1871.
July 18.

Appeal Suit No. 176.

RATANBA'I, widow .....(*Plaintiff*) *Appellant.*

THE GREAT INDIAN PENINSULA
RAILWAY COMPANY.....(*Defendants*) *Respondents.*

Death caused by Negligence—Compensation to Family of Deceased—Measure of Damages—Act XIII. of 1855.

Measure of damages to be given (under Act XIII. of 1855) to the family of a person whose death has been wrongfully caused, considered.

English cases bearing upon the subject discussed and applied.

THIS was an appeal from the decision of WESTROPP, C.J., in Original Suit No. 326 of 1869. Judgment was delivered in the Division Court on the 28th of August 1870. A brief summary of the facts of the case will be found at page 120 of the 7th volume of the Bombay High Court Reports, Original Civil Jurisdiction.

In addition to the facts there set forth, it was stated by Bamanji, the eldest son of the deceased, that, besides the property mentioned in the schedule of the deceased as possessed by him during the time over which his schedule extended, he had also been possessed of a sum of Rs. 60,000, which had been lost by the misconduct of one of his sons, Hormasji. This fact did not appear on the face of the schedule. It was also stated by Bamanji that the profits of the deceased for the year preceding his death had risen to the sum of Rs. 500 or 600 per mensem, but the deceased's books for that year were not produced at the hearing, and the learned Chief Justice said that he did not consider Bamanji's evidence trustworthy.

The appeal came on for hearing on the 15th of June 1871, before SARGENT and MELVILL, JJ.

Anstey and *Mayhew,* for the appellant :—The learned Chief Justice was wrong in taking the schedule, and the sum of Rs. 19,000 entered therein as the profits of the deceased, as the basis of his calculations. During the latter period of his lifetime the deceased had carried on two classes of business—1st, that of speculator ; 2nd, that of skilled workman.

For some years preceding his insolvency he had almost abandoned the latter for the former, and his insolvency was caused thereby. During the year immediately preceding his death he had returned to his legitimate business, and the profits of that year should be taken as the basis upon which the damages should be awarded. The statements of Bamanji as to the amount of these profits are entitled to credit. There was, at any rate, a reasonable expectation of an increased profit to the relations of the deceased from the continuance of his life, by reason of his having discontinued his speculations. This ought to have been taken into consideration in awarding the damages: *Dalton* v. *South-Eastern Railway Company* (*a*); *Franklin* v. *South-Eastern Railway Company* (*b*); *Pym* v. *Great Northern Railway Company* (*c*). The damages should not have been calculated according to annuity tables: *Armsworth* v. *South-Eastern Railway Company* (*d*), per Parke, B. The measure of damages under Lord Campbell's Act is not the same as that in actions brought by the sufferer himself. In the latter class of cases pecuniary loss must be distinctly proved, and such proof only can be acted upon. In the former class the mere relation of parent and child, and the loss of the former, is sufficient to warrant the court in awarding damages: *Tilley* v. *Hudson River Railway Company* (*e*). See this case and other American authorities collected in a note at page 652 of Mr. Sedgewick's work on Damages (4th ed.).

The Honorable A. R. Scoble (Acting Advocate General) and *Ferguson*, for the respondents:—The Chief Justice had to consider in awarding damages, *firstly*, what was the position of the deceased at the time of his death, and *secondly* what reasonable expectation he then had of retrieving his former position. The schedule was the only safe guide for estimating his prospective by a consideration of his past profits. The deceased was an insolvent who had only obtained a personal

(*a*) 27 L. J., C. P. 227; S. C. 4, C. B., N. S., 296.
(*b*) 3 H. & N. 211.
(*c*) 32 L. J., Q. B. 377; 4 B. & S. 396. (*d*) 11 Jur. 758.
(*e*) 29 New York Rep. 252.

1871.
RATANBA'I v. G. I. P. RAIL. CO.

discharge under the Act. There was no reasonable expectation that he would have materially improved his position. All contingencies must be considered: see the judgment of Cockburn, C.J., in *Pym* v. *Great Northern Railway Company* (*f*). Damages must be confined to pecuniary injury; no *solatium* can be given for wounded feelings: *Blake* v. *Midland Railway Company* (*g*).

Anstey, in reply:—We do not claim anything as mere *solatium*. We ask for damages for the loss of a parent's care and nurture.

Cur. adv. vult.

18th July 1871. SARGENT, J.:—This suit was brought under Act XIII. of 1855 by the widow and administratrix of one Pálanji Jivanji, who was killed on the 26th of January 1869 at the Reversing Station on the Bhore Ghát. The only question in the case is, whether the learned Chief Justice has rightly assessed the quantum of damages for the loss resulting from the death of the deceased to the parties for whose benefit the suit was instituted. The wording of this Act is almost identical with that of the corresponding English Act, commonly called Lord Campbell's Act—the only difference (if it be one) being that in the English Act the jury are to give damages proportioned to the "injury," and in the Indian Act the court is to give damages proportioned to the "loss" resulting from the death. The latter expression is (if anything) not so large as the former, and, therefore, so far, is less favourable to the parties claiming compensation.

Now, although some difference of opinion would appear to have existed amongst Judges sitting at Nisi Prius in the early cases tried under the English Act, as shown by the summing up of Mr. Baron Parke in *Armsworth* v. *South-Eastern Railway Company* (*h*) and of Chief Baron Pollock in *Gilliard* v. *Lancashire and Yorkshire Railway Company* (*i*), it was afterwards clearly laid down by the Queen's Bench in *Blake* v. *Midland Railway Company* (*j*) that the principle upon which

(*f*) 2 B. & S. 759. (*g*) 18 Q. B. 93.
(*h*) 11 Jur. 758. (*i*) 12 Law Times R. 356. (*j*) 18 Q. B. 93.

damages are to be assessed is that of a loss of which a pecuniary estimate can be made; and that, therefore, compensation in the form of a *solatium* could not be given. Further, it was laid down, both by the Court of Common Pleas in *Dalton* v. *South-Eastern Railway Company* (*k*) and by the Exchequer Chamber in *Franklin* v. *South-Eastern Railway Company* (*l*), that the pecuniary advantage was not to be confined to one for which the deceased would have been legally liable, but might be one of which the claimant had a reasonable expectation. Both those principles were adopted and applied by the Exchequer Chamber in *Pym* v. *Great Northern Railway Company* (*m*). Chief Justice Erle, who delivered the judgment of the court, says :—"The jury were bound to give damages for the money which they supposed lost by the reasonable probability of pecuniary benefit being taken away by the death." We see no reason for applying a different principle to cases under the Indian Act. Now, the deceased in the present case was a man of fifty-three years of age. He had filed his schedule in the Insolvent Court on the 12th of November 1868, and, after several postponements arising from the unsatisfactory state of his balance-sheet, was expecting his discharge in the following March. His legitimate trade had been that of a contractor for building houses, and repairing ships in the harbour; but it appeared from his balance-sheet that in about 1864 he became engaged in extensive land and building speculations with borrowed capital, which proved unsuccessful. That from 1861 to the time of filing his schedule, the amount of gross profits realised by his business had been only Rs. 19,000, whilst the losses on two contracts alone had amounted to Rs. 19,446; and that at the time of his becoming insolvent he owed Rs. 1,22,359 to general creditors, one of whom had a mortgage on the only piece of property (except some trifling jewellery) left to the insolvent, namely, a house in the Fort, valued by himself at Rs. 66,000. Much stress, indeed, was laid on a sum of Rs. 60,000 which, it was said, had been made away with by the deceased's son Hormasji before the insolvency. We think

(*k*) 4 C. B., N. S. 296. (*l*) 3 H. & N. 211. (*m*) 32 L. J., Q. B. 377.

1871.
RATANBA'I
v.
G. I. P.
RAIL. Co.

that the evidence before the court in support of this story—whatever other evidence it might have been in the plaintiff's power to give—was quite unreliable; but in any case the money is gone, and we do not understand how the story, if taken as proved, can materially affect the question before the court as to the probable future property of the deceased, had he lived. The probable future of such a man must necessarily, for the most part, be matter of mere conjecture. It does not admit of being determined by any strict process of reasoning; but, looking at the deceased's past career, as disclosed by the schedule, we can discover no ground of reasonable expectation that there would have been any source to which the wife and family could look for pecuniary benefits other than the profits of his regular business. It was, however, objected that the Chief Justice should not have taken as the basis of his calculation the entry in the schedule of profits realised between 1861 and 1868. It was said that the profits of the deceased's regular business might reasonably be expected to be larger than before his insolvency, as he had abandoned speculation and devoted himself exclusively to his legitimate calling. And the evidence of his son Bamanji was relied on to show that his monthly profits during the year preceding his death had risen to between Rs. 500 and Rs. 600. But we cannot accept the mere statement of Bamanji as sufficient proof of what those profits may have been, more especially when we find him admitting that his father sustained a loss of Rs. 12,000 in doing repairs to a ship called the "Ritual" during the last year of his life, and that he could not say whether his losses exceeded his gains, as he did not keep his accounts. If it were intended to rely on the increase of his business during the year preceding his death, the books of the deceased should have been produced, as the best and proper evidence as to the state of his business. Lastly, it was urged by Mr. Anstey that the court should give compensation for the loss of deceased's "protection and care," and the authority of an American case cited in Sedgewick on Damages was pressed on us as establishing that proposition. Now, so far as by the expression "protection and care" may be meant the

money which a father can reasonably be expected to spend on his family, compensation has been given for it; but so far as it is intended to mean more than that, without saying that under very special circumstances it might not be brought within the principle we have laid down, we are of opinion that no such circumstances exist in the present case. On the whole, we are unable to say that the family had a reasonable and well-grounded expectation of pecuniary benefit exceeding the sum assessed by the learned Chief Justice; and the appeal must, therefore, be dismissed, and with costs, unless the company consent to waive them, which, as this is the first case in which the application of the Act has been fully discussed, we think they might do with great propriety.

1871.
RATANBA'I v. G. I. P. RAIL. CO.

Appeal dismissed.

Attorneys for the plaintiff: *Macfarlane and Skipsey.*

Attorneys for the defendants: *Hearn, Cleveland, and Peile.*

HARIVALLABHDA'S KALLIA'NDA'S .....*Plaintiff.*
UTAMCHAND MA'NIKCHAND .....*Defendant.*

July 27.

Practice — Sequestration—Indorsement upon Copy-Order — Limiting Time in Order—"Forthwith"—Supreme Court Rules, Nos. 388 *and* 389.

The process of sequestration for contempt of a decree or order of court, as it existed in the late Supreme Court, will, in a proper case, issue out of the High Court.

The object of Rule 389 of the Supreme Court Rules, which required a party who wished to enforce an order by sequestration to indorse upon the copy of the order served upon his opponent a memorandum to the effect that in default of performance of the order he would be liable to be arrested, and to have his estate sequestered, was to enable the party making such indorsement to apply *ex parte* for the writ. In the absence of such a memorandum indorsed upon the copy-order, a party desirous of enforcing an order by sequestration must give proper notice to his opponent of his intention to apply for the writ.

An order commanding an act to be done "forthwith" is sufficiently in conformity with the rule that requires the time within which an act ordered to be done is to be performed to be specified in the order.

A statement of the proceedings in this case will be found in the 7th volume of the Bombay High Court Reports, O. C. J., p. 172.