

JUAH E. BUCHANAN, Appellant, v. THOMAS E.
BUCHANAN and INEZ MALONEY, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
MONTSERRADO COUNTY.

Argued March 21, 1963. Decided May 10, 1963.

An appeal from a judgment dismissing an action for divorce on the ground of adultery is not abated by the death of the appellee.

Appellant sued appellee Buchanan for divorce on the ground of adultery. The circuit court dismissed the suit on proof that the marriage between appellant and appellee Buchanan had been terminated by decree of a Mexican court. After appellant had completed an appeal to the Supreme Court from the judgment of the circuit court, appellee Buchanan died, and counsel for appellees moved to strike the appeal from the docket of the Supreme Court. Appellant filed a motion to note the death of appellee Buchanan on the record and proceed in favor of appellant as surviving party, which *motion* was *granted*.

Morgan, Grimes and Harmon Law Firm for appellant.
Simpson Law Firm for appellees.

MR. CHIEF JUSTICE WILSON delivered the opinion of the Court.

On March 7, 1961, and after the withdrawal of a prior action for divorce, the present appellant instituted a renewed action of divorce *a vinculo matrimonii* against her husband, the late Thomas E. Buchanan, charging him with having cohabited sexually and indulged in notorious adulterous living with one Inez Maloney in the City of Monrovia during the month of October, 1948, and there-

after, in violation of his obligations under a contract of marriage, the said appellant and appellee having been married on October 1, 1948, in the City of Monrovia, County of Montserrado, Republic of Liberia.

When the case was assigned for hearing and disposition of the law issues which had progressed up to and including plaintiff's surrejoinder, Judge James W. Hunter, then presiding over the June, 1961, term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, in ruling on the issues of law, dismissed the action on proof that the appellee had previously terminated said marriage by a decree of divorce which he had obtained in the Republic of Mexico.

Appellant, who had challenged the legality of appellee's Mexican divorce, noted exceptions to the ruling of the circuit court, and appealed to this Court of last resort for review thereof. But before said appeal could be heard by this Court, appellee died.

Upon assignment of the case for review at this term of Court, counsel for appellees filed a one-count motion to strike the case from the docket, assigning as reasons the following:

"That Thomas E. Buchanan, a party to the above case, died in the City of Geneva, Switzerland, on November 26, 1961; and as there is no statutory provision whereby he can be substituted for any other person, said cause should now be stricken from the docket of this Honorable Court."

This motion was filed on March 21, 1963, at 10:15 A.M.

On the same day, within minutes thereafter according to the filing declaration made by the clerk of this Court, appellant filed a motion to note appellee's death on the record and proceed in favor of appellant. Appellant's motion contained four counts which we consider necessary to quote in full as follows:

"1. Appellant and Thomas E. Buchanan, an appellee

herein were lawfully married on October 1, 1948, in the City of Monrovia, Montserrado County, Republic of Liberia, and thereafter lived and cohabited together as man and wife. For some unknown reason, said appellee undertook the institution of a divorce suit against appellant for cruelty on May 17, 1960, which action appellant vigorously resisted, resulting in the withdrawal of said suit by said appellee on June 18, 1960, at which time appellee conceded that said action was unmeritorious. Thereafter, said appellee sought out a compromise with appellant and within a few days thereafter left Liberia on a "health trip." Subsequently, it became known that appellee had gone to the Republic of Mexico to obtain a divorce which he could not obtain in Liberia, thereby disclosing his fraudulent and diabolical intentions. While in Mexico he endeavored to wangle, by fraudulent *ex-parte* means, a divorce decree from a court in Mexico. On said appellee's return to Liberia, he engaged in open, notorious, adulterous living with co-respondent, co-appellee in these proceedings, and when attacked, produced this Mexican divorce decree, purporting to have dissolved the marital contract entered into between appellant and himself in Liberia. Appellant, meanwhile, in protection of her rights, and not recognizing the validity of the decree, suit out this action of divorce for adultery because of said open and notorious adulterous acts.

- "2. The pleadings progressed as far as the sur-rejoinder in the case of the defendant, now appellee, and as far as the rejoinder in the case of the co-respondent, now co-appellee herein.
- "3. His Honor, James W. Hunter, Circuit Judge assigned to preside over the June, 1961, term, of the Circuit Court of the Sixth Judicial Circuit, Mont-

serrado County, called for the disposition of the law issues and dismissed the action on the ground that the plaintiff, having already obtained a foreign divorce notwithstanding the circumstances, is barred from institution of this action against her husband. From this ruling, plaintiff, now appellant, excepted and appealed to this Honorable Court of final resort. During the pendency of said appeal, however, said appellee Thomas E. Buchanan expired, leaving the case undetermined.

- “4. That under the laws of the Republic of Liberia, in the event of the death of a defendant during the pendency of an action in which the right sought to be enforced survives only to the plaintiff, as in this case, of divorce, the action does not abate; the death shall be noted on the record, and the action shall proceed in favor of the surviving party.”

We shall proceed to consider the above-quoted motion, particularly Count 4 thereof. But, before commenting on appellant's right to recover after the death of her husband before the termination of her action of divorce filed against him for adultery, let us examine the controlling statute. Our Domestic Relations Law provides:

“When the wife as plaintiff prevails, the final judgment of the court shall award her not more than one-third of his personal property outright and not more than one-third of his real property for life.” 1956 Code, tit. 10, § 77 (b).

Invoking the above-quoted statute, appellant contended that because marriage constitutes a contract between husband and wife, the breach of which by the husband's adultery entitles the wife to a portion of his personal property outright and a portion of his real property for her natural life, his death could not abate her right to recover from his estate.

Appellant also pointed out that in an action of divorce for adultery, there is an indispensable third party; the

co-respondent; and in this case, the co-respondent Inez Maloney had appeared and joined issue and was not incapacitated to defend the suit.

Appellant relied on the following provision of our Civil Procedure Law:

“In the event of the death of one or more plaintiffs or one or more defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or against the surviving defendants, the action does not abate. The death shall be noted on the record, and the action shall proceed in favor of or against the surviving parties.” 1956 Code, tit. 6, § 100.

Countering the claim of counsel for the appellant, the appellee cited and relied upon the following statutory provision:

“An action for damages for personal injury cannot be maintained by or against representatives or trustees. Except as provided in the last sentence of the fourth paragraph of section 100 of the Civil Procedure Law, the right to bring such action is terminated by the death of either the injured person or the injurer.” 1956 Code, tit. 17, § 12.

But the above-quoted statutory provision expressly applies to actions for damages for personal injuries and is hence clearly inapplicable to actions *ex contractu*. We therefore have no alternative but to deny appellee's motion and grant that of appellant.

The clerk of this Court is hereby ordered to note the death of the appellee, Thomas E. Buchanan, on the record of this Court; and in harmony with § 100 of the 1956 Code, order that the action of divorce *a vinculo matrimonii* presently on appeal to this Court proceed in favor of appellant as the surviving party. And it is so ordered.

Appellant's motion granted.