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## Evidence—Effect of Tortfeasor's Death Upon Admissibility of Blood Test in Civil Action

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Second, state courts can, and should, share the burden of considering the increasing volume of habeas corpus applications which are being presented to the federal district courts.<sup>15</sup>

Petitioner's state remedies now *are* exhausted.<sup>16</sup> The federal district court, following the pattern prescribed in *Blair*,<sup>17</sup> may now decide to hold an evidentiary hearing and, perhaps, grant the writ of habeas corpus.

## EVIDENCE

**Effect of Tortfeasor's Death Upon Admissibility of Blood Test in Civil Action.** The question whether analyses of blood samples taken from a deceased person may be admitted into evidence in a civil suit is one of first impression in Washington. Plaintiff, a truck-owner, sued decedent's executor for damages to his truck sustained in a collision with decedent's automobile, alleging that decedent was negligent in driving under the influence of intoxicants. A blood sample was taken by a coroner, in accordance with Washington Revised Code section 68.08.106,<sup>1</sup> approximately one hour after death. Analysis of decedent's blood sample was admitted into evidence over defendant's objection, as proof of decedent's intoxication. On appeal from a jury verdict for plaintiff, *held*: Analysis of a blood sample lawfully taken from a deceased person by a coroner is admissible into evidence in a civil suit. *Zenith Transport, Ltd. v. Bellingham Nat'l Bank*, 64 Wn.2d 967, 395 P.2d 498 (1964).<sup>2</sup>

The language of Washington Revised Code section 68.08.106, allow-

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<sup>15</sup> See Becker, *Collateral Post-Conviction Review—View of a District Judge*, 33 F.R.D. 452, 491 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961).

<sup>16</sup> "If no state remedy is available or if, pursuing it, the state prisoner fails to obtain the relief desired, exhaustion of state remedies would be established and 28 U.S.C. § 2254 would not stand in the way of federal habeas corpus." *Blair v. California*, 340 F.2d 741, 745 (9th Cir. 1965).

<sup>17</sup> In *Blair*, the district court was ordered to hold the defendant's petition in abeyance pending his application to the California court. The issue involved denial of counsel to petitioner on appeal from his California conviction, in light of the Supreme Court decision in *Douglas v. California*, 372 U.S. 353 (1963). If the defendant failed to obtain the relief desired from the California court, the district court was then to consider the petition.

<sup>1</sup> "[T]he coroner, upon his own authority or upon the request of the prosecuting attorney . . . may make or cause to be made an analysis of the stomach contents, blood, or organs, or tissues of a deceased person and secure professional opinions thereon and retain any specimens or organs of the deceased which in his discretion are desirable or needful for anatomic, bacteriological, chemical or toxicological examination or upon lawful request are needed or desired for evidence to be presented in court. Costs shall be borne by the county." (1953).

<sup>2</sup> The court remanded the case for a new trial on another ground.

ing a coroner discretion to take and preserve blood samples for evidence in court, does not specify the types of court actions to which it applies. The court in the principal case rejected defendant's argument that the statute applied only to criminal actions, and applied the statute to civil actions as well.<sup>3</sup>

Defendant also objected to the admission of decedent's blood analysis into evidence upon the basis that Washington Revised Code section 46.56.010 grants a person the right to refuse to submit to a blood analysis.<sup>4</sup> The court in turn rejected this contention, stating: "The driver's right to refuse to consent to a blood test is a personal right which terminates with his death."<sup>5</sup> All other jurisdictions which have considered the question also hold that this common law right of privacy terminates at death and cannot be claimed by decedent's estate.<sup>6</sup>

At common law, a right of action for wrongful death did not survive the tortfeasor's death.<sup>7</sup> In 1961, however, the Washington legislature provided that a right of action for wrongful death may be maintained against the personal representative of a deceased tortfeasor.<sup>8</sup> Although the common law seems to have been unjust to a deceased tortfeasor's victim, the decision in the principal case may be equally unjust to a deceased tortfeasor's estate.

Not only does the cause of action survive the tortfeasor's death, but his common law right of privacy—also protected by statute while he was alive<sup>9</sup>—is divested by his death. The legislative intent in enacting the wrongful death statute was to treat the estate of a decedent tortfeasor as if no death had occurred.<sup>10</sup> The decision of the principal case

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<sup>3</sup> For other decisions admitting blood samples into evidence in civil actions, see *Diener v. Mid-American Coaches, Inc.*, 378 S.W2d 509 (Mo. 1964); *Fossum v. Zurn*, 78 S.D. 282, 100 N.W2d 805 (1960); *Lawrence v. City of Los Angeles*, 53 Cal. App.2d 6, 127 P.2d 931 (1942); *Kuroske v. Aetna Life Ins. Co.*, 234 Wis. 394, 291 N.W. 384 (1940).

<sup>4</sup> "Nothing herein contained shall be construed as requiring any person to submit to a chemical analysis of his blood, and the refusal to submit to such an analysis shall not be admissible in evidence in any criminal prosecution for a violation of the provisions of this section or in any civil action." (1961).

<sup>5</sup> 64 Wash. Dec.2d at 987, 395 P.2d at 500.

<sup>6</sup> *E.g.*, *Diener v. Mid-American Coaches, Inc.*, 378 S.W2d 509 (Mo. 1964); *Ravellette v. Smith*, 300 F.2d 856 (7th Cir. 1962); *Fretz v. Anderson*, 5 Utah 2d 290, 300 P.2d 642 (1956).

<sup>7</sup> *Bortle v. Osborne*, 155 Wash. 585, 285 Pac. 425 (1920); *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687 (1912).

<sup>8</sup> WASH. REV. CODE § 4.20.046(2) (1961): "Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury may be maintained against the personal representative of such person."

<sup>9</sup> WASH. REV. CODE § 46.56.010, *supra* note 4.

<sup>10</sup> *Richards, Survival of Actions*, 36 WASH. L. REV. 331 (1961).

recognizes the tortfeasor's death only insofar as his defenses are terminated thereby. There is no indication in the principal case that this issue was recognized or considered by the court.

It is unfortunate that the court in the principal case also did not consider the deceased's lack of opportunity to rebut the blood analysis. When a blood alcohol test reveals an alcohol content of 0.15 per cent or more by weight, Washington Revised Code section 46.56.010<sup>11</sup> raises a rebuttable presumption, in criminal prosecutions, of being "under the influence of intoxicating liquor." The court noted in *City of Seattle v. Bryan*<sup>12</sup> that a defendant's own testimony may be sufficient to overcome this presumption of intoxication. In the principal case, death precluded any possible explanation by decedent of the 0.14 per cent analysis of his blood. Admission of blood analysis results in a tort action alleging intoxication of a party no longer able to offer explanation of the results would seem to prejudice decedent's estate as defendant.

### PROPERTY

**Power of Termination—Effect of Failure To Exercise Within A Reasonable Time.** The Washington court recently considered the effect of prolonged silence and lack of affirmative action by the holder of a power of termination after a condition subsequent has been broken. In 1884, the grantor conveyed land to a water company. The deed required that the land be used for a right of way to conduct water, enforceable by a power of termination reserved to the grantor and his heirs. The land was subsequently conveyed to plaintiff by a deed subject to the same condition. Prior to 1905, the condition occurred when the land was set aside for park purposes. Not until 1963, when the heirs of the original grantor filed a counter-claim to plaintiff's quiet title action, was forfeiture claimed under the power of termination. The trial court granted plaintiff's motion for summary judgment. On appeal, *held*: Failure to exercise a power of termination within a reasonable time after occurrence of a condition subsequent results in loss of the power of termination. *Metropolitan Park Dist. v. Unknown Heirs of John L. Rigney*, 65 Wash. Dec.2d 764, 399 P. 2d 516 (1965).

When a fee simple subject to condition subsequent in real property is created, the party entitled to enforce the condition is said to have a right of re-entry or a power of termination. This power of termination

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<sup>11</sup> *Supra* note 4.

<sup>12</sup> 53 Wn.2d 321, 333 P.2d 392 (1958).