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Anthony Frank

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"Habitual Drunkenness"—Meaning in Divorce and Criminal Law Statutes.—Plaintiff sued for a divorce on the grounds of cruel and inhuman treatment and habitual drunkenness. The parties were married in 1918, and the present divorce action was commenced in September, 1939, and was the fourth upon these grounds, the other three having been dismissed after reconciliations. Plaintiff and defendant operated a tavern, which was the cause of much of the marital discord. Defendant had been drinking for a number of years, and to great excess since 1931. He had been arrested five times for drunkenness. Defendant's desire for liquor reached its highest intensity during the last year. For the plaintiff, the testimony was that the defendant was drunk anywhere from "one-third to one-half" of the time. He had been seen "laid out" or to "crawl up the stairs many times." Frequently he was so intoxicated that he did not "know what he was doing." Defendant's own witness, upon being asked as between sobriety and intoxication for the defendant's condition replied, "Well, I guess it would be about half and half." Defendant's routine was not daily or regular. He would be drunk for five days or a week at a time, and then perhaps he would be sober for two or three weeks again, and he would start over again. All the witnesses agreed that the defendant's hours of intoxication were longer and oftener during the preceding summer. During these periods of drunkenness, the defendant was an abusive, molesting and boisterous person. Defendant contended that his drunkenness was only occasional and not habitual, and that these occasional periods of drunkenness were caused by plaintiff's criticism and nagging. Under the divorce statute, the "habitual drunkenness" complained of must have been "for one year immediately preceding the commencement of the action." Plaintiff was denied a divorce; she appealed from an order denying amended findings or a new trial.

On appeal, *held,* judgment reversed. The defendant is an habitual drunkard within the divorce statutes. An habitual drunkard within the divorce statutes is one who, by frequent, periodic indulgence in liquor to excess, has lost the power or desire to resist alcoholic opportunity with the result that intoxication becomes habitual rather than occasional. *Hereid* v. *Hereid,* 292 N.W. 97 (Minn. 1941).

The rule in the majority of states as to what constitutes habitual drunkenness, within the meaning of the divorce laws is that, "Habitual drunkenness is such a fixed, irresistible custom of frequent indulgence in intoxicating liquor with consequent drunkenness as to evidence a confirmed habit and inability to control the appetite for intoxicants, and contemplates periodic frequency of indulgence, loss of power or normal action and inability to resist temptation when opportunity offers." *Lecates* v. *Lecates,* 190 Atl, 294 (Del. 1937); *De Lesdernier* v. *De Lesdernier,* 45 La. Ann. 1364, 14 So. 191 (1885); *Kennedy* v. *Kennedy,* 134 So. 201 (Fla. 1931); *Lentz* v. *Lentz,* 137 N.W. 229 (Mich. 1912); *Tarrant* v. *Tarrant,* 156 Mo. App. 725, 137 S.W. 56 (1911); *O'Kane* v. *O'Kane,* 103 Ark. 382, 147 S.W. 73 (1912); *Page* v. *Page,* 86 Pac. 582 (Wash. 1906); *Wilson* v. *Wilson,* 128 Ark. 110, 193 S.W. 504 (1917); *Magahay* v. *Magahay,* 35 Mich. 210 (1876); *Walton* v. *Walton,* 34 Kan. 195, 8 Pac. 110 (1885).

The mere fact that occasional spells of sobriety and moderate drinking followed repeated acts of drunkenness did not prevent a Louisiana court from granting a divorce decree on the grounds that the defendant was an habitual drunkard. That court held that repeated acts of drunkenness, followed by occasional spells of sobriety and moderate drinking, with the habit of drinking so fixed that temptation to drink cannot be resisted, will constitute habitual drunkenness within the meaning of the divorce statute. *De Lesdernier* v. *De Lesdernier, supra.*

However, proof of habitual but moderate use of alcohol will not be a cause for divorce. *Kennedy* v. *Kennedy, supra.*

Likewise, the evidence in a Michigan case to the effect that the defendant was drunk on four or five specific occasions, each occasion occurring about a year after the previous one, and that the plaintiff had seen the defendant drunk only once during the last two years, resulted in the court refusing to find that the defendant was an habitual drunkard. *Lentz* v. *Lentz, supra.*

The testimony in behalf of the defendant that although the defendant often drank, he never was so intoxicated in the sense that he could not control himself, or be unable to conduct himself in a rational manner ,resulted in a Delaware court affirming the lower court which refused to grant the plaintiff a divorce because the defendant was not shown to have been an habitual drunkard within the meaning of the divorce laws. *Lecates* v. *Lecates, supra.*

The fact that a defendant was not incapacitated from transacting his business did not prevent a Missouri court from deciding that, "To be an habitual drunkard within the meaning of the divorce laws a person does not have to be constantly drunk, nor necessarily incapacitated from transacting his business. A man may be an habitual drunkard, and yet be sober during business hours." *Tarrant* v. *Tarrant, supra.* Again, the evidence in a Washington case showed that the defendant came home intoxicated as much as three times a week during the last three or four years; and that he squandered his earnings on drink so that the plaintiff was forced to rely on the charity of her parents and friends for support. The defendant's drinking was shown not to have interfered with his work. A decree of divorce was refused the plaintiff in the lower court; however, on appeal the verdice was reversed, the upper court holding that the habitual drunkenness required by the divorce statute was present. *Page* v. *Page, supra.*

The inability of one to resist the temptation to indulge to excess in intoxicating liquor was the cause for a Michigan court and a Kansas court holding that such person was an habitual drunkard within the meaning of the divorce law. *Magahay* v. *Magahay, supra; Walton* v. *Walton, supra.*

The term "habitual drunkenness" within the meaning of the criminal law statutes does not appear to be so clearly defined. However, the case of *Sitton* v. *Grand Lodge A.O.U.W. of Missouri,* 84 Mo. App. 208 (1910), compares favorably in its definition of habitual drunkenness as a crime with the general definition of habitual drunkenness in the divorce laws. The court in that case held that an habitual drunkard is a person given to inebriety or excessive use of intoxicating drinks, and who has lost the power or will by frequent indulgence to control his appetite for it.

In an Alabama case, a probate judge was charged with habitual drunkenness in an information filed by the Attorney General of the state. The judge's "sprees" lasted from one to two or more days, and once for two weeks. The upper court, in holding the defendant guilty of habitual drunkenness, gave the following definition of habitual drunkenness, which definition seems to be from a physiological rather than the psychological viewpoint usually adopted in the definition in the divorce law; "'Drunkenness' is that effect produced on the mind, passions, or body, by intoxicants taken into the system, which so far changes the normal condition as to materially disturb and impair the capacity for healthy, rational action or conduct; which causes abnormal results, or such as would not ensue in the absence of the intoxicants, . . . the changed effect produced by the immoderate or excessive use of intoxicants, as contrasted with normal status and conduct. 'Habit' is the customary state or disposition acquired

by frequent repetition; aptitude by doing frequently the same thing; usage; established manner. When a person has repeatedly acted in a particular way at intervals, whether regular or irregular for such length of time as that we can predicate with reasonable assurance that he will continue so to act, we may affirm that this is his habit." *State* v. *Savage,* 89 Ala. 1, 7 So. 183, 7 L.R.A. 426 (1890).

However in another case on habitual drunkenness from the viewpoint of criminal law the element of loss of will power to resist alcoholic stimulants was not stressed. The court held: "An habitual drunkard is one who customarily becomes intoxicated, the word "habitual" meaning frequent or customary conduct, and it is not necessary that such person be intoxicated most of his time or that he shall have lost his will power so that he cannot resist stimulants." *Lester* v. *Sampson,* 180 S.W. 419 (Mo. 1915).

The necessity of giving a clear-cut definition of habitual drunkeness either under the divorce statutes or under the criminal law statutes does not appear to have arisen in any Wisconsin decisions.

ANTHONY FRANK.

Insurance—Effect of Doubtful and Ambiguous Language in Applications and Policies.—Intestate on an application for a life insurance policy, on May 21, 1938, in reply to a question of whether he ever had an ailment or disease of the stomach answered "no." The true fact was that he did have cancer of the stomach, as was discovered by a physician who examined him in September 1938 and who inferred that cancer had existed for some time. The plaintiff sought to have the insurance policy rescinded on the ground that the lack of knowledge of such an ailment was a breach of a warranty, within the statute which provided, that the insured's misrepresentations or warranties in the negotiation of a policy, is not material and will not defeat the policy unless made with actual intent to deceive or unless the matter represented was made of one's knowledge, in a matter susceptible of knowledge, without having knowledge. Lower court gave judgment for the defendant. Held, on appeal, that there was no misrepresentation because the question in the application was of doubtful meaning, therefore it could not be construed as calling for more than an opinion or statement to the best of the applicant's knowledge or belief. The court also stated that an innocent misrepresentation in an application for life insurance could be constructive fraud, where the applicant stated as a fact something material to the risk, susceptible of knowledge and it be untrue, although he believed it to be true. *Metropolitan Life Insurance Co.* v. *Bruno,* 309 Mass. 7, 33 N.E. (2d) 519 (1941).

A review of the decisions reveals the fact that the courts have construed the language in insurance applications and policies most favorable to the applicant or the insured, when the language is ambiguous or of doubtful meaning. *Indiana Lumbermen's Mutual Ins. Co.* v. *Fair,* 109 F. (2d) 607 (C.C.A. 5th, 1941); *Wall* v. *Mutual Life Ins. Co. of New York,* 228 Ia. 119, 289 N.W. 901 (1940); *Muller* v *.Boston Casualty Co.,* 304 Mass. 549, 24 N.E. (2d) 514 (1931); *Miller* v. *Mutual Life Ins. Co. of New York,* 206 Minn. 225, 289 N.W. 399 (1939).

In reply to a question, on an application for life insurance, as to whether the applicant ever had the disease of rheumatism, he answered "no," while in fact there was evidence tending to show the insured had sub-acute rheumatism. The court held that the insured had the right to answer the question upon the