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October 3 and 7.

CAVE & CO. *v.* ERSKINE.

C. R., Colombo, 12,057.

Action for goods sold and delivered—Prescription—Institution of suit—Order that suit do abate—Civil Procedure Code, ss. 402 and 452—Irregularity of such order—Restoration of suit to the cause roll—Commencement of suit.

The filing of a plaint in Court is an act of the plaintiff by which he signifies that he has commenced an action against the defendant, and the summons thereafter gives him the exact date on which the action was instituted or commenced.

There is no distinction between the expressions "institution of action" and "commencement of suit."

Section 402 of the Civil Procedure Code does not empower the Court *ex mero motu* to make an order of abatement of a suit. It can be made only on the application of the defendant and due notice to the plaintiff.

Where the Fiscal has not been able to serve summons on the defendant, and no blame is attachable to the plaintiff for such non-service, it is not open to the Court to order the suit to abate.

An action for goods sold and delivered up to November, 1899, filed on 12th March, 1900, and improperly ordered to abate and then restored to the roll on 13th March, 1902, is not prescribed under section 9 of Ordinance No. 22 of 1871.

IN this case the plaintiffs filed their suit on the 12th March, 1900, against the defendant for a sum of Rs. 145, being balance value of goods alleged to have been sold to him between 10th October, 1894, and 25th November, 1899. The defendant pleaded that the action was prescribed under section 9 of Ordinance No. 22 of 1871, inasmuch as the Court having, on 12th January, 1901, ordered the action to abate, and on 13th March, 1902, restored

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the action to the roll, the action was commenced on 13th March, 1902, more than one year after the alleged sale by the plaintiffs to the defendant.

The Commissioner, Mr. H. White, after hearing counsel and witnesses, held as follows:—

"The only question for decision is whether the action dates from 12th March, 1900, when it was instituted, or from 13th March, 1902, when the order of abatement of 12th January, 1901, was set aside. That order was not regularly passed. It was made by the Court *ex mero motu* without notice to the plaintiffs, and not on the application of the defendant. *D.C., Colombo, 3,544 (3 N. L. R. 77)*. That order being null and void, I have no hesitation in deciding that the action dates from 12th March, 1900. On the law and the merits I find for the plaintiffs".

The defendant appealed. The case was argued on the 3rd October, 1902, before Grenier, A.J.

Elliot, for appellant,—The plaint was filed on 13th March, 1900, and the defendant was not served with summons for a long time. The Commissioner ordered the action to abate. That order killed the action. It was restored on 13th March, 1902. In *Murugupillai v. Muttulingam (3 C. L. R. 92)* it has been held that, as to the question of prescription, the action must be taken to date from the order of revival. But in *Fernando v. Perera (3 S. C. C. 158)* the judgment of Cayley, C.J., seems adverse to the appellant. Clarence, J., however was quite clear that the suit begins on the day the summons was issued. The Commissioner had no right or justification *ex mero motu* to set aside his order of abatement. The object of section 402 of the Civil Procedure Code is not to allow the Court roll to be encumbered with plaints not duly pressed. If the plaintiff could not find the defendant, he should have moved to withdraw the suit with leave obtained to re-institute it.

Van Langenberg, for plaintiffs, respondent.—The Fiscal could not serve the summons on the defendant, as the defendant was on the move, going from one place to another, performing his duties as surveyor. The Commissioner without notice to the plaintiffs ordered the suit to abate. Section 402 does not justify such an order. That section applies to cases where the defendant has appeared in response to the summons, and not to cases where summons could not be served. Wrong as the order of abatement was, it had not the effect of "killing" the action. To restore a case to the roll does not mean to re-institute it. *Murugupullai v. Muttulingam*

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(*3 C. L. R. 92*) is distinguishable from the present case. There the plaintiff neglected to obey the provisions of sections 69 and 70 of the Procedure Code, but here the plaintiff did all he could to have the summons served. The attention of Lawrie, J., was not directed to section 90.

Cur. adv. vult.

7th October, 1902. GRENIER, A.J.—

This was an action for goods sold and delivered, and was instituted by the plaintiffs on the 13th March, 1900, on which date, I take it, the plaint was filed and the action commenced. I cannot appreciate any distinction, for really and truly there is none of any kind whatever, between the institution of an action and the commencement of a suit. The filing of the plaint closely following, as is generally the case, upon the letter of demand with the usual notice in it of an action at law, is an act of the plaintiff by which he signifies that he has commenced an action against the defendant, and the summons thereafter gives him the exact date on which the action was instituted or commenced.

I will, therefore, take it as a fact apparent on the record itself, that this action was brought, or instituted, or commenced—all these words have precisely the same legal meaning and effect—on the 13th March, 1900.

The plaintiff obtained a summons, which was made returnable on the 4th April, 1900, the reason for this long date being apparently that the defendant was resident in Ratnapura, which is over 50 miles from Colombo. On the 4th April the defendant was absent, and there was no return to the summons. The next day, on the 5th April, the summons was received with an endorsement on it that it was not served on defendant, as he was not known. This does seem an extraordinary return in view of the fact that the defendant, as I understand, is a gentleman employed in the Survey Department. The Commissioner then made an order that the summons should be re-issued, and that plaintiff should take steps to have the summons served. Summons, I suppose, was re-issued, and on the 25th June, 1900, I find this entry in the record: "Defendant absent. Summons not served. Reported not to be found. Fresh summons may issue". What transpired in the interval the journal entries do not disclose, but on the 12th Januuary, 1901, I find this entry: "The plaintiff having taken no steps to prosecute this action since the 25th June, 1900, it is ordered that the action do abate". This order of abatement was made *ex mero motu* by the Commissioner, and was bad. In the case of *Fernando v. Pieris* (*3 N. L. R. 77*) it was held that an order of abatement under this section should not

be entered by the Court *ex mero motu*, but on application by the defendant on due notice to the plaintiff, and, indeed, looking at the wording of section 402, it is only where the plaintiff takes no step to prosecute the action where such step is necessary, that the Court may pass an order that the action shall abate.

Now, can it be said that the Court was justified, in the circumstances, assuming that it had the power of its own motion to order the action to abate, to make such an order on the ground that the plaintiff had not taken the necessary steps to prosecute the action? It goes without saying that the action of the Fiscal must necessarily, to a great extent, be uninfluenced by what the plaintiff wishes or desires may be done. When a summons is entrusted to a Fiscal for service, it is not to be expected that the plaintiff or his representatives would accompany the process server in order to have the summons served, especially on a defendant who resides 50 miles from where the plaintiff resides. Consequently it seems to me that it was not the plaintiff's fault that the Fiscal was unable to discover for nearly seven months the whereabouts of the defendant, who was ultimately found to be in Batticaloa. If I were to give way to the contention that the default was on the part of the plaintiff, although there is no proof of it in this case, that the summons was not served earlier, then it would be easy for any defendant, by arrangement with the Fiscal's process server, to postpone the service of the summons on him until such time as would enable him to set up a defence of the nature under consideration.

I am, however, strongly of opinion that section 402 does not apply to a case of this kind where the Fiscal has not been able to serve summons on the defendant for a considerable period, but to cases where the defendant appears on summons, and it may be files his answer, but the plaintiff thereafter fails to take the necessary steps to prosecute the action by bringing it to speedy trial and finality. In this view, I am supported not only by the terms of section 403, which enables the plaintiff or the legal representatives of a deceased or insolvent plaintiff to apply for an order to set aside an order for abatement or dismissal, but by section 405, which refers to the procedure which has to be followed where either the plaintiff or defendant applies for the exercise of the discretion of the Court under chapter 25, as also by the case reported in *3 N. L. R. 77*. It is plain that the defendant cannot be made a respondent to such an application unless he has already been reached by the Fiscal by the initial summons in the case.

The order of the Commissioner, setting aside and treating as null and void the order that the action do abate, was therefore

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clearly right, and the case was properly restored to the file of pending cases on the 13th March, 1902.

It was argued that if the order for abatement was good, this restoration had the effect of "killing the plaint", to use the words of the appellant's counsel, and that the true date of the institution must be taken to be the 13th March, 1902. I cannot accede to this argument, because, as a matter of fact, the plaint was filed, or the action was commenced, on the 13th March, 1900, and that is the date to be considered, so far as the question of limitation is concerned. There cannot possibly be two filings of plaints and two commencements of actions, and therefore I must take the 13th March, 1900, as the time from which the period of limitation has to be counted, in which case plaintiff's action is not barred.

I was referred to the case of *Murugupulle v. Muttulingam* (*3 C. L. R. 92*), in which Mr. Justice Lawrie held upon the following facts that the action must be taken to have commenced *quoad* the period of limitation, from the date the order of abatement was set aside. The facts were these. The plaintiff, in May, 1891, when the defendant was absent from Ceylon, commenced an action for the price of goods sold, but took no steps to serve the summons out of the jurisdiction, and in 1892 the action was ordered to abate under this section. The defendant having returned to Ceylon, the order of abatement was set aside and summons served on him.

Here it will be at once remarked, subject of course to what I have with considerable diffidence already intimated is my own view of the scope and object of section 402, that the plaintiff, after filing his plaint and obtaining summons, did not proceed under section 69 of the Civil Procedure Code, which lays down a certain procedure in regard to the service of summons out of the Colony. There must be an application for an order for leave to serve such summons, and it must be supported by evidence, by affidavit, or otherwise showing in what place or country such defendant is or may probably be found, and the grounds on which the application is made, and section 70, which has to be read with section 69, gives particulars as to the terms of the order. Plaintiff, in the case under consideration, in the words of section 452, did not take any step to prosecute the action "where such step is necessary", and this case is, therefore, clearly distinguishable from the present one, where the Fiscal was entrusted with certain ministerial duties with regard to the summons, and the summons were duly entrusted to him for service, not so much by the plaintiff, as by the Court which issued it. Practically no blame could be attached to the

plaintiff for the non-service of the summons till it was actually served on the defendant at Batticaloa.

The case of *Fernando v. Perera* (*3 S. C. C. 158*) settles, I think, authoritatively the question as to the meaning of the term "commencement of an action." It was held in that case by Chief Justice Cayley that the expression "action brought" in Ordinance No. 8 of 1834, means the same thing as "action commenced" in section 10 of Ordinance No. 22 of 1871, and that the filing of the libel, or the *vivâ voce* statement of the plaintiff under the rules and orders of 1st October, 1833, constituted the commencement of that action. To sum up this part of the case in a few words, no distinction can possibly be drawn between "the filing of the plaint," "action brought," and "commencement of the action." Mr. Justice Clarence, however, was of opinion that the commencement of the action was the issue of summons, but, speaking from my own experience, I may say that this distinction did not meet with much approval, and that it was considered that Chief Justice Cayley had interpreted the sections in question as this should be interpreted.

The only question that was argued before me being this question of law, to which I have addressed myself at some length, there, apparently, being no merits, I think that the defendant's plea of prescription must be rejected and the judgment of the Court below affirmed.