

FERNANDO v. CURERA.

D. C., Chilaw, 743.

1896.

February 2.

Postponement of cases—General postponement irregular—Civil Procedure Code s. 82.

An order striking a case off the roll until the decision of a connected case is an order of general postponement, and one that should not be made. The hearing of a case may, under section 82 of the Civil Procedure Code, be postponed for a fixed day, and not generally.

It is the duty of the Court to fix a day for the hearing of a case, and not to await an application therefor by the plaintiff.

THE facts of the case appear in the judgment of BONSER, C.J.

Dornhorst, for appellant.

2nd February, 1896. BONSER, C.J.—

This is an appeal from an order of the District Court of Chilaw setting aside an order which had been made under section 402 of the Civil Procedure Code, that the suit should abate.

It appears that on the 14th November, 1895, when the case was ready for hearing, the parties desired that the case should not come on until after the decision of this Court had been given in another case, which was connected in some way or other with this case; and thereupon the Court made an order that the case should be "struck off the trial roll until the connected case No. 731 "is decided in appeal."

That was an order of general postponement which should not have been made. Section 82 of the Civil Procedure Code provides for the postponement of the hearing of cases, but they must be postponed to a fixed day, and not generally.

However, the order was made, and nothing further was done in the suit until November, 1895, when the proctor for the defendant moved, under section 402 of the Civil Procedure Code, for an order that the action should abate, on the ground that a period exceeding twelve months had elapsed subsequently to the date of the last order or proceeding on the record without the plaintiff taking any step in the case. Thereupon the Court made this order now appealed against, and it seems to me that the order was made wrongly. In the first place, it was made *ex parte*, without notice to plaintiff; and secondly, it does not appear that the plaintiff had failed to take any step to prosecute the action, which it was necessary for him to take. The Court seems to have assumed that it was the duty of the plaintiff to make an

1895. application to fix a day for the hearing of the action ; but it was
February 2. the duty of the Court to fix a day for the hearing. If the original
BONSER, C.J. order had been in proper form there would have been no difficulty,
because then the case would have been fixed for a certain day, and
would have come up in its turn. If, however, at that time the
decision of the Appeal Court had not been given, the case could have
been postponed to a further day, and thus the Court would never
have lost seisin of the case. When the plaintiff got notice of the
order abating the action, he moved, upon notice to the defendant,
to set it aside, and in my opinion the District Judge rightly set
it aside. Mr. Dornhorst, who appeared for the defendant, appellant,
frankly admitted that he could not contend that the order was
wrong. He limited his appeal to a question of costs, and we think
that under the circumstances no costs should be given of that
motion ; and the order will accordingly be varied by making the
costs of that motion costs in the cause.

LAWRIE, J.—I agree.
