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Kentucky Law Journal

Volume 32 | Issue 4 Article 7

1944

# The Rule of Dying Declarations

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Recommended Citation

Oxley, Leo E. (1944) "The Rule of Dying Declarations," *Kentucky Law Journal*: Vol. 32 : Iss. 4 , Article 7.
Available at: https://uknowledge.uky.edu/klj/vol32/iss4/7

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## THE RULE OF DYING DECLARATIONS

At early common law, dying declarations were considered admissible by many authorities in both civil and criminal cases as an exception to the hearsay rule.[1] The modern rule holds such declarations to be admissible only in cases of felonious homicide, where the decedent's death is the subject of the charge, and the circumstances of the death are the subject of the dying declaration.[2] In the light of the modern tendency to receive evidence that formerly was rejected as incompetent,[3] this rule is fantastically narrow and cannot be sustained in either principle or logic. Where a dying declaration meets all the prerequisites for admissibility in a homicide case,[4] it is indeed difficult to understand why slavish adherence to legal precedent compels its exclusion in other cases, e. g., assault with intent to kill,[5] burglary[6] fornication and bastardy,[7] rape,[8] abortion,[9] carnal knowledge of a female,[10] and in civil cases. If the administration of justice is rendered more efficacious by the admission of dying declarations where the defendant's life or liberty may be forfeited, similar reasoning should compel adherence to the same rule where a lesser penalty may be exacted, or in civil cases, where only the defendant's property is at stake.

The inadmissibility of dying declarations in civil cases had its genesis in "the misconstrued words of a treatise-writer, followed by a 'nisi prius' decision or two" giving rise to a "heresy which in the next generation obtained full sway"[11] In 1803, Serjeant East, a treatise-writer, pointed out that in the case of homicide, dying declarations of the injured party are admissible out of necessity,

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[1] ELLIOT, EVIDENCE (1904) 345; 5 WIGMORE, EVIDENCE (3d ed. 1940) sec. 1431.

[2] "It is now a rule of almost universal application that dying declarations are admissible only in cases of felonious homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration." 49 A. L. R. 1282, 1284. See also 5 WIGMORE, EVIDENCE (3d ed. 1940) sec. 1432; 1 ELLIOT, EVIDENCE 352.

[3] 2 WIGMORE, EVIDENCE (3d ed. 1940) sec. 578.

[4] Dying declarations may be impeached like any other evidence by proof of declarant's bad reputation for truth and veracity; by showing conviction of a felony· or by showing his prior contradictory statements. 1 ELLIOT, EVIDENCE 346; declarant must be dead when declaration is offered. 1 ELLIOT, EVIDENCE 347; declarant must believe his death to be imminent. 1 ELLIOT, EVIDENCE 349; 1 GREENLEAF, EVIDENCE (13th ed.) 159; dying declarations will not be received if the declarant would not have been a competent witness while living and present in court. 1 GREENLEAF, EVIDENCE (13th ed.) 159; 1 ELLIOT, EVIDENCE 350.

[5] Hudson v. State, 43 Tenn. (Coldw.) 288 (1866).

[6] People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892)

[7] Commonwealth v. Reed, 5 Phila. (Pa.) 528 (1864).

[8] Haley v. State, 99 Ark. 356, 138 S. W 631 (1911).

[9] People v. Davis, 56 N. Y. 95 (1874).

[10] Hansel v. Commonwealth, 260 Ky. 148, 84 S. W (2d) 68 (1935).

[11] 5 WIGMORE, EVIDENCE (3d ed. 1940) sec. 1431.

since it often happens that there is no third person to witness the fact.[12] No authority was cited for confining the evidence to such cases, and probably such was not the writer's intention. The early cases where such declarations were admitted were cases charging homicide, and the early common-law writers considered them likewise admissible in civil cases.[13] When the courts were presented with the precise question of admitting such declarations in civil cases, no *actual* precedent could be found where they had been admitted. The courts thereupon drew the line very strictly, holding them to be admissible in homicide cases only.[14] In 1860, a note by Chief Justice Redfield in his edition of Greenleaf on *Evidence* gave widest credit to the rule as stated by East, and thereafter, it was generally accepted in that form, with no more reason or logic than could have been mustered for it in 1803.[15] Thus, the rule was born by accident and nurtured to its present stature by *stare decisis*.

Though long established, the rule has been frequently criticised and many courts are not satisfied with it. Many have followed it, not out of respect for its logic, but rather from reluctance to break with precedent.[16] Baron Parke admitted that in some cases to exclude such statements would perhaps be the "exclusion of one mode of discovering the truth."[17] The Supreme Court of Georgia, while declining to depart from the general rule, nevertheless agreed that it might well be changed.[18] Other courts, in their desire to admit the declarations without overturning precedent, have stretched another rule, *res gestae*, beyond the limits of reason.[19] North Carolina has by statute made dying declarations admissible in civil death actions for damages under the same rules as in criminal actions for homicide.[20] By an amendment to its statutes in 1909, Oregon made such declarations admissible in civil cases.[21] In 1914, in the case of

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[12] 1 EAST, PLEAS OF THE CROWN 353.

[13] *Supra* note 11.

[14] 1 ELLIOT, EVIDENCE 351 (1904).

[15] *Supra* note 11.

[16] "The reasoning which limits admissibility of dying declarations is not plain. Such limitation, however, seems too well settled to be successfully combatted. We have been able to discover but a single jurisdiction wherein admissibility of dying declarations, as such, has been extended to civil cases. Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625, 50 L. R. A. (N.S.) 1167 (1914). And the reasoning of the court in that jurisdiction, while cogent and convincing, has not yet been adopted in other states, the general attitude of the courts being that precedents are of too long standing now to be shaken." 3 JONES, COMMENTARIES ON EVIDENCE 2153.

[17] Strobart v. Dryden, 1 M. & W. 615, 150 Eng. Rep. 581 (1855).

[18] Wooten v. Wilkins, 39 Ga. 223 (1869).

[19] Day v. Armour Fertilizer Works, 8 La. App. 720 (1928), Brownell v. Pacific Railroad Co., 47 Mo. 239 (1871), Hobbs v. Great Northern Ry. Co., 80 Wash. 678, 142 Pac. 20 (1914).

[20] St. 1919, C. 29, Amending Cons. St. 1919, sec. 160.

[21] Spencer, *Dying Declarations in Civil Cases* (1930) 9 Ore. L. Rev. 174, 179.

*Thurston* v. *Fritz*, the Supreme Court of Kansas, in a bold and cogent opinion, made dying declarations admissible in civil cases as well as in criminal prosecutions for homicide. The court said:

> "We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason, and continued without justification. The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and, if no reason ever existed that fact furnishes additional justification."[22]

Various objections have been raised against admitting such declarations in civil cases, but these objections, it would appear, are opposed to their admission in any case. Admittedly, such evidence is of a dangerous type and should be surrounded with every possible safeguard. This, however, speaks all the more loudly for the admission of such evidence in civil cases, where the effect of error would likely be far less grave than where a man's life or liberty is at stake. The objection that the declarant's mind is not in proper condition to observe and relate facts with great accuracy is really an objection to dying declarations in *all* cases. Objection has been made that the tendency to falsify might be greater in civil cases. The contrary would seem to be true, for in crimes of violence there is more likelihood of passion and prejudice than in civil actions. And likewise with all the objections encountered: they are attacks upon dying declarations in general and not upon their admissibility in civil cases.

Three theories have been suggested for the admission of dying declarations as an exception to the hearsay rule: "(1) because of the necessity arising from the fact that the only eye witness has been effectually put out of the way, or (2) because of the public necessity of preventing and punishing manslaughter, or (3) because the imminence of death creates a sanction equivalent to that of an oath."[23] Serjeant East, the originator of the rule, placed it on the first theory,[24] and Chief Justice Redfield followed the same reasoning, saying: "It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished the rule is no doubt based upon the presumption that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished are unquestionably the chief grounds of this exception in the law of evidence."[25] In *Railing* v. *Common-*

[22] Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625, 50 L. R. A. (N.S.) 1167 (1914).

[23] Ryan, *Dying Declarations in Civil Actions* (1930) 10 Boston U. L. Rev. 470, 472.

[24] *Supra* note 12.

[25] Note by Chief Justice Redfield in 1 GREENLEAF, EVIDENCE 156.

*wealth,*[26] the court, in excluding a dying declaration in a prosecution for criminal abortion, said that necessity is the true ground for admitting this class of testimony The fatal defect in this theory as a ground for excluding such evidence in a civil action is that there is just as great a likelihood that the declarant is the only person to whom the true facts of the transaction are known as in the case of a homicide, and to exclude the declaration is to seal against inquiry the only source of truth.

With reference to the second theory it cannot be said that public necessity provides a more valid ground for admitting such declarations in criminal cases than in other cases. Professor Wigmore has forcefully stated the matter as follows:[27]

"2. The spurious principle, even so far as carried out, rests on wrong assumptions; for it is of as much consequence to the cause of justice that robberies and rapes be punished and torts and breaches of trust be redressed as that murders be detected; the notion that a crime is more worthy of the attention of Courts than a civil wrong is a traditional relic of the days when civil justice was administered in the royal courts as a purchased favor, and criminal prosecutions in the king's name were zealously encouraged because of the fines which they added to the royal revenues. 3. The sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and the necessity being the same, the admissibility should be the same. 4. The spurious principle is recognized as unworkable in logical strictness, and, when fairly carried out, comes into conflict with convenience and good sense."

It would seem that the third theory, that imminence of death creates a sanction equivalent to an oath, is the only substantial ground for admitting such declarations. It is known that the hastily mumbled oath administered in the court room is no guarantee that the witness will speak the truth, yet the purpose in administering it is that, with God called to be a party to the transaction, the witness will be induced to tell the whole truth, realizing that divine retribution awaits the oath-breaker at the bar of eternal justice.

The rule admitting dying declarations was framed upon the underlying belief by courts and legal theorists that the grim reality of death and the imminent necessity of crossing the threshold into eternity would induce the person to speak the truth as surely as would an oath in open court. As stated by Lord Chief Baron Eyre:[28]

" they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."

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[26] 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7 (1885).
[27] 5 WIGMORE, EVIDENCE (3 ed., 1940) sec. 1436.
[28] Rex v. Woodcock, 1 Leech 500, 168 Eng. Rep. 352, 353 (1789).

If this be the ground for admissibility, comment is scarcely necessary to demonstrate that the distinction which admits the declaration in a case of homicide and exludes it in prosecutions for other crimes and in civil cases rests upon a distinction too finely drawn to be longer maintained.[29]

If dying declarations are to be admitted in any case they should likewise be admissible in all cases. Where logic and practical good sense are on the side of changing the rule and removing this anomaly in the law of evidence, courts should not be deterred in doing so by the weight of precedent supporting it. Where courts are not bold enough to remove this inconsistency in the law, it should be done by the legislature.

LEO OXLEY

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[29] "If the sole reason for the admissibility of dying declarations lies in the reliability resting on the solemnizing influence of approaching death, there would seem to be no reason why the declaration, if material, should not be used in civil as well as criminal cases." 1 ELLIOT, EVIDENCE, *supra* note 14.