Evidence--The Opinion Rule as Applicable to Dying Declarations in West Virginia

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EVIDENCE—THE OPINION RULE AS APPLICABLE TO DYING DECLARATIONS IN WEST VIRGINIA.—Dying declarations have been admissible in evidence as an exception to the hearsay rule\(^1\) from a very early date.\(^2\) Such declarations are subject not only to the general rules which determine the admissibility of evidence,\(^3\) but also to other limitations and restrictions not within the scope of this note.\(^4\) The cases usually state, in the form following, or in form to a like effect, that the declarations are substitutes for sworn testimony and must be such narrative statements as a witness might properly give on the stand if living;\(^5\) that whatever would exclude the statement

\(^{1}\) Pippin v. Commonwealth, 117 Va. 919, 86 S.E. 152 (1915); 5 Wigmore, Evidence § 1430 (3d ed. 1940); 26 Am. Jur. 426.

\(^{2}\) 5 Wigmore, Evidence § 1430, dates it back as far as the first half of the 1700’s.

\(^{3}\) Coots v. Commonwealth, 295 Ky. 687, 175 S.W.2d 139 (1943); Commonwealth v. Fugmann, 330 Pa. 4, 198 Atl. 99 (1938); State v. Burnett, 47 W. Va. 731, 35 S.E. 983 (1900) (by implication); see also 26 Am. Jur. 430.

\(^{4}\) Dying declarations are also restricted to the identification of the accused and the deceased, to the act of killing and the circumstances producing and attending the act and forming a part of the res gestae. State v. Shelton, 116 W. Va. 75, 178 S.E. 633 (1935); State v. Graham, 94 W. Va. 67, 117 S.E. 699 (1923); Crookham v. State, 5 W. Va. 510 (1871); Hill v. Commonwealth, 2 Gratt. 594 (Va. 1845).

\(^{5}\) The reports abound in statements to this effect. Only the West Virginia cases and one other leading case are cited: State v. McLane, 126 W. Va. 219, 224, 27 S.E.2d 604 (1943); State v. Hood, 63 W. Va. 182, 185, 59 S.E. 971 (1907); State v. Burnett, 47 W. Va. 731, 738, 35 S.E. 983 (1900); Marshall v. State, 219 Ala. 83, 121 So. 72, 63 A.L.R. 560 (1929).
of a witness from evidence were he called to the stand to testify will exclude it when offered as a dying declaration. Because of the rule apropos of opinion evidence, that it is not competent for a witness, in court and presently testifying, to state an inference or conclusion from facts, where it is possible to give the facts to the jury, a mere conclusion or expression of opinion or belief by a dying man, according to the weight of authority, is not admissible as a dying declaration.

There is a basic fallacy, it would seem, in the reasoning of the courts which apply the opinion rule to dying declarations. Major premise: Dying declarations, being a substitute for sworn testimony, wherein the sense of impending death takes the place of an oath, are subject to the general rules which determine the admissibility of evidence. Minor premise: As a general rule, opinions or conclusions based on facts are not admissible in evidence. Therefore, the same rule will exclude the opinions or inferences of a dying man. With amazing tenacity the courts blindly follow these broad propositions without so much as pausing to consider the reason behind the opinion rule.

Dean Wigmore states that the original and orthodox objection to opinion was that it was only the guess of a person having no personal knowledge of the facts concerning the event about which he seeks to testify. No one thought of questioning the opinions and inferences of the lay witness whose testimony was based on actual knowledge. He says that not until shortly after 1800 did the courts lay down "a distinct rule of a new sort" applicable to opinion testimony and then upon the ground of its superfluousness as an aid to the

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8 See the annotations in 30 C.J. 274 n. 48. Query whether State v. Burnett, 47 W. Va. 731, 35 S.E. 983 (1900), cited therein upholds this proposition. See also 40 C.J.S. 1277 n. 70; 26 Am. Jur. 431 n. 1; 5 Wigmore, Evidence § 1447 n. 1; 1 Wharton, Criminal Evidence §§ 535-541 (11th ed. 1935).
9 See, e.g., Whitley v. State, 38 Ga. 50 at 70 (1868); "... the opinions of witnesses under oath, as a general rule, are inadmissible in evidence in criminal cases, and hence opinions in dying declarations are excluded."
10 7 Wigmore, Evidence § 1917.
jury and not because of lack of personal knowledge or of inferences based on personal observation. He states it thus:

"... the later and changed theory is that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous. ... The old objection is a matter of testimonial qualifications, requiring personal observation; the modern one rests on considerations of policy as to the superfluity of the testimony. ...

"The true theory, then, of the Opinion rule... is simply that of the exclusion of supererogatory evidence. It is not that there is any fault to find with the witness himself or the sufficiency of his sources of knowledge or the positiveness of his impression; but simply that his testimony, otherwise unobjectionable, is not needed, is superfluous. ...

"This testimony is excluded simply because, being useless, it involves an unnecessary consumption of time and a cumbersome addition to the mass of testimony. ... it will be excluded because the other facts are already or may be brought sufficiently before the tribunal. If they are not or cannot be, then the witness' judgment or inference will be listened to."

This being so, it would seem to follow that the opinion rule should have no application to dying declarations. Since the declarant is deceased he cannot state the specific facts on which his inferences are based. It is no longer possible to obtain from him by questions any more detailed data than his statement contains. Hence, "his inferences are not in this instance superfluous, but are indispensable."

What, then, is the reason for the tenacity with which the majority of the courts adhere to this rule? It would seem that the only argument worthy of consideration would be to the effect that the opportunity for cross-examination of a witness on the stand furnishes a safeguard against untrue general statements of conclusions based on knowledge, whereas this is impossible in the case of the admission in evidence of a dying declaration. It could also be argued that such evidence, of necessity, has a potent influence with the jury because of the solemnity, sorrow, despair and other emotional factors surrounding the circumstances under which it is

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11 Ibid.
12 7 id. at 10; 2 id. at 637.
13 5 id. § 1447.
14 State v. Elkins, 101 Mo. 344, 14 S.W. 116 (1890); see the dissenting opinion in Boyle v. State, 105 Ind. 469, 482-487, 5 N.E. 209 (1885); 1 Wharton, Criminal Evidence § 535.
rendered. Superficially at least Dean Wigmore's thesis would seem open to such attack. Notwithstanding the fact that originally there never existed a rule excluding the inferences of a witness where they were based on personal observation, it is doubtful if a case could be found wherein the witness' inferences alone were received. But even if there were, the witness would have been subject to cross-examination; an agency not available in the case of a dying declaration. In answer to this it can be said that the declarant's statement of inferences based on fact would be just as trustworthy as in the case where he states specific facts. The declarant is in articulo mortis and therefore, it is presumed, will speak of truths only. In addition to this, the declaration should be admitted because of the necessity of the occasion. Necessity, not in the sense of a paucity of other testimony, but because the declarant is on the verge of death and therefore cannot be expected to give a detailed account of the facts surrounding the event. A perception of these two principles, trustworthiness and necessity, is responsible for the existence of nearly all of the exceptions to the hearsay rule. It was put this way in the case of Pendleton v. Commonwealth:

"... The declarant most often, indeed, is in extremis, and so not in a physical condition to state occurrences in detail, but only conclusions of fact, and, so far as truth is concerned, the sanction afforded by the sense of impending death, without any expectation or hope of recovery, would seem to constitute an equal guaranty of the truth of both character of statements. With respect to unintentional errors in statements of fact, they may, it is believed occur at least equally as often, if not more frequently, in statements of detailed occurrences, than of conclusions of fact. The trial jury is charged with and seldom fails to perform the duty of making the proper allowance for such errors of statement. The dying declaration is not ad-

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12 Boyle v. State, 105 Ind. 469, 5 N.E. 203 (1885). See, however, People v. Cheney, 36 Ill. 131, 13 N.E.2d 171 (1938) (dying declarations do not have any inherent or acquired superiority over the sworn testimony of living witnesses); State v. Kennedy, 169 N.C. 326, 85 S.E. 42 (1915) (no superstitious effect is to be given a statement because it is a dying declaration).

13 Meaning, of course, where the facts are already or may be brought before the tribunal, not where they are not or cannot be. In the latter case the inferences would be admissible. See Curfman v. Monongahela West Penn Pub. Ser. Co., 113 W. Va. 85, 166 S.E. 848 (1932); State v. Waters, 104 W. Va. 433, 140 S.E. 139 (1925); Starcher v. South Penn Oil Co., 81 W. Va. 587, 95 S.E. 28 (1918); 2 Wigmore, Evidence § 557.

14 Admissibility of dying declarations is not affected by the fact that there is an abundance of other testimony. State v. McGhee, 25 N.M. 692, 170 Pac. 739 (1918); see also 26 Am. Jur. 427; 30 C.J. 253; 40 C.J.S. 1251.

15 131 Va. 676, 697, 109 S.E. 201, 209 (1921); see also Vass v. Commonwealth, 3 Leigh 788 (Va. 1831).
mitted as evidence, which is true, but only for the consideration of the jury for what it may consider it worth in the light of all the other evidence and circumstances in the case."

Notwithstanding the soundness of Dean Wigmore's reasoning, it is significant that the only case found which both approved and followed the rule as stated was the Virginia case of *Pippin v. Commonwealth.* Later cases in the same jurisdiction, seemingly follow the lead of certain other illogical holdings and admit statements of conclusions drawn from facts observed, not on the theory that the opinion rule has no application to dying declarations, but rather on the spurious principle that they are facts, not opinion, and admissible for that reason. These courts at the same time pay lip service to the rule that an opinion expressed in a dying declaration is inadmissible.

Difficulty and confusion attend the attempt to determine just what constitutes a statement of fact or what is a statement of an opinion. A glance at the adjudicated cases will show that statements made by a declarant would be considered a statement of fact in one jurisdiction while in another, the same, or similar, statement would be deemed but an opinion and hence inadmissible. In *House v. State,* illustrative of the reasoning used in this line of decisions, the following test was laid down:

"To us the true and proper test as to admissibility is whether the statement is the direct result of observation through the declarant's senses, or comes from a course of reasoning from collateral facts. If the former, it is admissible; if the latter, it is inadmissible . . . If the facts . . . could not have been known to the declarant, then his statement would necessarily be founded on inference, rather than known facts, and would be an opinion not admissible; but if, as in this case, everything . . . was fully known to declarant, we fail to see why his statement that the killing was without cause was not a statement of fact, and admissible."

The test applied here is correct in so far as it admits inferences drawn by declarant from observed facts. The court thereby achieves

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20 117 Va. 919, 86 S.E. 152 (1915).
21 Pendleton v. Commonwealth, 131 Va. 676, 109 S.E. 201 (1921); Reynolds v. Commonwealth, 135 Va. 716, 115 S.E. 379 (1923). No reference was made in either of these cases to the *Pippin* case, supra note 20.
22 Boyle v. State, 105 Ind. 469, 5 N.E. 208 (1885); Payne v. State, 61 Miss. 161 (1889); Wroe v. State, 20 Ohio St. 460 (1870); see also 26 Am. Jur. 431; 30 C.J. 274 n. 47; 40 C.J.S. 1277 n. 69.
23 See 7 WIGMORE, EVIDENCE § 1919; 1 WHARTON, CRIMINAL EVIDENCE § 536; 26 Am. Jur. 431.
24 94 Miss. 107, 48 So. 3, 5 (1909); see also Hollywood v. State, 19 Wyo. 493, 120 Pac. 471 (1912); 30 C.J. 275; 40 C.J.S. 1278; 26 Am. Jur. 431; 1 WHARTON, CRIMINAL EVIDENCE § 536.
the desired result. It is submitted, however, that the reason the court gives for the admissibility thereof is unsound. It lays down two propositions: (1) If the statement is the direct result of observation then the declarant's inferences are facts, not opinion, and therefore not barred by the rule excluding opinion evidence; (2) If the facts could not have been known to the declarant then his statement would necessarily be founded on inference and would be excluded by the opinion rule.

Except for the rules relating to expert testimony, it is elementary in the law of evidence that the declarant must generally have had actual knowledge or observation of the facts to which he seeks to testify; without this he would be incompetent to take the stand. The reason, however, is not so much that his testimony is opinion but rather because he had no personal knowledge or observation. No person, not present, could say that there was no "reason" or "cause" for the homicide because he would have no knowledge of the facts and circumstances attending the event. A knowledge of these facts is absolutely essential to such a statement. How then, is such a statement to be arrived at? Obviously the declarant must take the facts and circumstances surrounding the event, weigh them, compare them, and by this process arrive at a conclusion. The conclusion that there was no "cause" or "reason", or that it was done "on purpose" or "intentionally", is the result of mental processes and can be arrived at in no other way. It must be the result of reasoning from other facts. Therefore, the result of such mental process is not, in the common and legal sense of the word, a fact. It is but a conclusion or opinion based upon facts, yet still an opinion.

The writer has no quarrel with the results reached by this line of decisions. His only contention is that the reasoning on which these courts base their results is unsound. The test as applied in the House case is sound in so far as it admits conclusions and inferences based on facts within the declarant's knowledge or observation. The court crosses the bounds of reason, however, when it purports to call these conclusions facts as such and admits them as such, thus by-passing the barrier presented by the opinion rule.

Why not call a spade a spade? Logically, at least, Dean Wigmore's thesis is sound. It would seem that these courts would want to adopt such a theory on which to base their decisions, rather than

25 Wigmore, Evidence §§ 478, 557, 650-668; 5 id. § 1445; 7 id. § 1917. Another exception to this fundamental principal is that one can testify as to his own age. 2 id. § 667.

26 See the dissenting opinion in Boyle v. State, supra note 14.

27 Supra note 24.
to concoct spurious and illogical theories calling for the distinction between opinion and fact. Dean Wigmore says:

"... it is obvious ... that there is no virtue in any test based on the mere verbal or logical distinction between 'opinion' and 'fact.' There is perhaps, in all the law of Evidence, no instance in which the use of a mere catch-word has caused so much of error of principle and vice of policy;—error of principle, because the distinction between 'opinion' and 'fact' has consistently and wrongly been treated as an aim in itself and a self-justifying dogma; vice of policy, because if this specious catch-word had not been so handily provided for ignorant objectors, the principle involved would not have received at the hands of the Bar and the Bench the extensive and vicious development which it has had in this country." 28

The writer's conclusion is that the rules apropos of the application of opinion evidence to dying declarations should be substantially as follows: Originally there never existed a rule of evidence excluding the inferences and opinions of a witness where they were based on personal knowledge and observation. The only reason for the adoption of the opinion rule was to exclude supererogatory evidence. The deceased declarant is unavailable so therefore the inferences which he draws from observed facts are not superfluous but, on the contrary, are indispensable and should be admitted. Their weight is for the jury considered in the light of all other evidence and circumstances of the case. Where it has not been, or cannot be shown that the declarant's inferences, beliefs or conclusions are based on actual knowledge or observation, then the statement should be excluded on this ground, viz., lack of testimonial qualifications, 29 rather than on the ground that it violates the rule excluding superfluous testimony.

Does the opinion rule apply to dying declarations in West Virginia? In State v. Burnett 30 the only decision bearing directly on the question, the declaration, as detailed by the court, was as follows: 31

"Dr. Brown . . . in asking Morris about the shooting . . . inquired: 'Do you have any idea who shot you?' He said: 'I do. Of course, I do, but I am not sure. I was shot with Burnetts' little rifle, and I think Charley Burnett did the shooting.' I said, 'Why do you think that?' He said, 'Because he has threatened to do it.' Then I asked him if he had seen any one

28 7 Wigmore, Evidence 14.
29 See note 25 supra.
30 47 W. Va. 731, 35 S.E. 983 (1900); see note 8 supra.
31 Id. at 737, 35 S.E. at 985.
on the road who he would suspicion of having shot him. He said, 'No.' He had told me of a row that he and Mrs. John Hill had had. I says: 'Do you think Mrs. Hill did it?' He said, 'No, she didn't do it' I says, 'Do you think John did?' He says, 'No, sir; neither of them didn't do it. They are mean enough, but they didn't do it. I think Charley Burnett did it.'"

Unfortunately this declaration was excluded on the ground that it was mere opinion and therefore inadmissible because it "would not have been admitted if the deceased had been living, and endeavoring to give this testimony from the witness stand."

In attempting to pass upon a question never before decided, the court cited only a few general propositions as laid down in 10 Am. & Eng. Encyc. Law 376 as follows:

"'Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts which the declarant could have thus testified to, they are admissible. Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible.'"

No attempt was made to determine the reason behind the opinion rule. No attempt was made to determine whether the rule, logically, should apply to dying declarations. The court, it would seem, was dazzled by the light of precedent.

The Burnett case was criticized in State v. Graham, on the ground that the rule laid down therein was broader than warranted by the facts. Although the criticism was directed to a point other than that part of the holding regarding the admissibility of statements of opinion in dying declarations, the tenor of the decision in the Graham case was one of general disapprobation.

Actually the question as to whether or not the dying declaration in the Burnett case was admissible was not properly before the court nor was it essential to the determination of the case. Therefore it could be

\[\text{Id. at 738, 35 S.E. at 985.}\]
\[\text{Ibid.}\]
\[\text{This last sentence was emphatically disapproved in State v. Graham, 94 W. Va. 67, 71-72, 117 S.E. 699 (1923).}\]
\[\text{Ibid.}\]
\[\text{Note 34 supra.}\]
\[\text{For instance, in speaking of the statement excluded in the Burnett case, the court said: "This court held that all of the statement should have been excluded. While the court bases its ruling on the fact that it contains mere declarations of opinion, yet there are also statements of fact..." 94 W. Va. at 71, 117 S.E. at 700.}\]
\[\text{The court said that the case was being remanded for another reason and that although "it would serve no good purpose to pass upon the validity of the instructions" attention is called to the dying declaration "which will, no}\]
classified as *obiter dicta.*

In fact, Judge Brannon, who filed a separate opinion in the case, said "I think the dying declarations . . . not admissible though I do not see that there was objection to it in the court below or exceptions."  

In addition to the foregoing, the court, so it would seem, failed to apply the proper rules of evidence determinative of the case. The declarant said he thought C.B. shot him because sometime previously C.B. had threatened to do so. This statement could have, in fact, should have been excluded on at least two other grounds, one of which is not within the scope of this note. The statement, of itself, shows that it was not based on facts within the declarant's knowledge or observation, but upon mere guess or supposition. Therefore, the rule properly applicable would have been the one excluding evidence not based on personal observation. Dean Wigmore criticizes the case on this ground.

Notwithstanding the fact that the *Burnett* case is the only one bearing directly on the point, other cases have cited with approval the statement therein that a dying declaration must be such as would be admissible if the party were living and giving evidence. None, however, were concerned with the question regarding opinion evidence in dying declarations. Yet each could be used as authority for that proposition. The bald statement that "the scope of a dying declaration should be confined to what, if otherwise offered, would be admissible testimony", would infer that such evidence would be inadmissible since the West Virginia court applies the opinion rule to witnesses on the stand.

At any rate, if the question should again present itself to the court, it is hoped that, regardless of the outcome, it will make a thorough, independent re-examination of the problem before deciding to follow the dicta laid down in the *Burnett* case.

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