

523.

Syllabus.

bond prior to the request made January 27, 1912. We have no occasion to consider any of these contentions. It nowhere appears that the company had bound itself to continue to pay premiums until the Secretary canceled the bond and gave the surety notice thereof. So far as disclosed by the record, the payment of premiums was voluntary. The judgment of the Court of Claims is

*Affirmed.*

MR. JUSTICE MCKENNA dissents.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY v. HOLLOWAY, ADMINISTRATOR OF HOLLOWAY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 209. Submitted March 15, 1918.—Decided April 15, 1918.

In an action under the Employers' Liability Act on behalf of the widow of a deceased employee, an instruction that the measure of damages should be such as would fairly and reasonably compensate her for the loss of pecuniary benefits she might reasonably have received but for her husband's death, *held* correct, as a general instruction, leaving to the defendant the right to have it supplemented by another indicating that, in estimating the amount of such compensation, future benefits must be considered at their present value.

Under the Employers' Liability Act, defendant is not entitled to have the jury instructed, as matter of law, that the value of money to the beneficiary should be measured by a specific (the legal) rate of interest, or that the duration of future benefits could not have exceeded the life expectancy of the deceased employee, as given by an actuarial table.

Whether the state court has obeyed a local rule of practice requiring

the substitution of correct instructions for defective ones requested, is a question of state law not reviewable by this court in an action under the Employers' Liability Act.

When not based upon an erroneous theory of federal law, refusal of the state court to reverse a judgment upon the ground that the damages are excessive is not reviewable here in an action under the Employers' Liability Act.

168 Kentucky, 262, affirmed.

THE case is stated in the opinion.

*Mr. Benjamin D. Warfield, Mr. N. Powell Taylor and Mr. John C. Worsham* for plaintiff in error.

*Mr. Jas. W. Clay, Mr. J. F. Clay and Mr. A. Y. Clay* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Holloway, a locomotive engineer, was killed on the Louisville and Nashville Railroad while engaged in the performance of his duties. His administrator brought, for the benefit of his widow, an action under the Federal Employers' Liability Act in a state court of Kentucky and recovered a verdict of \$32,900. The judgment entered thereon was reversed by the Court of Appeals (163 Kentucky, 125); and, at the second trial, a verdict was rendered for \$25,000. Judgment was entered on this verdict, and was affirmed with ten per per cent. damage by the Court of Appeals (168 Kentucky, 262). The case comes here under § 237 of the Judicial Code. The errors assigned in this court and now insisted upon are these:

The first assignment: That the Court of Appeals erred in approving the giving of an instruction and the refusal of another<sup>1</sup> by which the trial judge had denied to the com-

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<sup>1</sup>The instruction given was: "The measure of recovery, if you find for the plaintiff, being such an amount in damages as will fairly

pany the benefit of the rule declared in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U. S. 485, 491, that in computing damages recoverable for the deprivation of future financial benefits, the verdict should be based on their present value.

The third assignment: That the Court of Appeals erred in refusing to reverse the judgment of the trial court on the ground that the damages were excessive, and in holding as part of the loss of benefits the widow might have received and which the jury was entitled to consider "not only her support and maintenance of \$50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated if he had lived out his allotted span" of life.

*First:* The instruction given, though general, was correct. It declared that the plaintiff was entitled to recover "such an amount in damages as will fairly and reasonably compensate" the widow "for the loss of pecuniary benefits she might reasonably have received" but for her husband's death. This ruling did not imply that the verdict should be for the aggregate of the several benefits payable at

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and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to wit: \$50,000.00."

The instruction refused was: "The court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the Court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years."

No other instruction on the measure of damages was given; and none was requested except an instruction, not now insisted upon, limiting the recovery specifically to \$13,737.60.

different times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate." The language used was similar to that in which this court has since expressed, in *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*, p. 489, the measure of damages which should be applied.<sup>1</sup> The company had, of course, the right to require that this general instruction be supplemented by another calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction. Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) that money would be worth to the widow six per cent., the legal rate of interest; (2) that the period during which the future benefits would have continued was 28.62 years,—the life expectancy of the husband according to one of several well known actuarial tables. The company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*, pp. 490-492. Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect in form or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one (see *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 316), was applicable in the case at bar. That is a question of state law, with which we have no concern.

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<sup>1</sup> "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased."

In the *De Atley Case*, the Kentucky Court of Appeals assumed for the purposes of its decision that the local rule applied, and was thereby led to decide a question of federal law. Consequently we had and exercised jurisdiction to review its decision upon that question.

*Second:* The third assignment, in so far as it relates to the refusal of the Court of Appeals to reverse the judgment "on the ground that the damages are excessive," is not reviewable here. *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 86. It does not appear in the case at bar, as it did in *Chesapeake & Ohio Ry. Co. v. Gainey*, 241 U. S. 494, 496, that the action of the Court of Appeals in sustaining the verdict was necessarily based upon an erroneous theory of federal law. As to the alleged error of the Court of Appeals in holding as part of the benefit the widow might have received "not only her support and maintenance of \$50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated," it is a sufficient answer that the trial court did not give any instruction on that subject, nor was it requested to give any, and that the Court of Appeals did not hold as stated that the widow could share in the loss to the estate. It held that the pecuniary benefit which the jury was entitled to consider in estimating the widow's damages was not merely what she would have spent for maintenance and support, but what she would otherwise have received from her husband.

*Affirmed.*