

# Dying Declarations--Admissability (Shepard v. U.S., 54 S. Ct. 22 (1933))

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A declaratory judgment may be resorted to only when circumstances render it useful and necessary, where it will serve some practical end in stabilizing or quieting an uncertain or disputed jural relation as to present or prospective obligations.<sup>6</sup> Where mere rumors cast doubt upon the marital status of the parties concerned, no declaration by the court that it is false will be useful to suppress it.<sup>7</sup>

Equity will not restrain by an injunction an act which merely injures a person's feeling and causes mental anguish.<sup>8</sup> Casting doubt upon one's position as a wife and consequent loss of social position and reputation will not be enjoined by a court of Equity.<sup>9</sup> Since injunctions against immoral conduct open such a wide field of possible litigation with so much doubt of effective results, and strong probability that the administration of the law might be made an object of ridicule, it will not be expedient to extend equitable relief in those cases of injuries to family relations.<sup>10</sup> It is well settled that equity will not enjoin the commission of a crime.<sup>11</sup> Under the law it is a matter of their own consequences. The same may be said of individual morals.<sup>12</sup> Any attempt to regulate the morals of the people by injunctions can only result in making ridiculous the courts which grant such decrees.<sup>13</sup> The injured wife may resort to other remedies. A civil suit may be maintained for alienation of affections or criminal conversation against the paramour,<sup>14</sup> or the wife may have her husband prosecuted criminally for his adultery.<sup>15</sup>

I. L. K.

**DYING DECLARATIONS—ADMISSIBILITY.**—The defendant was convicted of poisoning his wife. At the trial the Prosecutor offered in evidence a conversation between the deceased and her nurse, in rebuttal to a suicidal intent set up by the defense. The evidence was

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<sup>6</sup> James v. Alderton Dock Yards, 256 N. Y. 298, 176 N. E. 49 (1931); Wardrop v. Fairfield Gardens, 237 App. Div. 605, 262 N. Y. Supp. 95 (1st Dept. 1933); Marine Lighterage Corp. v. Luckenbach S. S. Co., 139 Misc. 612, 248 N. Y. Supp. 71 (1931).

<sup>7</sup> Instant case; cf. Bauman v. Bauman, 250 N. Y. 382, 165 N. E. 819 (1929).

<sup>8</sup> Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (D. C. W. D. Mo. 1912); Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902); Atkinson v. Doherty & Co., 121 Mich. 372, 80 N. W. 285 (1899).

<sup>9</sup> *Supra* note 5. *Contra*: Burns v. Stevens, 236 Mich. 443, 210 N. W. 482 (1926).

<sup>10</sup> Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 674. *Contra*: instant case, Crane, J., dissenting opinion.

<sup>11</sup> *Supra* note 7.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> WALSH, EQUITY (1930) §52.

<sup>15</sup> N. Y. PENAL LAW (1909) §§100-103.

rejected, but was later received upon the ground that it was a dying declaration, upon proof that the deceased said "she was not going to get well, she was going to die." At that time, two days after the illness started, there was no diagnosis of poison, and the attending physicians had not considered her seriously ill. Death was the result of a relapse, which occurred two weeks later. *Held*, inadmissible as there was no belief in impending death and abandonment of hope of recovery. *Shepard v. U. S.*,—U. S.—, 54 Sup. Ct. 22 (1933).

To admit an *ante mortem* statement of the deceased as to the cause of his condition and the circumstances surrounding it,<sup>1</sup> it must appear that at the time of the declaration, the victim was in danger of death, and believing this, had abandoned all hope of recovery.<sup>2</sup> These requirements need not be expressed by the victim verbally, they may be signified by signs<sup>3</sup> or inferred from the circumstances.<sup>4</sup> Their purpose is to have some indemnity against deception, to be found in the awe of that moment and the abandonment of temporal aims.<sup>5</sup> Since this mental security is the foundation of the admissibility,<sup>6</sup> it is apparent that the statement must be made by the victim,<sup>7</sup> and if made while this pledge of truth is present, it does not matter that he survive for some time.<sup>8</sup>

The credibility of the declarant may be attacked by showing the presence of other motives antagonistic to truth, such as hatred and revenge.<sup>9</sup> He is subject to the testimonial disqualifications of an

<sup>1</sup> *People v. Morse*, 196 N. Y. 306, 89 N. E. 816 (1909); *People v. Stacy*, 119 App. Div. 743, 104 N. Y. Supp. 615 (3rd Dept. 1907).

<sup>2</sup> *Brotherton v. People*, 75 N. Y. 159 (1878); *People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (1902); *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624 (1903); *People v. Del Verno*, 192 N. Y. 470, 85 N. E. 690 (1908); *People v. Governale*, 193 N. Y. 581, 86 N. E. 554 (1908); *People v. Morse*, *supra* note 1; *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (1911); *People v. Falieto*, 202 N. Y. 494, 96 N. E. 355 (1911); *People v. Saranzo*, 212 N. Y. 231, 106 N. E. 87 (1914); *People v. Kane*, 213 N. Y. 260, 107 N. E. 655 (1915); *People v. Evans*, 40 Hun 492 (N. Y. 1886); *People v. Burt*, 51 App. Div. 106, 64 N. Y. Supp. 417 (3rd Dept. 1900); *People v. Stacy*, *supra* note 1; *People v. Brecht*, 120 App. Div. 769, 105 N. Y. Supp. 436 (1st Dept. 1907); *People v. Mikulec*, 207 App. Div. 505, 202 N. Y. Supp. 551 (3rd Dept. 1924); *People v. Flaherty*, 218 App. Div. 204, 218 N. Y. Supp. 148 (4th Dept. 1926); *People v. Weiss*, 261 N. Y. Supp. 646, 147 Misc. 595 (1932).

<sup>3</sup> *People v. Madas*, *supra* note 2.

<sup>4</sup> *People v. Falieto*, *supra* note 2.

<sup>5</sup> *People v. Saranzo*, *supra* note 2; 3 WIGMORE, EVIDENCE (2d ed. 1923) §1443.

<sup>6</sup> *People v. Saranzo*, *supra* note 2.

<sup>7</sup> *People v. Becker*, 215 N. Y. 126, 109 N. E. 127 (1915).

<sup>8</sup> *People v. Weiss*, *supra* note 2; *State v. Bruno*, — Iowa —, 132 N. W. 817 (1911); *State v. Brown*, — La. —, 135 So. 818 (1904); *Reeves v. State*, — Miss. —, 64 So. 836 (1914); *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194 (1903); *State v. Colvin*, 226 Mo. 446, 126 S. W. 817 (1911).

<sup>9</sup> *Reeves v. State*, *supra* note 8.

ordinary witness<sup>10</sup> such as insanity,<sup>11</sup> lack of knowledge,<sup>12</sup> self-serving declarations,<sup>13</sup> prior commission of a felony,<sup>14</sup> failure to understand questions<sup>15</sup> and disbelief in God.<sup>16</sup>

The declaration is to be restricted to a statement of the cause of death and the attending circumstances, the *res gestae*.<sup>17</sup> It must contain definite<sup>18</sup> facts,<sup>19</sup> to which the declarant could testify if alive,<sup>20</sup> not opinions and conjectures.<sup>21</sup>

Although originally applicable to all types of cases, the use of this exception to the Hearsay Rule, in the 18th century was restricted to criminal cases,<sup>22</sup> and later by statute was applied in indictments for abortion.<sup>23</sup> The constitutional right of the accused to be confronted with his accuser has been held not to have been violated by the use of dying declarations; that the deceased is not a witness within the meaning of the constitution, and it is sufficient if the witness who testifies as to the declaration is present.<sup>24</sup>

C. T. S.

ACTIONS—HUSBAND'S RIGHT OF ACTION FOR LOSS OF WIFE'S CONSORTIUM AGAINST VENDOR WHO SOLD HER CONTAMINATED FOOD.—The vendor sold to the plaintiff wife a quantity of crabmeat, which proved to be contaminated and the plaintiff wife became ill from the consumption thereof. The wife and her husband brought concurrent actions against the vendor, the wife for breach of implied

<sup>10</sup> 3 WIGMORE, EVIDENCE (2d ed.) §1445.

<sup>11</sup> *Lipcomb v. State*, — Miss. —, 22 So. 188 (1897); *Reeves v. State*, *supra* note 8.

<sup>12</sup> *Jones v. State*, — Miss. —, 30 So. 759 (1901); *Reeves v. State*, *supra* note 8.

<sup>13</sup> *Patterson v. Commonwealth*, 114 Va. 807, 75 S. E. 737 (1912).

<sup>14</sup> *State v. Baldin*, 15 Wash. 15, 45 Pac. 650 (1896).

<sup>15</sup> *People v. Saranzo*, *supra* note 2; *People v. Kane*, *supra* note 2.

<sup>16</sup> *State v. Razell*, — Mo. —, 225 S. W. 931 (1920).

<sup>17</sup> *People v. Davis*, 56 N. Y. 95 (1874); *People v. Smith*, *supra* note 2; *Hackett v. People*, 54 Barb. 370 (N. Y. 1886); *Walton v. State*, — Miss. —, 126 So. 29 (1930); *State v. Colvin*, *supra* note 8.

<sup>18</sup> *Odum v. State*, 13 Ga. App. 687, 79 S. E. 858 (1913); *Castillo v. State*, — Tex. —, 69 S. W. 517 (1902).

<sup>19</sup> *Berry v. State*, 137 Mo. 125, 38 S. W. 1038 (1897); *People v. Shaw*, 63 N. Y. 36 (1897); *People v. Falletto*, *supra* note 2.

<sup>20</sup> *People v. Shaw*, *Berry v. State*, both *supra* note 19.

<sup>21</sup> *Brotherton v. People*, *supra* note 2; *People v. Smith*, *supra* note 2; *People v. Falletto*, *supra* note 2; *Maine v. People*, 9 Hun 113 (N. Y. 1876); *Jones v. State*, *supra* note 12; *Berry v. State*, *supra* note 19.

<sup>22</sup> *People v. Falletto*, *supra* note 2; 3 WIGMORE, EVIDENCE (2d ed. 1923) §1432.

<sup>23</sup> N. Y. CODE OF CRIMINAL PROCEDURE (1909) §398a; 3 WIGMORE, EVIDENCE (2d ed. 1923) §1432.

<sup>24</sup> *State v. Colvin*, *supra* note 8; *People v. Corey*, 157 N. Y. 332, 67 N. E. 303 (1898).