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Detinue--Requirement that Property be of Actual Value--Alternate Judgment as Controlling Element in Value Requirement

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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 Act[6] 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).

two judges dissenting, that *R* was entitled to possession of the note irrespective of its actual value to him. *Baker v. Bank of Milton.*[1]

Incident to the decision of the instant case, as emphasized by the vigorous dissent, is the general proposition that the property sued for in detinue must be of some actual value.[2] In a prior West Virginia case, *Hefner v. Fidler,*[3] where one claiming the right to rescind a contract on the ground of fraud sued in detinue to regain possession of promissory notes executed by him pursuant to the contract, the court held that since the plaintiff had a complete defense, the notes could be of no actual value to him and that detinue, therefore, would not lie for their recovery.[4] The *Hefner* case has been widely cited as authority for this doctrine.[5] At least one court, however, has taken the position that the possibility of being forced to undergo a suit on the outstanding paper would impute actual value to the instrument, as to the maker out of possession, even if he had a complete defense thereon.[6]

Apparently a major reason for the general rule that the property sued for in detinue must be of actual value is the requirement for a money evaluation upon which an alternate judgment can be based,[7] if the article be not forthcoming.[8] Since under the common law an unsuccessful defendant had the election either to return the chattel detained or to pay the assessed value,[9] a choice no longer available under our statute,[10] the historical necessity for

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1 200 S. E. 346 (W. Va. 1938), Kenna, J., dissenting, and Riley, J., dissenting in part.

2 Wilson v. Rybolt, 17 Ind. 391 (1861); Whitfield v. Whitfield, 44 Miss. 254 (1870); 3 BL. COMM. 152; (1938) 16 AM. JUR. 950; (1915) 9 R. C. L. 148.

3 58 W. Va. 159, 52 S. E. 513, 112 Am. St. Rep. 961, 3 L. R. A. (N. S.) 138 and note (1905).

4 See Todd v. Crookshanks, 3 Johns. 432 (N. Y. 1808).

5 (1938) 16 AM. JUR. 950; (1915) 9 R. C. L. 148; BURKS, PLEADING & PRACTICE (3d ed. 1934) § 107.

6 Savery v. Hays, 20 Iowa 25, 28 (1865) (possession of the note is important, and the right to the possession, such a right as the law ought to protect and enforce); (*a fortiori*, where the instrument is not overdue and might be negotiated to a holder in due course); Shipley v. Reasoner, 80 Iowa 548, 45 N. W. 1077 (1890); Kennedy v. Roberts, 105 Iowa 521, 75 N. W. 363 (1898) (all actions in statutory replevin brought for detention of property).

7 Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513 (1905); and see CHITTY, PLEADING (13th Am. ed. 1859) 124.

8 See W. VA. REV. CODE (Michie, 1937) c. 55, art. 6, § 6.

9 BRACTON 102b, § 4; 3 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) c. 12, 157.

10 W. VA. REV. CODE (Michie, 1937) c. 55, art. 6, § 6; also see Damecki v. Bills, 88 W. Va. 246, 106 S. E. 629 (1921); and Carlin, *Rights of a Plaintiff with Reference to Property Delivered to Him under a Detinue Bond* (1926) 32 W. VA. L. Q. 137, 145-146.

an alternate judgment is at once apparent. No doubt this common law background extends a lingering influence over present-day holdings under the statute.[11] The cases are almost uniform in holding that, where the litigated property is in the hands of the losing party in the detinue action, an alternate judgment must be rendered.[12] But where the winner in detinue is entitled to only a part of the value of the article by reason of a lien it is error to award an alternate judgment.[13] Likewise, the successful party may waive his rights to have an alternate judgment pronounced and may accept an award for the property only.[14] Similarly, where the winner in detinue is in possession when the verdict is returned, omission of the alternate judgment for the value is immaterial[15] or at least harmless error.[16] It would seem, therefore, that affording complete protection for the successful party constitutes the essential reason for the alternate judgment and that the reason ceasing, to that exent the rule should cease.

In the instant case, where the note was in the possession of a third party, one advancing no claim thereon and being ready to deliver the instrument according to the court's decision, there would seem to be no reason for an alternate judgment and ample reason for relaxing the strict requirement as to what constitutes actual value in an action of detinue.

W. E. N.

PLEADING — VALIDITY OF JUDGMENT ON NOTE AS AFFECTED BY FAILURE TO ALLEGE OR PROVE RETURN OF NOTE FOR TAXATION. — *X*, administrator, in a proceeding by notice of motion for judgment on a note obtained judgment against petitioners for $850, to prevent the enforcement of which, petitioners brought an original prohibition proceeding in the supreme court of appeals. A statute provided:

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[11] W. VA. REV. CODE (Michie, 1937) c. 55, art. 6.

[12] White v. Emblem, 43 W. Va. 819, 28 S. E. 761 (1897); Graham v. Bright, 91 W. Va. 233, 112 S. E. 499 (1922); Stirling v. Garritee, 18 Md. 468 (1862); Averett & Griffin v. Milner & Wilson, 75 Ala. 505 (1883).

[13] Waddell v. Trowbridge, 94 W. Va. 482, 119 S. E. 290 (1923).

[14] Malone v. Davis, 77 W. Va. 120, 86 S. E. 1100 (1915).

[15] Chevrolet Motor Co. v. Commercial Credit Co., 214 Ala. 433, 108 So. 248 (1926); Gwin v. Emerald Co., 201 Ala. 384, 78 So. 758 (1918).

[16] Dykes v. Clark, 98 Ala. 657, 13 So. 690 (1893); Scott v. Howard, 215 Ala. 590, 112 So. 194 (1927); Jones v. Pullen, 66 Ala. 306 (1880); Finney v. Dryden, 214 Ala. 370, 108 So. 13 (1926); Shepherd v. Story, 62 Ala. 336 (1878).