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Intoxication as a Defense

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Deere Plow Co. *v.* Mowry, 222 Fed. 1 (C. C. A. 6th, 1915), it was held that "it is only to a settled rule of a State Court applicable to the *precise* facts disclosed by the record that Federal Court should yield its own judgment."

The weight of the authority seems to be that where there has not been a final adjudication by the highest court of State the Federal Courts will make their own rule and are bound thereby. Dernberger *v.* B. & O. R. R., 243 Fed. 21, (C. C. A. 4th, 1917); U. S. *v.* Cargel, 263 Fed. 856, (C. C. A. 8th, 1920); John Deere Plow Co. *v.* Mowry supra, Karch Co. *v.* Adams, 231 Fed. 950, (C. C. A. 6th, 1916).

Better Rule would seem to be that in construing a State Statute the Federal Courts should for sake of harmony lean to agreement with State Court. Pineland Club *v.* Roberts, 213 Fed. 545, (C. C. A. 4th, 1914); Holden *v.* Circleville Light & Power Co., 216 Fed. 490, (C. C. A. 6th, 1914).

CRIMINAL LAW—HOMICIDE—INTOXICATION AS A DEFENSE—The defendant was charged, in the indictment and on the trial was convicted, of killing one Mahaira while engaged in the commission of a felony, to wit, the crime of robbery, upon the person killed. Evidence as to the defendant's intoxication was adduced as a defense and the court charged that the defendant could be convicted of first degree murder or acquitted. An appeal is brought on a refusal to charge as to the different degrees of homicide. *Held,* that since a conviction of homicide was dependent upon specific intent, it was error to refuse the charge as to intoxication. Judgment reversed and new trial granted, three judges dissenting, the dissenting opinion is apparently based on the conclusion that no intoxication was shown by the evidence and that therefore the conviction should be affirmed. People *v.* Koerber, 244 N. Y. 147, 155 N. E. 97 (1926).

Voluntary intoxication has not always been considered a defense in a criminal prosecution "He who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober." 1 Hawk. P. C. ch. 1 par. 6. In fact, some old decisions, no longer law, hold that voluntary drunkenness is an aggravation of the crime; Beverly's Case, 4 Coke 123 B. 125 A; 4 Black. Com. 25; State *v.* Thompson, Wright (Ohio) 617 (1834). This rule was apparently based on the theory that voluntary intoxication is, in itself, a wrongful act, for the immediate consequences of which the law will hold the party liable. Lew U. S. Crim. Law 405; O'Herrin *v.* State, 14 Ind. 420 (1860). But settled insanity produced by habitual intoxication is a defense to crime to the same extent as insanity produced by other causes. State *v.* Potts, 100 N. C. 457, 6 S. E. 657 (1888); State *v.* Kavanaugh, 4 Pen. (Del.) 131, 53 Atl. 335 (1902).

The modern rule of intoxication in New York, has been embodied in the Penal Code, sec. 1220, which provides substantially that no criminal act shall be excused by reason of voluntary intoxication. But, wherever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take in to consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act. This statute has

been interpreted to mean that whenever the intoxication of a defendant arises upon the evidence in a trial for murder, the jury should say whether such intoxication prevented the intent, premeditation and deliberation essential to constitute the crime and failure to so instruct is error although no request to so charge is made on the defendant's behalf. People *v.* VanZandt, 224 N. Y. 354, 120 N. E. 725 (1918); People *v.* Leonardi, 143 N. Y. 360, 38 N. E. 322 (1894). This rule applies not only to total, but to partial intoxication also. People *v.* Gerdvine, 210 N. Y. 184, 104 N. E. 129 (1914). But where a person, after previously determining to commit a homicide, voluntarily drinks himself into a state of intoxication, it is no defense under the Code. People *v.* Koerner, 191 N. Y. 528, 84 N. E. 1117 (1908); State *v.* Shelton, 164 N. C. 513, 79 S. E. 883 (1913).

PARENT AND CHILD—NEGLIGENCE—An action brought by an infant, his mother as guardian ad litem, against his father, defendant, to recover for personal injuries sustained in an automobile accident by reason of the defendant's negligence. *Held,* the suit could not be maintained inasmuch as a child under the age of 14 could not recover damages against the parent on the above stated facts. Judgment reversed and cause remanded with instructions to sustain demurrers. Wick *v.* Wick, 212 N. W. 787 (Wisc. 1927).

Inasmuch as there are no English cases as a precedent the inference may be drawn that such action was not maintainable at common law. Up to the year of 1891, this issue was not decided by an appellate court until the case of Hewlett *v.* George, 68 Miss. 703, 9 So. 885 (1891), wherein it was held that the action was untenable. Following this adjudication, many states have based their decisions, most consistently and in surprising judicial harmony. McKelvey *v.* McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller *v.* Roller, 37 Wash. 242, 79 Pac. 788 (1905); Taubert *v.* Taubert, 103 Minn. 247, 114 N. W. 763 (1908); Small *v.* Morrison, 185 N. C. 577, 118 S. E. 12 (1923); Smith *v.* Smith, 81 Ind. Rep. 566, 142 N. E. 128 (1924); Materese *v.* Materese, 47 R. I. 131, 131 Atl. 198 (1925); Mannion *v.* Mannion, 3 N. J. Misc. 68, 129 Atl. 431 (1925). In support of this doctrine, the reasons advanced are on the ground of public policy. The family consists of a unit of sanctity, wherein the strongest natural ties bind all of its members to mutual love, interest and welfare. For to question parental authority encourages the impairment and undermining of the wholesome influence of the home. The disruption of the fireside's peacefulness and stability is the proximate result. However, —where one standing *in loco parentis* is guilty of excessively punishing a child, he is liable for damages. Steber *v.* Norris, 188 Wis. 366, 206 N. W. 173 (1925).

In the able dissent of Crownhart, J., it is pointed out that the Constitution of Wisconsin, Art. I, Sect. 9, provides for the relief of *any* person for injuries received to his person, property or character. As to a principle of common law, the maxim is "there is no wrong without a remedy." Especially well stressed is this forceful argument. Why is a cause of action by an infant against his parent tenable for a debt due or for an accounting of trust funds or for the