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States does determine the constitutional question involved in the present case and the prior case of *Weiss v. Leason*,¹¹ the problems flowing from racial restrictive covenants will continue to remain, in part, unsolved.

TORTS—RIGHT OF WIFE'S ADMINISTRATOR TO RECOVER FROM HUSBAND'S ESTATE UNDER WRONGFUL DEATH STATUTE

After shooting his wife, a husband then shot and killed himself. The wife died a few minutes after her husband and was survived by a minor daughter by a previous marriage. A suit was brought against the executor of the husband's estate by the administrator of the wife's estate. The trial court gave judgment for the defendant notwithstanding the verdict of the jury for the plaintiff. Judgment was affirmed by the Illinois Appellate Court for the Third District¹ but was reversed by the Illinois Supreme Court in *Welch v. Davis*, 410 Ill. 130, 101 N.E. 2d 547 (1951).

The Appellate Court had based its decision denying recovery on its construction of the Married Women's Act² and the Wrongful Death Statute³ and held that the Married Women's Act did not give a wife the right to sue her husband for a personal tort. Therefore, since the wife could not maintain an action against her husband during her lifetime, her administrator could not maintain an action for her wrongful death.

The Supreme Court's reversal was based on an interpretation of the Wrongful Death Statute only. The court reasoned that the statute meant to create a new cause of action in the next of kin, that the disability of the wife to sue was personal, that the marriage had been terminated and that, therefore, there was no reason to extend the inability to the beneficiaries under the act.

At common law a person was not liable in tort for causing the death of another.⁴ A cause of action for personal injuries did not survive the injured party, and there was no action to recover damages caused by the death of someone else. Recognizing the injustice of the situation, and the beneficial interests that one party may have in the life of another, legislatures passed what are commonly referred to as Wrongful Death Statutes. Generally, these statutes give a cause of action to the next of kin of the deceased if the deceased would have been able to maintain a suit, had death not ensued.

Such defenses as contributory negligence and self defense, which miti-

¹¹ 359 Mo. 1054, 225 S.W. 2d (1949).

¹ *Welch v. Davis*, 342 Ill. App. 69, 95 N.E. 2d 108 (1950).

² Ill. Rev. Stat. (1951) c. 68, §§ 1-21.

³ Ill. Rev. Stat. (1951) c. 70, §§ 1, 2.

⁴ 25 C.J.S., Death § 13 (1941); 16 Am. Jur., Death § 44 (1938).

gate the wrongfulness of the defendant's act, are generally held to bar recovery by the next of kin.⁵ But when the defendant asserts some status or relationship, such as the husband and wife immunity asserted in the *Welch* case which would have prevented the deceased from recovering, the decisions are divided as to whether or not that status or relationship will prevent recovery by the next of kin. Some courts feel that the statutes do not intend to make the liability of the defendant greater than it was to the deceased.⁶

Other courts follow the view expressed by the Illinois Supreme Court, holding that the statute gives a new cause of action to the next of kin, which, though it must be based on a wrongful act, should not be lost because of some personal disability of the deceased which would have barred his recovery had he lived.⁷

It seems probable that the decision in the instant case will have an important bearing on analogous situations. Two such situations arose in cases cited by the Supreme Court as supporting authority.

In *Cowgill v. Boock*,⁸ suit was brought against the defendant for causing the death of defendant's minor son. The court allowed recovery, stating that the deceased could have recovered against his father because of the father's serious and wilful misconduct. Thus, the case is not strictly in point, but another case can be cited where the next of kin were allowed to recover even though the dead child could not have himself sued his parent.⁹

The Minnesota court, in *Albrecht v. Potthoff*,¹⁰ held that even though the wife of the defendant was the sole beneficiary of the action brought by the executor of the deceased, the common law rule that a wife cannot sue her husband did not apply.

Should any of these or other closely analogous situations arise in Illinois, it would seem probable and reasonable that the next of kin could recover.

Under the common law a wife could not bring any action against her husband.¹¹ So-called Married Women's Acts have been passed by the legislatures allowing a wife to sue as though feme sole.

⁵ 25 C.J.S., Death §§ 43, 44, 46 (1941); 16 Am. Jur., Death § 129 (1938).

⁶ *Graham v. Miller*, 182 Tenn. 434, 187 S.W. 2d 622 (1945); *Cronin v. Cronin*, 244 Wis. 372, 12 N.W. 2d 677 (1944); *Aldrich v. Tracy*, 222 Iowa 84, 269 N.W. 30 (1936); *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 96 S.E. 315 (1918).

⁷ *Russell v. Cox*, 65 Idaho 534, 148 P. 2d 221 (1944); *Breed v. Atlanta B. and C.R. Co.*, 241 Ala. 640, 4 So. 2d 315 (1941); *Oliveria v. Oliveria*, 305 Mass. 297, 25 N.E. 2d 766 (1940).

⁸ 189 Ore. 282, 218 P. 2d 445 (1950).

⁹ *Oliveria v. Oliveria*, 305 Mass. 297, 25 N.E. 2d 766 (1940).

¹⁰ 192 Minn. 557, 257 N.W. 377 (1934).

¹¹ 41 C.J.S., Husband and Wife § 396(a) (1944); 27 Am. Jur., Husband and Wife § 599 (1940).

Nearly all jurisdictions have held, in construing these statutes, that married women have been given the right to sue their husbands in property cases,¹² but only a few states have allowed wives to recover from their husbands for personal torts.¹³

No cases can be found in Illinois, except the Appellate Court decision in the *Welch* case, which decides whether or not the present Illinois Married Women's Act allows a wife to recover from her husband for personal tort injuries. A more recent Illinois Appellate Court case seems to take it for granted that a wife cannot sue her husband.¹⁴

Some vague inferences may be drawn from the language of the Supreme Court in the *Welch* case indicating that the justice writing the decision would favor allowing wives to sue their husbands for personal torts. However, it must be remembered that any reference to the Illinois Married Women's Act in this case is dicta and even these vague implications are not necessarily the opinion of the majority of the court.

It is, therefore, doubtful that the *Welch* case will be of any help to an attorney advocating that a wife, under the present Illinois Married Women's Act, has the right to sue her husband for personal injuries.

EVIDENCE—ADMISSIBILITY OF DRUNKOMETER TESTS

Defendant was convicted of driving an automobile while under the influence of intoxicating liquor. On appeal, it was held that the admission into evidence of the results of a drunkometer test was not error even though such tests have not received general scientific recognition. *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E. 2d 569 (1951).

In most communities, the only basis for a diagnosis of intoxication is the testimony of police officers and witnesses to an accident or traffic violation. Because the accuracy of such observations can be seriously challenged, certain scientific tests employing blood, breath or urine were developed.

The breath test makes use of a device known as the Harger Drunkometer. The person whose breath is to be tested voluntarily inflates a balloon. The breath thereby captured is released into a tube containing certain chemicals which change color as they absorb the alcohol from the air. The weights of the chemical before and after the test are compared, and by simple mathematical computation, the amount of alcohol in the

¹² 41 C.J.S., Husband and Wife § 396(b)(3) (1944); 27 Am. Jur., Husband and Wife §§ 599, 600 (1940).

¹³ 41 C.J.S., Husband and Wife § 396(b)(2) (1944); 27 Am. Jur., Husband and Wife §§ 591, 592, 593 (1940).

¹⁴ Tallios v. Tallios, 103 N.E. 2d 507 (Ill., 1952). This case held that a wife may sue her husband's employer for a tort committed by the husband while acting as an agent of the defendant.