Volume 45 | Issue 4 Article 11

June 1939

Damages--Duty to Mitigate

A. F. G.
West Virginia University College of Law

Court here seems to bind the states on an issue of state law which it has held it could not consider on appeal from the states' courts. The issue being one of state law,[13] the further question arises of which state's law is to be applied; certainly the Supreme Court here had to apply a "general" or "federal" common law.[14]

Will this decision be confined to its particular facts, that is, to cases where the taxes claimed exceed the total value of the decedent's entire estate and where the estate is very large? There are indications in the language of both the majority and dissenting opinions that the holding will be so restricted.[15]

J. P. R.

DAMAGES—DUTY TO MITIGATE.—*P* reported in September at the Hamlin grade school where he was to serve under a one-year contract as principal and learned that, as a part of a wholesale transfer of teachers in the county, his place of work had been changed to the Red River school in another district of the same county at the same salary. *P,* refusing to comply with the transfer, remained unemployed as a teacher at day school until March, at which time he was reemployed at the Hamlin school. In an action by *P* against the school board for his contract salary from September until March verdict and judgment were entered for *P.* On appeal, judgment affirmed. *Held,* that one need not mitigate damages arising under a broken contract by accepting similar employment in a different locality. *Martin v. Board of Education of Lincoln County.*[1]

The general proposition sought to be applied in the principal case is the well-established one "that it is 'the duty' of a party,

(1918). And judgment on each state's taxes is entitled to full faith and credit. Milwaukee County v. White Co., 296 U. S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935).

[13] *In re* Bain's Estate, 104 Misc. 508, 172 N. Y. Supp. 604 (1918); RESTATEMENT, CONFLICT OF LAWS (1934) § 10 (1); 1 BEALE, CONFLICT OF LAWS (1935) 105, § 10.1.

[14] After Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842), the federal courts applied in matters of general jurisprudence what was called a general common law, but they denied that there was any federal common law as a body of law distinct from the common law of the states. The recent case of Erie R. R. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1937), though overruling Swift v. Tyson, maintained still that "There is no federal general common law."

[15] From the majority opinion: "Taken as a whole the case is exceptional in its circumstances and in the principles of law applicable to them . . ." From the dissenting opinion: "To be sure, the Court's opinion endeavors to circumscribe carefully the bounds of jurisdiction now exercised."

[1] 199 S. E. 887 (W. Va. 1938).

injured by the breach of his contract, to exercise reasonable diligence to minimize his damages."[2] In establishing such a duty in the case of a breach of contract of employment, the burden is on the contract breaker[3] to allege and prove that the plaintiff could have obtained other employment of a similar nature[4] in the same locality.[5] As it is set forth in the opinion of the court, the holding in the principal case rests primarily on the belief that this element of locality has not been adequately alleged or proved. The soundness of using locality as the sole test seems at least doubtful in light of the flexibility in the meaning of the word "locality"[6] and the presence here of proof that the Red River school, though not in the same district with it, was in the same county as the Hamlin school, the size and geographic conditions of which county might have been judicially known to the court.[7]

Irrespective of the soundness of this reasoning, there are other considerations, not articulated by the court, which may have justly influenced its decision of this problem. One such consideration arises from the fact that had plaintiff accepted the subsequent similar employment, as it is insisted he should have done, it would require that he remain in the employ of those who had wronged him by the breach of their contract. Courts hesitate to impose such a duty on a party,[8] and consequently are likely rather to accord due regard to the pride and feelings of those before it. Another consideration which should bear weight in most cases of

[2] *Id.* at 889. Also see Huntington Easy Payment Co. v. Parsons, 62 W. Va. 26, 57 S. E. 253, 9 L. R. A. (N. S.) 113, 125 Am. St. Rep. 954 (1907); Davis v. Lumber Co., 85 W. Va. 191, 101 S. E. 447 (1919).

[3] Huntington Easy Payment Co. v. Parsons, 62 W. Va. 26, 57 S. E. 253 (1907); McCORMICK, DAMAGES (1935) § 159.

[4] Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); Cooper v. Stronge & W. Co., 111 Minn. 177, 126 N. W. 541, 27 L. R. A. (N. S.) 1011, 20 Ann. Cas. 663 (1910); Williams v. Robinson, 158 Ark. 327, 250 S. W. 14, 28 A. L. R. 734 (1923), as to *like* employment; Emery v. Steckel, 126 Pa. 171, 17 Atl. 601, 12 Am. St. Rep. 857 (1889), as to "other employment of the same or similar kinds".

[5] RESTATEMENT, AGENCY (1933) § 455, Comment *d*; Byrne v. Independent School District, 139 Iowa 618, 117 N. W. 983 (1908).

[6] Connally v. General Const. Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926), discussing the interpretation of the word locality as used in a statute dealing with wages paid in any locality, and stating " 'locality' means place, near the place, vicinity, or neighborhood. These terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or miles." See James v. Board of Com'rs, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821 (1886), which by dictum seemingly limits locality to community.

[7] See 5 WIGMORE, EVIDENCE (1923) § 2580.

[8] McCORMICK, DAMAGES § 160; Americus Grocery Co. v. Roney, 129 Ga. 40, 58 S. E. 462 (1907).

this type is the probability that any employment offered in lieu of that denied by the breach of contract will be under conditions less desirable to the wronged party, and fairness demands that one should not be made to so act to his own disadvantage.

A. F. G.

DAMAGES—RECOVERY UNDER WRONGFUL DEATH ACT.—Action for wrongful death brought under the wrongful death act[1] by administrator of the deceased who left no distributees who could take the recovery in accordance with the statutes providing for the distribution of estates of persons dying intestate.[2] *Held,* that the lack of beneficiaries was a good defense and that the recovery did not escheat to the state. Two judges dissented on the ground that the recovery should be allowed and should escheat to the state by a strict interpretation of the wrongful death act and the distribution statutes. *Wilder v. Charleston Transit Company.*[3]

This case, in determining whether the recovery is a part of the deceased's estate, throws further light on the nature of the wrongful death act in West Virginia. If recovery is a part of the estate, since there are no beneficiaries, it would escheat under the distribution statutes. If it is not part of the estate, where there are beneficiaries, it will be held in trust for them, and if there are no beneficiaries, no recovery can be had.

The first wrongful death act in West Virginia[4] specifically provided that the recovery was for the benefit of the widow or next of kin of the deceased. The present act provides that the recovery shall be distributed to the parties entitled under the statutes providing for the distribution of the estates of persons dying intestate. This would seem to show that the legislature's intent was to make the recovery a part of the deceased's estate. Another indication of this is to be found in the fact that the court has allowed the jury to award punitive damages.[5] These damages are not in the nature of compensation to the beneficiaries, but rather are imposed on the defendant with the idea that he should be penalized over and above the amount of the actual injury caused by his wrongful act.

---

1 W. VA. REV. CODE (Michie, 1937) c. 55, art. 7, §§ 5, 6.
2 *Id.* at c. 42, art. 2, §§ 1, 2.
3 197 S. E. 814 (W. Va. 1938).
4 W. Va. Acts 1863, c. 98.
5 Turner v. Norfolk & W. Ry., 40 W. Va. 675, 22 S. E. 83 (1895).