1916.

Present: Shaw A.C.J. and Schneider A.J.

MACKWOOD & CO. *v.* PERERA.

43—D. C. Colombo, 35,020.

Subsequent application for execution for costs not included in first application.

There is nothing in our Code which prevents a subsequent application for execution for costs if the amount has not been ascertained on the first application.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for appellant.

Bartholomeusz, for respondent.

June 14, 1916. SHAW A.C.J.—

On August 18, 1915, a final decree was entered against the appellant for Rs. 3,373.79, interest, and costs. On August 25 the respondent applied for execution of the decree by the issue of writ against the appellant's property. At this time the costs of an appeal by the appellant to the Supreme Court had been taxed, but the costs in the District Court had not. The application for execution contained the particulars required by section 224 of the Civil Procedure Code, and stated that the District Court costs had not been taxed, but the Supreme Court costs had been taxed at Rs. 454.

The writ issued to the Fiscal on August 27 to recover " the sum of Rs. 3,373.79, with interest thereon at 9 per cent. per annum from September 10, 1912, till payment in full, and costs, which the plaintiff has recovered against the defendant. " The amount of the costs was not mentioned in the writ, as indeed it could not be, as the amount was not then ascertained, and the practice appears to be for the District Court to notify the Fiscal before sale and after taxation what the amount of the costs to be recovered is.

In the present case the amount of the judgment-debt and interest was tendered to the Fiscal, and he accepted it and made return to the writ.

On December 20, the costs then having been taxed, the District Court ordered a new writ to issue for the amount. The appellant moved to recall the writ, but the Judge refused, and from his refusal the present appeal is brought.

The appellant contends that the judgment-creditor cannot split his claim so as to recover by separate writs first the amount of the

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judgment-debt and by the second the costs, and cites as an authority *Harris v. Jewell*,[1] showing that in England, before the Judicature Act, 1870, and the rules made thereunder, if a judgment-creditor issued execution before the cost were taxed, he was held to have waived his right to costs.

I do not think the old English practice has any application here, or that we should go out of our way to revive here a practice that was found to be a bad one and expressly altered in England.

There appears to be no direct authority here on the point before us, nor has any case under the corresponding Indian section been referred to but I find the Court in *Radha Kishen Lall v. Radha Porshad Sing*[2] saying, " when a decree gives relief of a different character, such as a decree for possession and a decree for costs, we see nothing in the Code of Procedure which prevents successive applications for execution as regards each of them. " I see nothing in our Code which prevents a subsequent application for execution for costs if the amount has not been ascertained on the first application, but the point hardly arises in the present case, as the first writ to the Fiscal did direct him to recover the costs. The respondent not having obtained full execution of his decree on the first writ, and having been guilty of no want of due diligence, is entitled to a new writ, under section 337, for the amount not recovered.

I would dismiss the appeal with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.

[1] (*1883*) *W. N. 216.*

[2] *18 Cal. 517.*