1909.
November 5.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

PERIES *v.* COORAY.

D. C., Kalutara, 1,398.

First application for execution of writ—No time limit—Civil Procedure Code, s. 337.

There is no limit to the time within which a first application for execution of writ may be granted.

APPEAL from a judgment of the District Judge of Kalutara. In this action the plaintiff, who obtained a mortgage decree against the defendant (Cooray) for Rs. 500 on May 5, 1896, assigned the decree to one Perera, who mortgaged the said decree with the petitioner-appellant (Fernando). The petitioner instituted action, D. C., Kalutara, No. 3,755, upon his mortgage against the mortgagor (Perera), and purchased the decree (No. 1,398) under a Fiscal's sale held in execution of writ No. 3,755 on March 24, 1909. On May 13, 1909, the petitioner applied for execution of the mortgage decree (1,398) against Cooray.

The learned District Judge refused the application on the ground of delay in applying for execution, inasmuch as no step had been taken to have the decree executed since 1896.

The petitioner (Fernando) appealed.

Bawa (with him *Balasingham*), for the appellant.—The repeal of section 5 of Ordinance No. 22 of 1871 removed the time limit within which a first application for execution may be granted. Section 337, Civil Procedure Code, does not refer to a first application for execution; it refers to a "subsequent application." Counsel also referred to *Saibo v. Silva*,[1] *Peris v. Perera*,[2] *Don Jacovis v. Perera*,[3] *Allagappa Chetty v. Wijesinghe*.[4]

No appearance for the respondent.

Cur. adv. vult.

November 5, 1909. HUTCHINSON C.J.—

By the decree made in this action on May 5, 1896, it was ordered that the defendant should pay to the plaintiff Rs. 500, and certain property was declared to be bound by and executable under the decree. The plaintiff's interest in the decree became vested in the petitioner, W. K. B. Juwakinu Fernando, who on May 13, 1909, applied for a writ of execution. The District Judge refused the

[1] *3 A. C. R. 77.*
[2] *(1899) 6 N. L. R. 230.*
[3] *(1906) 9 N. L. R. 166.*
[4] *(1909) 1 Cur. L. R. 109.*

application because of the long delay from 1896 to 1909, during which no step had been taken to have the decree executed, and of which no explanation was offered.

The right of a judgment-creditor to a writ of execution is governed by our Statute Law. Sections 218 and 225 of the Civil Procedure Code give him the right, and I can find nothing in section 337 or elsewhere which takes away the right where the decree is an old one. Section 5 of the Prescription Ordinance, No. 22 of 1871, limited the right to cases where the decree was not more than ten years old; but that section was repealed by the Civil Procedure Code, and no similar provision has been enacted. It is possible that the words "such subsequent" in section 337, where it says that "no such subsequent application shall be granted after the expiration of ten years" were inserted by mistake; but if so, only the Legislature can strike them out.

I think that the order of the District Court should be set aside, and the case sent back for decision on the other objections taken by the respondent to the appellant's application. The respondent should pay the appellant's costs of this appeal.

MIDDLETON J.—

The plaintiff here obtained a mortgage decree against defendant on May 5, 1896. Shortly after the plaintiff assigned his decree to one Komitige Santiago Perera, the brother-in-law of the defendant, who mortgaged the said decree with the petitioner-appellant on March 5, 1904. The petitioner-appellant instituted action, D. C., Kalutara, No. 3,755, upon his mortgage against the said Santiago and obtained a decree against him on October 13, 1908, to seize and sell the decree in the present action. On March 24, 1909, the appellant purchased the decree under a Fiscal's sale. The appellant on May 13, 1909, applied by petition for an order *nisi* on the defendant-respondent to show cause why the decree should not be executed, and the properties, bound and executable, sold to satisfy his judgment in D. C., Kalutara, 3,755.

An order *nisi* was granted on May 17, 1909, and the respondent filed a list of objections on June 21, 1909: (*a*) That no evidence whatever of the sale is furnished. If no conveyance is necessary, a receipt should be produced from the Fiscal to show that the petitioner is the purchaser. (*b*) The petitioner being in the position of an assignee, he should first apply to have himself substituted plaintiff before he can obtain an order *nisi* for the execution of the decree. (*c*) That ten years having elapsed from the date of the decree, the petitioner cannot execute the decree.

The District Judge, without considering the others, held on the last objection that the petitioner was not entitled to execution of his decree under section 337 of the Civil Procedure Code, and dismissed the application.

1909.
November 5.
MIDDLETON J.

The appellant appealed, and in my opinion the decision of the District Judge is wrong. The words of section 337 are clear as they apply here, that no such subsequent application shall be granted after the expiration of ten years from the date of the decree sought to be enforced or of the decree, if any, on appeal affirming the same.

This is the first application for execution, and in my opinion the time limit only applies to a subsequent application. It would seem, therefore, and I can find no decision to the contrary, that there is no limit now to the time within which a first application for execution may be granted, as section 5 of Ordinance No. 22 of 1871 is specifically repealed by the schedule of the Civil Procedure Code.

In my opinion the order of the District Judge must be set aside, and the case remitted to him for further consideration and decision on the other objections raised, taking into account the terms of section 339 of the Code as to the substitution of the transferee's name.

As regards objection (*a*), it seems to me that the appellant should be in possession of some written evidence to show his purchase under the Fiscal's sale on March 24, 1909.

The appeal will be allowed with costs.

Appeal allowed.