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Evidence--Dying Declarations

Eleanor Dawson
University of Kentucky

STUDENT NOTES

EVIDENCE—DYING DECLARATIONS.—In a recent Kentucky case, *Alford* v. *Commonwealth*, 244 Ky. 27, 50 S. W. (2d) 1 (1932), the court held a dying declaration admissable as evidence in a homicide prosecution. The case came before the Court of Appeals for review as to the admissibility of certain portions of the declaration. The part relating to the deceased's consciousness of impending death, ". . . no use to pray, I am too far gone . . . he shot a deathly shot," was admitted by the court as directly connected with the homicide and relevant to it. The remainder relating to a business difficulty between Alford and the deceased some months prior to the shooting was held not to be intimately connected with the shooting and therefore incompetent. Other testimony concerning the same subject matter had been admitted without objection, however, and the court ruled that in view of these facts the statement complained of was not sufficiently prejudicial to justify a reversal.

This Kentucky case follows the line of authority in this country and England. A dying declaration, as the term is used in law, means a statement concerning the facts and circumstances under which a fatal injury was inflicted, made by the victim of a homicide at a time when he realizes that death is impending and when he has given up all hope of recovery. *State* v. *McCoomer*, 79 S. C. 63, 60 S. E. 237 (1908).

Dying declarations are an exception to the rule against hearsay evidence, and have been recognized as such since the first half of the 1700's when the hearsay rule was coming to be systematically and strictly enforced. At the same time certain excepted cases were coming to be recognized and defined; 3 Wigmore Evidence (2d ed. 1923) § 1430.

It has been suggested that the admission of dying declarations violates the constitutional provision that the accused in a criminal case shall be confronted with the witnesses against him, with the right of cross-examination. This objection has been uniformly overruled, however, whenever raised. *Addington* v. *State*, 8 Okl. Cr. 703, 130 Pac. 311 (1913); *Jones* v. *State*, 130 Ga. 274, 60 S. E. 840 (1908).

The fallacy of the objection lies in the supposition that the dead person whose dying declaration is proven is the witness in the case. That is not true. The witness in the case is the person who testifies to the dying declaration, and of course such witness is in court. The defendant is confronted by him and has an opportunity to cross-examine.

Dying declarations are admissible in homicide prosecutions for three reasons:

First—The necessity arising from the fact that the deceased may have been the only eye witness to the crime.

Second—Public necessity of preventing and punishing manslaughter.

Third—The imminence of death is regarded as creating a situation equivalent to that of an oath. *Woodcock's Case*, 1 Leach Cr. C. 50 (1789).

It is not indispensable that there be no other evidence, and declarations are admissible notwithstanding other means of proof. 3 Wigmore, Evidence (2d ed. 1923) § 1435.

To be admitted, the statement must be made by the victim under a sense of impending death, but the declarant need not have expressly stated that he thought he was going to die, it being sufficient if his belief of speedy dissolution or approaching death be established by his actions and the surrounding circumstances, however long he survived. *State* v. *Boyd*, 157 La. 854, 103 So. 190 (1925). While the trial judge must have some circumstantial basis for his ruling, there is no single objective test which he must apply. Hence it is undesirable to disturb his finding on review. 36 Yale L. Jour., 880-881.

A declaration made without belief in impending death, if ratified when the declarant is conscious of impending death, is admissible as a dying declaration. *Flor* v. *People*, 73 Colo. 403, 215 Pac. 875 (1923). A declaration made under a belief in impending death is not inadmissible because of a subsequent hope of recovery. The only thing necessary is that when the statement was made the declarant believed himself about to die. *Jackson* v. *Commonwealth*, 189 Ky. 68, 224 S. W. 649 (1920).

A dying declaration is only admissible when the death of the deceased is the subject of the charge and the circumstances of death the subject of the dying declaration. *Pendleton* v. *Commonwealth*, 131 Va. 676, 109 S. E. 201 (1921). Under this rule the statement cannot detail matters not connected with the infliction of the injury, even though these matters are with reference to some former difficulty between the deceased and the person on trial, unless such former difficulty was directly and intimately connected with the difficulty which resulted in the fatal injury.

In line with the opinion in the case above, actions brought under the Workman's Compensation Act have been held to be outside that class of cases in which dying declarations are admissible. *Milne* v. *Sanders*, 143 *Tenn.* 602, 228 S. W. 702 (1921). Likewise in abortion cases, dying declarations are generally excluded unless the death is the subject of the charge.

An action merely charging illegal abortion, even though the victim had died, would not admit dying declarations as evidence. If, however, the death itself is the subject of the charge, the dying statement may be admitted. Cases in *State* v. *Fuller*, 52 Ore. 42, 96 Pac. 456 (1908). Courts are prone to interpret abortion cases in the narrow sense, although some do admit the use of dying declarations. *State* v.

Fleetwood, 6 Pennewill, 153 (Del.), 65 Atl. 772 (1906). Indiana and New Jersey have held likewise, and Massachusetts, Ohio, Pennsylvania, and South Dakota permit its use in abortion cases by statute.

A dying declaration should be definite and certain. A mere conclusion or expression of opinion, or belief by a dying man is inadmissible as a dying declaration. *Philpot* v. *Commonwealth*, 205 Ky. 636, 266 S. W. 348 (1924).

As a general rule, courts hold that the question of admissibility is for the court and not for the jury. After the dying declaration has been admitted, however, the weight to be given it is a matter clearly for the jury. The fact that the court determines that the dying statement is admissible as a dying declaration, and is competent and relevant does not require the jury nor the defendant to accept the statement as true. When a dying declaration is admitted in evidence, it may be impeached in the same manner that testimony of the declarant could have been, had he been testifying in person. *Clark* v. *State*, 163 Ark. 180, 259 S. W. 378 (1920).

Thus the opposing counsel is free to cross-examine the witness who details the statement. The jury can believe the statement or not, but so far as they do or do not, their judgment need not be controlled by rules of law. Therefore, though they do not suppose the declarant to be conscious of death, they may still believe the statement, or though they do believe him to be conscious of death, they may not believe the statement. These canons of ultimate belief are not the same as the preliminary legal conditions of admissibility, and it is error for the judge after once admitting evidence, to instruct the jury that they must reject the declaration or exclude it from consideration if the legal requirement as to consciousness of death does not in their opinion exist. They may reject, if they so desire, but they do not need to follow the legal definition. 3 Wigmore, Evidence (2d ed. 1923) § 1451-b.

Any person competent according to the general rules of evidence may be a witness to prove the dying declaration. If oral, it is proven by some person or persons who heard it, and if in writing and signed by the dead person, by some person who is familiar with the fact that the written statement was understood by the dying person and signed by him voluntarily. If the written statement contains no expression of a belief in impending death, this fact may be proved by oral evidence. Written evidence is not preferred over oral evidence.

The peculiar rule that dying declarations are admissible in criminal but not in civil actions has often been attacked. Nevertheless, this established rule prevails and in only one jurisdiction have courts overruled it. *Thurston* v. *Fritz*, 91 Kan. 468, 138 Pac. 625 (1914). Oregon and North Carolina admit dying declarations in civil actions by statute.

According to Wigmore its use should be allowed in civil actions. He says there was no distinction until 1800, and that the present rule is based upon a misinterpretation of the words of a treatise writer in

1803. (Sergeant East in *Pleas of the Crown*). This misinterpretation limited dying declarations to criminal prosecution for homicide. A note by Chief Justice Redfield in his edition of Professor Greenleaf's treatise, gave it its widest credit and led to its general acceptance. 3 Wigmore, Evidence (2d ed. 1923) §1432.

In 10 B. U. L. Rev. 470-87, the fundamental difference in the reception of evidence in criminal and civil actions is given as the reason for the distinction. It is unnecessary in civil actions because in a pending action testimony of witnesses can be taken by deposition, and in anticipated actions, the testimony may be perpetuated. This is not true in criminal cases. If the exception were not made, slayers might often go free because of the provision in the Federal Constitution securing to the accused the right to be confronted with witnesses against him.

While it is submitted that the admissibility of dying declarations in civil as well as criminal actions is the only logical and consistent rule, the fact remains that by the overwhelming weight of authority, dying declarations are admitted as evidence only in public prosecutions for homicide involving legally the resulting death as a necessary element.

ELEANOR DAWSON.

PLEADING—PROBATIVE FACTS MAY NOT BE PLEADED.—In an action to recover on an insurance policy a demurrer to the plaintiff's petition was sustained in the trial court. Plaintiff refused to plead further and appealed the case, assigning the ruling on the demurrer as error. The injury for which the plaintiff sought damages consisted of the loss of sight of one eye. The policy read, "loss of eye or eyes shall mean the irrecoverable loss of the entire sight thereof." In his petition the plaintiff stated that he entirely and irrecoverably lost the practical use and sight of his left eye. It was contended by the appellee that this was a mere conclusion of the pleader, since no facts are alleged showing to what extent the sight of his eye was impaired or diminished. The court stated that it was sufficient to plead ultimate as distinguished from probative facts, and that if plaintiff had stated to what extent he was able to discern objects or distinguish light from darkness he would merely have pleaded evidentary facts tending to establish the resultant or ultimate fact. *Johnson* v. *Inter-Southern Life Ins. Co.*, 244 Ky. 83, 50 S. W. (2d) 16 (1932).

Briefly, the subject under discussion in this paper is the statement of facts in the pleading of either party, which sets forth his petition, answer, counterclaim, or any other pleading that might appear. There are imaginary limits within which the pleader must place his statement of facts. He must not, on the one hand, make his pleadings so elementary as to embrace evidentary matter, nor, on the other, make them so general as to be only conclusions of law. The line of demarcation between ultimate facts and evidentary matter will be the only one dealt with here.