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Trapnall ex parte.

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TRAPNALL ex parte.

1. PRACTICE IN SUPREME COURT.

This court will not, before an appeal is taken, revive a cause against a legal representative, in order to enable him to appeal from a judgment or decree rendered against his testator or intestate prior to his death.

2.—*Appeal by executor from judgment against his testator.*

The correct practice in such cases is for the legal representative to file a petition with the clerk of this court showing the facts, and his representative capacity, and take an appeal in his own name; whereupon, if the adverse party desires to controvert the fact of the death, or representative character of the party praying the appeal, he can be heard in this court.

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MOTION for Appeal by the executor from a decree against his testator.

*Clark & Williams*, for the motion.

HARRISON, J. In the matter of the application of George Trapnall, executor of Benjamin C. Trapnall, to suggest in this court the death of his testator, since the rendition in the chancery court of Pulaski county of the decree in the case of *Hill and wife and others v. Benjamin C. Trapnall and another*, and have the case revived here against him as such executor, and be permitted to file the transcript, and take an appeal in the case, we will state that after consideration, we think this court can take no action before the appeal is taken and the case reaches here. We are, however, of the opinion that, inasmuch as the executor is entitled to the interests and rights which belonged to his testator, he can as effectually and to the same extent prosecute the appeal as his testator might have done. The remedy by appeal, we conceive to be analogous to that by writ of error, and we can see no good reason, if the executor may sue out a writ of error after the death of his testator, why he may not bring up his case for review, also by appeal.

We will suggest, as probably the most convenient, if not the best course to pursue in a case like the present, that the executor or administrator present a petition to the clerk, stating the facts, the rendition of the judgment or decree, the subsequent death of the testator or intestate, the probate of the will or appointment of the administrator, etc., and pray to be allowed to file the transcript and take the appeal in his own name; upon which the clerk should grant the appeal; file the transcript, and docket the case. Then if the other side wishes to controvert the fact of the death, or the representative character of the party bringing the appeal, he can be heard in this court.