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Should the Admissibility of Dying Declarations in Evidence be Limited to Homicide Cases?

The dying declaration, an often criticized but frequently recognized exception to the hearsay rule, dates back to the early 1700's. While the application of the doctrine admitting dying declarations in evidence has been substantially modified since those early days, the elements to be considered in connection therewith have experienced little change. These elements are clearly stated in an English case decided in 1789 in these words:

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and 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 created by a positive oath administered in a court of justice." 2

This language, it is noted, does not limit the application of the doctrine to any particular type of case. Such was the early practice, and it was not until 1803 that the doctrine was limited to homicide cases. 3

No attempt will be made in this note to restate all of the conditions and limitations relating to the admissibility of dying declarations in evidence. It is sufficient for present purposes to state the general conditions of admissibility. They are: (1) the declarant at the time of making the declaration was in actual danger of death and had no hope of recovery; (2) the declarant must have been in such state of mind that he would have been a competent witness had he lived; (3) the declaration must point only to the cause of death and the circumstances producing and attending it, and not to prior bad feelings between the parties; and (4) the declaration need not be in any particular form to be admissible but may be oral, in writing or by means of signs. 4

The rule as generally stated is that dying declarations are admissible only in homicide cases. It must be a prosecution for an offense "involving legally the resulting death as a necessary element." 5 The various theories under which dying declarations are

1 5 Wigmore, Evidence § 1430 (3d ed. 1940) [hereinafter cited as Wigmore].
2 5 Wigmore § 1438.
3 5 Wigmore § 1431.
4 1 Jones, Evidence §§ 332a, 333, 334, 335 (4th ed. 1938); Mckelvey, Evidence §§ 261, 265, 266 (5th ed. 1944).
5 5 Wigmore § 1432.
admissible in criminal cases are: (1) the necessity arising from the fact that the only witness has been effectually put out of the way; or, (2) the public necessity of preventing and punishing manslaughter; or, (3) because the imminence of death creates a sanction equivalent to that of an oath. Commentators generally find merit only in the third theory. With the theories of necessity ruled out, what warrants limitation of the doctrine solely to homicide cases?

This limitation has been much criticized by leading writers and judges. About such practice Mr. Wigmore has said:

"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 the attention of Courts then 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.

"... Its limitations are heresies of the last century, which have not even the sanction of antiquity. They should be wholly abolished by legislation."

In view of the strong currents of commentary supporting this view, it is difficult to understand why the general rule remains unchanged. The position of the courts adhering to the general rule can be summed up by saying that in many instances they are willing to admit the lack of logic in restricting the doctrine to homicide cases, but feel, as does Mr. Wigmore, that any change should be accomplished by the legislature, and not by judicial fiat.

The minority view, which allows dying declarations to be admitted in evidence in civil as well as criminal cases, can be broken down into three categories: first, those jurisdictions admitting such evidence without aid of statute; second, jurisdictions which have broad statutory provisions allowing dying declarations to be used

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6 Ryan, Dying Declarations in Civil Actions, 10 B.U.L. Rev. 470, 472 (1930).
7 Id. at 473.
8 Various citations to text writers and cases throughout this note serve to substantiate this statement.
9 5 Wigmore § 1498.
in civil cases generally; and, third, jurisdictions which have statutory provisions allowing such evidence in civil cases, but restricting it to civil cases involving death actions.

Despite more than a century of solidification of the pronounce-ment by Seargent East that dying declarations were admissible only in homicide cases, the Kansas court resolved to once again return the standing of such evidence to its rightful, logical place in the trial of cases. In Thurston v. Fritz,¹¹ it was determined that the restriction of the doctrine to homicide cases was illogical and was inconsistent with constitutional guarantees. After propounding Mr. Wigmore's views as to the foundation for the limitation, 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 continuing 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 furnish additional justification."¹²

The effect of the above finding was to extend the admissibility of dying declarations to civil cases in Kansas. It did not in any other respect relax the requirements for the admission of such evidence.

The Thurston case has not been followed outside of Kansas, although a similar view received favorable comment in at least one Nebraska case.¹³ In the ultimate determination of the case, however, the Nebraska court admitted the dying declaration on the theory that it constituted a part of the res gestae.

Probably the strongest support that the Thurston case has enjoyed was in the dissenting opinion of a North Dakota case.¹⁴ The dissenting judge pointed out that, in his opinion, if the rule was founded on justice, it should be applicable in any case where a valuable right was involved, whether that right be a personal or a property right. He concludes that by analogy the dying declaration should be admissible in support of a right less valuable than life or liberty.

The majority opinion of the North Dakota case,¹⁵ in justifying the rejection of dying declarations in civil cases, stated that in pend-

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ⁱ¹ 91 Kan. 468, 188 Pac. 625 (1914).
ⁱ² Id. at 475, 188 Pac. at 627.
ⁱ³ State ex rel. Sorenson v. Lake, 121 Neb. 331, 236 N.W. 728 (1931).
ⁱ⁵ Id. at 197, 164 N.W. at 683.
ing civil actions the testimony of witnesses could be taken by deposition and that in anticipated civil actions the testimony of witnesses could be perpetuated. The court further noted that in homicide cases this could not be done because the federal constitution secured to the accused the right to be confronted with the witness against him. This would appear to be more of an excuse than a justification with the court thinking only in terms of abandoning dying declarations completely or retaining the general view. It is but another example of the lengths to which courts will go to justify unjustifiable rules of law.

Characterizing the second category of the minority view is a Colorado statute.\textsuperscript{16} Under that statute dying declarations are admissible in evidence in all civil and criminal trials and other proceedings before courts, commissions and other tribunals to the same extent and for the same purposes that they might have been admissible had the declarant survived and testified. To this general statement the Colorado legislature appended four restrictions. To render the declaration admissible it must be satisfactorily proven that declarant knew he was dying and had no hope of recovery, that he made the statements voluntarily without any persuasion, that the declaration was not made in answer to interrogatories calculated to produce a particular answer, and that the declarant was of sound mind when he made the declaration.

Only one civil case is found to have been decided under this statute.\textsuperscript{17} The case involved an automobile accident resulting in death to the driver. The court admitted the driver's dying declaration after reiterating the restriction to admission set forth in the statute. No attempt was made, however, to restrict the broad coverage of the statute.

The third category of the minority view is exemplified by the statutes of three states.\textsuperscript{18} While the language of these statutes is similar in most respects, it may be helpful to consider them separately.

The Arkansas statute provides that the dying declaration of the person for whose fatal injury or death an action is brought may be proved or admitted as dying declarations are proved and admitted in homicide cases within the state.\textsuperscript{19} The statute further provides

\textsuperscript{16} COLO. REV. STAT. ch. 52, art. 1, § 20 (1952).
\textsuperscript{17} Barsch v. Hammond, 110 Colo. 441, 185 P.2d 519 (1948).
\textsuperscript{18} The three states are Arkansas, North Carolina and Oregon.
that for the declaration to be admissible it must pertain to the fatal injury or death or the cause thereof. The cases that have been decided under this statute have simply followed the meaning of the statute and have retained the same restrictions for admissibility as have been followed in homicide cases.\(^{20}\)

The North Carolina statute\(^{21}\) is substantially the same as the Arkansas statute and has been applied in a like manner.\(^{22}\) An early decision upheld the constitutionality of this statute.\(^{23}\)

The Oregon statute does not spell out the conditions of its application as clearly as the other two statutes.\(^{24}\) It provides that dying declarations are admissible if made under a sense of impending death respecting the cause of death. This statute was amended in 1909 by deleting from it the words, “in criminal cases.” It has been suggested that, in all probability, had the original draft of the statute omitted these same words, the courts would have construed it as declaratory of the common law and restricted its application to homicide cases.\(^{25}\) However, since the omission was made from an existing statute, it has been given its intended meaning and has deviated from the common law.\(^{26}\) In applying the statute, the courts have propounded two basic conditions to its admissibility: (1) the declarant must have been in extremis; and (2) the declaration must have been made in the conscious belief that death was impending and without hope or expectation of recovery.\(^{27}\)

While speaking of statutory provisions, it is well to note that the language of a Massachusetts statute appears to be sufficiently

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broad to allow admission of dying declarations in civil cases.\textsuperscript{26} However, no cases have been found in which such admissions have been allowed under this statute, and it is unlikely that the courts would so construe it. One basic reason for such unlikeness is that the Massachusetts legislature has enacted another statute\textsuperscript{29} specifically allowing dying declarations in abortion cases, which make it at least likely that the courts would apply the doctrine of inclusio unius est exclusio alterius.

From the foregoing breakdown of authorities it is clear that the view which would admit dying declarations in civil cases enjoys a very small following. Why the states have not seen fit to extend the use of the doctrine is not at all clear. Certainly a vast majority of the writers in this segment of the law advocates such an extension. We must agree that the original notion for the restriction as stated by Mr. Wigmore\textsuperscript{30} no longer exists. It is also a fair assumption that the only theory of merit is the one which admits dying declarations because the imminence of death creates a sanction equivalent to that of an oath.\textsuperscript{31} Why, then, have the legislatures persisted in retaining a restrictive doctrine stripped of logic and resting solely upon stare decisis?

One writer on the subject has said that it is difficult to see how the nature of the case, civil or criminal, can affect the trustworthiness of the utterance of a dying man. It is argued that a dying man in an automobile accident might place the monetary gains to his family over his fear of meeting his maker with a lie on his lips. It may be that the safeguard is weak, but it is equally weak in criminal actions where great enmity and bitterness may in many cases be as strong a motive for falsehood as a material gain to the declarant's survivors.\textsuperscript{32}

The writer then goes on to say that there is as much to be said on one side as the other, and that since the use of dying declarations is well established in the common law, there is no great reason not to allow them in civil cases.

Another expressed view is that dying declarations should be excluded in all cases, both civil and criminal.\textsuperscript{33} To substantiate this view, it is contended that the solemnity of the circumstances

\textsuperscript{30} See the quoted excerpt to which footnote 18 refers.
\textsuperscript{31} See the text of this note to which footnote 10 refers.
\textsuperscript{32} Spencer, supra note 25, at 179.
\textsuperscript{33} 16 Va. L. Rev. 825, 828 (1930).
is not an adequate guarantee of a truthful and accurate narration. The reasons set forth for this contention may be summarized as follows: The tremendous strain and distraction accompanying such an occasion coupled with the desire of the declarant to exculpate himself and leave a worthy memory, and the likelihood of a misunderstanding of the spoken declaration, all have a tendency to make the declaration inaccurate and untruthful. This position is best answered by the following statement:

"... But the rules of law are based upon the habits and reactions, the beliefs and aspirations, of the average man — not upon the cynicism of the irreligious or the pessimism of the hypereducated, the self-styled intelligentsia; and it is common knowledge that the average man does believe in a hereafter with rewards and punishments bearing some relation to good and evil conduct here... If his moral constitution is of such fiber that even the certitude of moral dissolution will not lead him to the truth, then what imaginable restraint is imposed upon him in a court of law by the mumbling of an oath?"

Thus far the primary concern has been to present a general discussion of the status of dying declarations in the United States. The latter portion of this paper will be concerned with the West Virginia position relative to the admissibility of such evidence.

In conformity with the common law and majority view, West Virginia admits dying declarations only in homicide cases where death is a necessary element of the offense. Our court has held that before dying declarations may be admitted in evidence, it must be shown that at the time the declaration was made the declarant was under a sense of impending death and had abandoned hope or expectation of recovery. The solemnity of the situation is regarded as a substitute for the solemn obligation of an oath administered in a court of justice. Substantially the same conditions and limitations governing the admissibility of such evidence have been propounded by the West Virginia court as are applied in the remainder of the jurisdictions.

Recognizing that West Virginia adheres to the majority view, we may then consider the propriety of retaining such view. Certainly, if the opinion of the top legal minds in the country were

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34 Ryan, supra note 6, at 474.
37 State v. Clark, 64 W. Va. 625, 630, 63 S.E. 402, 405 (1909).
heeded, the restrictions would have ceased long ago. Admittedly, the arguments of both the proponents and opponents of any change are of merit. Therefore, any resolution governing the admissibility of dying declarations must necessarily depend upon the justice of the change.

It is stated by Mr. McKelvey in his treatise on evidence\(^{39}\) that certainly in some cases passion, hatred and other feelings of a similar nature will have their effect, even at the point of death. It will also happen, he contends, that the inaccuracy of ideas and confusion of mind attendant upon approaching dissolution will color a person's utterances. He concludes, however, that, despite these dangers, it is probably true that the ends of justice are on the whole better served by the admission of this class of declaration than by the exclusion thereof.

One move toward remedying the situation, at least in part, is manifested in a bill introduced in the 1957 West Virginia Legislature which sought to extend the admissibility of dying declarations to civil actions for wrongful death.\(^{40}\) The bill found support in the senate, but died in the house of delegates for reasons not apparent from legislative records.\(^{41}\) The legislators may not have been sufficiently informed on dying declarations to realize the complete inconsistency with which they are now admitted or perhaps were not satisfied that the proposal was sufficiently broad to remedy the present situation. Whatever the reason, if failure of that bill will lead to the passage of a broader, more logical and consistent legislative enactment, it will have been a success.

Unquestionably, the admission of dying declarations in civil cases is firmly entrenched in the common law. Therefore, abolition of the admissibility of such evidence being highly improbable as well as undesirable, the next most logical step is to admit dying declarations in civil cases. No guide beyond logic can direct the limit of coverage needed. The primary reason for the admissibility of dying declarations is that death creates a sanction equivalent to that of an oath. With this as our basic premise, can we actually say that a death resulting from an automobile accident, or from a

\(^{39}\) McKELVEY, EVIDENCE § 260 (5th ed. 1944).

\(^{40}\) S. 100, 53d Leg., Reg. Sess. § 5 (1957).

\(^{41}\) Journal of House of Delegates, W. Va. Legislature 1957, 886, shows the senate passed bill had been amended in the house judiciary committee and was reported out of committee with the recommendation that the bill pass as so amended. However, no further action of the house of delegates is reported in the Journal.
heart attack, or even from slipping and falling on a banana peel, creates any greater sanction than a death resulting from a fatal stab by a knife or a shot from an assailant’s gun? It is submitted that no difference exists and logically and in the interest of the improved administration of justice dying declarations should be admitted in all civil cases in the same manner and subject to the same conditions as they are now admissible in homicide cases.

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