1902.
September 5 and 10.

Re Last Will of SEGO TAMBY.

D. C., Colombo, 1,287.

PALANIAPPA CHETTY, Appellant.

KADAR UMMA, Executrix of Sego Tamby, Respondent.

Creditor of deceased testator—Decree against executrix—Seizure of money brought to the credit of the deceased's estate for distribution to legatees—Apportionment of fund.

A creditor of a deceased testator, having obtained judgment against his executrix, caused the Fiscal to seize a certain sum out of the money brought by her into Court for the credit of the estate, in order that two legatees who were minors might be paid their legacies in due course, the other legatees having been already paid.

Held, that the creditor was entitled to receive, out of the funds brought into Court on behalf of the minor legatees, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies under the will.

ONE Palaniappo Chetty having obtained a decree against the executrix of Sego Tamby, deceased, in D. C., Colombo, 14,652, caused certain moneys brought to the credit of the deceased's estate in this case to be seized, and moved for a notice on the executrix to show cause why an order of payment should not issue to him for the sum of Rs. 617.25, and interest on Rs. 400 at 9 per cent. from 28th February, 1901, together with Rs. 181.82 as taxed costs, as also the costs of the present application. The executrix appeared and showed cause.

The District Judge (Mr. D. F. Browne) found that, in pursuance of the last will of the deceased Sego Tamby, the executrix had realized his property, and after payment of certain debts had a surplus of Rs. 5,446.43 for distribution among the legatees; that two of the legatees being minors, she had deposited in Court the amounts due to them, aggregating Rs. 1,486.69; that such deposit stood to the credit of the testamentary proceedings, and not to that of the two legatees; that there was no judicial settlement of her account; that the applicant had obtained judgment against the executrix on a promissory note of the deceased and was granted a decree for Rs. 617.25, with further interest and costs, amounting in all to Rs. 798.37; that for this amount he issued writ and seized so much of the Rs. 1,486.69 as would suffice to pay his claim; and that the executrix had apparently abandoned her intention to appeal after obtaining the leave of the Court to appeal.

The District Judge then held as follows:—

"The authority and cases on the point appear to be Williams on *Executors (ed. 1893), p. 1208; Gillespie v. Alexander (3 Russ.*

1902.
September 5 and 10.

Ch. Cas. 130); David v. Frowd (1 M. & K. 210); Davis v. Nicholson 2 De G. & J. 693); Greig v. Somerville (1 Russ. & M. 338); Cattel v. Sims (8 Beav. 243). As every estate in Ceylon is administered by the Court, and as the ruling in *Gillespie v. Alexander* will apply here, I have no hesitation in following it, for it appears to me that Lord Eldon's opinion, as given in *3 Russ.* at *p. 138*, is entirely apposite, as here legatees who were infants were not paid, but according to the scheme of distribution, funds were in effect, though not nominative, carried to their account. I must therefore hold that the seizure is good only to the amount of the proportion of the debt which those legatees' fund of Rs. 1,486.69 bears to the entire surplus of Rs. 5,446.63, and that the creditor must be left to his action against the legatees, who have been paid, to recover from each his like proportions of his claim. Against the fund in Court the proportions will be Rs. 5,446.43 : Rs. 1,486.69 : : Rs. 798.37 : Rs. 217.91. I therefore hold the seizure good for Rs. 217.91.

Palaniappa Chetty appealed.

Bawa, for appellant.

Weinman, for the executrix, respondent.

Cur. adv. vult.

September 10, 1902. MIDDLETON, J.—

This was an appeal from an order of the District Judge refusing to allow the appellant to receive out of Court the full amount of a judgment recovered by him against the respondent, executrix of Varukku Magan Sebo Tamby, deceased, of whom the appellant had in his lifetime been a creditor. The deceased died in February, 1900; probate was granted to the respondent in April, 1900, and the appellant brought his action in March, 1901, and obtained judgment in November, 1901, for a sum amounting in the aggregate with interest and costs to Rs. 798.37. The executrix filed an account on the 1st November, 1900, showing a surplus of Rs. 5,446.43, after payment of all debts acknowledged in the will, amongst which the appellant's debt did not appear. On her scheme of distribution of these assets all legatees were paid but two minors, and the sum of Rs. 1,486.69 due to the minors was paid into Court on the 9th January, 1901, to the credit of the testamentary proceedings. The appellant seized so much of this money as would suffice to pay his debt, and, upon his moving to draw the same, the order appealed from was made on the authority of *Gillespie v. Alexander* (*3 Russ. Ch. Cas. 130*). It would seem that no judicial settlement had been arrived at, and that, apparently,

1902.
September 5 and 10.

MIDDLETON, J.

no notice to creditors to come in and claim had been published by the executrix.

For the appellant it was contended that *Gillespie v. Alexander* would not apply to this case, as there was no laches on the part of the creditor, and the estate was not administered by the Court. In *Gillespie v. Alexander* the estate had been apportioned, under the order of the Court, amongst the legatees, and actually paid to them, except that one legatee, being an infant, his proportion could not be paid to him, but was carried to his account in the suit; and Lord Eldon held that the creditor, who had obtained permission to prove his debt, was entitled to receive out of the funds of the legatees remaining in Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies under the will. *David v. Frowd* (*1 Mylne & Keen, p. 200*), quoted by counsel for respondent, does not impugn that principle. In *Davies v. Nicholson* (*2 De Gex & Jones 693*) it was held that, where the act was not done under authority, but was done without judicial intervention and as a private action, in the course of the administration of the estate, the principle laid down in *Gillespie v. Alexander*, would not apply. Now, the learned District Judge in his judgment prefaces his ruling by the premise that every estate in Ceylon is administered by the Court, and if we look at chapter 38 of the Civil Procedure Code, sections 538, 551, 553, and chapter 54, sections 724 and 725, it would appear that this is so. On turning to the journal entry in this action, dated 1st November, the procedure under section 553 was carried out under the sanction of the Court, and noted as "allowed" by the Judge. Again, on 20th December, the deposit of the balance divisible amongst the minor legatees was made under the direction of the Judge.

It would appear, therefore, that the act of the executrix here in paying the sum into Court was done under the authority of the Court, and that in default of any further claim turning up, as has occurred, the executrix had fulfilled all that was required of her in accounting to the Court, and paying all legacies and proved debts within a year from grant of probate. In such a case it would seem that no judicial settlement would be sought for or required.

I am, therefore, of opinion that the learned Judge was right in holding as he did, and would dismiss this appeal with costs.

MONCREIFF, A.C.J.—

I am of the same opinion.