

SECOND DIVISIONAL COURT.

MARCH 19TH, 1919.

## \*HAWLEY v. HAND.

*Costs—Death of Defendant pendente Lite—Revivor in Name of Executrix—Rule 301—Order to Continue Issued by Executrix—Costs of Action Adjudged against her—Personal Liability—Assets of Deceased—Discretion of Trial Judge—Appeal without Leave.*

Appeal by Jessica H. Hand, executrix of Havelock E. Hand, the original defendant, from the judgment of FALCONBRIDGE, C.J.K.B., 15 O.W.N. 170, in so far as it required the appellant personally to pay the costs of the action, which had been continued against her, upon the death of her husband pendente lite, under an order to proceed issued under Rule 301.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, LATCHFORD, and MIDDLETON, JJ.

J. M. Ferguson, for the appellant.

R. S. Robertson and J. W. Pickup, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering the judgment of the Court at the conclusion of the hearing, said that the proper form of judgment against an executor has always been that the plaintiff recover debt and costs out of the assets of the testator, if the defendant have so much, but, if not, the costs out of the defendant's own property: executors and administrators have no advantage over other litigants as to costs; they were always liable to pay them de bonis propriis if there were no assets.

In this case the executrix voluntarily assumed the defence of the action, taking out herself the order continuing it against her—no doubt in the expectation or hope that the judgment would be in her favour; but it was not.

There was, therefore, no good reason in law, or as a matter of discretion, why she should not pay the costs out of the estate or personally according to the rule stated.

It was, of course, enough to dispose of this appeal to consider that there was power so to impose costs as mentioned: the Court could not review the discretion exercised in awarding them, no leave to appeal having been obtained.

The appeal should be dismissed.

\* This case and all others so marked to be reported in the Ontario Law Reports.