1913.

Present: Pereira J. and Ennis J.

PERERA *v.* PALANIAPPA CHETTY.

70—D. C. Colombo, 3,819.

Death of judgment-debtor before execution of decree—Civil Procedure Code, s. 341—Assets of an estate brought into Court by administrator—Seizure by creditor—Concurrence—Civil Procedure Code, ss. 199, 232, and 352.

Section 341 of the Civil Procedure Code lays down the procedure for the execution of a decree when the judgment-debtor dies before it is fully executed. The use of the word "may" in the section does not imply that the decree may be executed in a manner other than that laid down in the section. It merely indicates the permissible procedure for the execution of a decree in the circumstances mentioned in the section.

Where the administrator of the estate of a deceased person brought into Court a sum of money as assets of the estate, and the sum was seized on a writ issued at the instance of a creditor of the estate, claims to the amount seized are not to be disposed of either under section 352 or section 199, but under section 232 of the Code, and the rights of parties as to concurrence or preference are governed by the general law and not the English law.

THE facts appear from the judgment.

H. J. C. Pereira, for appellant.

H. A. Jayewardene, for administrator.

A. Drieberg, for respondent.

Cur. adv. vult.

June 27, 1913. PEREIRA J.—

In this case the administrator brought into Court a certain sum of money as assets of the estate of the deceased which he was administering. The amount brought into Court was insufficient to meet all the demands on the estate. It appears that the respondent (Palaniappa Chetty) had a decree against the deceased in case No. 30,586 of the District Court of Colombo, and on that decree he had the money brought into Court by the administrator seized. Before proceeding further, I should like to observe that I cannot understand the learned Judge's observations on Mr. Rasiah Joseph's objection that the judgment-creditor in No. 30,586 did not follow the procedure of section 341 of the Civil Procedure Code. He says that the judgment-creditor "moved to substitute the

administrator as defendant, and writ issued against him." If so, it seems to me that the procedure of section 341 had practically been complied with, and yet the learned Judge says: " The section is discretionary, and I do not think that the seizure is bad on that account." If he means that the section has not in fact been complied with, the seizure, in my opinion, was clearly bad. The section, no doubt, is discretionary in a sense, but not in the sense in which it apparently is understood to be so by the learned District Judge. To illustrate the position. When in section 94 (to take a section at random) the Code says that a party may by leave of Court, to be obtained on motion *ex parte*, deliver interrogatories for the examination of the opposite party, the Code does not mean that interrogatories may be delivered in the manner prescribed or in any other manner. What it means is that interrogatories may be delivered in the manner prescribed by the Code or not at all. And so, when a judgment-debtor dies before the decree has been fully executed, it is not open to the creditor to proceed in any way other than that prescribed in section 341. He may proceed as indicated in that section or not at all. That, I take it, is the force of the word " may " used in that section. If, therefore, in the present case, the creditor in No. 30,586 did not, after the death of his debtor, proceed under section 341, the seizure under his writ of the sum of money in question was clearly bad, and for that reason, if nothing else, the order appealed from cannot, in my opinion, be supported. But, assuming that the respondent made due application to the Court for execution and had the money in question seized under his writ, can it be said that he is in a better position than creditors who had not instituted actions and obtained judgments? I agree with the District Judge that this case does not fall under section 352 of the Civil Procedure Code; and the case of *Hay v. The Administrator of Nunn's Estate* [1] does not permit of the application of section 199 of the Code to this case. Section 350 cannot be applied, because that section applies only where money is paid into Court to the credit of a regular " action " as defined in the Code; and it seems to me that the section under which the case really falls is section 232. The money brought in by the administrator is now money in the custody of the Court, and it is open to any creditor who desires to seize it or any portion of it to do so under section 232. It has been recently held by this Court that in the event of a seizure of money under that section questions of title or priority are to be decided in the same manner as claims to property seized in execution are adjudicated upon under sections 242 to 245 of the Civil Procedure Code (see 21,328, D. C. Kandy); and if section 352 does not apply to this case, I do not see why those claims should be claims in respect of which applications for execution have been made. The old procedure as laid down by Moncreiff

[1] *(1906) 9 N. L. R. 161.*

1913.

PEREIRA J.

Perera v. Palaniappa Chetty

A.C.J. in the case of *Palaniappa v. Seidik* [1] would apply; that is to say, parties who claim concurrence or preference may support their claims by means of affidavits.

I would set aside the order appealed from and remit the case to the Court below (1) to ascertain whether, as a matter of fact, there has been a proper seizure of the money in question; and (2) if there has been such a seizure, to adjudicate upon the claims made under section 282 of the Civil Procedure Code. The rights of parties as to concurrence and preference in a case like this are, in my opinion, governed by the general law of the land, and not the English law. I would let all costs abide the event.

ENNIS J.—I agree.

Set aside and sent back.