

1927

Present: Fisher C.J. and Driberg J.

FERNANDO v. LIVERA et al.

138—D. C. Negombo, 1,551.

Actio personalis—Death of plaintiff—Patrimonial loss—Lex Aquilia.

Where, in an action to recover damages for injuries inflicted by the defendant, the plaintiff died after service of summons, the action may be continued by the heirs in respect of the claim for patrimonial loss to the estate of the deceased.

THE plaintiff sued the defendants for the recovery of a sum of Rs. 2,564.50, damages sustained by him as the result of an assault on him by the defendants. The plaintiff alleged that owing to the injuries inflicted he was disabled from doing any work and also that he had incurred expense in having his injuries treated. After service of summons but before answer was filed the plaintiff died. The appellant, his widow, then applied to be substituted as plaintiff and to be allowed to continue the action, limiting the claim to Rs. 728.50, which was the amount that could be claimed on so much of the cause of action as survived to his legal representative. Her application was disallowed.

Rajapakse, for appellant.—The petitioners confine their claim to damages sustained by the plaintiff's estate. Damages are not claimed on account of *injuria* in the limited sense, viz., wrongs to the honour of a person and those in which there was an element of insult (*contumelia*). In the latter case the cause of action is extinguished by the death of the party. The petitioners restrict their claim to actual expenses incurred by the deceased and loss of income. Counsel cited *Morice's English and Roman-Dutch law* and *De Villiers on Injuries and 4 Maasdorp*, p. 19.

1927.
Fernando v.
Livers.

Croos Da Brera, for respondent.—The word *injuria* is used in a broad sense by Voet (see *De Villiers*), no exception is made in the case of wrongs to persons. The general rule appears to be that in all actions for damages for *injuria* the death of the party injured defeats the action. The plaintiff died before *litis contestatio* and the right of action is extinguished. *Litis contestatio* arises after close of pleadings (*3 Nathan 1597; Banda v. Cader, 16 N. L. R. 79*).

Rajapakse in reply.—The rule as to *litis contestatio* applies in the case of an action for damages for *injuria* involving *contumelia* and not where damages are claimed for patrimonial loss.

October 7, 1927. DRIEBERG A.J.—

The plaintiff brought this action on March 17, 1927, for the recovery of Rs. 2,564.50, damages sustained by him as the result of an assault on him by the defendants respondents, on October 11, 1926; the plaint alleged that as the result of injuries inflicted on the plaintiff, he was disabled from doing any kind of work and would not be able to follow his usual occupation for about three and a half years; also that he had incurred expenses in having his injuries treated.

After service of summons but before answer was filed the plaintiff died. The appellant, his widow, then applied to be substituted as plaintiff with her minor child and to be allowed to continue the action, limiting her claim to Rs. 728.50, which she said was the amount which could be claimed on so much of the cause of action as survived to his legal representative. Her petition does not set out the claim fully, but it is clear that the intention was to limit it to medical expenses and other matters which diminished the value of his estate and thereby caused what is known in the Roman-Dutch law as patrimonial loss.

The appellant's application was dismissed on the ground that the claim was one for damages sustained by the appellant and her child by the death of the plaintiff and that therefore, though she could herself bring an action for relief, she could not as the legal representative of the plaintiff continue the action brought by him.

1927.

Durrango

A.J.

Fernando v.
Livera.

The learned District Judge was led into this error by an observation of Counsel that the plaintiff had died as the result of the injuries; even if this was the fact the order is not right for the action was not one of that nature and the appellant sought relief as regards a part of the claim which the plaintiff made in his life time.

Mr. Croos Da Brera for the respondents could not support the order on this ground. He, however, contended that as this was an action of injury, the cause of action would only survive if the plaintiff died after *litis contestatio* and that the plaintiff died before that stage in the action was reached.

This rule of law however only applies to that class of actions of injury such as libel and slander which have for their object reparation for a sentimental hurt independent of any patrimonial loss. Where the wrongful loss has caused patrimonial loss and comes within the principles of the *Lex Aquilia* the action does not lapse with the death of the plaintiff before *litis contestatio* but endures to the benefit of the heirs. The difference between the two classes of actions is fully explained in *de Villiers, Roman and Roman-Dutch law of injuries*, pp. 182, 183, 235, 236, and *Maasdorp, Institutes of Cape law, vol. IV., p. 19.*

The petitioner and her child as the heirs of the plaintiff are therefore entitled to be substituted as plaintiffs and to continue the action for the recovery of such damages as they are by law entitled to claim.

The case will go back for the substitution of the petitioner and her child as plaintiffs and for further proceedings.

As the claim is now limited to Rs. 728.50, the action will continue for the purpose of all costs, duties, and charges as if it was brought for that amount.

The respondents will pay to the petitioner her costs of the appeal and of the proceedings of July 27.

Set aside.