1933 *Present :* **Macdonell C.J. and Drieberg J.**

THORNTON *et al v.* EMANUEL *et al.*

127—D. C. (Inty.) Jaffna, 5,408.

Administration—Estate of person with foreign assets—Power of Ceylon Court to give preference to Ceylon creditors—Concurrence—Seizure of money in administration case—Assets realized in execution—Preference—Civil Procedure Code, s. 352.

Where administration is granted in Ceylon to the estate of a person who was also possessed of assets in a foreign country, which were being administered in that country,—

Held, that the Ceylon Court was not entitled to give priority to creditors in Ceylon unless the foreign court gave preference to creditors of its nationality.

The eleventh respondent obtained judgment in D. C., Colombo, No. 18,082, against the estate of one S for Rs. 16,000. He applied for execution and on April 23, 1928, seized money in deposit in the testamentary case of the District Court of Jaffna, sufficient to meet the claim. The seizure was effected by a notice under section 232 of the Civil Procedure Code to the District Court of Jaffna requesting that the money be held subject to the further orders of the District Court of Colombo. On May 20, 1929, the Jaffna Court was requested by the Colombo Court to bring the money to the credit of D. C. Colombo, No. 18,082. The appellants obtained judgment against the same estate on November 29, 1929, in D. C. No. 24,796, but had not proceeded to execution at the time the claim of the eleventh respondent was considered.

Held (in an application for concurrence by the appellants), that the eleventh respondent was entitled to preference.

APPEAL from an order of the District Judge of Colombo, made in testamentary proceedings of the intestate estate of A. R. A. R. S. M. Somasunderam Chetty who died in India on July 31, 1923. Letters of administration were granted to the attorneys of his two sons, who were in India, and the administration being unsatisfactory, they were

eventually granted to the first respondent, the Secretary of the District Court of Jaffna.

The sons of the intestate who carried on business in Colombo and India under the same *vilasam* were adjudged insolvent and the administration of their insolvent estate was in the hands of the official assignee of Madras. While the estate of the intestate was being administered under letters granted by the District Court of Jaffna, a last will executed by Somasunderam was found in India and administration with the will annexed was granted by the High Court of Madras to the official assignee. The appellants who are the attorneys of the official assignee applied for grant of administration with the will annexed to the District Court of Jaffna. The District Judge held that the appellants were entitled to administration but on condition that the Ceylon creditors should be given preference.

Hayley, K.C. (with him *Subramaniam* and *Batuwantudawe*), for petitioners, appellants.—English law is clear that there is no distinction between local and foreign creditors. There is one proviso, viz., if it is found that a foreign court owing to peculiar law differentiated foreign from English creditors, then English law will intervene to protect its own subjects. See *In re Kloebe* [1]; *Hay v. Administrator of Estate of Minor* [2]; *Kurukulasekera v. de Silva* [3].

Our general law of administration is the English law. An administrator is entitled to pay creditors as he chooses. See *Littleton v. Cross* [4].

[DRIEBERG J.—Here he is an executor.]

The same principle applies to both executors and administrators. See *Williams on "Executors", 11th Ed., Vol. I., p. 793.*

The Court has disciplinary powers over an administrator who misbehaves. Here, the Judge has exaggerated his powers. It is the administrator who has to administer the estate, not the Court. The administrator can decide priority in cases of creditors' claims. On that basis there is nothing to prevent him choosing himself.

H. V. Perera (with him *Navaratnam*), for executors of the last will of the eleventh respondent.—The question of priority has to be decided by the District Judge of Jaffna. The law always favours the vigilant creditor. The Insolvency Ordinance protects creditors who seize property before petition of sequestration. In England, the provisions of the law are different. The section of the Indian Civil Procedure Code is similar to ours.

Hay v. Administrator of Estate of Minor (*supra*) indicates the position of a creditor who obtains decree and seizes. A pure decree does not give the right, but the seizure does. Section 352 applies. The point of time is the seizure.

Even if the estate is in fact, insolvent, the Court has no control without insolvency proceedings first being instituted. There is no law which says that one might wait until other creditors obtain decrees and apply for execution.

In administration suits, it is the Court which controls very largely the functions of executors or administrators.

[1] (1885) 28 *Ch. D. 175.*
[2] *9 N. L. R. 161.*
[3] *8 C. W. R. 73.*
[4] *3 B. and Cr. 317 at 382.*

Our Courts have held that immediately a creditor has done everything he can do with regard to enforcing his decree there is realization. The law states that where assets are realized at the instance of A, he must share it with others who have put their writs in the hands of the fiscal. Seizures under one writ are available for other writs (*Supramanian Chetty v. Mohamed Bhai*[1]). Creditors can come in and claim concurrence only where there is a joint seizure (*42 Mad. 692*). There is no realization as long as the money is held to the credit of the debtor. Money lying in Court does not mean that the money is realized.

Under English law, the jurisdiction of the Bankruptcy Court is extended to the case of estates of deceased insolvents. Our own Ordinance implies insolvents who are alive. Counsel cites *Perera v. Palaniappa Chetty*[2] and *Shaw v. Sulaiman*[3].

Thyagarajah (with him *Pandita Gunawardene*), for second to tenth creditors, respondents.

Hayley, K.C., in reply.

April 13, 1933. DRIEBERG J.—

This appeal is from an order of the learned District Judge of April 9, 1930, dealing with several matters, among them an inquiry into the conduct of the official administrator of the estate. The intestate, A. R. A. R. S. M. Somasunderam Chetty died in India on July 31, 1923, and letters of administration were granted to Subha Naidu and Letchiman as attorneys of his sons who were in India; administration by them having proved unsatisfactory, the Secretary of the District Court, the first respondent to this appeal, was appointed administrator to act jointly with them. Subha Naidu died, Letchiman it is said has disappeared from the case, and the first respondent had complete charge of the administration of the estate. The sons of the intestate who carried on a considerable business in Colombo and India under the same *vilasam* of A. R. A. R. S. M. were adjudged insolvent, and the administration of their insolvent estate is in the hands of the official assignee of Madras. While the estate of the intestate was being administered under letters granted by the District Court of Jaffna, a last will executed by Somasunderam was found in India, and administration with the will annexed was granted by the High Court of Madras to the official assignee.

The official assignee by his attorney, the second petitioner, then applied that his grant be resealed under the provisions of Ordinance No. 7 of 1921; it was held that that course was not open to him and later the appellants as his attorneys applied for a grant of administration with the will annexed in the usual way to the District Court of Jaffna.

This application was one of the matters dealt with in the order of April 9, 1930. The appellants were held entitled to a grant of administration but on condition that the Ceylon debts, by which I understand is meant debts due to Ceylon creditors, should be paid first, payment of foreign debts being postponed until these were settled. Another condition was that all money recovered should be deposited in Court and that no payment should be made out of estate money without leave of Court.

[1] *27 N. L. R. 425.* [2] *16 N. L R. 508.*

[3] *29 N. L. R. 481; 30 N. L. R. at p. 460.*

The appellants ask that this limitation on the grant to them of bringing all money into Court and not paying out without leave of Court be removed. It appears to me that it is best that this limitation should be retained. The administration of this estate up to this stage has been most unsatisfactory. The learned Judge says that the grant to the appellants is necessary to wind up the estate rapidly and to deal with the intestate's lands in Galle; estates in Jaffna have to be sold and debts have still to be recovered. The administration hitherto being by the Secretary of the Court was subject to special powers of control by the Judge; I take it he is of opinion that he should continue this control, and this he cannot exercise unless all money is paid into Court and payments out made only by its leave. It cannot be said that the District Judge has not the power to impose these conditions, and no sufficient reason has been shown why we should question his discretion.

The appellants also complain of the order that Ceylon debts should be paid before foreign debts. The official assignee, representing the creditors of the insolvent estate of the sons in India and in Ceylon, has obtained judgment against Somasunderam's estate in case No. 24,796 of the District Court of Colombo for Rs. 182,724.47 and has a special interest in this question. I understand that there are more debts due to creditors not residing in Ceylon.

The learned District Judge was influenced in making his order by a reference to *In re de Penny, de Penny v. Christie* [1] in Williams on Executors and Administrators. That was a case of conflict regarding the administration of the estate of de Penny who was born in Scotland and lived and died in Bolivia. His widow procured from the Bolivian Court a declaration of her intestacy and of her right to his movables, including his personal estate in England. His next of kin in Scotland procured *ex parte* from the Court of Aberdeen a confirmation of their title appointing them executrices dative of the deceased. The confirmation was sealed in England. There was a considerable sum of money in the hands of de Penny's agents in London. The widow brought an action against the executrices and de Penny's agents to restrain them from paying the money to the executrices or from otherwise parting with it except to her. Chitty J. said: "It has been the practice of the Courts in all countries to retain assets within their jurisdiction for the purpose of ensuring payment of the debts of creditors within the jurisdiction, and not to permit the assets to be taken away until such creditors are paid, and only after they are paid to allow the surplus assets to be remitted to the principal administrator in a foreign country." There is no question here of the removal of assets from the jurisdiction of the Jaffna Court; so far as claiming payment is concerned, if their claims are before the Court in a form in which they can be recognized by our law, foreign creditors stand on the same footing as those of this country. In the case of *In re Kloebe, Kannreuther v. Ceiselbrecht* [2] Pearson J. said, "I can find no case in which the Court in distributing assets has made an inquiry into the nationality of different creditors, or ordered that English creditors should be paid in priority to others . . . . On the other hand the rule is that they are all to be treated equally, subject to what

[1] (1891) 2 *Ch. D. 63.*

[2] (1885) 28 *Ch. D. 175.*

priorities the law may give them." A Court however has power when the foreign court gives preference to creditors of its nationality to adopt a similar policy in the case of local creditors so as to equalize payments; it is not suggested that this is the case here and that Ceylon creditors have not received equal treatment with Indian creditors in the insolvency proceedings in India. The order of the learned Judge on this point cannot stand.

The appellants also object to the order allowing the claim of the eleventh respondent, Sir P. Ramanathan, to be paid the entire amount of his decree. The eleventh respondent, who has since died and is represented by his executors, obtained judgment on December 13, 1926, in D. C. Colombo, No. 18,082, against the estate of Somasunderam for Rs. 16,000. He applied for execution, writ was issued, and on April 3, 1928, money in deposit in this case sufficient to meet his claim was seized. The seizure was effected under section 232 of the Civil Procedure Code by a notice to the District Court of Jaffna requesting that the money be held subject to the further orders of the District Court of Colombo. This notice was signed and served by the Fiscal under the authority of the writ of execution, section 233. Under section 232 questions of priority would have to be decided by the District Court of Jaffna. On May 20, 1929, the Jaffna Court was requested by the Colombo Court to bring the money to the credit of D. C. Colombo, No. 18,082, and the Jaffna Court on May 30, 1929, ordered that notices should issue to the official assignee to show cause why the money should not be remitted to the District Court of Colombo and directed that the notice of the District Court of Colombo should be acknowledge and that Court be informed of the order made.

The appellants did not get judgment in D. C. No. 24,796 until November 29, 1929, and had not proceeded to execution at the time when the claim of the eleventh respondent was considered. They say that the eleventh respondent is not entitled to preference by reason of his seizure and that they are entitled to share rateably with him.

Before the introduction of the Civil Procedure Code in 1890 a creditor who had proceeded to execution acquired no preference over other creditors, and so long as the proceeds of execution had not been given over tc him other creditors were entitled to concurrence even though they had not obtained judgment against the execution-debtor ; Layard C.J. in *Raheem v. Yoosoof Lebbe* [1], and Thomson's Institutes of the Laws of Ceylon, Volume I., page 456. In *Konamalai v. Sivakulanthu* [2], the Full Bench held that section 352 of the Code had superseded the Roman-Dutch law regulating the concurrent claims of creditors upon the execution proceeds of a common debtor's property. This ruling has been approved in later cases. In *Raheem v. Yoosoof* (*supra*), Layard C.J. said that the judgment in *Konamalai v. Sivakulanthu* (*supra*) had always been followed for the last nineteen years and declined to have it submitted for reconsideration. Even after the difficulty of applying section 352 was realized, the ruling in *Konamalai v. Sivakulanthu* (*supra*) was approved by the Full Court, *Mendis v. Peris* [3]. The only case to the contrary is *Perera v. Palaniappa Chetty* [4], to which I shall refer later.

[1] *(1902) 6 N. L. R. 169 on p. 170.*
[2] *(1891) 9 S. C. C. 203.*
[3] *(1915) 18 N. L. R. 310.*
[4] *(1913) 16 N. L. R. 508.*

This case presents a difficulty which frequently arises from the fact that section 352 is very limited in its scope and it is not applicable to many cases of competition between judgment-creditors.

Section 352, which was taken from the Indian Code of 1882, section 295, provides that "whenever assests are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons." It will be seen that the section is limited to those who hold decrees of the Court which holds the assets, for it speaks of those who have applied to that Court for execution. This created no difficulty in India for there the holder of a decree can apply to another Court for execution of it, but here application for execution must be made to the Court which passed the decree and that Court alone can execute it.

Further, the section is limited to assets realized by "sale or otherwise in execution of a decree"; it was held in Indian cases that "otherwise" meant some process of Court in execution expressly provided by the Code. The words do not extend as they should, if the section is to be of real use, to all assets of a judgment-debtor held by a Court. This difficulty was met in the Indian Code of 1908 by substituting for the old provisions section 73 which is as follows:—"Where assets are held by a Court and more persons than one have before the receipts of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization shall be rateably distributed among all such persons."

The insufficiency of section 352 to meet many cases of competition between judgment-creditors was pointed out as long ago as 1904, see *Mirando v. Kiduru Mohamadu*[1]; and in 1915 Shaw J. in *Mendis v. Peris* (*supra*) drew attention to the urgent need for its amendment.

In the present case the money in Court is not the proceeds of execution; it was not realized by sale or by any process of execution provided in the Code. The administration was by the Secretary who was directed to bring all money belonging to the estate into Court, and a considerable sum has accumulated in Court. This circumstance and the fact that the District Court of Jaffna, which holds the money, is not the Court which passed the decrees in favour of the appellants and of the eleventh respondent place the case outside the scope of section 352. The question before us is how competing claims are to be decided in such a case as this, to which section 352 is not applicable.

Our Courts have determined the claims of creditors to concurrence and preference on the principle in section 352, that is to say, giving preference to those who have applied for execution over those who have not, in cases which do not fall within section 352. Where a case is not within the section for the reason only that the competing decrees are not of the Court which holds the assets, no difficulty arises in applying the other test in the section, namely, whether a creditor had applied for execution before realization. For example, in *Mendis v. Peris* (*supra*)

[1] (1904) 7 *N. L. R.* 280.

property was sold in execution of the decree in D. C. Kalutara, No. 5,402, the Fiscal, having in his hands at the time writs in two cases of the Court of Requests of Gampola against the same judgment-debtor, issued at the instance of another creditor, the appellant. The proceeds of sale were deposited in the Kalutara Kachcheri on September 30 and on some day in October to the credit of the D. C. Kalutara case. They were therefore proceeds of execution held by that Court. Subsequently to this, the appellant, who had another writ against the same debtor obtained in a case of the District Court of Kandy, sent it to the Fiscal for execution. The case was heard by a Bench of three Judges, and Wood Renton C.J. and Shaw J. held that the appellant was entitled to concurrence with the creditor in the D. C. Kalutara case only in respect of his writs in his Court of Requests Gampola cases, but not in respect of his writ in the D. C. Kandy case as that writ was not in the hands of the Fiscal at the date of sale. It will be seen that on a strict requirement of the conditions of concurrence prescribed by section 352 the appellant could not have got concurrence for his two writs of the Court of Requests of Gampola, for though he had satisfied one condition, namely, that they were in the hands of the Fiscal before realization by sale of the property, he could under section 352 only get concurrence if his writs were of the Kalutara Court. Shaw J. was of opinion that section 352 was applicable only when the Court had before it holders of decrees passed by itself, but the importance of the decision lies in the ruling that holders of decrees of other Courts are not barred for that reason from concurrence, and further, that their right to concurrence is not based on the Roman-Dutch law, which would have given concurrence even to creditors without judgments, but on the right of a creditor who is vigilant to preference over one who is not, the test of vigilance being whether he had proceeded to execution—the application of what Burnside C.J., in *Konamalai v. Sivakulanthu* (*supra*), said was the commonsense maxim of *vigilantibus non dormientibus equitas subvenit*. The judgment of Wood Renton C.J. is of special interest, for he referred to his judgment in *Suppramaniam Chetty v. Rawther Naina Mute*[1] in which the circumstances were similar to this case. He pointed out that the Full Court in *Konamalai v. Sivakulanthu* (*supra*) had held that the Civil Procedure Code had superseded the Roman-Dutch law regulating the concurrent claims of creditors upon the execution proceeds of a common debtor's property and he allowed the appellants concurrence for his C. R. Gampola writs on the ground that they were in the hands of the Fiscal at the time of sale, and refused concurrence for the D. C. Kandy writs on the ground that it was not in the hands of the Fiscal at the time of sale.

Suppramaniam Chetty v. Muhamadu Bhai[2] was a case of money seized in the hands of a public officer on a writ issued in D. C. Kandy, No. 33,020. The appellants claimed concurrence for writs issued in two cases of the Court of Requests of Kandy. One of the conditions of section 352 was present, namely, that the money so seized and paid into Court fell within the description of "assets realized by sale or otherwise in execution of a decree"; the other condition was absent, namely, that the decrees

[1] *60 (Inty.) D. C. Testamentary Negombo, No. 1,420, Supreme Court Minutes May 21, 1915.*
[2] *(1926) 27 N. L. R. 425.*

should be of the same Court, the Court of Requests and the District Court of Kandy being different Courts. Though the cases for this reason did not fall within section 352, it was held that the creditors of both Courts were entitled to concurrence if their writs were in the hands of the Fiscal at the date of realization. It was possible in that case to determine the date of realization. On August 5 the money was seized in the hands of the Government Agent by the notice under section 233. On August 19 notice issued to him to show cause why he should not pay the money into Court. On August 24 the Government Agent informed the Court that there was a sum of Rs. 407 due to the judgment-debtor and that the Government had no claim to it. On August 31, the Court ordered the Government Agent to deposit the money in Court and he did so on October 10. The appellants seized the money on their writs on August 27. It was held that they were entitled to concurrence on the ground that the realization took place when "the assets were brought into this case by the order of August 31", Jayewardene A.J. on page 429.

When money held by a public officer is by a process of execution brought into Court and made available to creditors, it can fairly be described as assets realized in execution of a decree, for something in the nature of conversion has occurred by its being rendered available to creditors; the position is similar to where a debtor of the judgment-debtor to whom alone he owes the money is compelled by a garnishee order under section 230 to pay the money into Courts where it would be liable to the demands of the creditor who procured the order as well as others entitled to concurrence. But in the case of assets of an intestate deposited in court in the course of administration, at what stage, if at all, can they be said to be "realized" by some process of execution?

There are three cases in which conflicting claims of judgment-creditors to money in deposit in testamentary cases have come before the Court; *Perera v. Palaniappa Chetty (supra), 60 (Inty.) D. C. Negombo, Testamentary No. 1,420 (supra)*, and *Shaw & Sons v. Sulaiman*[1].

In *Shaw & Sons v. Sulaiman (supra)* it was held that realization does not occur until the attaching Court directs the Court which holds the assets to pay the money over to it, and that "it is only after such an order that the assets can be said to be realized for the benefit of one or all of the judgment-creditors". The money was seized under the appellant's writ in a case of the District Court of Colombo; it was lying to the credit of a testamentary case in the same Court. It was held that no order had been made in the case in which writ issued for a transfer to that case of the money in the testamentary case and that there was no realization.

In the case under consideration such an order was made before May 30, 1929, this is the date of the receipt of the notice by the District Court of Jaffna; the record in the journal of this action under date May 20, 1929, is as follows:—"Notice received from the District Judge, Colombo, requesting to bring to the credit of case No. 18,082, D. C. Colombo, the sum of money seized under the writ issued in that case out of the money lying in deposit to the credit of this case." On the authority of this case the eleventh respondent is entitled to preference over the appellants who at that date did not even have a judgment.

[1] *(1928) 29 N. L. R. 481 and 30 N. L. R. 460.*

It was contended for the appellants that there could be no realization until the Jaffna Court paid over the money to the attaching Court. Under section 232, all claims to priority would have to be decided by the District Court of Jaffna and the money could not be paid over until those claims were decided. If the stage of realization is not reached until the money is paid over to the Colombo Court, which in effect is payment to the eleventh respondent, it follows that the Jaffna Court would be obliged to entertain and allow any claims made until that stage was reached, and in the result a diligent creditor who proceeded to execution would have to take concurrently with any creditors who might come in with claims at any time before the money was transferred to the Court of his action. This would place him in the same position as an execution-creditor before the Code.

In *Meyappa Chetty v. Weerasooriya*[1] the question arose of a claim to concurrence by a creditor who came in with his writ between the purchaser at a sale in execution giving to the Fiscal a cheque for the balance purchase money and the deposit of the proceeds of that cheque in the Kachcheri; the money was deposited in the Kachcheri twenty days after the sale. It was held that realization took place at the moment of the sale and not when the money was paid to the Kachcheri. Shaw J. said, referring to the contention that realization did not take place until the deposit in the Kachcheri, "such a construction of the words 'realized by sale' as is contended for on behalf of the appellants would, in my opinion, defeat the object of the legislation and revive the old evils it was intended to remedy. It would enable a creditor to stand by and then to come in and defeat, to a large extent at any rate, the original execution-creditor's claim."

There can be no doubt that if it is possible to do so we should take a view which would secure to a creditor the fruits of his vigilance.

In *Perera v. Palaniappa Chetty* (*supra*) Pereira J. held that the case did not fall within section 352. The reason is not stated but I gather it was so by reason of the nature of the claims of the creditors and there being no proper seizure. He held that this being so, the rights of parties to concurrence and preference should be governed by the "general law of the land", which I take it is the law as it existed before the Code. This case was relied on by the appellants to support their claims to concurrence. It is not possible now to hold that the matter can be decided in this manner. I have referred to the many cases in which it has been held that the old law has been superseded and where the principle on which preference is allowed under section 352 has been applied in cases which did not fall within that section.

In *60 (Inty.) Negombo Testamentary No. 1,420* (*supra*), the administrator of the intestate sold property by order of Court and the proceeds were deposited in the testamentary case; the respondent, a decree holder, thereafter seized the proceeds; the appellant, a creditor who had not obtained a judgment but whose claim was admitted by the administrator, claimed concurrence with the respondent. Wood Renton C.J. held that the case did not fall within section 352 as the respondent's seizure was after realization. He said that "in *Konamalai v. Sivakulanthu* (*supra*) it was held by a Bench of three Judges that the Civil Procedure Code had

[1] *(1916) 19 N. L. R. 79.*

superseded the Roman-Dutch law regulating the concurrent claims of creditors to the execution proceeds of a common debtor's property, and that section 352 enacts substantive as well as adjective law in cases to which it is applicable. In *Raheem v. Yoosoof* (*supra*) Sir Charles Layard C.J., with whom Moncrieff J. agreed, said that, with reference to claims in concurrence, the judgment in *Konamalai v. Sivakulanthu* (*supra*) had always been followed for the last nineteen years. Now it is true that section 352 deals specifically with cases in which there had been an application to the Court prior to the realization, but it seems to me that the respondent is entitled to the benefit of the rule of substantive law which it enacts."

For my part, I incline to the opinion that in the case before us the money was at no stage assets realized in execution of a decree that it is one of those cases, not of that description, which the Indian Code of 1908 sought to include by the words assets held by a Court. It was money in Court available for payment to any creditor who could establish a right to payment. It was always so available and at no time was it converted or changed so as to be available to creditors, and it is not easy to see at what stage it was realized. But even if this is so and the case is not within section 352 for that reason, on the principle laid down in *60 (Inty.) D. C. Negombo, Testamentary No. 1,420* (*supra*), the eleventh respondent should have preference, for when their claims came to be considered in March, 1930, he had proceeded as far as he could with the execution of his decree, while the appellants only held a judgment.

If, however one has to find at what stage realization, or what corresponds to it in such a case as this, took place, I think it must be when the District Court of Jaffna received on May 30, 1929, a notice from the Colombo Court requesting that the money should be brought to the credit of the Colombo case. The seizure did not constitute realization and I have pointed out the impossibility of holding that realization does not take place until all the claims are decided. If it does occur, it must occur at some intermediate stage and I think it can be regarded, on the authority of *Shaw & Sons v. Sulaiman* (*supra*), as having taken place when the Jaffna Court was requested to pay over to the Colombo Court. The money passed at that stage definitely from the control of the administrator, and from money available generally to creditors of the estate it became money marked off as available to those creditors who under section 352 could establish a right to be paid out of it, that is to say, creditors who before that date had proceeded to execution. The learned District Judge was right in giving preference to the eleventh respondent, and the appeal on this point must fail.

It was suggested that the estate of Somasunderam should be administered as an insolvent one under the provisions of section 199 of the Civil Procedure Code. It is sufficient to state that the Judge finds that the estate was solvent when Somasunderam died. Apart from this, this procedure is not available in such a case as this, *Shaw & Sons v. Sulaiman* (*supra*).

In the petition of appeal objection is taken to the giving of preference to another creditor Kandiah, the creditor in D. C. Jaffna, No. 21,060; this creditor is not a party to the appeal and it is not necessary to deal with his claim.

The order appealed from is varied by deleting the direction that the debts of Ceylon creditors should be paid before those of foreign creditors; subject to this, the appeal is dismissed. The appellants will pay the costs of the appeal of the eleventh respondent, and the second to tenth creditors-respondents will pay the costs of the appellant.

MACDONELL C.J.—I agree.

Decree varied.