

## Statement of the case.

## RAILROAD COMPANY v. BARRON.

1. A railroad company, which grants the use of its road to another company, is responsible for accidents caused to passengers which it itself carries, by the negligence of the trains of the other company thus running by its permission.
2. When a statute—giving a right of action to the executor of a person killed by such an act as would, if death had not ensued, entitled such person to maintain an action for damages—provides, that the amount recovered shall be for the exclusive benefit of the widow, and next of kin, in the proportion provided by law in the distribution of personal property left by persons dying intestate; and that “in every such action the jury may give damages as *they shall deem a fair and just compensation with reference to pecuniary injuries resulting from such death, &c.*,” not exceeding, &c.”—it is not necessary to the recovery that the widow and next of kin should have had a legal claim on the deceased, if he had survived, for their support.
3. *Semble*, that statutes of this kind are enacted, as respects the measure of damages, upon the idea that as a general fact the personal assets of the deceased would take the direction given them by the law governing the case of intestates. Hence any damages given must, as a general thing, be so distributed, even though the party have left a will not so devoting his property.
4. The damages in these cases must depend very much upon all the facts and circumstances of the particular case. And as when the suit is brought by the party himself, for injuries to himself, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body, so when it is brought by the representative for his death, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. In the latter and more difficult case, as in the former one, often difficult also, the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury, applied, as above stated, to all the facts and circumstances.

ERROR to the Circuit Court for the Northern District of Illinois, the suit below having been one against a railroad company to recover damages for the death of a passenger killed by its negligence.

A statute of Illinois enacts:

“SECT. 1. That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would, if death had not ensued, have entitled

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the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages not withstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount to *felony*.

"SECT. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the *exclusive benefit of the widow and next of kin of such deceased person*, and shall be distributed to such widow and next of kin, in the proportion provided by law, in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation *with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person*, not exceeding the sum of five thousand dollars."

With this statute in force, Barron's executor brought a suit against the Illinois Central Railroad Company, to recover damages for the death of his testator, occasioned by the negligence of the company in conveying him as a passenger.

The deceased was killed while in the act of leaving the car in obedience to the orders of the conductor, who apprehended an immediate collision with an express train that was coming up behind with great speed, and which struck the car with such violence in the rear as to split and drive it on each side of the baggage car in front. The Illinois company owned the road, but had granted or leased to the Michigan Central Railroad Company, of which the express train was one of the line, the privilege of running their trains on this part of the road.

The testator was a bachelor, thirty-five years old, and had an estate of about \$35,000, all of which, as it was stated in the argument, he left by his will to his father. He was an attorney by profession, but for four years prior to his death had been judge of the county court of Cook County, Illinois. His term of office having then recently expired, he had resumed, or was about to resume, the practice of his profes-

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sion, with a fair promise, as the evidence tended to show, of doing as well as before he was elected judge. His professional income, prior to his election as judge, had been about \$3000 dollars per annum.

The plaintiff was his father, and he left brothers and sisters; one of whom had formerly received some assistance from him for support.

The defendant's counsel asked the court to charge the jury as follows

"1st. That the statute under which the action was brought intends to give no damages for the injury received by the deceased, but refers wholly to the pecuniary loss which the next of kin may be found to have sustained. That it makes their pecuniary loss the sole measure of damages, and that the satisfaction of that loss is therefore the sole purpose for which an action of this kind can be instituted, there being nothing to be allowed for bereavement. And that it is incumbent on the plaintiff, before he can recover anything more than nominal damages, to show by the evidence that there are persons in existence entitled to claim the indemnity given by the law, and that they have sustained a pecuniary loss justifying their claim.

"2d. That to entitle the plaintiff to recover anything beyond merely nominal damages, the parties for whose benefit the action is brought must be shown by the evidence to have had at the time of the death of Barron a legal interest in his life, and that by his death they have been deprived of something to which they had a legal right.

"3d. That if the persons for whose benefit this action is brought have received in consequence of the death of said Barron, and out of this estate inherited by them from him, a pecuniary benefit greater than the maximum amount of damages which could, under any circumstances, be recovered in this action, then, as a matter of law, they have by the death of said Barron sustained no actual pecuniary injury for which compensation can be recovered in this action.

"4th. That if the collision of the two trains of cars in question, and the death resulting therefrom, was occasioned solely by the carelessness or default of the persons in charge of the express train, and that the defendant had no authority or con-

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trol over such persons, but that they were wholly under the authority and direction of the Michigan Central Railroad Company, then the defendant is not liable in this action, even for nominal damages."

But the court refused so to charge the jury; and charged as follows:

It is contended by the defendant that as Barron was never married, the next of kin, being his father, brothers, and sisters, had no claim on him for support or services, and therefore there could have been no pecuniary loss to them by his death.

We cannot adopt this construction of the law, but charge you that there can be a recovery if the deceased left no kin surviving him who had any legal claim on him if living, for support.

The cause of action is given in the first section of the act in clear and unmistakable terms. If the injured party, by the common law, had a right to sue if he had lived, then if he dies his representatives can bring an action.

Many individuals who lose their lives by the fault of persons and corporations are of age, unmarried, and have no next of kin dependent on them for support. We cannot suppose that the statute intended to give the representatives of such persons the right to sue in one section and make that right nugatory in the second section, by depriving them of all damages.

The policy of the law was evidently to make common carriers more circumspect in regard to the lives intrusted to their care. They were responsible at common law if through their fault broken limbs were the result, but escaped responsibility if death ensued. To remedy this evil and provide a continuing responsibility, was in the opinion of the court, the object of the law.

We do not think it requisite to prove present actual pecuniary loss. It can rarely be done. The attempt to do it would substitute the opinion of witnesses for the conclusions of the jury. The facts proved will enable the jury to decide on the proper measure of responsibility. Some cases are harder than others, and the law intends that the jury shall discriminate in different cases. There is no fixed measure of damages, and no artificial rule by which the damages in a given case can be computed.

The jury are not to take in consideration the pain suffered by the deceased, or the wounded feelings of surviving relatives, and no damages are to be given by way of punishment.

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In this case the next of kin are the parties who were interested in the life of the deceased. They were interested in the further accumulations which he might have added to his estate, and which might hereafter descend to them.

The jury have a right, in estimating the amount of pecuniary injury, to take into consideration all the circumstances attending the death of Barron—the relations between him and his next of kin, the amount of his property, the character of his business, and the prospective increase in wealth likely to accrue to a man of his age with the business and means which he had. There is a possibility in the chances of business that Barron's estate might have decreased rather than increased, and this possibility the jury may consider. The jury also have a right to take into consideration the contingency that he might have married, and his property descended in another channel.

And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the court to particularize, but which will occur to you. The intention of the statute was to give a compensation for the pecuniary loss which the widow (if any) or the next of kin might sustain by the death of the party; and the jury are to determine, as men of experience and observation, from the proof what that loss is.

In order to render a verdict for the plaintiff it is necessary that the defendant should have been in fault.

The Illinois Central Railroad Company engaged to carry Judge Barron safely from Hyde Park to Chicago, and as a common carrier was bound to the most exact care and diligence required for the safety of passengers. . . .

It is not a question which train was mostly in fault, but whether the train of the defendant was in fault at all. It is for the jury to say from the evidence whether the employees of the Illinois Central road used the necessary degree of care and diligence in the management of their train on that morning. . . .

We understand that the road on which the accident occurred belonged to the defendants, and by its charter was under its sole control to carry passengers and property, and if it allowed the trains of the Michigan Central to run over it under the management of the agents of the Michigan Central, it should be done in such a manner as not to interfere with the safety of the passengers of the defendant, and as to such passengers the fault

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of the Michigan Central road in running their train is the fault of the defendant.

Verdict and judgment for \$3750 damages. The case was now here on exceptions to the charge as made, and on the refusal to charge as requested.

*Mr. Tracy, for the railroad company, plaintiff in error :*

1. The court erred in declining to charge as requested in the first proposition.

The intention of the act was to compensate the widow and next of kin of the person killed for the pecuniary injury to them occasioned by his death. If the death caused them no pecuniary injury, the act gave them no damages, for the compensation for that was to measure the damages.

The statute is in form like one passed in New York,\* and frequently considered in the courts of that State. The decisions of these courts are pertinent then to this case. In *Dickins v. New York Central Railroad*,† it was held, that a husband as administrator of his wife, whose death was caused by the act of another, and who had no children, and no near relatives but sisters, could not recover for damages resulting by her death to him, and only for pecuniary damages sustained by her next of kin.

So in *Tilley v. Hudson River Railroad*,‡ that in an action by a husband, as administrator of a wife whose death was caused by the act of another, leaving children, the possibility that the children would have received an estate increased by their mother's earnings, could not be considered.

So in *Oldfield v. New York and Harlem Railroad Company*,§ where a little girl of six years old was killed, leaving a mother, the court charged in the words of the statute, and by explanation told the jury that the damages were to be a sum which, in their opinion, would be the pecuniary loss of the next of kin.

\* Revised Statutes of New York, vol. iii, p. 589, § 4.

† 23 New York, 158.

‡ 24 Id. 471.

§ 3 E. D. Smith, 103.

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IN the case at bar, there was no one of the next of kin who could properly be said to sustain any pecuniary loss by the testator's death. None of his next of kin had any pecuniary interest in his life. No one stood in the relation to him that the mother did to her child, and whose duty it would be to furnish it care and nurture. No one in the relation that the minor child did to its mother, who could receive the benefit of its services until it became of age. His father was not dependent upon him,—not entitled to his future earnings, nor were his brothers and sisters, and, indeed, instead of a pecuniary loss to them his death gave them, or one of them, an estate of \$35,000, which otherwise he could not then receive, and which he might never receive.

In Pennsylvania, under a statute not unlike the one now before us, the Supreme Court of that State seems to have held\* that the pecuniary damages to be assessed in the case of the loss of a minor son of the plaintiff's was to be estimated by the value of his services during his minority, together with the actual expenses of his care while suffering from the injury before his death, and the funeral expenses incurred.

And in a case† where a widow brought her action for the death of her husband, the same court held that although the jury might be charged that "much is left, and much always must be left to your sound discretion," it was because this was but an addition to the instruction that "what the plaintiff had lost in a pecuniary point of view by the death of her husband, namely, a reasonable support and subsistence for herself," was the rule to be observed.

The courts of Illinois have also examined the statute.

In *Chicago and Rock Island Railroad Company v. Morris*,‡ there was no averment in the declaration of any facts showing a pecuniary loss. The court held, that as no other loss

\* *Pennsylvania Railroad Company v. Kelly*, 31 *Pennsylvania State*, 373; Same Plaintiff *v. Zebe et ux.*, 33 *Id.* 318.

† *Pennsylvania Railroad Company v. Ogier*, 35 *Pennsylvania State*, 72.

‡ 26 *Illinois*, 400.

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could be shown, the declaration should have alleged facts showing it.

2. The court erred in refusing to charge, as requested by the second prayer, that the plaintiff could recover only nominal damages until he had shown that the decedent's next of kin had some *legal interest* in his life, and that, by his death, they had been deprived of something to which they had a legal right.

A "*compensation with reference to the pecuniary injuries resulting from such death,*" is within the discretion of the jury; but not a compensation for the affliction the death occasions, nor for the *possibility* that the deceased might, if he had lived, make presents to the relatives. If it had been shown that his next of kin were paupers, and he bound to support them, and that he could, and would do so from his earnings, and that his death deprived them of this support, *and had this been pleaded*, the jury would had something upon which to exercise their judgment in estimating a pecuniary loss. But no such thing was either alleged or shown. No one of his next of kin was alleged or shown to be dependent upon him.

As a matter of fact, it is plain that had the defendant lived and added to his property and then died unmarried, the whole would have gone to the father, not to the other relatives.

3. The court erred in refusing to charge, that so far as the next of kin of the testator inherited from him a greater pecuniary benefit than the maximum which they could recover, they cannot have sustained pecuniary injury by his death.

The ground upon which the recovery must be had, is pecuniary injury to the next of kin, occasioned by his death. If his death necessarily and directly involved no pecuniary loss, and it did directly put money in their pocket, or that of any of them, they, or such of them, have sustained no pecuniary injury.

4. The court erred in refusing to charge as requested in

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regard to the cause of the death and its effect in discharging the Illinois Central road.

If the jury believed that the death was occasioned solely by the carelessness or default of the company in charge of the express train,—the Michigan Company,—and that the defendants had no control over them, the very fact would preclude the idea of any negligence or carelessness of the defendant. Yet, by the refusal to charge as asked, the jury were left, notwithstanding such their belief, to find a verdict against the defendant for a negligence of which its servants were not guilty.

If the Michigan Company's servants in charge of the express train were guilty of the entire fault of causing the collision, their negligence was a gross one, and the Illinois Central Company's servants were innocent of any actual or permissive wrong; they violated no duty to the deceased. The company was not a warrantor of the lives of passengers against negligent or wilful acts wrongfully committed by another.

As to the charge actually given.

It was directly calculated to withdraw the provisions of the act from the jury's consideration, and to leave them at liberty to assess damages arbitrarily, in the nature of punitive damages for the killing of the deceased, and irrespectively of any pecuniary injury to his next of kin.

It in effect instructed the jury that the father and brothers and sisters of an unmarried man of thirty-five years of age—one whose death, supposing him to reach the ordinary age of "threescore years and ten," was still thirty-five years distant—would be his next of kin at his death; a presumption strongly against probabilities; and that they thus had a pecuniary interest in his further accumulations, and his prospective increase of wealth.

It invited the jury into a speculation as to whether he would or would not increase his means, would or would not marry, and would or would not have and leave issue; in short, into a speculation resting on uncertainties compounded with uncertainties, and probabilities not depending upon

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any facts before them; and about which neither sense nor science could form any conclusion whatever. How far less precise and scientific is this than the view of the courts of New York, which have held that a supposed interest in the savings which a mother might by her exertions make to the increase of her husband's estate, was not an element in assessing the *pecuniary injuries* sustained by her children in her death!

*Mr. Lincoln Clark, contra, for the executor :*

By the law as it was before the statute was passed, injury to the person might be compensated in damages if it was less than fatal: if death resulted, no action for damages would lie. There was a remedy for the lesser evil, but none for the greater. The object of the statute clearly was to declare that a provision of law so unreasonable should no longer exist. The statute embraces no new idea or theory in reference to damages. It only extends the right of action for the purpose of securing compensation for the same kind of injuries, and imposing penalties for the same character of negligence; and to this all the provisions of the statute look.

Opposite counsel plant themselves upon this provision in the second section, "And in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the *pecuniary injuries resulting from such death to the wife and next of kin, &c.*" But if the action were at common law for injuries to the person, would not the rule as to damages be precisely the same? If it would, then the statute introduces no new rule, and damages would be given in the case of death upon the same principle, and for the same reasons as in case of injuries to the person only. But it has never been pretended in any case, nor is it in this, that had the deceased been injured to any extent short of his life, pecuniary damages might not have been adjudged to him, though he was a man of wealth and leisure, and not dependent even upon the improvement of his estate for the necessities or the luxuries of life. It would not be said that

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he had suffered no pecuniary injury because of no such dependence.

The statute gives damages to the next of kin. What damages? Damages of the same kind and for the same reasons as in case of injury to the person. Damages not dependent upon the necessities of the individual, but damages made up of all the facts and circumstances which would naturally tend to prevent the accumulation of his estate, and deprive the individual of the means of doing better for his next of kin than otherwise he might do, and in presumption of law would do.

Opposite counsel took below the distinction, in the charges which they asked the court to give, between substantial and nominal damages. The language of the act is, "in every such case the jury may give such damages as they shall deem a fair and just compensation." Is the court to presume that mere nominal damages would, in any case, be a fair and just compensation, in so far that it might, as a matter of law, instruct the jury that they could give no more? If not, then the jury are the judges as to what a fair and just compensation is.

Can it be inferred from the language of the act that the case is destitute of merits because the next of kin have no legal claim for support? If this were so, then the *children* of a father killed could not have the benefit of the action if they had passed their majority and his guardianship and tutelage; and especially if they had separate estates, and were better able to support themselves than the father was to support them; for, in such a case, there would be no legal claim for support. The next of kin is a comprehensive term, and must often include those who have no claim for support, and stand in distant relationship to the individual.

We thus infer that a recovery is not founded upon the idea of a legal claim for support, by showing that the action given by the statute is of the same nature as that given by the common law for mere injuries to the person, and is to be governed by the same reasons; that pecuniary injuries result in both cases in kind, though they may not in degree. And whether

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the damages recoverable go to those who have a claim for support makes no difference. Those having no claim may be as palpably injured as those who have.

But the statute upon which the action is based has received a construction by the Supreme Court of Illinois. In the *City of Chicago v. Major*,\* the death was of a child four years of age, and the objection to a recovery was substantially the same as in this case, to wit, that the verdict of the jury must be for the present pecuniary loss, and that as the child left no widow nor next of kin who were directly injured by the death, in a pecuniary point of view, therefore no recovery could be had. But such was not the view taken by the court.

In a New York case, *Oldfield v. The New York and Harlem Railroad Company*,† the death was of a girl twelve years of age. The court refused to grant a nonsuit on the ground that there was no special damage.

The proposition of the plaintiffs in error, that "no recovery can be had in this case because the plaintiffs, or those for whom the action is brought, gain more by the death than the maximum of damages which can be recovered," assumes what is untrue in fact. None of the beneficiaries of this action received anything by the death, except the father, who was the plaintiff and sole legatee.

But can it be supposed that the legislature designed to place the right to recover damages upon so uncertain a condition? A man is killed in a railroad collision; he has property; he leaves children; by his will he leaves all his property to others. According to the argument, the children may have damages as for pecuniary injuries, because by the death they suffer pecuniary injury; that is to say, the man killed has, by the death, been deprived of the power to direct that his property should go to his children; but if he dies without a will, so that his property goes in the regular course of descent, or if having made a will, he bequeaths his property

\* 18 Illinois, 349.

† 3 E. D. Smith, 103.

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to his children, no recovery can be had, because by the death they have been benefited beyond the maximum of damages recoverable; that is to say, if the property descending or bequeathed is greater than that maximum. To this result the argument leads.

But the right to recover can be placed upon no such fortuitous circumstances. The presumption of law is, that a man's next of kin are benefited by his life; that he can do better for them alive than dead; that his gains will accrue to them. These may be in greater or less degree; they may be none at all. However these things may be, the facts will speak for themselves, and produce their proper effects on the trial.

In *Pym v. The Great Northern Railway Company*,\* the plaintiff's husband was killed. He was in the enjoyment of a life estate in land yielding an annual income of £3864. Upon his death the estate passed under the entail to the eldest son, subject to a charge of £1000 per annum to the plaintiff (the wife), and £800 a year to the children. The deceased also left personal property to the amount of £3390, which was divided between the widow and the children. Now it may be that the widow and children derived a greater benefit by the death than they would by the life of the husband and the father. By the death they came to the enjoyment of ascertained amounts; but the jury gave damages in the sum of £13,000, and that, too, although the deceased was of no profession or business, and had no income or property other than that already mentioned. Upon what principle were such damages awarded? Clearly upon the principle that had the father lived he might have used his income for the benefit of his family, though it would have been in his power not to do it. Had he lived and thus prevented his property from going to the entail, he could have done better for his family than was done in the event of his death. And this is the presumption in every case, subject to the fullest inquiry as to the facts. Had Barron lived, his next of kin

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\* 2 American Law Register, N. S. 234.

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might have realized by his life more than they did by his death; and this, no doubt, was the view which the jury took of the case under the instructions of the court. Was it wrong?

The rule of the statute which gives damages for the value of the life lost, may be regarded as loose and indefinite. But the rule as to other injuries is equally loose and indefinite, as in the case of defamation of character, assault and battery of the person, breach of promise of marriage contract; and yet juries find no difficulty in awarding damages, and no doubt the injury and damages will be found to vary according to the dignity, character, and position of the person.

In *The Pennsylvania Railroad Company v. McCloskey*,\* the court say:

“The damages must necessarily be measured by the value of the life lost, and not by the pecuniary loss which the representatives shall have thereby sustained. The sanction of the law lies in the duty of compensation for the value of the life destroyed, measured according to its own merits, and not according to the necessities of the kindred.”

The Pennsylvania statute does not essentially differ from that of Illinois.

In *Dickins v. The New York Central Railroad Company*,† the court say:

“An action can be maintained by the personal representatives of a deceased person, whose death has been wrongfully caused by the defendant, though the deceased left no husband or wife or next of kin surviving who could ever have any legal claim upon such person if living, for services or support.”

As to the proposition of the plaintiff in error, that “no recovery can be had if the colliding train was the most or chiefly to blame,” little need be said.

The contract on the part of the deceased was with the Illinois Central road, the defendant below. They owed him

\* 23 Pennsylvania State, 530.

† 28 Barbour, 41.

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the duty of safe conduct; they had a direct responsibility to him, and in this case no doubt exclusive; and that responsibility they cannot avoid by leasing their road, or granting a license to another corporation to use it. It has been repeatedly decided that a railroad corporation can not avoid their responsibilities by leasing their road.\*

Mr. Justice NELSON delivered the opinion of the court.

There are only two questions raised in the course of the trial in the court below that it is material to notice.

It was insisted on the trial, in behalf of the defendants, that the express train was wholly in fault, and responsible for the injury. But the court ruled, that, considering the facts to be as claimed, still the defendants were liable; and this presents the first question in the case.

It will be observed the defendants owned the road upon which they were running the car in which the deceased was a passenger at the time of the collision, and that the train in fault was running on the same road with their permission.

The question is not whether the Michigan Company is responsible, but whether the defendants, by giving to that company the privilege of using the road, have thereby, in the given case, relieved themselves from responsibility? The question has been settled, and we think rightly, in the courts of Illinois holding the owner of the road liable.† The same principle has been affirmed in other States.‡

The second question is, as to the proper measure of damages.

The only direction on this subject in the statute is, that the jury may give such damages as they shall deem a fair

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\* *Chicago & Rock Island Railway Co. v. Whipple*, 22 Illinois, 105; *Ohio & Mississippi Railroad Co. v. Dunbar*, 20 Id. 623.

† *The Chicago and Saint Paul Railroad Co. v. McCarthy*, 20 Illinois, 385; *Ohio, &c., Railroad Co. v. Dunbar*, Id. 623; *Chicago and Rock Island Railroad Co. v. Whipple*, 22 Id. 105.

‡ *Nelson v. The Vermont, &c., Railroad Co.*, 26 Vermont, 717; *McElroy v. Nashua, &c., Railroad Co.*, 4 Cushing, 400.

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and just compensation, regard being had to the pecuniary injuries resulting from the death to the wife or next of kin, not to exceed five thousand dollars.

The first section gives the action against the company for the wrongful act, if death happens, in cases where, if the deceased had survived, a suit might have been maintained by him. The second restricts the damages in respect both to the principles which are to govern the jury, and the amount. They are confined to the pecuniary injuries resulting to the wife and next of kin, whereas if the deceased had survived, a wider range of inquiry would have been admitted. It would have embraced personal suffering as well as pecuniary loss, and there would have been no fixed limitation as to the amount.

The damages in these cases, whether the suit is in the name of the injured party, or, in case of his death, under the statute, by the legal representative, must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case. If the suit is brought by the party, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body. So when the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. If the deceased had lived, they may not have been benefited, and if not, then no pecuniary injury could have resulted to them from his death. But the statute in respect to this measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law, and hence the amount recovered is to be distributed to the wife and next of kin in the proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin; in case of his death by the in-

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jury the equivalent is given by a suit in the name of his representative.

There is difficulty in either case in getting at the pecuniary loss with precision or accuracy, more difficulty in the latter than in the former, but differing only in degree, and in both cases the result must be left to turn mainly upon the sound sense and deliberate judgment of the jury.

It has been suggested frequently in cases under these acts, for they are found in several of the States, and the suggestion is very much urged in this case, that the widow and next of kin are not entitled to recover any damages unless it be shown they had a legal claim on the deceased, if he had survived, for support. The two sections of the act taken together clearly negative any such construction, as a suit is given against the wrong-doer in every case by the representative for the benefit of the widow and next of kin, where, if death had not ensued, the injured party could have maintained the suit. The only relation mentioned by the statute to the deceased essential to the maintenance of this suit, is that of widow or next of kin; to say, they must have a legal claim on him for support, would be an interpolation in the statute changing the fair import of its terms, and hence not warranted. This construction, we believe, has been rejected by every court before which the question has been presented. These cases have frequently been before the courts of Illinois, and the exposition of the act given by the learned judge in the present case is substantially in conformity with those cases.\*

JUDGMENT AFFIRMED.

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\* *City of Chicago v. Major*, 18 Illinois, 349; *Chicago and Rock Island Railroad v. Morris*, 26 Id. 400; 21 Id. 606?; *Pennsylvania Railroad Company v. McCloskey*, 23 Pennsylvania State, 526; *Oldfield v. New York and Harlem Railroad Company*, 3 E. D. Smith, 103.