1943 *Present :* **Keuneman J.**

NAGALINGAM, *et al.*, Appellant, *and* SATHASIVAM, Respondent.

210—C. R. Chavakachcheri, 32,295.

Administrator—Action on promissory note by creditor of deceased—Right to sue before letters.

A creditor of a deceased person is not entitled to sue the administrator of his estate unless the administrator has taken out letters or intermeddled with the estate.

APPEAL from a judgment of the Commissioner of Requests, Chavakachcheri.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for plaintiff, appellant.

L. A. Rajapakse (with him *C. T. Olegasegaram*), for defendant, respondent.

Cur. adv. vult.

March 18, 1943. KEUNEMAN J.—

In this case the plaintiff sued the defendant, who is described in the caption to the plaint "as administrator of the estate of the late K. Kasipillai". The plaint was filed on the March 7, 1942, in respect of a

[1] *6 C. L. Rec. 176.* [2] *29 N. L. R. 321.*

promissory note executed by the deceased on March 9, 1936. The defendant filed answer on May 7, 1942, stating, *inter alia*, that he could not be sued as administrator. In fact, letters of administration were not obtained by the defendant until May 12, 1942. At the trial among the issues framed was one raising the question whether the defendant was the administrator of the said estate at the time of the institution of the action. Certain questions as to whether the defendant carried on the affairs of his father's estate, and as to whether the defendant held himself out as administrator were disallowed by the Commissioner. Later plaintiff's Counsel suggested issue 5, viz: "was the defendant an executor *deeson tort* of the estate of Kasipillai". This issue was disallowed, and in the result the plaintiff's action was dismissed with costs, on the ground that the defendant was not an administrator of the estate at the time of the institution of the action.

Counsel for the appellant contended that this finding was wrong. He cited two cases to me, viz., in the *Goods of Elizabeth Pryse*[1], and *Long and Hebb and other*[2], where it was held that letters of administration relate to the time of the death of the intestate, and therefore an administrator may bring an action of trespass or a trover and conversion for goods of the intestate taken by one before the letters granted to him, otherwise there would be no remedy for the wrong done. Those cases, however, do not deal with the matter of an action against an administrator, who had not at the time obtained letters.

A number of cases have also been cited to me, in which an heir of the intestate has, subject to section 547 of the Civil Procedure Code, been permitted to bring actions against third parties. I do not think that these cases are of any help.

I think the true principle is to be found in the decision of the Privy Council in *Mohideen Hadjiar v. Pitchey*[3].

> "A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased, unless he has either administered, that is intermeddled with the estate, or proved the will."

Their Lordships make it clear that the words "prove the will" are equivalent to "take out probate", and state—

> "It would certainly be a most dangerous doctrine to hold that the creditors could tear an estate to pieces on going through the form of an action against a person who has neither intermeddled with the assets, nor duly clothed himself with a representative character."

I think this applies with even greater force to the case of an administrator.

The case of *Kudhoos v. Joonoos*[4] cited to me, does not help, for this was decided on principles which are not applicable to the present case.

In the case of *Hornigold v. Bryan*[5] the words attributed to Dodderidge and Coke, viz., "The reason why an executor shall be sued before probate, because that otherwise great mischief might happen, for that a bad executor would never then prove the will", are not in conflict

[1] *L. R. 1904, Probate Division 301.*
[2] *82 English Reports, K.B. 760.*
[3] *3 S. C. R. 105–107.*
[4] *15 C. L. W. 133.*
[5] *81 English Reports, K. B., p. 62.*

with the Privy Council decision. For it is made clear that "Proof allowed of there, is by two ways, (1) By insinuation; and (2) In *communi forma*, by showing of *literas testamentarias*".

The narrow reason on which the Commissioner rested his judgment, must then be upheld, but I think he erred in excluding the evidence which was tendered by the plaintiff. Even without issue (5), I am inclined to think that the Commissioner should have allowed evidence, to show that the defendant intermedled with the assets of the deceased. But at any rate, I cannot uphold his reason for excluding issue (5). In substance the allegation was that defendant was a representative of the estate of the deceased.

I accordingly set aside the judgment of the Commissioner, and remit the case for trial of issues (1), (2) and (5) and also issue (4) which the Commissioner has not answered. The Commissioner has answered issue (3) in the affirmative and that finding will stand.

The Commissioner will have a discretion with regard to the costs of the trial already held. As both parties have partially succeeded in appeal, there will be no order for the costs of appeal.

Set aside ; case remitted.