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Damages--Recovery Under Wrongful Death Act

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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 act¹ 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 Virginia⁴ 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).

On the other hand, the historical background of the wrongful death act shows that it is for the benefit of the widow or next of kin. The first act of this kind was Lord Campbell's Act⁶ which provided that the action was to be brought for the benefit of the wife, husband, parent and child of the deceased. The West Virginia act is copied from this act, except for the provision relating to the distribution of the recovery. It can be argued that the legislature intended to retain the compensatory nature of the act by using the same language because if the recovery was intended to become a part of the estate and thus change the nature of the act, specific language to that effect would have been used. The act also provides that the recovery is not liable for the decedent's debts, which would tend to show that it was not intended to be a part of his estate. The court has apparently recognized the compensatory nature of the act in holding that the jury may award damages to a father for the mental anguish suffered upon the loss of his only son,⁷ and that compensation was a proper element of damages in an action brought under this act.⁸

Thus it appears that upon weighing these arguments, the court followed the slight preponderance in holding that there could be no escheat, and it can be said that the recovery under the wrongful death act in West Virginia is not a part of the deceased's estate.

J. C. A.

DETINUE — REQUIREMENT THAT PROPERTY BE OF ACTUAL VALUE — ALTERNATE JUDGMENT AS CONTROLLING ELEMENT IN VALUE REQUIREMENT.—*R* executed a promissory note for \$4000 payable to bearer. *J* as agent for *R* secured a loan of \$2400 from a bank for the benefit of *R*, *J* giving his personal note for the amount of the loan and depositing *R*'s \$4000 note as collateral. Subsequently, *R* assumed the \$2400 debt and discharged the note for that amount thereby fulfilling the purpose for which the \$4000 note was executed, divesting *J* of any legal claim on the note and affording himself a complete defense on the instrument. *J*'s administrator brought detinue against the bank for the possession of the \$4000 note retained by the bank. Disclaiming any interest in the note the bank interpleaded *R* who was made a party defendant. *Held*,

⁶ 9 & 10 VICT. c. 93.

⁷ *Kelley v. Railroad Co.*, 58 W. Va. 216, 52 S. E. 547 (1905).

⁸ *Morris v. Railroad Co.*, 107 W. Va. 97, 147 S. E. 520 (1929).