Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of the Grand Trunk Railway Company of Canada v. *Jennings from the Court of Appeal, Ontario; delivered 4th August* 1888.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.

[*Delivered by Lord Watson.*]

THIS appeal is taken in an action brought by the Respondent in the Court of Queen's Bench, Ontario, for damages in respect of the death of her husband, the late William Jennings; her right to recover being founded upon cap. 135 of the Consolidated Statutes of Ontario, secs. 2 and 3, which are expressed in substantially the same terms with the first and second sections of the English Statute, 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act. The deceased, who was a healthy man, 41 years of age, lost his life on the 10th August 1885, through the negligence of the Appellants' servants. He had been for upwards of 18 years in the employment of the American Express Company, and had for a considerable time been earning wages at the rate of $75 per month. He left no estate, real or personal, but he was a member of the Ancient Order of United Workmen, a benefit society, with which he had effected a life policy for $2,000, payable to the Respondent; and the sum insured was paid to her in full after his decease.

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At the trial of the cause the Appellants' Counsel asked Chief Justice Wilson, the presiding judge, to direct the jury that, inasmuch as the sum of $2,000 was not for the benefit of the deceased, but was immediately payable to the Respondent in respect of his death, they ought to deduct it from the amount which they might assess as damages. The learned Chief Justice refused to give the direction. The Appellants then obtained an order *nisi* on the ground, *inter alia*, that the judge had erred in not directing the jury to deduct the amount of the policy on the life of the deceased from the amount of the verdict. The order *nisi* was discharged by the Queen's Bench Division, and their judgement was affirmed by the Court of Appeal for Ontario.

In ruling the point thus raised against the Appellants, the learned judges of the Courts of Ontario considered themselves bound by the authority of "Beckett *v.* The Grand Trunk Railway Company," which was finally decided, on appeal from Ontario, by the Supreme Court of Canada. In that case, which was very similar in its circumstances to the present, the judge presiding at the trial directed the jury to deduct $2,500, the amount of an insurance policy on the life of the deceased, from the sum at which they estimated the pecuniary loss sustained by his wife and children through his death; and the jury following the direction assessed damages at $3,250. An order obtained by the Plaintiffs to show cause why the verdict should not be increased by the sum of $2,500 so deducted was made absolute by a Divisional Court of the Queen's Bench, and judgement entered for the Plaintiffs for the sum of $5,750 with costs. In the Court of Appeal for Ontario, and also in the Court of Appeal for Canada, the case gave rise to much

difference of judicial opinion; but, in both, the decision of the Divisional Court was upheld.

In this appeal the Appellants have raised precisely the same point which they unsuccessfully pressed in Beckett's case. They have never, in the courts below, suggested that the receipt of the insurance money by the widow was merely one of the circumstances which ought to be taken into account by the jury in estimating her pecuniary loss; their contention has all along been, that the primary duty of the jury is to assess damages, irrespective of any such consideration, and that the court or the jury are then bound, as matter of law, to deduct from the damages assessed on that footing the full amount paid to the widow under the policy. It is true that, in the reasons of appeal appended to their case, the Appellants plead alternatively that the jury ought "at least, in awarding such damages, "to take the receipt of the said insurance "money by the Respondent into their considera-"tion"; but litigants who have excepted to the presiding judge's refusal to give a direction in law, which, if given, would practically have withdrawn the insurance money from the consideration of the jury, cannot be permitted to impeach their verdict for the first time in a court of review, on the ground that the judge ought to have given a direction the very reverse of that for which they insisted at the trial. Unless, therefore, it can be shown that every cent of the $2,000 paid to the Respondent, on account of the policy upon her husband's life, must, as matter of law, be deducted from the $6,000 found by the verdict of the jury, the present appeal must fail.

In Beckett's case, as well as in the present, all the courts below have justly held that the right conferred by statute to recover damages in respect of death occasioned by wrongful act, neglect, or

default, is restricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application; but in others, the extent of loss depends upon *data* which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture. When a man has no means of his own, and earns nothing, it is obvious that his wife or children cannot be pecuniary losers by his decease. In like manner, when by his death, the whole estate from which he derived his income passes to his widow, or to his child (as was the case in Pym *v.* The Great Northern Railway Company, 2 Best and Smith 759, and 4 Best and Smith 296), no statutory claim will lie at their instance. A very different case arises when the means of the deceased have been exclusively derived from his own exertions, whether physical or intellectual. It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work, and remuneration; and also how far these, if realised, would have conduced to the benefit of the individual claiming compensation.

Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, they may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased.

When the deceased did not earn his own living, but had an annual income from property, one half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life, effected and kept up by a man in the position of the deceased William Jennings. The pecuniary benefit which accrued to the Respondent from his premature death, consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him, out of his earnings. In such a case, the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration; and it was, upon that footing, that Lord Campbell, in " Hicks " *v.* The Newport, &c. Railway Company (4 Best " and Smith, footnote, p. 403)," suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy.

For these reasons, their Lordships are unable to affirm that the exception taken by the Appellants to the ruling of the presiding judge is well-founded. They are not disposed to regret the result, because it appears that the learned judge excluded from the consideration of the jury all chances of the deceased's having obtained a rise of wages, or of his having been able to make some further provision for his widow. They will humbly advise Her Majesty that the judge-

ment of the Court of Appeal for Ontario ought to be affirmed, and the appeal dismissed. The appeal being *ex parte*, there will be no order as to costs.