*1908.*
*July 7.*

*Present:* The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

LORENSU APPUHAMY *et al.* *v.* PAARIS *et al.*

*D. C., Negombo, 4,525.*

*Civil Procedure Code, s. 402—Order of abatement—Failure to take necessary step—Order made* ex mero motu*—Fixing case for trial—Civil Procedure Code, s. 80.*

Where, after the defendants had filed answer in a partition suit the Court did not fix any day of trial, and the plaintiffs themselves did not take any further steps in the action for over a year, and the Court ordered that the action do abate, and four years after the plaintiffs moved that the order of abatement be vacated—

*Held* (reversing the order of the District Judge), that the order of abatement was wrongly made, as the plaintiffs had not failed to take any necessary step in the action, and that the said order should be vacated.

WOOD RENTON J.—The duty of fixing the case for trial rests on the Court.

*Quære.*—Whether an order of abatement made by the Court *ex mero motu* is bad?

APPEAL from an order of the District Judge of Negombo (R. W. Byrde, Esq.). *1908. July 7.*

*Wadsworth*, for the plaintiffs, appellants.

*H. Jayewardene*, for the defendants, respondents.

July 7, 1908. WOOD RENTON J.—

The appellants instituted this action in the District Court of Negombo for the partition of certain lands, which they alleged to belong in common to themselves and the respondents, on April 25, 1902. Answer was filed on behalf of the 2nd, 3rd, 5th, 6th, and 8th respondents on June 17. It then became the duty of the Court, under section 80 of the Civil Procedure Code, to fix the day of trial and "give notice thereof to the parties." The record contains no entry showing that this was done. But on October 24, 1903, the then District Judge made the following entry: "No steps having been taken for more than a year, it is ordered that this action do abate." On December 3, 1907, the proctor for the first plaintiff-appellant filed an affidavit, and moved for a notice on the respondents to show cause why the order of October 24, 1903, abating the action, should not be vacated. Ultimately all the respondents were served, and on March 16, 1908, the present District Judge, after hearing the evidence of the first plaintiff-appellant, dismissed the motion with costs. Against that order the present appeal is brought. The appeal possesses no merits. The attempt of the first plaintiff-appellant in his affidavit and in his evidence to explain his delay of four years in challenging the order of October 24, 1903, on the ground of ill-health, was ridiculous, and on the materials before him the decision of the learned District Judge was quite right. But Mr. Wadsworth, the appellant's counsel, has taken a fresh point before us. He contends that the order of abatement was bad, inasmuch as (i) the Court has no power under section 402 of the Civil Procedure Code to make, as it appears to have done in the present case, an order of abatement *ex mero motu*, and (ii) the appellants had not failed within the meaning of that section to take some steps "necessary" to the prosecution of the action. In support of the former branch of the argument, Mr. Wadsworth relied on the case of *Fernando v. Peris*,[1] in which Lawrie J. said at page 78: "The consequences of an order that an action shall abate are so serious 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." The same view was expressed by Grenier J. in *Cave & Co. v. Erskine*.[2] In support of the latter branch of his argument, Mr. Wadsworth relied on the text of the Code itself.

[1] *(1897) 3 N. L. R. 77.*

[2] *(1902) 6 N. L. R. 338.*

*1908.*
*July 7.*

WOOD RENTON J.

However desirable it may be, in view of the provision in section 403 of the Code that " when an action abates . . . . no fresh action shall be brought on the same cause of action," that the Court should not act *ex mero motu* under section 402, it would be difficult, I think, for us to hold in the absence of any language in section 402 itself expressly or impliedly imposing any such fetter on the Court, that if it did make an order of abatement *ex mero motu*, that order would be bad. But it is not necessary to decide that point now. For I confess that I am unable to get over the difficulty created by Mr. Wadsworth's alternative contention.

The appellants had within the meaning of section 402 taken every step incumbent upon them with a view to the prosecution of the action. I think that when that section uses the word " necessary," it means " rendered necessary by some positive requirement of the law." We ought not to interpret it as if the section ran " without taking any steps to prosecute the action which a prudent man would take under the circumstances." In the present case the appellants had done all that the law required of them. The duty of fixing the day of trial rested, under section 80 of the Civil Procedure Code, on the Court (see *Fernando v. Curera*,[1] and *cf. Ponnampalam v. Canagasabay* [2]).

With great reluctance I have come to the conclusion that the decree appealed against should be set aside, the order of October 24, 1903, vacated, and the appellants allowed to proceed with their action. All costs should be costs in the cause.

HUTCHINSON C.J.—I agree.

*Appeal allowed.*

[1] *(1896) 2 N. L. R. 29.*

[2] *(1896) 2 N. L. R. 23.*