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Notes on Recent Cases

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NOTES ON RECENT CASES

CRIMINAL LAW — Evidence — Dying Declaration.—Defendant was charged and convicted of sodomy. Evidence was introduced at the trial tending to show intimacy between defendant and several youths; also that defendant had taken one "P" along on a trip who found he had contracted a loathesome venereal disease which soon caused his death. Shortly before his death, "P" told his mother that he had contracted the malady as a result of defendant's unnatural practices. The mother of "P" was permitted, over objection of defendant's counsel, to recite the declaration made by her son. On appeal the admission of this testimony was assigned as error as not constituting an exception to the Hearsay Rule. *Held,* "Dying declarations are admissible only in cases of homicide, and then only where the death of declarant is subject of the charge". *Clark v. State* (Nebr. 1926) 211 N. W. 16.

The above ruling is supported by the weight of authority. 22 C. J. 258; Greenleaf, "Evidence", 16 ed. sec. 156a; Hughes, "Evidence" 3 ed p. 64; *People v. Stison* 140 Mich. 216, 103 N. W. 542, 12 Am. S. R. 397, 6 Ann. Cas 69; and cases there cited.

Dying Declarations are admissible in Evidence as exceptions to the Hearsay Rule for two reasons: viz; (1) the solemnity of approaching dissolution dispenses with the necessity of an oath—it being logical to suppose that a person with the death pallor on his face and conscious of soon coming face to face with his Master has no incentive to falsify; (2) the necessity of supplying evidence in this manner because the declarant ofttimes happens to be the only person, other than the accused, who has knowledge of the material facts. In earlier times dying declarations were admitted in civil as well as criminal cases. "Evidence" 22 C. J. 259, n. 91. Later it was restricted to criminal cases, and at the beginning of the nineteenth century was limited to cases of homicide. "The language of Serjeant East seems to have been the unwitting source of the heresy", says Professor Wigmore, "Evidence" 2 ed. Vol. 3, sec. 1431. The limitation alluded to by the opinion of Serjeant East was given wide publicity and credence by Redfield in his edition of Green-

leaf, became imbedded in American jurisprudence, and remains to this day the almost universal rule.

The general rule is stoutly criticized by Professor Wigmore, Evidence 2nd ed. Vol. 3, sec. 1436; by Rose, J., in a dissenting opinion to the principal case; and by the courts of Kansas where dying declarations are admissible in civil cases. *Thurston v. Fritz,* Kan. 468, 138 Pac. 625, 50 L. R. A. (N. S.) 1167, Ann. Cas 1915 D 212; *Vassar v. Swift Co.,* 206 Kas. 836, 189 Pac. 943. Accord: *Latham v. Andrews,* 105 S. E. (N. C.) 423, (by statute). The rule has been relaxed in some states to permit the admission of dying declarations in cases of *abortion* resulting in death. *Montgomery v. State,* 80 Ind. 345, 22 C. J. 258. *State v. Dickinson,* 41, Wis. 299, 308.

The reason such declarations are frowned upon is that the accused has no opportunity to cross examine the declarant, but this is equally true in cases of homicide as well as such revolting cases of secret vice as the one under discussion. The same necessity exists in the latter as does in the former. There is the same solemnity of impending death supplying the office of an oath and the same public policy requiring the guilty one to be punished. It is hard, therefore, to perceive why a distinction has been made, based upon objections as technical they are.

W. L. T.

DIVORCE—By simulated residence in state other than that of matrimonial domicile—Status of parties cohabiting after removal of impediment to valid marriage. Plaintiff, a married woman whose matrimonial domicile was in England became engaged to the defendant, a married man whose matrimonial domicile was in New York. They agreed to go to Colorado and seek divorces from their mates. Under the law of Colorado no divorce could be granted unless the petitioners had maintained a *bona fide* residence there for one year prior to the institution of divorce proceedings. However, the plaintiff resided in Colorado only a month before she commenced her divorce suit. Notice was given to her husband by publication, he being in England, and she obtained a decree of absolute divorce. The defendant after residing the statutory period in Colorado obtained a divorce also. Shortly thereafter the plaintiff and defendant applied to a justice of the peace in Missouri and went through the ceremony of mar-

riage. Later the plaintiff's husband who was still in England procured a divorce from her in that country. Defendant's wife also obtained a divorce from him in New York where he made appearance in the suit. The New York decree prohibited him from remarrying within a year. About two years later this first wife of defendant died. It was contended on behalf of defendant, in plaintiff's suit for divorce, that there was no valid divorce and, therefore, he prayed for annulment. Plaintiff replied that conceding the Colorado divorces to be invalid, they (plaintiff and defendant) had cohabited and lived together as husband and wife after dissolution of plaintiff's first marriage, and after the death of defendant's wife, and thereby acquired the status of husband and wife by the common law of New York where they resided. *Held,* the divorce decrees in Colorado procured by simulated residence there were *invalid* and not binding in other states, hence the subsequent marriage ceremony was of no effect and a removal of the impediments to a valid marriage did not create a common law marriage status between them where they began and continued their relations as husband and wife under the invalid marriage. *Friedenwald v. Friedenwald,* (Ct. App. D. C. 1926) 16 F. (2nd) 509.

It is well settled that a simulated domicile by one party to a divorce where the other was served only by publication is not a basis for a decree which is entitled to full faith and credit under the constitution of the United States. *Haddock v. Haddock* 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1

The dissenting opinion of Associate Justice Robb, in the principal case, upholds the contention of plaintiff that there arose a common law marriage as a result of their continued cohabitation and conduct after removal of the impediment to a valid marriage Although there is an irreconcilable conflict of authority on the proposition involved, the weight of authority and reason seems to support the dissent of Justice Robb. *Smith v. Reed* 145 Ga. 724, 89 S. E. 815, L. R. A. 1917 A. 492; *Stuart v. Schoonover* (Okl.) 229 Pac. 812; *Barker v. Valentine* 125 Mich. 336, 84 N. W. 297, 51 L. R. A. 787, 84 Am. St. Rep. 578; *Eaton v. Eaton* 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199; *Manning v. Spurck* 199 Ill. 447, 65 N. E. 342; *White v. White* 82 Cal. 427, L. R. A. 799; *Blanchard v. Lambert* 43 Ia. 228, 22 Am.

Rep. 245; *North v. North* 43 Am. Dec. 778. *Fenton v. Reed* 4 Am. Dec. 244; *Teter v. Teter* 88 Ind. 494; "Marriage" 38 C. J. sec. 51, 96; 18 R. C. L. 438. *Contra: Collins v. Voorhees* (N. J.) 14 L. R. A. 364; *Hunt's Appeal* 86 Pa. 294; *Williams v. Williams* 46 Wis. 464, 32 Am. Rep. 722; *Reading v. Riegel* 113 Pa. 204, 57 Am. Rep. 448; *Cram v. Burnham* 5 Me. 213, 17Am. Dec. 218. Some States fairly put the question to the jury to say whether the continued cohabitation after removal of the impediment to a valid marriage constitutes a common law marriage. *State v. Worthingham* 23 Minn. 528; *Northfield v. Plymouth* 20 Vt. 582.

JAMES W. COLMAN

PARENT AND CHILD—Right of minor to sue parent for injuries.—A minor son was injured while riding in his father's automobile. By his next friend the child brought an action against the parent to recover for injuries sustained as the result of alleged negligent operation of the care. *Held,* the parent not liable in tort for injuries to minor son. *Elias v. Collins,* (Mich. 1926.) 211 N. W. 88.

The great weight of authority denies a minor the right to sue his parent, or person standing in *loco parentis,* for personal injuries—the rule being based on public policy and established precedent. *Matarese v. Matarese* (R. I. 1925) 131 Atl. 198, 42 A. L. R. 1360; *Mannion v. Mannion* (N. J. 1925) 129 Atl. 431; *Smith v. Smith.* (Ind. 1924) 142 N. E. 128; *Small v. Morrison* 185 N. C. (1923) 577, 118 S. E. 12, 31 A. L. R. 1135; *Foley v. Foley* 61 Ill. App. 577; *Hewlett v. George* 68 Miss. 703, 9 So. 885, 13 L. R. A. 682; *McKelvey v. McKelvey* 111 Tenn. 388, 77 S. W. 644, 102 Am. S. R. 787, 64 L. R. A. 991; *Roller v. Roller* 37 Wash. 242, 79 Pac. 788, 107 Am. S. R. 805, 68 L. R. A. 893. It has been said "At common law it is well established that a minor child cannot sue a parent for a tort"—*Roller v. Roller,* supra; but, the truth of that statement has been strenuously denied. See, dissenting opinion of Clark, C. J., in *Morrison v. Small,* supra. In *Treschman v. Treschman,* 28 Ind. App. 206, 61 N. E. 961, a stepmother who had brutally banged the head of her step-daughter against a brick wall was held to have acted *malo animo* and was made to respond in damages for the tort. The court quoted with approval, Reeve's "Domestic Relations", (4th Am. Ed. 357) a leading English work, wherein the author declares

that the child, on principle, may rightfully sue his irrational parent for punishment *malo animo*. *(Smith v. Smith, supra,* a later Indiana decision is distinguished from the *Treschman* case.)

Some states have not felt themselves bound to follow the general rule and have repudiated it in whole or in part. *Dix v. Martin* (1913) 171 Mo. App. 266, 157 S. W. 133; *Clasen v. Pruhs* 69 Nebr. 228, 95 N. W. 640, 5 Ann Cas. 112. Determined attempts have been made in recent years to induce the courts to allow recovery to a minor child for injuries caused by the parent but the general rule has been steadily followed. Approximately one-fourth of all the reported cases involving this principle have arisen in the last five years—probably due to the fact that automobiles are regarded as dangerous instrumentalities in the hands of careless parents whose reckless propensities, it is contended, should be curbed, by an exception to the rule, for the welfare of their chidlren. Another reason for the prevalence of such controversies is the supposition entertained by some minds that the rights of a child should be extended much the same as a wife's rights have been enlarged under the modern law. But, it is submitted, if any change is to be wrought it should be done by the legislature; not by the courts. The courts have gone far enough in their strained reasoning of late years. It is high time to rest opinions on a firm foundation, and there is no more substantial ground for adhering to a rule of law than the sound public policy as handed down from generation to generation. The modern craze for reform has gone far enough.

A father's right of chastisement has always been recognized; one authority states that a parent owes his child an education; and chastisement is allowed on the theory that it is a form of education. In ancient days infanticide was tolerated—giving the parent discretion in the matter of life and death of his child, SCHOULER, *Domestic Relations,* (6th ed.) 782; but the progress of civilization has leveled the rights and duties of a parent down to a fairly mean recognition of justice to his offspring without endangering the disciplinary authority of the former. Let the scepter of parental authority remain in the rightful sovereign of the household, permit the child to take refuge behind the shield of criminal prosecution provided by law, and the welfare of the family will best be served. W. L. T.