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Ralph L. Halpern

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is no evidence whether the defendant spouse had or had not appeared the case must be remanded to determine that issue. Justice Frankfurter believed that where there is no such evidence it must be presumed that the defendant spouse failed to appear and that therefore the jurisdictional fact of domicile could be collaterally attacked.

Janet McFarland

WRONGFUL DEATH—ACTION BY WIFE'S ADMINISTRATOR ALLOWED
THOUGH WIFE COULD NOT HAVE BROUGHT ACTION HAD SHE LIVED

Plaintiff, administrator of the estate of a woman who was killed by her husband, sued the executor of the husband's estate under the Illinois Wrongful Death Statute. *Held*: Even though the wife could not have maintained an action in tort had she lived, because a wife cannot sue her husband in tort in Illinois, her administrator can sue her husband's executor for wrongful death. *Welch v. Davis*, 410 Ill. 130, 101 N. E. 2d 547 (1951).

At common law all civil actions for personal injuries abated with the death of either the injured party or the wrongdoer. *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (K. B. 1808); *Putnam v. Savage*, 244 Mass. 83 at 84, 138 N. E. 808 at 809 (1923). In 1846 the English adopted a wrongful death statute known as Lord Campbell's Act (9 and 10 Vict., c. 93). It allowed an action for the death of a person whenever the person himself could have sued for the injury had he survived. Such a statute was enacted in New York. L. 1847 c. 450, now in N. Y. Decedent Estate Law §§130-134. Today every state has a similar statute. Wrongful death statutes are not survival statutes giving a right of action for a personal injury to the deceased. *Greco v. Kresge Co.*, 277 N. Y. 26 at 32, 12 N. E. 2d 557 at 560 (1938). The cause of action is one entirely independent from any that the deceased may have had. It is given to a representative of the decedent's estate as trustee to recover damages suffered by the surviving spouse and next of kin, because of the death of the deceased. *Greco v. Kresge Co.*, *supra*.

The first section of wrongful death acts usually provide for liability notwithstanding the death of the injured person. The second section of the act provides that the action shall be brought in the name of a personal representative of the deceased, and the amount recovered shall be for the exclusive benefit of the widow and next of kin of the deceased, and that the jury may give such damages and compensation as they deem fair. See, N. Y. Decedent Estate Law §130.

The provision limiting the death action to those cases when the deceased might have recovered damages had he lived is the crucial section in the instant

RECENT DECISIONS

case, and it is necessary to examine its treatment by the courts. In the following cases recovery was denied: where decedent assumed the risk, *McAdams v. Windham*, 208 Ala. 492, 94 So. 742 (1922); where deceased was contributorily negligent, *Carran v. Warren Chemical Co.*, 36 N. Y. 153 (1867); where deceased recovered for the tort before his death, *Littlewood v. City of New York*, 89 N. Y. 24 (1882); where defendant acted in self-defense, *Ohio & Miss. Ry. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259 (1859); where the act of the defendant was not the proximate cause of the death, *Osborne v. Chesapeake & Potomac Telephone Co.*, 121 W. Va. 357, 3 S. E. 2d 527 (1939); where defendant obtained a release from decedent before the death, *Cogswell v. Boston & M. R.R.*, 78 N. H. 379, 101 Atl. 145 (1917); where the statute of limitations had run before the death, *Kelliher v. N. Y. C. & H. R. Ry. Co.*, 212 N. Y. 207, 105 N. E. 824 (1914); where defendant acted to protect his property, *Suell v. Derricott*, 161 Ala. 259, 49 So. 895 (1909); and where deceased consented to the act, *Newton v. Illinois Oil Co.*, 316 Ill. 416, 147 N. E. 465 (1925).

The above decisions make it clear that a wrongful death action cannot be maintained if the elements of the tort are not present or if the tort is justified. However there is a conflict as to whether a wrongful death action can be maintained where the disability on the part of the deceased goes to his identity as a party plaintiff rather than to the elements of the cause of action. The problem most often arises in states where spouses are under a disability to sue one another. The majority of the decisions hold that where the deceased would be unable to sue because local law bars a suit between husband and wife, the disability will extend to the decedent's representative. *Hovey v. Dolmage*, 203 Iowa 231, 212 N. W. 553 (1927); *Dishon's Adm'r. v. Dishon's Adm'r.*, 187 Ky. 497, 219 S. W. 794 (1920); *Demos v. Freemans*, 43 Ohio App. 426, 183 N. E. 395 (1931); *Wilson v. Barton*, 153 Tenn. 250, 283 S. W. 71 (1925); *Wilson v. Brown*, 154 S. W. 322 (Tex. Civ. App. 1913); *Keister Adm'r. v. Keister Exr's.*, 123 Va. 157, 96 S. E. 315 (1918). The rapidly growing minority view, *Russell v. Cox*, 65 Idaho 534, 148 P. 2d 221 (1944); *Robinson's Adm'r. v. Robinson*, 188 Ky. 49, 220 S. W. 1074 (1920); *Deposit Guaranty Bank & Trust Co. v. Nelson*, —Miss.—, 54 So. 2d 476 (1951), points out that the reason for the disability is the preservation of domestic peace and of the family unity, *Wick v. Wick*, 192 Wisc. 260, 212 N. W. 787 (1927), and that this reason fails to exist on the death of one or both of the spouses. *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 184 Atl. 663 (1936); Prosser on Torts p. 967 (1941).

In many jurisdictions the problem of the principal case has been eliminated by legislation which removes the disability of spouses to sue each other in tort. See, N. Y. Domestic Relations Law §57. Although Illinois has not abrogated the common law disability, the Illinois court has wisely limited its application to situations for which it is designed to operate, namely in tort actions between

living spouses. Where one or both of the spouses are dead the reason for the rule no longer exists, and where the reason does not exist, the rule should not be applied.

Ralph L. Halpern

UNINCORPORATED ASSOCIATIONS—SUBSTANTIVE LIABILITY NOT
AFFECTED BY STATUTE

Plaintiff brought an action against the National Maritime Union under General Associations Law section 13 by naming the president and treasurer of the union as defendants. The complaint alleged publication of a libel in the official union newspaper; that the newspaper was under the direction and control of the union officers; that the libel was published in pursuit of the objectives of the union; and that the officers were acting in the course of, and within the scope of their employment. HELD (4-3): the complaint was defective, section 13 requires pleading and proof of actual authorization or ratification of the act complained of by all the members. *Martin v. Curran*, 303 N. Y. 276, 101 N. E. 2d 683 (1951).

Under Common Law an unincorporated association is not capable of suing or being sued in its common or association name. Unlike a corporation, it is not an artificial person and it has no existence apart from its members. *Ostrom v. Greene*, 161 N. Y. 353 55 N. E. 919 (1900); *Brown v. The Protestant Episcopal Church in the United States of America*, 8 F. 2d 149 (E. D. La. 1925); See note, 149 A. L. R. 510. Nor is it a partnership; the distinction being that a partnership is organized for acquisition of monetary gain, whereas a voluntary association is organized for moral, benevolent, social, or political purposes. *Lafonde v. Deems*, 81 N. Y. 508, (1880). For that reason no authority to create personal liability is implied or presumed from the mere fact of membership. A member is liable for acts done in the name of the association only on a strict agency theory; i.e., actual consent to, or ratification of the act. Gilmore, Partnership 44 (1911); Mechem, Elements of Partnership 14 (2d ed. 1920).

Although the legal status of unincorporated associations has not been changed, the modern view is that for some purposes they must be treated as juristic entities, capable of suing or being sued in the association name. Stevens, Private Corporations, 40 (2d ed. 1949). In England, labor unions were given the capacity to sue and be sued in their registered name by the Trade Union Acts of 1871 and 1876. *Taff Vale Railway Co., v. Amalgamated Society of Railway Servants*, (1901) A. C. 426. In this country federal legislation characterizing labor unions as entities was the basis for the decision in *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, (1922),