

are sufficient for providing against a breach of the peace. In support of his view, that, in the absence of any special law he was justified in acting on his own discretion, Mr. Hampton says,—that “there is no section of the law authorizing return of stolen property recovered, to the man robbed, yet it is in reason that the property should be so returned.” Mr. Hampton has apparently overlooked the provisions of s. 418 of the Code. That section clearly provides for the case which he supposes to be left not provided for.

1879

IN THE  
MATTER OF  
DURJAN  
MAHLON  
v.  
WAJID  
HOSSAIN.

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ORIGINAL CIVIL.

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*Before Mr. Justice Wilson.*

BHOYRUB DASS JOHURRY v. DOMAN THAKOOR.

1879

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May 12.

*Abatement of Suit—Death of sole Plaintiff—Revivor—Civil Procedure Code (Act X of 1877), ss. 363, 365, 366, 371—Limitation Act (XV of 1877), sched. ii, arts. 171, 178.*

Upon the death of a sole plaintiff, if no application to revive is made within sixty days from the date of the plaintiff's death, the suit abates. But the Court may, under s. 371 of the Code of Civil Procedure, revive the suit, on the application of the legal representative of the plaintiff, within three years from the time when the right to apply accrues, if he can show that he was prevented by sufficient cause from continuing the suit.

THIS suit was commenced on the 16th of September 1878 in the name of Bhoyrub Dass Johurry as sole plaintiff. Bhoyrub Dass Johurry died on the 9th of November 1878. Probate of his will was not obtained until the 5th of April 1879, on account of special citations having been issued, and other difficulties as regards the appointment of executors.

Mr. Bonnerjee for the executors obtained a rule nisi, calling upon the defendant to show cause, why the suit should not be revived in the names of the executors, or why the suit should not abate under s. 366 of the Civil Procedure Code, and in the event of an order being made for abatement, such order should not be set aside under s. 371, and the names of the executors be entered upon the record.

1879

BHOYRUB  
DASS JOHURRY  
v.  
DOBAN  
THAKOOR.

Mr. *Cracknall* for the defendant showed cause.—The first part of the rule cannot stand, as here there was a sole plaintiff, and no application to revive the suit has been made under s. 365 within sixty days from the date of the plaintiff's death, as required by the Limitation Act, sched. ii, art. 171. If the suit abates under chapter xxi of the Civil Procedure Code, and an application is made under s. 371 to set aside the order for abatement, due diligence must be shown. Here the plaintiff died in November, and no application is made till to-day. If there were difficulties about probate, the proper course was to apply for limited administration. An application made after the period of limitation has elapsed, must be dismissed: Limitation Act, s. 4.

WILSON, J.—The first question, whether I have power to make either of the orders asked for, is important. Section 363 of the Code provides, that if there be more plaintiffs than one, and any of them dies, and the cause of action does not survive to the surviving plaintiff or plaintiffs alone, but survives to him, or them, and the legal representative of the deceased plaintiff jointly, the Court may, on the application of such legal representative, enter his name on the record in place of such deceased plaintiff, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs and such legal representative. Section 365 provides that, "in case of the death of a sole plaintiff, or sole surviving plaintiff, the Court may, where the cause of action survives, on the application of the legal representative of the deceased, enter his name in the place of such plaintiff on the record, and the suit shall thereupon proceed." Article 171 of the Limitation Act says, that the period of limitation for applications under these sections, shall be sixty days from the date of the plaintiff's death. The result is, that as to the first part of the present application, which is to revive under s. 365, the applicants are barred. Section 366 of the Code provides, that "if no such application (that is no application under s. 365) be made to the Court, by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and award to the defendant the

costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff; or the Court may, if it thinks proper, on the application of the defendant, and upon such terms as to costs, or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes." When the order is made under the first part of this section, the suit abates. Section 371 says, "that when a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action. But the person claiming to be the legal representative of the deceased, bankrupt, or insolvent plaintiff may apply for an order to set aside the order of abatement or dismissal; and if it can be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal, upon such terms as to costs, or otherwise as it thinks fit." No period of limitation is specifically provided for applications under the last two sections, and the period of limitation, therefore, must come under art. 178 of the Limitation Act, which gives three years from the time when the right to apply accrues. Under these two sections there is, I think, power to deal with such cases as the present, by declaring the suit abated under s. 366, and at the same time reviving it under s. 371. The question then is, whether the applicant was prevented by any sufficient cause from continuing the suit. I think that he was. Mr. Cracknall says sufficient cause was not shown, because the applicant might have applied for limited administration, but his omission to apply for such an administration, which might, or might not have been granted, was not, I think such neglect as should disentitle him to relief.

*Rule absolute.*

Attorney for the applicant: Mr. Leslie.

Attorney for the defendant: Baboo Narendronath Sen.

1879

BHOYRUB  
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THAKOOR.