

1940

*Present : Howard C.J.*

PERERA *v.* PUNCHI APPUHAMY.

*56—C. R. Avissawella, 18,050*

*Administration—Action by son of deceased payee of promissory note—Letters of administration granted pending action—Right to maintain action—Civil Procedure Code, s. 547.*

Plaintiff as eldest son of a deceased intestate instituted this action on August 7, 1939. Letters of administration were issued to plaintiff only on November 3, 1939, on which date the promissory note on which the action was brought was prescribed.

Held, that the plaintiff had an interest in the estate which gave him the right to institute the action and that, after obtaining letters of administration, he was entitled to proceed with the action.

**A** PPEAL from a judgment of the Commissioner of Requests, Avissawella.

J. E. M. Obeysekere (with him H. W. Thambiah), for the plaintiff, appellant.

Cyril E. S. Perera (with him G. G. E. Rodrigo), for the defendant, respondent.

*Cur. adv. vult.*

July 11, 1940. HOWARD C.J.—

This is an appeal by the plaintiff from a judgment of the Commissioner of Requests, Avissawella, dismissing his action with costs. The action was instituted on August 7, 1939, by the plaintiff as administrator of the estate of the late M. G. Perera of Kitulgala. Letters of administration were issued to the plaintiff only on November 3, 1939, on which date the debt which was the subject-matter of the action was prescribed. At the time of the filing of the action the claim which arose out of a promissory note was not prescribed. In dismissing the plaintiff's claim the learned Commissioner has held that the plaintiff had no status to sue on the note at the time the action was instituted. Counsel for the plaintiff in maintaining that the Commissioner came to a wrong decision relies on the cases of *Hassen Hadjar v. Levane Marikar*<sup>1</sup> and *Alagakawandi v. Muttumal*<sup>2</sup>. In the first of these cases it was held that the primary object of section 547 of the Civil Procedure Code is to protect the revenue and that the words "no action shall be maintainable" mean only "shall be capable of being proceeded with". In the second case it was held that it was open to anyone who has an interest in the property of a deceased to institute an action in respect of such property and to proceed to get, at any rate, an interim injunction prior to letters of administration being granted. The words "no action shall be maintainable" in section 547 of the Civil Procedure Code do not amount to the same thing as "no action shall be instituted". If therefore, these cases are good law, it follows that the plaintiff was entitled to sue the defendant on the promissory note inasmuch as being the eldest son of the deceased he had an interest in property.

The respondent's Counsel relies on the case of *Mohamadu v. Jamis Baas*<sup>3</sup>. In that case an action was brought on April 30, 1925, to recover a sum of money alleged to be due by a deceased person. His heirs were made defendants and being infants they appeared by their guardian *ad litem*. On June 1, 1928, an amended plaint was filed in which the appellant who was the administrator appeared as sole defendant. The lower Court had held that the amended plaint would date back to the original plaint in the case. This view of the law as pointed out by Fisher C.J. was wrong inasmuch as the original action was against the heirs, not as persons representing the estate but as persons who have become possessed of the estate. The administrator was not the successor of the heirs in administration of the estate. He was an independent person and the action against him must be taken to have begun on the date on which he was made a defendant, that is to say on June 1, 1928, on which date the debt was prescribed. The case of *Mohamadu v. Jamis Baas* (*supra*) has, therefore, no relevancy so far as the present case is concerned. The plaintiff being entitled to institute proceedings on August 7, 1939, no question of the dating back of the proceedings from November 3, 1939, the day on which he was granted letters of administration, arises.

In these circumstances the appeal must be allowed and judgment entered for the plaintiff with costs in this Court and the Court below.

*Appeal allowed.*

<sup>1</sup> 15 N. L. R. 275.

<sup>2</sup> 22 N. L. R. 111.

<sup>3</sup> 32 N. L. R. 61.