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February 3.

WICKREMASINGHE *v.* JAYAWARDANE.

D. C., Galle, 49,903.

Decree against defendants—Revival of decree—Application for execution against heirs of defendants, deceased—Stale application—Old and new procedure.

Where a decree, obtained in 1884, was revived in 1886, and execution was taken out in September, 1887, and then in August, 1897, an application was made that the heirs of the judgment-debtors should be substituted in lieu of the latter:

***Held*, that the case did not come under section 337 of the Civil Procedure Code, and that the plaintiff was entitled to his application as a matter of course, under the practice obtaining before the passing of that Code.**

THE plaintiff moved on 4th August, 1897, for a notice on the respondents "to show cause why they should not be substituted in lieu of the 1st, 2nd, and 3rd defendants, deceased, against whom he had obtained judgment in 1884 and taken out execution in September, 1887." The District Court ordered that an application by way of petition should be made under section 341 of the Code. That order was dated 9th August, 1897, and in obedience thereto the plaintiff petitioned for an order *nisi* on the respondents to show cause why the decree passed therein against the defendants on the 10th September, 1884, should not be executed against the 1st, 2nd, 3rd, 4th, 5th, and 6th respondents as legal representatives of the deceased 1st defendant; the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, and 18th respondents as the legal representatives of the deceased 2nd defendant; the 19th respondent as administrator of the estate of the deceased 3rd defendant; and the 20th respondent as the original 4th defendant.

This petition was filed on the 24th September, 1897, and the order *nisi* made returnable on 25th October, 1897. As cause the respondents showed that the writ was returned unexecuted on the 17th November, 1887. No explanation was tendered as to the cause of the delay in making the present petition.

The District Judge made the order *nisi* absolute, holding that "though the application may be stale, no adequate cause has been shown against the order *nisi*."

The respondents appealed.

Van Langenberg, for appellants.

Dornhorst, for respondents.

BONSER, C. J.—

This case raises an important point as to the execution of judgment decrees.

It appears that the original decree was dated the 10th September, 1884. Execution was taken out upon that decree, but the whole amount was not realized.

In 1886 the decree was revived and execution was again taken out in September, 1887, but the full amount of the decree was not realized.

The matter then slept until August, 1897.

Before the ten years had elapsed from the last issue of execution an application was made that the heirs of the judgment-debtors who had died in the meantime should be substituted on the record in lieu of the judgment-debtors, to enable the plaintiff to make an application for execution of the decree.

The District Judge made an order allowing notices to be served on the heirs, but it is stated that he said that it was unnecessary that an application should be made for a formal order to revive the judgment, but that it would be quite sufficient if an application were made to substitute the heirs on the record and for execution to issue against them.

That application was accordingly made, and was resisted by the heirs on the ground that there was no explanation of the delay in making the application, and that the application was stale.

It is admitted that it was not prescribed by law. The District Judge held that no cause was shown against the application and allowed execution to issue.

In my opinion that order was right. I should have been glad to find any reason for holding that the application was too late, but I have been unable to do so. The case does not come under section 337 of our Procedure Code.

The application must therefore be dealt with under the old practice. It has been decided by this Court, unfortunately I think, that an application to execute a decree made before the coming into operation of the Code is not an application under chapter XXII. of the Code, and therefore that section 337 is no bar to a subsequent application made after the coming into operation of the Code.

It appears that decrees under the old practice were allowed to be revived as a matter of course. It was necessary to cite the debtors, but that was only for the purpose of giving them an opportunity to show, if they could, that the debt had been paid or otherwise satisfied. It would appear that it was not necessary for

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the plaintiff to give any explanation of his delay. The case reported in *3 Lorenz 210* seems to be clear on this point. That being so, the petitioner in this case is entitled to issue his writ.

WITHERS, J.—

I agree. This is really an application to revive judgment under the old procedure. The plaintiffs were entitled to an order of revival as a matter of course. They cited the heirs of the judgment-debtor to show cause why the order should not be made absolute.

The objection that they took was that there was long delay on the part of the plaintiffs in making the application. The District Judge, however, held that no sufficient cause was shown against the application and made the order now appealed from, which should be affirmed.