FERNANDO *v.* PERIS *et al.*

D. C., Colombo, 3,544.

1897.

November 29 and December 15.

Order of abatement—In what circumstances it should be made—Right of Court to enter it mero motu*—Striking case off the roll—Procedure on death of a plaintiff.*

Per LAWRIE, A.C.J.—An order of abatement under section 402 of the Civil Procedure Code should not be entered by the Court *ex mero motu,* but on application by the defendant on due notice to the plaintiff.

Per BROWNE, A.J.—When, on the trial date of a case, it appeared to the Court that one of the plaintiffs was dead, the proper order was not to strike the case off the roll, but to postpone it to such a date as would suffice for representation to be raised to the deceased.

IN this case three plaintiffs (Welun, Velmina, and her husband Baron) sued the defendants for the recovery of a sum of money due on a bond. The defendants filed answer, and the case was fixed for trial on the 24th July, 1893. When the case was called on that day the third plaintiff was present and informed the Court that the first plaintiff was dead. The Court ordered the case to be struck off the roll.

The surviving plaintiffs having failed to take any steps in the case for a period exceeding twelve months, the Court ordered on 5th June, 1897, that the action should abate.

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The administrator of the first plaintiff and of his wife and the second and third plaintiffs applied that the order of abatement be set aside on the ground that the delay in prosecuting the suit was due to the fact that it was necessary to obtain administration of the first plaintiff's estate.

The District Judge disallowed the application for the following reasons :—

" Administration does not appear to have been applied for till " June, 1896, and the administrator is none other than the third " plaintiff himself, and the second plaintiff is his wife. If in June, " 1896, the third plaintiff considered himself the fittest person to " represent the deceased first plaintiff, he might well have done " so in 1893 also, and duly prosecuted the suit.

" The death of the first plaintiff can also afford no excuse what- " ever for the second and third plaintiffs (who are still alive) not " prosecuting their claim during the last four and a half years.

The applicants appealed.

1897. *December 15.*

LAWRIE, A.C.J.—

The consequences of an order that an action shall abate are so serious that my opinion is that the Court should never exercise the power *ex mero motu*, but only on application by the defendant and after due notice to the plaintiff.

On 24th July, 1893, the District Judge was informed that one of the three plaintiffs was dead, the case was struck off the trial roll.

On 4th June, 1897, the proctor for the plaintiffs moved to amend the plaint by deleting the name of the deceased and by substituting the name of his legal representative, the administrator, but for some reason or other this motion was not fully recorded, and next day, with the knowledge that there was an administrator, the District Judge ordered the action to abate. I cannot approve of that. I think it was unfair, and so thinking I am adverse to affirm an order refusing to set aside the abatement which I think ought not to have been entered. I would set aside the order of abatement.

BROWNE, A.J.—

I agree that the order to abate should not have been made when, and only when, an administrator was taking steps to revive the proceedings, in order that he might close the affairs of his intestate. The error in the procedure was in " striking the case off the roll " on the death of one of the plaintiffs. That trial should have been postponed to such a date as would have sufficed for representation to be raised to the intestate. If this was not done within twelve months thereafter, I venture to consider the Court could then order it should not encumber its trial roll any longer.