1924

*Oct. 14, 15.
*Nov. 19.

DAVID LEW (PLAINTIFF) .....APPELLANT;

AND

WING LEE (DEFENDANT) .....RESPONDENT.

Action—Malicious prosecution—Jury awarding greater damages than claimed—Trial judge reducing amount—Judgment reversed by appellate court—Appeal to Supreme Court of Canada—Death of plaintiff—Revivor of appeal by representative—New trial—Order conditional.

The appellant sued the respondent for malicious prosecution claiming $490 as special damages and $5,000 as general damages. At the trial, the jury rendered a verdict awarding the appellant $490 as special damages and $10,000 as general damages. The appellant did not ask to amend his claim, but, through his counsel, requested that his recovery be restricted to the amount demanded in his statement of claim. Thereupon, without consent of the respondent, the trial judge entered judgment for $490 special damages and $5,000 general damages. The Court of Appeal set aside this judgment and ordered a new trial. The appellant appealed to this court and obtained stay of proceedings on giving security for costs. Before his appeal came on for hearing, the appellant died. His personal representative moved to be allowed to enter a suggestion of death in order to continue the prosecution of the appeal. The respondent contested the application upon the maxim *actio personalis moritur cum persona.*

Held, that the application should be granted. The personal cause of action of the appellant for tort was merged in the judgment of the trial court; and although that judgment had been vacated on appeal,

*PRESENT:—Anglin, C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

the effect of the merger was not entirely gone. The "cause of action" preferred in this appeal is not the *injuria plus damnum* which the appellant originally asserted in the action, but his right to have restored the judgment of which he complains that he has been wrongly deprived and that "cause of action" survives to and is enforceable by his personal representative.

Held also that the judgment of the trial judge for $490 for special damages should be restored. As to general damages, the court may require the defendant, as a condition of affirming the order for a new trial, to undertake not to raise the objection that the original cause of action was extinguished by the plaintiff's death. Should that undertaking be refused, the appeal should be allowed with costs and the judgment of the trial court restored *in toto*.

Judgment of the Court of Appeal (33 B.C. Rep. 271) varied.

APPEAL from the decision of the Court of Appeal for British Columbia, (1) reversing the judgment of the trial judge with a jury and ordering a new trial.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

E. Lafleur K.C. for the appellant.

Sir Chs. H. Tupper K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—In this action for malicious prosecution the plaintiff claimed $490 as special damages and $5,000 general damages. At the trial the jury rendered a verdict in his favour awarding the $490 special damages claimed and $10,000 general damages. The plaintiff did not ask to amend his claim, but, through his counsel, requested that his recovery be restricted to the amount demanded in his statement of claim. Thereupon, without consent of the defendant, the learned trial judge entered judgment for $490 special damages and for $5,000 general damages.

On appeal by the defendant the Court of Appeal of British Columbia (Macdonald C.J., Martin and Galliher JJ.A.) set aside this judgment, Mr. Justice Martin dissenting, and directed a new trial.

The plaintiff appealed to this court asking the restoration of the judgment of the trial court. He obtained the

(1) [1924] 33 B.C. Rep. 271; [1924] 1 W.W.R. 744.

1924
LEW
v.
LEE.

Anglin C.J.C.

usual stay of proceedings on giving security for costs. Before his appeal came on for hearing, however, he was murdered.

Instead of entering a suggestion of death as provided for by Supreme Court rule No. 50, whereupon the respondent might have moved under rule 51 to set such suggestion aside, the appellant moved before a judge in chambers to be allowed to enter the suggestion. The judge applied to directed that the motion should be brought before the court when the appeal should be reached on the docket on which it had been inscribed and the court accordingly heard the motion. It may, we think, conveniently be dealt with as if the respondent were moving under rule 51 to set aside a suggestion entered under rule 50.

The maxim *actio personalis moritur cum persona* is no doubt applicable to an action for malicious prosecution and, so far as we are aware, there is no legislation in force in British Columbia restricting its application before verdict. A cause of action for malicious prosecution is not one which survives. But by order XVII, rule 1, of the rules of the Supreme Court of British Columbia (which embodies s. 139 of the Imperial statutes 15-16 Vict., c. 76; 17 Car. 2, c. 8, s. 1), it is provided that

> whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death.

A fortiori the right of enforcing a judgment obtained before a plaintiff's death will survive to his personal representative; so too the right of defending such a judgment if subsequently attacked. Had the Court of Appeal affirmed the judgment of the trial court there could have been no doubt either as to the right of the defendant to prosecute an appeal to this court, notwithstanding the plaintiff's death, or as to the right of the personal representative of the latter to uphold the judgment if attacked. The purely personal cause of action for the tort had become merged in the judgment and the issue on such an appeal would be the legality and validity of that judgment and of the further judgment affirming it. (*Cox's Administrator* vs. *Whitfield* (1).

(1) [1851] 18 Ala. R. 738.

But it is urged that where, as here, the verdict for the plaintiff at the trial and the judgment founded on it had been set aside and vacated on appeal, the effect of the merger was gone and the plaintiff had been remitted to his original cause of action—and that died with him. No doubt if he had acquiesced in the judgment of the Court of Appeal that would have been his position. His personal representative could not prosecute the new trial ordered; that would be a proceeding on the original cause of action which had died with the plaintiff.

Where, however, there has not been such acquiescence but, on the contrary, an appeal to this court has been launched in due course to have the vacated verdict and judgment restored, the "cause of action" preferred in such an appeal is not the *injuria plus damnum* which the plaintiff originally asserted in the action, but his right to have restored the judgment of which he complains that he has been wrongly deprived, and that "cause of action" in our opinion, survives to and is enforceable by his personal representative. Although the converse case of the death of a sole plaintiff respondent is covered by the authority of *Stace* v. *Griffith* (1), we have found no English or Canadian decision dealing with the point now before us. *White* v. *Parker* (2) is not in point. It was directly involved, however, in the case of *Ellis* v. *Brooks* (3). The right of the personal representative of a plaintiff, who had died after a judgment had been rendered in her favour based on a "cause of action" for tort, to prosecute an appeal to have that judgment restored by a second appellate court on the ground that it had been erroneously set aside by the first appellate court, was there upheld. The reasoning of the court in that case commends itself to us. In the case of *Coughlin* vs. *District of Columbia,* before the Supreme Court of the United States (4), the syllabus in part reads as follows:—

3. When a judgment for the plaintiff in a personal action was erroneously set aside, and a subsequent final judgment against him is brought up by writ of error, pending which he dies, this court will affirm the first judgment *nunc pro tunc.*

(1) [1869] 6 Moore P.C. N.S., 18 at p. 23.
(2) [1889] 16 Can. S.C.R. 699.
(3) [1908] 101 Tex. 591 at p. 594.
(4) [1882] 106 U.S.R. 7 at p. 11.

1924
LEW
v.
LEE.
Anglin C.J.C.

The practice of the House of Lords appears to be to require revivor of the cause in the court below before entertaining a petition for revivor of an appeal abated by the death of a party whose interests are not fully represented by other parties to the appeal. Denison and Scott's House of Lords' Appeal Practice, 95, 199; Macqueen's House of Lords' Practice, pp. 241 et seq. The modern practice in the Privy Council is similar. Beckwith, Privy Council Practice (1912), 305. Our rules 50 and 51 do not contemplate such a procedure. They provide for the matter of revivor being dealt with here.

An appeal to this court is not a step in the cause (Supreme Court Act, s. 73), as is usually the case with appeals to a provincial appellate court. *Grasett* v. *Carter* (1). Entertaining the view that the issue before this court is not that determined by the verdict at the trial, but rather is whether sufficient grounds existed for setting aside that verdict and the judgment based upon it; that if that judgment should be restored it will operate as if it had never been set aside and *proprio vigore* as of its original date; and that the appellant's "cause of action" before this court is in substance and reality the alleged error that intervened in the Court of Appeal and induced that tribunal to vacate a judgment which he maintains had been rightly entered by the trial court, we are of the opinion that that "cause of action" is not subject to the operation of the maxim *actio personalis moritur cum persona*. In the judgment obtained from the trial court the plaintiff had an asset. The defendant thereby became bound to pay him $5,490 and costs. Deprived of that asset by the Court of Appeal the plaintiff by his appeal to this court sought to recover it. The right to prosecute that appeal survives to his personal representative. See note to *Wheatley* vs. *Lane* (2). A suggestion of the appellant's death may, therefore, rightly be entered under rule 50 and when so entered will not be set aside under rule 51.

Subject to the disposition of the motion just dealt with the merits of the appeal were argued.

(1) [1884] 6 O.R. 584.

(2) 1 Wm. Saun. 216.

In directing judgment for the plaintiff the learned trial judge said that the amount of it ($5,490)

> is much greater than would have been rendered by a judge trying the case without a jury.

In the Court of Appeal the learned Chief Justice said:—

> The jury, I think, showed a decided bias against the defendant; their verdict was for $10,000 damages, whereas the plaintiff claimed but $5,000.

Martin J.A. thought "the reduced amount not unreasonable"; Galliher J.A. said:—

> I have no hesitation in saying that the verdict brought in by the jury as to the amount of damages is wholly unwarranted by the evidence and shows on its face bias and prejudice * * * The very unreasonableness of the amount awarded by the jury answers itself, and I think it is a proper case for a new trial.

Although, with the exception of Mr. Justice Galliher, none of them says so explicitly, it would seem that all of the judges below regarded the verdict of $10,000 for general damages as excessive—so grossly excessive that it showed that the jury had been misled by prejudice or passion and that it therefore could not be maintained. No other ground for setting it aside is suggested. After a study of the record we are of the opinion that as to the general damages that view is correct. Indeed $5,000 would seem a large recovery having regard to all the circumstances of the case, and especially to the intervention and advice of Mr. Arthur Leighton, which, however open to criticism, it must not be forgotten was that of a solicitor of the Supreme Court of British Columbia, and of Alfred G. King who was a provincial land surveyor.

While of the opinion that had the verdict been sustainable for the sum for which it was rendered it would have been within the power of the learned trial judge to accept the plaintiff's renunciation of the excess over the amount of his claim and to enter judgment for the latter sum, we are equally satisfied that the verdict being bad because it was grossly excessive he had not that power. The doctrine of *Watt* v. *Watt* (1), and *Bray* v. *Ford* (2), is, we think, conclusive on this point. The defendant had a statutory right to have the general damages again assessed by a jury, R.S.B.C. 1911, c. 58, s. 53; O. 36, r. 2. The case, therefore, does not fall within order LVIII, rule 5a.

But the award of $490 for special damages is severable from that for $10,000 special damages. The allowance of

(1) [1905] A.C. 115.
(2) [1896] A.C. 44.

1924
LEW
v.
LEE.
Anglin C.J.C.

$490 is not open to attack for excess. Other grounds upon which the defendant sought to impeach the verdict cannot prevail. There was evidence on which a jury might well find the other elements in the cause of action in favour of the plaintiff.

There is, therefore, no reason why, upon the proper suggestion being entered under our rule 50, the verdict finding the defendant liable and awarding $490 as special damages should not be restored and with it the judgment for the plaintiff for that amount and for the costs of the action down to and inclusive of the judgment of the trial court. *Barber & Co.* v. *Deutsche Bank* (1).

Moreover, under all the circumstances disclosed in the record, it seems eminently proper that the granting of a new trial for a re-assessment of the general damages should be subject to terms which will preclude the defendant escaping, by reason of the plaintiff's death, liability for whatever amount a jury might properly award. Direct authority for what we propose to do is somewhat meagre. But it is well established that in granting a new trial the court exercises a judicial discretion and may impose terms as to any matter within its jurisdiction. (*Watt* v. *Watt* (2), per Lord Davey.) Notwithstanding the absence from the British Columbia statutes and rules of provisions corresponding to the English rules 6 and 7 of order XXXIX, the Court of Appeal of that province is, in our opinion, clothed with a like discretion. So far as we are aware doubt has never been thrown on the view expressed by the Court of Exchequer in *Griffith* v. *Williams* (3) (a case of breach of promise of marriage where the plaintiff had died after a rule nisi for a new trial had been obtained but before argument), that a court of appeal may, in order to prevent a defeat of justice, make its order for a new trial conditional upon the defendant undertaking not to raise the objection that the cause of action was extinguished by the plaintiff's death and may direct that the verdict at such new trial be entered as of the date of that set aside. On the contrary that decision seems to have

(1) [1919] A.C. 304. (2) [1905] A.C. 115, at p. 122.
(3) [1830] 1 Cromp. & J. 47.

had the assent of Lord Tenterden C.J. in *Palmer* v. *Cohen* (1). Garrow B. in the *Griffith Case* also referred to a precedent for such a conditional order in an earlier case in the Court of King's Bench in which he had been of counsel.

If the plaintiff's death had occurred while this action was pending in the Court of Appeal there can be little doubt that that court would have assented to an application for the imposition of terms similar to those indicated in the *Griffiths Case* (1). We are by s. 51 of the Supreme Court Act empowered to give the judgment which the Court of Appeal should have given. In the exercise of the jurisdiction thus conferred we deem it proper, in varying the judgment of the Court of Appeal by restoring the judgment of the trial court for special damages and costs as above indicated, and limiting the new trial which it directs to a re-assessment of the general damages, to impose on the defendant, as a condition of maintaining the order for a new trial to that extent, that he shall give the undertaking above indicated. If this alternative is accepted by written election filed with the registrar within one month there will be no costs to either party of the appeals to this court and the Court of Appeal. But should such election not be made, upon the proper suggestion being entered under rule 50, the appeal will be allowed with costs here and in the Court of Appeal and the judgment of the learned trial judge restored.

The direction for the entry of the formal judgment of the court was in these terms:

"Revivor of appeal allowed.

"On a proper suggestion being entered under rule 50 the appeal will be allowed with costs here and in the Court of Appeal and the judgment of the learned trial judge restored, unless the defendant shall elect, by writing to be filed with the registrar within one month, for a new trial limited to a re-assessment of the general damages claimed and subject to the condition that no exception based on the death of the plaintiff will be taken to such new trial proceeding and that judgment may thereafter be entered for the amount awarded on such new trial as of the date

(1) [1831] 2 B. & Ad. 966.

1924
LEW
v.
LEE.
Anglin C.J.C.

of the verdict in part set aside. Should the defendant so elect for such new trial, upon entry of the aforesaid suggestion the judgment of the Court of Appeal will be varied accordingly and the judgment of the learned trial judge will be restored for the sum of $490 special damages and costs of action down to and inclusive of the judgment at the trial court and there will be no costs to either party of the appeals to this court and to the Court of Appeal."

Appeal allowed in part.

Solicitor for the appellant: *F. S. Cunliffe.*
Solicitor for the respondent: *Arthur Leighton.*