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PERIS *v.* PERERA.

D. C., Ratnapura, 2,395.

Decree—Revival of—Delay in recovery of judgment-debt—Old procedure—Civil Procedure Code, ss. 2, 5, and 337—Effect of repeal of s. 5 of Ordinance No. 22 of 1871.

The plaintiff, having obtained judgment against the defendant in 1882, took out a writ of execution and recovered a part of his debt in 1883. Nothing was done afterwards in further execution of the decree till 1899, when plaintiff's motion to revive the writ was allowed, without proof of any explanation as to his delay in obtaining satisfaction, as provided by section 337 of the Civil Procedure Code.

Held that, as section 5 of the Ordinance No. 22 of 1871, which created the presumption of satisfaction of judgment, was repealed by the Code without affecting any right which had accrued under that section, and as, at the time when the repeal came into operation in August, 1890, ten years had not elapsed from the date of the decree, the plaintiff's right to have his writ re-issued as a matter of course under the old procedure was conserved to him, and it was not necessary on his part to revive the judgment as a preliminary to his application for the writ.

Sinnana Chetty v. Ukkuwa (D. C., Kegalla, 5,902), decided on 19th May, 1897, overruled.

IN this action the plaintiff sued the defendant upon a promissory note to recover Rs. 120 with interest, and a decree by default was entered in favour of the plaintiff on 14th April, 1882. Writ of execution was issued on 3rd May, 1882, and re-issued on 17th July, 1883, and a sum of Rs. 11.88 recovered and brought to the credit of the plaintiff on 3rd September, 1883. On 16th February, 1888, the plaintiff moved for an order of payment of the amount recovered in 1883, and on 1st March, 1899, he moved for a notice on the defendant to show cause why the judgment entered in this case should not be revived and writ issued to recover the balance. The motion being allowed, the Court heard both parties, and made order as follows on 25th April, 1899:—

"Defendant's proctor relies on section 337 of the Civil Procedure Code, which provides that, when an application to execute a decree has been granted under chapter 22, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction, or that execution was stayed by the decree-holder at the request of the judgment-debtor; but plaintiff's proctor maintains that this case must be dealt with under the old procedure, and cites D. C., Galle, 44,903 (*Wickramesinha v. Jayawardana*), in which it was held by

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the Supreme Court on 3rd February, 1899, that as decrees under the old practice were allowed to be revived as a matter of course (*3 Lorneez, 210*), it was not necessary for the judgment-creditor to offer any explanation as to his delay in applying for the writ. I yield to the ruling in this case, and, as it is not contended that the debt has been satisfied, I allow the plaintiff's application."

The defendant appealed.

Wendt, for appellant.

Bawa, for respondent.

The arguments of counsel are stated in the judgment of Withers, J.

Cur. adv. vult.

11th July, 1899. WITHERS, J.—

The simple but important question in this case is, What is the effect of the repeal of section 5 of the Ordinance No. 22 of 1871* under the following circumstances?

The applicant recovered a judgment on the 14th April, 1882, for Rs. 120. In 1883 he recovered Rs. 11.88 in part execution of the judgment. Now, after that date no writ, warrant, or process in further execution of the judgment was issued.

It was admitted that, if section 5 of Ordinance No. 22 of 1871 was still in force, that judgment must be deemed to be satisfied.

But it so happens that, when the repeal of that section came into operation in August, 1890, ten years had not elapsed from the date of the judgment.

The Civil Procedure Code of 1889 repealed section 5.

It was urged by appellant's counsel that section 2 of the Civil Procedure Code of 1889 conserved his client's right to have it declared that the judgment of 1882 was satisfied.

That section enacts as follows: "On and from the date on which this Ordinance comes into operation, the Laws, Ordinances, sections of Ordinances, and Rules of Court, respectively mentioned in the first column of the first schedule hereto, shall be severally repealed to the extent mentioned in the third column thereof, but such repeal shall not affect (1) the past operation of any enactment hereby repealed nor anything duly done or suffered under

* Section 5 of Ordinance No. 22 of 1871 enacted that every judgment, decree, or order should be deemed to have been satisfied after the expiration of ten years from the time when such judgment, decree, or order shall have been finally pronounced, unless such judgment, decree, or order shall have been duly revived, or unless some writ, warrant, or other process of law shall have been issued to enforce the same, in which case the said period of ten years shall be reckoned from the time when such revival shall have been decreed, or from the last time when such writ, warrant, or process shall have been issued.

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any enactment hereby repealed; nor (2) any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed."

The provisions of the latter clause were relied on by the appellant's counsel.

Mr. Bawa's answer to that contention was that the appellant's right had not accrued, in the sense that it had not become full and complete at the date of the repeal. We reserved our judgment to consider some unreported cases of this Court which were said to be relevant.

In D. C., Kegalla, 5,902, I pronounced the following opinion: "It seems to me that neither before the Code could parties, nor after the Code (i.e., the Civil Procedure Code) can parties, take out execution after more than ten years have elapsed since judgment, unless they prove that fraud or force has prevented their making application in time."

That opinion, so far as it goes, is in point, but though the Acting Chief Justice, who presided in the Court of Appeal when that case was argued, concurred with me in affirming the judgment of the Court below, he said nothing about the opinion which I had expressed. It is therefore open to me to re-consider that opinion.

It has been held by this Court that section 337 of the Civil Procedure Code of 1889 applies only to cases where a previous application has been made under the Code for execution of an unsatisfied judgment, so that a person circumstanced as the defendant is would, if Mr. Wendt's argument is sound, have no remedy, however stale the judgment against him, if ten years had not elapsed between the judgment against him and the date of the repeal of section 5 of Ordinance No. 22 of 1871. Such cases would be very hard, but we must take care to avoid the charge of making bad law out of hard cases. In my opinion, however, Mr. Wendt's argument is unsound.

The accrual of a right cannot, I consider, have the sense contended for by Mr. Wendt. If ten years had elapsed between the judgment of 1882 and the date of the repeal of section 5 of Ordinance No. 22 of 1871, then the Ordinance No. 22 of 1871 would have operated on the judgment.

But clause 1 of section 2 of the Civil Procedure Code of 1889 is directed, amongst other things, to the past operation of an enactment, which in this case is section 5 of Ordinance No. 22 of 1871. The provisions, therefore, of clause 2 of the Civil Procedure Code of 1889 must apply to a different case. It appears that the right of the appellant to the presumption of satisfaction

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of a judgment ten years old accrued to him after the issue of the process under the judgment of 1883.

If the repeal had been absolute and unqualified, the appellant's case would have been a very strong one.

Ten years having elapsed between the issue of that process and the present application to execute the said judgment of 1882, it seems to me that the respondent has made out a good case, and that the judgment appealed from ought to be affirmed.

BROWNE, A.J.—

I agree with my brother's judgment, which appears to me to be in accord with the collective decision reported in *1 S. C. R. 307*. The only right which was existent in August, 1890, when the Civil Procedure Code came into operation, was the right of the judgment-creditor to have the writ re-issued in due course, and that right section 2 of the Code conserved to him, with the further assistance that it was no longer thereafter necessary to him to have the judgment revived as a procedure preliminary to his application.