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property, which was granted by the lower Court, but refused by this Court on the 20th June, 1888[1].

The mortgagors have also stated in their petition that the mortgage money was not paid in time, nor the appeal filed, owing to the negligence of their chief kárbhári, Ratilal, who had been instructed to attend to those matters and was possessed of the necessary funds, that they did not discover that the appeal had not been filed till August or September, 1886. But no reason is given why they did not then apply for an extension of the time for appealing, except that they, on the contrary, were advised to give up all idea of appealing and to rest satified with filing cross-objection.

It has been argued that the period of time since the filing of cross-objections might be excluded in applying section 5 of the Statute of Limitations by way of analogy to section 14, as was suggested might be done in *Sitaram* v. *Nimba*[2]. But here there was no question either of doubtful jurisdiction or procedure, but merely the choice of one of two courses, and the analogy does not, therefore, exist. We must, therefore, discharge the rule with costs.

Rule discharged.

(1) I. L. R., 13 Bom., 106. (2) I. L. R., 12 Bom., 321.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

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NA'RA'YEN JETHA', (PLAINTIFF), *v.* THE MUNICIPAL COMMISSIONER AND THE MUNICIPAL CORPORATION OF BOMBAY, (DEFENDANTS).*

Negligence—Death by negligence—Act XIII of 1855*—Suit for damages by parents of a child killed by negligence—Contributory negligence—Liability for negligence of servants—Damages—Deduction for maintenance of child—Funeral expenses.*

The plaintiff's unmarried daughter, a child of between five and six years old, fell into an open manhole of a sewer in a lane in Bombay on the 20th August, 1890, between 4½ and 5 o'clock P.M., and, when her body was recovered, life was extinct. The sewer was vested in the Municipality of Bombay and was under the control the Municipal Commissioner by virtue of sections 220 and 289 of the Bombay

* Suit No. 5103 of 1891.

Municipal Act of 1888. When such manholes are opened, it is the duty of the Municipal Commissioner under section 321 of that Act to have them properly fenced and guarded.

On the 28th August, 1890, the manhole, in question, was opened for the purpose of inserting a flushing door in the sewer. From the time the manhole was opened until the occurrence of the accident the deceased child's mother was seated at the corner of the street selling cucumbers about four yards from the manhole in question. The hole was at first properly fenced with four timber hurdles about four feet high set up right round it at a distance of two feet from the hole, secured at the corners with ropes. Soon after 4-30 P.M. the superintendent in charge of the work gave orders to cease work and close the manhole for the night. The accident took place almost immediately afterwards. The Judge found on the evidence that the child fell into the open hole in the interval that elapsed between the taking down of the fence and putting the cover on the hole. What she was doing the instant before she fell, there was nothing to show. She was seen running and playing about the street during the afternoon. Her mother, who was sitting close by, did not see the accident, her attention being at the moment occupied by some customers. She admitted that before the accident occurred she knew the fence was down and the hole open, and she would not have let the child go to it had she been playing beside her.

Held (1) that the defendants were guilty of negligence and that they were liable for the negligence of their servants, although the latter acted contrary to the express orders given by their superior;

(2) that although the mother of the child might have been guilty of negligence, which contributed to the accident, yet if the defendants could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, her negligence would not excuse them;

(3) that, as regards damages, in cases of this nature, distinct evidence of the loss sustained or benefit expected is not necessary. The jury may look at all the circumstances of the case and especially at the position of the parents and age of the child, and call in aid their own experience in arriving at their conclusions.

Where damages are allowed, a reasonable sum should be deducted on accoun of the maintenance for such period as the child might reasonably have been expected to live with her parents.

In an action under Act XIII of 1855 no sum can be awarded in respect of funeral expenses, whether for removal or disposal of the body or for outlay for ceremonial or obsequial purposes.

REFERENCE from the Court of Small Causes, Bombay, under section 69 of the Presidency Small Cause Court Act (XV of 1882).

The reference was stated by the Chief Judge as follows:—

"1. The facts of this case are fully stated in my judgment, copy of which accompanies this reference. Having regard to the importance of some of the questions involved, at the time of delivering judgment I reserved leave to the parties to inform

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me within a week what points of law, if any, they would require me to refer for the opinion of the High Court.

"2. The defendants have now required me under section 69 of Act XV of 1882 to refer the following points :—

(1) Whether the defendants have been guilty of negligence?

(2) Whether the defendants are liable for the negligence (if any) of their servants, although the latter have acted contrary to the express orders given to them by their superiors?

(3) Whether a child of between five and six years of age, of the class of life to which the deceased belonged, is ordinarily able to take reasonable care of itself?

(4) Whether the mother of the deceased child was guilty of contributory negligence in leaving the child to take care of itself?

(5) Whether the 'decisive' or 'proximate' cause of the accident was not the negligence of the deceased, seeing that the open hole had been seen and avoided by other passers by?

(6) Whether, in the event of its being held that a child of five or six years of age, of the class of life to which the deceased belonged, is not ordinarily able to take reasonable care of itself, the 'decisive' or 'proximate cause' of the accident was not the negligence of the deceased's mother?

(7) Whether the little domestic services, rendered to the plaintiff and his wife by the deceased in the present case, were of any appreciable pecuniary value, and whether the same are sufficient to form the basis of an action under Act XIII of 1855?

(8) Whether the parents of the deceased could have any reasonable expectation of benefit from the continuance of the life of the deceased when it was not proved that they had received any pecuniary assistance (*i.e.* payment in money) from the deceased during her life?

(9) Whether, in an action under Act XIII of 1855 brought by a parent for damages for the death of a child, the fact that such parent had received no pecuniary assistance (*i.e.* payment

in money) from such child during its life does not preclude the Court from awarding damages for any alleged 'reasonable expectation of benefit' which the parent might derive from the continuance of the life of such child?

(10) Whether the damages in the present case have been assessed on a right principle, and whether the same are not excessive?

(11) Whether, in the case of damages being allowed as in the present case, a reasonable sum should not be deducted on account of maintenance of the child for such a period as the deceased might reasonably have been expected to live with her parents?

(12) Whether in an action under Act XIII of 1855 any sum can be awarded in respect of funeral expenses, whether for the mere removal and disposal of the body or for the outlay for ceremonial or obsequial purposes, and if so, to what amount?

(13) Whether the decisions of the Irish Courts under Lord Campbell's Act (9 and 10 Vict., c. 93) are binding on the Court of Small Causes at Bombay as authorities of equal weight as the decisions in the English Courts, and if not, to what extent the same are binding?

"3. Some of these seem to me to be rather questions of fact than of law, and some again, though questions of law, not to arise on my finding of the facts. But, inasmuch as the case is one of some importance both to the public and the Municipality of Bombay, and because in questions of negligence, as in questions of fraud, it is not always easy to define precisely the boundary line where fact ends and law begins, I have thought it better to submit to their Lordships the questions I am required to refer exactly in the form in which they have been forwarded to me."

The following were the facts of the case as stated in the judgment of the Chief Judge:—

"It is undisputed that the deceased child Hirá, the infant unmarried daughter of the plaintiff and his wife Gunga, between 4-30 and 5 P.M. on 28th August, 1890, fell down an open manhole of a sewer in Khetwády 10th Lane, at that time under the control of the first defendant, and vested in the second by virtue of sections 220 and 289 of the City of Bombay Municipal Act, 1888, and when her

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body was recovered from another manhole some three hundred feet distant life was extinct.

"These manholes are circular openings in the street, wide enough to allow the passage of a man's body, for the purpose of giving access to the sewers under the roadway. Ordinarily they are kept closed by round covers made of thick plates of iron fitted over them, which to prevent obstruction to the traffic must be at the level of the road. When they are open, it is the duty of the first defendant, under section 321 of the City of Bombay Municipal Act, to have them properly fenced and guarded.

"On 28th August, 1890, the manhole in question was opened at about 1-30 P.M. with five others, for the purpose of inserting a flushing door in the sewer, the work for which was carried at another manhole in the opposite lane. From about the time the manhole was opened till the occurrence of the accident the deceased child's mother was seated at the corner of the street, with a basket of cucumbers, which she was selling to the passers by, at a distance of about four yards from the manhole in question and as she now says with her back to it. But in her deposition before the Coroner she is recorded as having said 'facing it,' and Inspector Chislett, of the Bombay Police, who was on the spot soon after the accident and questioned her about it, says she showed him the spot where she was sitting with her face towards the manhole, and that, I think, must have been her real position; otherwise she would have been turned away from the passers by who were to be her customers. She admits that the manhole was at first properly fenced with four timber hurdles about four feet high, set upright round it, at a distance of about two feet from the hole, secured at the corners with ropes. She says this fence was taken down about 3 P.M. But, I think, she fixes the time for this too early. The rest of the evidence leaves no doubt, in my mind, that the fence remained as first erected, till Mr. Etlas, the Superintendent in charge of the work, gave orders soon after 4-30 P.M. to cease work, and close the manholes for the night. The mukádam Vithu Bálu says that during the whole of this time two men, named Ráma and Bháu, remained in charge of the manhole in question. Unfortunately having left Bombay, they were not examined. But I think it is very improbable that Vithu is correct in his statement, which cannot have been made from personal knowledge, as he says he went away himself. In the first place, Mr. Etlas says that as the work was going on at another hole there was no one in particular at the hole in question. In the second place, it is not likely that, with a hole properly fenced, two men would be employed for three hours to do nothing but sit by it. In the third place, if they were, it is not unlikely that they would go away, at any rate till such time as they might be missed. Lastly, Vithu Bálu himself says that on receiving orders from Mr. Etlas to close the manhole for the night, which according to Mr. Etlas were given to him at another hole three hundred feet away, he ordered these same two men Ráma and Bháu to close the manhole in question, and within two minutes of doing so heard the alarm of the accident, when he was himself at another manhole eighty feet off. I think, therefore, Ráma and Bháu were not at the manhole in question when orders were given to close it. I consider it very improbable that they had been there ever since it was opened, and certainly they were not there when the child

fell in. To that extent, therefore, the hole was not guarded as required by section 321 of the City of Bombay Municipal Act. However I find nothing in the evidence which leads me to suppose that the fence was not in proper order round the hole from the time it was opened, about 1-30 P.M., till orders were given to close it about 4-30 P.M. It appears from the evidence of Mr. Etlas that his orders to the mukádam were to put the covers on to the manholes before removing the fences, and from the mukádam's evidence it appears that this is what is generally done. But he does not say that he expressly communicated Mr. Etlas' order to this effect to Ráma and Bháu, and he goes on to say: 'If there is a difficulty about getting the cover on, we push the fence away.' I think it is clear on the evidence of both sides as to the state of the fence at the manhole in question, immediately before and immediately after the accident, that at the moment the child fell into the open hole the fence had all been taken down, two pieces were lying flat on the road near the hole, and the other two were set leaning against a firewood stack, a few feet off. Mahomed Ali, who inhabits a house immediately overlooking that manhole, says that his attention was called to the accident by a cry raised by the mother of the child, and there was then no one else on the road near the hole except 'two coolies.' These may have been Ráma and Bháu on their way back to the hole after removing the first two pieces of the fence to the wood-stack, in order to remove the other two and to close the hole. If not, then Ráma and Bháu must have gone off to a greater distance than to the wood-stack or to some business other than the closing of this hole. Clearly the fence had all been taken down before the cover was put on the hole, and some of it had been removed to a distance of some feet. I have no doubt the child fell into the open hole in the interval that had elapsed after the taking down of the fence, soon after 4-30 P.M., and possibly during the process of its removal to the wood-stack. What she was doing the instant before she fell, there is nothing to show. Two of the witnesses saw her in the act of falling, and one of them saw her playing and running about the street during the afternoon. But neither of them could say what she was doing the moment before she fell. Her other, who was sitting close by, did not see the accident, her attention being at the moment taken up by some customers, and she was first apprised of it by the exclamation of some passers-by who saw the child fall. She admits that before the accident occurred she knew the fence was down and the hole open, and that she would not have let the child go to it had she been playing beside her. This, according to her deposition as recorded by the Coroner, is exactly what the child was doing, though before me she said she had kept the child in the house a considerable distance further from the manhole on the other side than she was sitting with the cucumbers.

"In this state of the facts I have to consider the defences raised before me at the hearing. They were, first, denial of negligence on the part of the defendants; 2nd, contributory negligence on the part of the child; 3rd, contributory negligence on the part of her mother; 4th, absence of pecuniary loss to the plaintiff by reason of the child's death, such as would entitle him to sue under the provisions of Act XIII of 1855; 5th, denial of damage to the amount claimed."

The Judge of the Small Cause Court gave judgment for the plaintiff for Rs. 250, apportioning that sum between the plaint-

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iff and his wife Gunga, the mother of the deceased child, in equal shares.

There was no appearance for the plaintiff.

Jardine for the defendant:—He cited Bevan on Negligence, p. 167; Pollock on Torts. p. 405; *Wakelin* v. *London & S. W. Railway Company*(1); *Dublin Wicklow and Wexford Railway Company* v. *Slattery*(2); *Pym* v. *Great Northern Railway Company*(3); *Bourke* v. *Cork and Macroom Railway Company*(4); *Hull* v. *Great Northern Railway Company*(5); *Duckworth* v. *Johnson*(6); *Franklin* v. *South-Eastern Railway Company*(7); *Sykes* v. *North-Eastern Railway Company*(8); *Wolfe* v. *Great Northern Railway Company*(9); *Dalton* v. *South-Eastern Railway Company*(10); *Hetherington* v. *North-Eastern Railway Company*(11).

SARGENT, C. J.:—In this case numerous points have been referred to this Court by the Chief Judge of the Small Cause Court, under Act XV of 1882.

The first two questions must be answered in the affirmative, for the reasons which the Chief Judge himself has given in his judgment. Section 321, clause (*b*) of the Municipal Act imposes on the Commissioner the statutory duty of having "all places, where the street is opened, fenced and guarded," and his default in taking this precaution made him liable in damages for the consequences of his negligence, and whatever instructions may have been given to the employés of the Municipality, such liability remains unaffected. The cases of *Gray* v. *Pullen*(12) and *Limpus* v. *London General Omnibus Company*(13) referred to by the Chief Judge are conclusive authorities for the above propositions.

Questions 3 and 4 are questions of fact. Question 6 does not arise.

Passing to the fifth point we understand it as intended to raise the question whether there was contributory negligence on the part of the deceased child which would have prevented the child from recovering damages from the defendants had the accident

(1) 12 App. Cas. 41.
(2) 3 App. Cas., 1155.
(3) 4 B. & S., 396.
(4) Law. Rep. (Irish) 4 Com. Law, 682.
(5) L. R. (Irish) 26 Com. Law, 289.
(6) 29 L. J. (N. S. Ex., 25.
(7) 3 H. & N., 211.
(8) 44 L. J. C. P. (N. S.), 191.
(9) L. R, (Irish) 26 Com. Law, 548.
(10) 4 C. B. (N. S.), 296.
(11) 9 Q. B. D., 160.
(12) 34 L. J. Q. B., 265.
(13) 1 H. & C., 526.

not proved fatal. The propositions of law which determine this question are stated as follows by Lord Penzance when delivering the judgment of the House of Lords in *Radlye* v. *London and North-Western Railway Company*[1] as deducible from the athorities, amongst which is *Tuff* v. *Warman*[2] to which the Judge of the Small Causes Court has referred, *viz.*: (1) The plaintiff cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. (2) Although the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him. The Judge of the Small Causes Court, as appears from the judgment, has applied both those rules to the evidence and answered questions 4, 5 and 6 in favour of the plaintiffs.

Passing to the seventh and eighth questions, which relate to the evidence in the case on the plaintiff's claim to compensation, it has long been settled by authority, as the Judge of the Small Causes Court himself points out, in construing Lord Campbell's Act which is in *pari materia* with the Indian Act XIII of 1855, that the plaintiffs cannot recover either nominal damages or a *solatium*, but must show that they have suffered appreciable pecuniary loss by the death of the deceased, or had a reasonable expectation of pecuniary benefit from the continuance of her life. It is sufficient to refer to *Duckworth* v. *Johnson*[4], *Sykes* v. *N.-E. Railway Company*[4]. The difficulty, however, is, as Baron Bramwell says in the former case, "upon what evidence the jury should act." The Chief Judge has applied those rulings to the evidence and found that the plaintiffs were entitled to compensation on both the above grounds and has awarded them Rs. 250, and if his finding can be regarded as raising a point of law capable of being referred to this Court, it can only be whether, by analogy to the question which presents itself to Judges in England on a motion to set aside the verdict, there was any

(1) L. R., 1 App. C. at p. 758.
(2) 5 C. B. (N. S.), 573.
(3) 4 H. & N., 653.
(4) 44 L. J. (N. S.) C. P., 191.

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evidence upon which the Chief Judge could find, as he did, in favour of the plaintiffs.* The English and Irish authorities doubtless show an important difference of judicial opinion, more especially as to how far the jury may form their own estimate of the loss sustained, or expectation of benefit, without the aid of distinct evidence. (See Bevan on Negligence, p. 170.)

The conflict of opinion is very marked between the judgments in *Holleran* v. *Bagnell*[1] and that of Pollock, C. B., in *Duckworth* v. *Johnson*[2]. In the latter case, Pollock, C. B., says: "There is no distinct evidence of the boy's services, or the cost of boarding and clothing him, but as to that the jury were better able to judge than we are." Whereas Morris, C. J., says in the former case, "there must be distinct evidence of pecuniary advantage actual or reasonably to be expected at the time of the death." However in *Condon* v. *Great Southern and Western Railway*[3], where the boy had never earned wages, we find Pigot, Chief Baron, holding that "the jury are entitled to apply their own experience and knowledge of life;" and in *Wolfe* v. *Great Northern Railway Company*[4] the Irish Appeal Court, in the main, adopted the view taken in *Duckworth* v. *Johnson*, which, it was remarked, had never been dissented from in the English Courts.

The result of these authorities as a whole is, we think, to show that in dealing especially with cases of this nature distinct evidence of the loss sustained or benefit expected is not necessary, but that the jury may look at all the circumstances of the case, and especially at the position of the parents and age of the child and call in aid their own experience in arriving at their conclusion. The judgment of the Chief Judge shows that he has virtually acted on this principle in the present case, and, therefore, his findings are unimpeachable. But he admits that he has intentionally omitted to deduct the expenses of the child's maintenance, because no argument was addressed to him on the subject, and he refers to *Duckworth* v. *Johnson* in support of his decision: but there the Court considered that, although there was no evidence on the subject, still the jury might be supposed to have taken it into consideration in determining the amount of compen-

(1) L. R., 6 (Ir.) C. L., 333.
(2) 29 L. J. Ex., 25.
(3) 16 Ir. C. L. R., 415.
(4) L. R., 26 (Ireland) C. L., 548.

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sation; but here the Judge admits that he has not taken it into his consideration, and as it is an essential factor in the question we think he was bound to do so before arriving at a conclusion as to the amount of compensation, and that, too, without any argument being addressed to him on the subject. Question 11 should, therefore, be answered in the affirmative.

As to the claim for loss arising from the funeral expenses, the Judge has rightly refused it on the authority of *Walton* v. *S.-E. Railway Company*(1). In section 2 of the English Act the word "injury" is used instead of "loss;" but we do not think that this difference of expression affects the reason for the English decision, which was that funeral expenses were not an injury resulting from the death within the meaning of section 2 of the Act.

Question 12 should be answered in the negative. It is unnecessary to answer quesstion 13,

The plaintiff in person.

Attorneys for the defendants:—Messrs *Crawford, Burder, Buckland and Bayley.*

(1) 4 C. B. (N. S.), 296.

ORIGINAL CIVIL.

Before Mr. Justice Telang.

1891. *October* 9.

BHUGWA'NDA'S BAGLA AND OTHERS, PLAINTIFFS, *v.* HA'JI ABU AHMED AND OTHERS, DEFENDANTS.*

Practice—Civil Procedure Code (XIV of 1882), Sec. 54—Leave obtained to amend plaint within a certain time—Failure to amend within time allowed—Application for extension of time after expiry of time originally allowed.

On the 6th April, 1891, the plaintiffs obtained an order giving them leave to amend the plaint and proceedings in the suit. By the order this amendment was to be made on or before the 30th April, 1891. On the 18th August, 1891, the plaintiffs obtained a summons calling on the defendants to show cause why the time allowed for amendment should not be extended for a month and why the hearing of the suit should not be postponed.

* No. 577 of 1890.