Kitchen* (1894-5), 16 P.R. 219, 17 P.R. 3. The *præcipe* order was rightly obtained upon the allegation of the executrix of her title. She was not required to produce or shew to the Court the letters probate. She derived her title, not from the probate, but from the will itself. When it is necessary for an executrix to prove her representative title, this can only be done by the production of letters probate granted by the proper Surrogate Court. Upon this motion, it being shewn that there is a contest still pending in the Surrogate Court as to the granting of probate there, the proper course is to stay the further proceedings in the action until that contest is at an end. This stay should not be affected by the making of a substantive order, but by a withholding of judgment until the Surrogate Court shall have finally determined the question which it alone has jurisdiction to resolve.