

1930

Present : Fisher C.J.

MOHAMADU v. JAMIS BAAS.

117—C. R. Dandagamuwa, 6,278

Prescription—Action against heirs—Plaint amended—Administrator made defendant—Court of Requests—Order of abatement—Final order—Courts Ordinance, No. 1 of 1889, s. 39.

Where an action was brought to recover money due from a deceased person against the heirs in possession, and the plaint was later amended by substitution of the administrator as defendant,—

Held (on a plea of prescription), that the action must be taken to have been brought against the administrator on the date he was made defendant.

An order setting aside an order of abatement is not a final order within the meaning of section 39 of the Courts Ordinance.

A PPEAL from a judgment of the Commissioner of Requests, Dandagamuwa.

Deraniyagala, for defendant, appellant.

N. E. Weerasooria, for plaintiff, respondent.

February 19, 1930. FISHER C.J.—

In this case an action was brought on April 30, 1925, to recover Rs. 251.35 alleged to be due by a deceased person. His heirs were made defendants as persons "who succeeded to the possession of the estate", and, being infants, they appeared by their guardian *ad litem*. On June 1, 1928, after certain interlocutory proceedings an "amended plaint" was filed in which the present appellant appeared as sole defendant. That plaint alleged that the deceased debtor died "leaving

property over the value of Rs. 1,000, and letters of administration were granted to the defendant abovenamed". Two issues were framed at the trial. The first issue was as to the validity of an order setting aside an order of abatement and the second issue raised the question of prescription. As regards the latter, it is not contested that unless the plaintiff is right in his contention that the action notwithstanding substitution of the present defendant as defendant must be taken to have begun on April 30, 1925, the defendant's plea of prescription must prevail. The learned Commissioner held that the "amended plaint would date back to the original plaint in the case". In my opinion that view is not correct. If the action as originally framed is to be regarded as being against the estate it was wrongly brought, because it was clearly brought in conflict with the provisions in section 547 of the Civil Procedure Code which provides that where a deceased person has left property exceeding in value the sum of Rs. 1,000 no action shall be maintainable for the recovery of any property included in the estate unless probate has been granted or letters of administration have been issued. The deceased man apparently died intestate and it is to be inferred that at the time of the institution of the action on April 30, 1925, no administration had been taken out. In any case, however, the action against the heirs was not the same as an action to recover property included in the estate. Such an action is against the heirs, not as persons representing the estate but as persons who have become possessed of the estate. It is a case of following the assets of the estate into the hands of beneficiaries. The present defendant therefore is not a successor of the heirs in administration of the estate, he is 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. The issue on prescription should, therefore, in my opinion, have been answered in the defendant's favour.

As regards the point raised whether the order setting aside the order of abatement was rightly made or not, I would only say that in my opinion it was not appealable inasmuch as it was not a final order within the meaning of section 39 of the Courts Ordinance, 1889, and therefore it was open to the appellant to raise it as he sought to do.

The decree in the Court of Requests is therefore set aside, and decree will be entered dismissing the action with costs in this Court and in the Court below.

Appeal allowed.
