1975 *Present :* **Tennekoon, C. J., Pathirana, J., and Vythialingam, J.**

NESARATNAM, widow of KANDIAHPILLAI, Appellant *and* K. VAITHILINGAM, Respondent

S. C. 264/70 (F)—D. C. Jaffna D/1092

Civil Procedure Code—Sections 341, 338 (3), 394 (2)—*Whether executor de son tort can be made respondent to application under Section* 341 (1)—*Do the words "executor or administrator" include executor de son tort.*

Held :

(1) (Tennekoon C. J. *dissenting*) that an executor *de son tort* is a legal representative of the deceased within the meaning of section 341 (1) of the Civil Procedure Code.

(2) An order for alimony pendente lite in favour of the wife necessarily comes to an end upon the death of the husband.

APPEAL from an Order of the District Court, Jaffna.

C. Thiagalingam with *C. Chellappah* and *S. Ruthiramoorthy* for Appellant.

C. Ranganathan with *M. Sivarajasingham* for Respondent.

Cur. adv. vult

November 27, 1975. TENNEKOON, C. J.—

I have read the judgment of my brother Pathirana, J., and I would like to say with respect that I do not find myself in agreement with him.

The question that arises in this case is whether the executor *de son tort* can be made respondent to an application under section 341 (1) of the Civil Procedure Code. This section reads as follows :—

"341 (1) If the judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the court which passed it by petition, to which the legal representative of the deceased shall be made respondent, to execute the same against the legal representative of the deceased.

(2) Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and for the purpose of ascertaining such liability, the court executing the decree may on the application of the decree-holder compel the said representative to produce such accounts as it think fit."

Section 338 (3) appearing in the same Chapter as section 341 provides as follows :—

"338 (3). For the purposes of this Chapter the term 'legal representative' shall mean an executor or administrator, or in the case of an estate below the value of two thousand five hundred rupees, the next of kin who have adiated the inheritance :

Provided, however, that in the event of any dispute arising as to who is the legal representative, the provisions of section 397 shall, *mutatis mutandis,* apply."

It is an admitted fact that the deceased judgment-debtor left an estate over the value of Rs. 2,500. It is urged on behalf of the appellant that the words 'executor or administrator' include executor *de son tort.*

The definition of the term 'legal representative' contained in section 338(3) is the same as that contained in Chapter XXV of the Civil Procedure Code dealing with the continuation of actions after the death of a plaintiff or a defendant or after any other alteration of a party's status. Section 394(2) occurring in that Chapter reads as follows :—

"394 (2). For the purposes of this Chapter legal representative shall mean on executor or administrator, or in the case of an estate below the value of two thousand five hundred rupees the next of kin who have adiated the inheritance."

Our Civil Procedure Code contains among other things, the law relating to testamentary actions under which provision is made for the declaration of persons as executors of wills and for the appointment of administrators of the estates of deceased persons. Under those provisions where a person shall die leaving a will, the person named as executor in the will may apply to a District Court to have the will proved and to have probate thereof issued to him ; also any person interested may apply to such court to have the will proved, and to obtain grant to himself of administration of the estate with copy of the will annexed.

(Section 518). Section 519 goes on to provide that upon application for probate being made, and "*in every case in which the estate of the testator amounts to or exceeds in value Rs. 2,500,* whether any such application shall have been made or not, it shall be obligatory on the court to, and the court shall, issue probate of the will to the executor or executors named in the will and if there is no executor resident in Ceylon competent and willing to act, the court shall issue letters of administration with or without the will annexed to some person competent to apply for the same or to some other person who the court thinks fit person to be appointed administrator." Section 530 makes it possible for application to be made for grant of administration of deceased person's property, where the deceased has died without making a will, or where the will cannot be found. Section 547 then provides that no action shall be maintainable for the recovery of any property of any person dying testate or intestate, *where such estate or effects amount to or exceed in value the sum of Rs.* 2,500, unless grant of probate or letters of administration shall first have been issued to some person or persons as executor or administrator of such testator or intestate.

In this context it seems to me that when sections 338 (3) and 394 (2) refer to an executor or administrator, the reference is intended to be to an executor or administrator who has obtained probate of a will or received the grant of letters of administration ; the wider interpretation given to the term 'legal representative' in these two sections in the case of estates below the value of Rs. 2,500 is I think fairly conclusive, for it is only in that class of cases that there may not be any testamentary proceedings in a District Court.

There can be no doubt that an administrator is a creature of the court, and his character as legal representative vests in him only upon his being appointed as such by order of a competent court. An executor is, of course, a creature of the will and may be regarded as coming into existence as soon as the will becomes an operative document, that is to say, when the testator dies ; however, although an executor under the will may represent the estate outside court even before obtaining probate his rights as executor can be established in court only on production of probate.

It is to be observed that the definition of the term 'legal representative' contained in section 394 (2) has to serve both in the case of the death of a plaintiff and in the case of the death of a defendant. Vide sections 394 (1), 395 and 398. In this situation it is difficult to give to the words 'executor or administrator' a meaning which will include the executor *de son tort* for it would

be absurd to say that the executor *de son tort* can be substituted in place of a deceased plaintiff. An executor *de son tort* is a person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor while there is no rightful executor or administrator in existence. An executor *de son tort* is answerable to the rightful executor or administrator or to any creditor or legatee of the deceased to the extent of the assets which may have come into his hand. Thus, while there can be no anomaly in making an executor *de son tort* answerable to a judgment-creditor, there is no basis on which he can be given the right to continue an action instituted by a deceased plaintiff. An executor *de son tort* is in no sense a legal representative of a deceased person or of his estate. He is only a person in a position of liability to answer for debts of the deceased to the extent of the assets he has taken possession of.

The Indian Code of Civil Procedure uses the expression 'legal representative', but this expression was not defined in the Code of 1882. Some Indian courts, in this situation, gave a wide interpretation to the expression 'legal representative' so as to include within that term persons who without title either as executors or administrators were in possession of the estate of the deceased and could be made answerable to a plaintiff who was in the position of a creditor of the estate. The Indian courts however have never gone so far as to hold that an executor *de son tort* can take the place of a dead plaintiff. The Indian Code of Civil Procedure of 1908, however, defined 'legal representative' as follows :—

> "Legal representative means a person who in law represents the estate of deceased person and includes any person who intermeddles with the estate of the deceased ....."

It is to be noted that this definition eschews the use of the terms 'executor' and 'administrator' and for that reason is quite different from our definition. Even with this definition the courts in India were soon faced with the problem as to whether a person who intermeddles with the estate of the deceased can be substituted in place of a deceased plaintiff, and they were driven to the conclusion that despite the definition, an intermeddler could not be substituted in place of a deceased plaintiff. The Indian Succession Act 1925 provides in section 211—

> "The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such."

That Act provides, as does our Civil Procedure Code, for testamentary proceedings and the grant of probate of wills and for the grant of letters of administration in certain situations.

Accordingly it has been held in India that in the case of a party to whom Succession Act applies the legal representative who can be substituted in place of a deceased plaintiff or defendant is only his executor or administrator. If, therefore, such party dies pending a suit and no representation is taken for his estate, the opposite party must move the court to have an administrator appointed as no right to the property of intestate's estate can be established in a court unless letters of administration have first been granted. See *Bornett Bros. Ltd. vs. Fowle*, A. I. R. 1925, Rangoon 186. In the same way if any person to whom the provisions relating to testamentary actions contained in the Civil Procedure Code apply, dies pending a suit and no executor or administrator has yet been appointed, the action can only be continued after an executor or administrator is duly appointed and such executor or administratior substituted in place of the deceased party.

There are of course those provisions of the Income Tax Ordinance, the Inland Revenue Act and the Estate Duty Ordinance in which the expression 'executor or administrator' is so defined or has been so interpreted by court as to include a person who intermeddles with the property of a deceased tax payer. This is understandable for under our law an executor *de son tort* is liable to a creditor and the tax payer being in the position of debtor and the State in the position of creditor, the extended meaning given to the expression 'executor' is in keeping with the common law concept of the liabilities of an executor *de son tort*. I do not think that this same approach can be made in the case of the definition of the term 'legal representative' contained in sections 338 (3) and 394 (2) ; for one thing, the expression 'executor and administrator' appear in a statute which in other parts provides for appointment of executors and administrators by courts and for another, these two sections do not contain the words 'and includes person who intermeddles with the estate of the deceased persons' nor the words 'or other person administering the estate of the deceased person.'

I might add that having regard to the fact that an executor *de son tort* is liable to answer for the debts of the deceased to the extent of the assets he has taken possession of, there is a good case for permitting the holder of a decree for money to execute the same against the executor *de son tort* of a deceased judgment-debtor ; but that must be done by the legislature after taking into account the impact of such a provision on the

collection of taxes due to the State from the estate of a deceased judgement-debtor ; it is not for the court under the guise of interpretation to alter the law so as to include within the definition of 'legal representative' an executor *de son tort* merely because the court thinks that would be good policy to do so.

For these reasons I prefer the view taken by the Supreme Court in the case of *Sarlin vs. James Fernando* (63 N. L. R. 34) to that taken, without reasons stated, in *Dahanayake vs. Jayasinghe* (71 C. L. W. 112).

In the result, I am of the opinion that the learned District Judge was right in dismissing the application of the plaintiff-petitioner to levy execution against the respondent Kandiahpillai Vaithilingam in his capacity as a person who intermeddled with the estate of the deceased. I would like to add that I agree with my brother Pathirana, J. that in any event the plaintiff will only be entitled to alimony pendente lite from 6th August, 1965 to 18th September 1966, together with the sum of Rs. 1,500 ordered as costs.

I would dismiss the appeal with costs.

PATHIRANA, J.—

This appeal is a sequel to the dismissal by the learned District Judge of an application under section 341(1) of the Civil Procedure Code made by the plaintiff-petitioner-appellant, who was a holder of a decree for arrears of alimony pendente lite and costs ordered by the District Court against her deceased husband, to have the respondent, a son of the deceased by the first bed of her husband, appointed legal representative of the deceased and to have the said decree against the respondent executed as legal representative of the deceased defendant. The plaintiff sought to make the respondent legal representative of the deceased as executor *de son tort* on the ground that he had intermeddled with the assets belonging to the deceased defendant.

The learned District Judge refused the application on the ground that it was premature for the reason that if the application was allowed there may not be sufficient funds to meet the claims by the Commissioner of Inland Revenue for income tax and for estate duty, and that "the dues to the Commissioner of Inland Revenue will have to be met before the other duties of the deceased can be satisfied."

The plaintiff-petitioner-appellant sued her late husband for a decree for judicial separation, for permanent alimony and alimony pendente lite. On the 6th of August, 1965 the defendant was ordered to pay the plaintiff Rs. 1,500 per month as alimony

pendente lite and Rs. 1,000 as costs to prosecute the action. The defendant appealed from the order to the Supreme Court on the 5th of February, 1966. This Court ordered the defendant to pay an additional sum of Rs. 500 to prosecute the appeal. While the appeal was pending the defendant died on the 18th of September, 1966. This appeal was declared abated by this Court. The defendant had during his lifetime neither paid the alimony pendente lite nor the costs ordered by Court to the plaintiff. The plaintiff claimed a sum aggregating to Rs. 39,250.

The respondent filed objections denying that the amount claimed by the plaintiff was due from the estate of the deceased. He further stated that in any event the plaintiff can claim alimony pendente lite only from the date of the order, that is, 6th August, 1965, till the death of the deceased on the 18th of September, 1966, that is, for a period of 13½ months. He further took up the position that the plaintiff should make a claim in the Testamentary cases Nos. 4350 and 5376 of the District Court of Negombo which were pending at that time in respect of the estate of the deceased. The respondent, however, admitted that he was collecting rents and incomes from certain properties and was paying the income tax and other taxes and Bank overdrafts and had deposited whatever monies that came into his hands in the Bank and that he was making every effort to preserve the estate. He also said that another son of the deceased and the plaintiff-petitioner had applied for Letters of Administration in the said Testamentary case No. 4356. The Testamentary cases were pending in the District Court of Negombo. The respondent took up the position that the plaintiff must make the claim as a liability from the estate in the said Testamentary cases.

We do not think that the ground on which the learned District Judge dismissed the application, namely, that the application was premature and that if he allowed the application there may not be sufficient funds to meet the claims of the Inland Revenue Department, can be sustained.

In our view there is no legal impediment in the way of a creditor who holds an unsatisfied decree against a judgment-debtor from proceeding to execute a decree against the legal representative of the debtor in the event of the judgment-debtor dying before the decree has been fully executed, on the ground that if the decree is executed there may not be sufficient funds to meet the claim against the deceased for income tax or estate duty. In our view Section 27 of the Estate Duty Ordinance which states that subject to the provisions of the Section, the estate duty payable by an executor shall be a first charge on all the property of the deceased and the provisions of Section 109 of the

Inland Revenue Act that tax in default shall be a first charge on the assets of the defaulter provided the necessary safeguards for the collection of estate duty or income tax from a deceased person.

If this contention is to prevail, then by parity of reasoning a claim by a creditor against an executor *de son tort* who has intermeddled with the assets of the deceased for debts due to him from the deceased can be defeated on this ground. But the law is now settled that such a claim against an executor *de son tort* can succeed and in execution against an executor *de son tort* such property of the deceased as is found in his possession can properly be seized and made liable in execution. *Appuhamy vs. Cole*, 8 C.W.R., 28.

Mr. Thiagalingam for the plaintiff-appellant submitted that an executor *de son tort* is a legal representative of the deceased within the meaning of Section 341 (1) of the Civil Procedure Code in Chapter XXII of the Civil Procedure Code. For the purpose of this chapter " legal representative " is defined in Section 338 (3) to mean " an executor, or administrator, or in the case of an estate below the value of Rs. 2,500, the next of kin who have adiated the inheritance. " Under Chapter XXV which deals with continuation of actions after alteration of a party's status ; in Section 394 (2) " legal representative " is defined in similar terms. Mr. Ranganathan for the respondent on the contrary submitted that a strict interpretation should be given to the term " legal representative " to mean only an " executor " or " administrator " and should not be extended to include an executor *de son tort.*

In order to determine this question it would be necessary to understand what makes a person an executor *de son tort and* what are his rights, duties and liabilities. If anyone who is neither executor nor administrator intermeddles with the assets of the deceased, or does any act characteristic of the office of executor, he thereby makes himself what is called in law an executor of his own wrong or more usually an executor *de son tort.* The slightest act of intermeddling with the goods of the deceased will make a person an executor *de son tort.* He who takes upon himself the office of executor by intrusion not being so constituted by the deceased such a person makes himself liable to the obligations of an executor *de son tort* by his own wrong. Williams on Executors and Administrators, 4th Edition, p. 28. An executor de son tort has all the liabilities, but none of the privileges that attach to the duly constituted executor. He is liable :

(i) to an action by the rightful executor or administrator ;

(ii) to be sued as executor by the creditor or legatee ;

(iii) to be made accountable for all death duties on the estate—Mustoe : Executors and Administrators, 4th Ed. p. 7.

In *Prins v. Peiris*—(1901), 4 N. L. R., 353, Bonser, C.J. took the view that the English law of executor de son tort was in force in Ceylon and that it was too late in the day to argue that it was not in force.

In Arunachalam v. Arunachalam—36 N. L. R., 49 at 51—MacDonald, C. J. held that to be an executor *de son tort* did not necessarily imply that you had done anything morally wrong. It simply means that you have been acting as executor of an estate without legal right to that position and that having so acted you are liable as if you have been executor with a legal right to that position.

In *Perera v. Pathuma*—21 N. L. R., p. 76 at 77 : Schneider, A. J. held that an executor is liable to be sued as executor *de son tort* by the creditor or legatee as well as by the lawful executor or administrator, but he cannot bring an action in right of the deceased.

An executor *de son tort* will only be liable to the extent of the assets that comes into his hands—*Perera v. Manuel,* 2 C. L. W., p. 343.

In *Dahanayake v. Jayasinghe*—71 C. L. W., p. 112, Sri Skanda Rajah, J. (with Alles, J. agreeing) held that the term " executor " in Section 394 (2) of the Civil Procedure Code which is in identical terms with Section 338 (3) : includes an executor *de son tort.* No reasons, however, have been given why this extended meaning was given to the term " executor " except that ' there was ample evidence to indicate that the appellant intermeddled with her late husband's estate and thereby constituted herself executrix *de son tort.*"

In *Junaid v. Commissioner of Inland Revenue.*— 65 N. L. R., p. 561, it was held that an executor *de son tort* falls within the definition of " executor " in Section 2 of the Income Tax Ordinance. Section 2 reads as follows :—

> " An executor means any executor, administrator or other person administering the estate of a deceased person, and includes a trustee acting under the trust created by the last will of the author of the trust. "

This extended meaning was given to the word "executor" by Sansoni, J. in this case in spite of the rule that statutes relating to taxation, like penal statutes should bestrictly construed. No doubt in Section 2, in addition to the words "any executor, administrator" there occurs the words "or other person administering the estate." Sansoni, J. at page 564 observed as follows :—

> ' By the words ' any executor, administrator or other person administering the estate' it is obvious that the Legislature intended to cast as wide a net as possible, and to include all persons who may have taken part in the administration of the estate whether they had a legal title to do so or not. The term ' executor ' itself does not necessarily mean a rightful executor, that is to say, a person who has been appointed an executor by the deceased. It could also include one who has acted as an executor of an estate without a legal right to the position."

The Estate Duties Ordinance Chapter 241 by Section 80 defines "executor" as follows :—

> "Executor or administrator of a deceased person, and includes, as regards any obligation under this Ordinance, any person who takes possession of, or *intermeddles with the property of a deceased person*, and any person who has applied or is entitled to apply to a District Court for the grant or resealing of probate or letters of administration in respect of the estate of a deceased person."

In *Sarlin v. James Fernando.*— 63 N. L. R., p. 34 Basnayake, C. J. however, held that in the case of an estate above administrable value it is only the executor or administrator that the plaintiff can in law specify as a person whom he desires to be substituted as the defendant in place of the deceased. The Court had no power to enter on the record in place of the deceased defendant the name of any person other than his administrator or executor.

Basnayake, C. J. observes as follows at page 40 :—

> "It is for the party on whom the duty of taking the necessary steps is imposed by the Civil Procedure Code to advise himself as to what in law is the correct step to be taken and to take that step ..... in Section 394 and the other sections of Chapter XXV the expression ' legal representative ' means an executor or administrator or in the case of an estate below the value of two thousands five

hundred rupees the next of kin who have adiated the inheritance. (s. 394 (2). In the instant case the estate is not below the value of two thousand five hundred rupees and it is only the executor or administrator that the plaintiff-respondent could in law have specified as the person whom he desired to be made the defendant instead of the deceased and the Court had no power to enter on the record in the place of the deceased defendant the name of any person other than his executor or administrator. The substitution of the deceased defendant's widow and children appearing by their guardian-ad-litem not being authorised by law has no legal effect and does not carry with it the consequences of a proper substitution under section 398. The proceedings subsequent to the death of the defendant-appellant have therefore been against persons who in law cannot be substituted in place of the deceased in the suit.

A person who is not entitled to take the place of the deceased defendant appellant in the suit and whom the Court has no power to appoint to take his place has no locus standi in judicio. The deceased defendant was therefore not in law represented at the hearing of his appeal which was dismissed without such representation.

(Section 394(2) is similiar to Section 338(3).

In this case the deceased defendant's widow had applied for letters of administration in respect of the estate of the deceased. Order Nisi was made under Section 531 and was made absolute under Section 534. The power of administration had not been conferred on her by issue of a grant of administration. Basnayake, C. J. at page 41, held :—

"The circumstances that the widow had applied for Letters of Administration in respect of the estate of the deceased and that the order nisi made under Section 531 had been made absolute under Section 534 did not make her the administrator, as under Section 52 of the Estate Duty Ordinance, the Court is forbidden to grant Letters of administration until the Commissioner has issued a certificate that the estate duty for the payment of which the administrator is liable under the Ordinance has been paid or secured or that the administrator is not liable to pay estate duty under the Ordinance, and that certificate has been filed in Court. It would appear by implication from Section 540 that the power of administration is not conferred on the administrator and cannot be exercised by him until it is conveyed by the issue of a grant of administration. In the instant case no such power had been conferred on the widow at the material time."

On the facts in this case there was clear intermeddling with the estate by the widow at least in that she had applied for letters of administration. Therefore, on the construction by Basnayake, C.J. an executor *de son tort* cannot come within the definition of executor or administrator within the meaning of Section 338 or Section 394(2) of the Civil Procedure Code.

We have, therefore, two conflicting decisions of this Court on the question whether the term executor or administrator in Section 338(3) and 394(2) includes an executor *de son tort.* It will be useful to examine the question under the Indian Civil Procedure Code. Section 50 of the Indian Civil Procedure Code, is in the same term as Section 341(1) of our Civil Procedure Code. It states :—

> "The holder of the decree may apply to the Court which passes it to execute the same against the legal representative of the deceased."

The term "legal representative", however, is defined differently to our definition of "legal representative" in Sections 338(3) and 394(2) of our Civil Procedure Code. "Legal representative" is defined in Section 2(ii) of the Indian Civil Procedure Code to mean, "a person in law representing an estate of the deceased person and includes a person who intermeddles with the estate of the deceased, and where a party so sued in a representative capacity, the person on whom the estate devolves on the death of the party so suing or sued." It is apparent, therefore, that the definition, "legal representative" in the Indian Civil Procedure Code is wider in scope and includes an executor *de son tort,* i. e., a person who intermeddles with the estate of the deceased. In the original Indian Civil Procedure Code of 1882 according to Mulla in his Commentary on the Civil Procedure Code of India, 10th Edition, p. 13, the expression, "legal representative" was not defined in the Code of 1882. In its strictest sense the term "legal representative" was limited to an executor and administrator only and in the cases under the Indian Succession Act that is still the case. But its meaning was extended after many conflicting decisions to include heirs and also persons who without title either as executors, administrators or heirs were in possession of the estate of the deceased. In view of the conflicting decisions, Mulla states that the present definition settles the meaning of the term to include even a person who had intermeddled with an estate, who in our law is called an executor *de son tort.*

The trend seems to favour an extended meaning to be given to the term executor or administrator as to include an executor *de son tort.* Both reason and logic seem to favour this view, particularly in interpreting Section 341 of the Civil Procedure

Code. If, for example, a debtor owes money to another and the debtor dies, it is settled law that the creditor can proceed against a person who intermeddles with the assets of the deceased. *Prins vs. Peiris* (1901) 4 N. L. R.., p.353.) There is no reason why when an action has been commenced by a creditor against the debtor and the debtor dies, an executor *de son tort* who intermeddles with the estate cannot be made a legal representative within the meaning of Section 341 for the purpose of executing the decree. An executor *de son tort* is essentially a person who has all the liabilities, but none of the privileges that is attached to a duly constituted executor—Vide Mustoe Executors and Administrators, 4th Edition, P. 7.

An essential characteristic of an executor *de son tort* is that as a result of taking upon himself the functions of an executor by intrusion he renders himself liable to be sued by a creditor of the deceased. It must logically follow that such a person renders himself by his conduct to be made a legal representative for the purpose of executing an unsatisfied decree against a deceased-debtor as he incurs the liabilities of his usurped office. We are, therefore, of the view that in section 341 read with section 338(3) an executor *de son tort* comes within the meaning of an executor or administrator. It is not disputed that on the admissions made by the respondent in his affidavit in the District Court he has clearly intermeddled with the assets of the deceased defendant. The respondent is therefore a legal representative for the purpose of Section 341 in this application.

Mr. Ranganathan also raised an objection to the application of the plaintiff-appellant that it did not contain a prayer for the execution of the decree. The plaintiff-appellant only prayed that the respondent as executor *de son tort* be appointed legal representative of the deceased defendant under Section 341 of the Civil Procedure Code. The objection raised is too technical. We are satisfied that the intention of the plaintiff-appellant was to invoke the provisions of Section 341(1) to have the respondent appointed legal representative for the purpose of executing the decree against him.

The next question we have to decide is the quantum of alimony the plaintiff-appellant will be entitled to. In her application she has stated that on the date of the order, that is. 6th August, 1965, neither the alimony pendente lite nor the costs had been paid. She therefore, claims Rs. 34,750 as alimony pendente lite and Rs. 1,500 as costs.

Mr. Ranganathan submits that an order for alimony pendente lite in favour of the wife must necessarily come to an end on the death of her husband, that is the deceased-defendant. For this reason the plaintiff will only be entitled to alimony pendente

lite from 6th August, 1965 to 18th September, 1966. He has cited the following passages from The South African Law of Husband and Wife by H. R. Hahlo, 2nd Edition, p. 328, in support of his contention :

> " Where it is the death of the wife which dissolves the marriage, a maintenance order in her favour necessarily comes to an end. Whether the same holds true if the marriage is dissolved by the husband's death, the wife surviving, cannot be regarded as settled, but it is submitted that the answer must be in the affirmative. A maintenance order in connection with a decree of judicial separation is intended to provide the innocent spouse with maintenance *durante separatione* and therefore necessarily lapses when the ephemeral separation under the order is superseded by the permanent separation of death. "

At page 346 there is also the following passages—

> ' There can be little doubt that in Roman-Dutch Law the widow had no claim for maintenance out of her husband's estate. In accordance with Roman law principles, duties of support, being regarded as personal to the person obligated, were not passively transmissible to his or her heirs. "

In *Bennett' vs Bennett's Executrix,* 1959 (1) South African Law Report—876 at page 880, de Villiers, A. J. has said—

> " The question is one of some difficulty, and for various reasons my time for research and consideration has been very limited. On principle, however it seems that a spouse's obligation of maintaining the other spouse must terminate with the death of the other. "

We, therefore hold that the plaintiff is entitled to alimony pendente lite only from 6th August, 1965 to 18th September, 1966, and also for the sum of Rs. 1,500 as costs.

We allow the appeal and set aside the order of the learned District Judge dismissing the application of the plaintiff-petitioner and we direct that the respondent, Kandiahpillai Vythialingam, be made a legal representative of the estate of the deceased in terms of Section 341 of the Civil Procedure Code. The plaintiff-appellant is entitled to alimony pendente lite from 6th August, 1965 to 18th September, 1966, that for a period of 13 1|2 months, at Rs. 1,500 per month, and a sum of Rs. 1,500 as costs. We direct writ be issued by the District Court against the respondent for the recovery of the said sum.

The plaintiff-appellant will be entitled to costs here and also costs in the District Court in respect of this application against the respondent.

VYTHIALINGM, J—I agree.

Appeal allowed.