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Evidence-Scope of Dying Declarations-Restoration of Original Scope

Ellahue A. Harper

the amending power, which could be gathered only from the general intent and spirit of the Constitution. Unfortunately the Court declined to answer categorically the arguments advanced in support of the theory, so it is impossible to be certain of its reasons for taking jurisdiction of such a question.

Considering the arguments advanced in the above cases, to establish the invalidity of the amendment, it is undoubtedly sound principle that such substantive and municipal legislation as there exists, restrictive in high degree of the sphere of individual activity and existing property rights, is out of place in a relatively unchangeable constitution, which is properly classed as a framework of government and the repository of fundamental rights. Such legislation represents only a transitory wave of public opinion and should be in a form more easily responsive to public opinion. However, saving all of the arguments against it, is it not possible that they were submitted to the wrong tribunal? The Supreme Court has not the power to take cognizance of the question on such grounds. The Court decided that the eighteenth amendment met all of the formal requisites of proposal and ratification and is thus a part of the Constitution. Beyond this, the Court cannot go. The only tribunal which can give ear to these arguments is a constitutional convention, having due and proper authority to speak for the people, the constitution makers. "Vox populi, vox Dei."

JOS. F. INGHAM

EVIDENCE—SCOPE OF DYING DECLARATIONS—RESTORATION OF ORIGINAL SCOPE—No case will suggest the above heading more strongly than *Donnelly v. United States*[1] and similar ones. In that case one Donnelly was tried for the murder of Chickasaw, an Indian, in California. Evidence was sought to be introduced of a dying confession of one Joe Dick, another Indian, which confession was corroborated by other plausible circumstantial evidence. But the confession was excluded by a majority of the court against the protest of three members—a strong minority protest. Justices Holmes, Hughes and Lurton said that such a confession under the circum-

[1]228 U. S. 243; 33 Sup. Ct. 449 (1913).

stances would have been believed by anyone outside of a court of law.

The majority applied the prevailing rules of evidence and held that such a confession could not be received under any of the numerous exceptions to the hearsay rule however plausible the alleged confession might be both as to the report of the confession and the thing confessed.

Originally the rule in regard to all declarations *in extremis* was admissibility whether pertaining to civil or criminal actions. The ground for this rule was stated by Lord Chief Baron Eyre[2] in these words, "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 in a court of law." But within a period of about fifty years beginning with near the middle of the 19th century, limitations were attached to the rule so that dying statements were no longer admitted in civil suits.

The last landmark admitting a dying statement in a civil action was the celebrated case of *Wright on the demise of Clymer v. Littler,*[3] where a dying witness declared that he "forged the second will." It is true this statement was brought out on cross-examination and to it there was no objection. But it is a significant fact that in his opinion Lord Mansfield devoted only 29 words to the cross-examination reason for admission and 128 words to the real, logical and common sense reason for admitting it. Note the language, "it was necessary to show how it was secreted (first will), and how discovered; the declaration of Middlecutt in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence. The instrument of 1745 (second will) was equally in his custody and secreted. The account he gave of it in his last moments is equally proper * * * as the account was a confession of a great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience; I am of the opinion that the evidence was proper to be left to the jury." Why was this evidence competent? Why was it material? Why was it proper? Was it because it was brought out on cross-examination

[2]R. v. Woodcock, 2 Leach's Cr. Cases 256.

[3]3 Burr 1244.

without objection? Lord Mansfield would not use such language in regard to evidence that got in the record on a mere technicality. He was too great a judge for that. The real ground for admitting it is contained in one sentence in the opinion, full of wisdom and good sense, "The competence of evidence depends upon the circumstances under which it is given."

Then came another celebrated case, that of *Stobart v. Dryden,*[4] not celebrated because of superior wisdom shown, nor justice, nor common sense; but because of the far-reaching effect it had in destroying the old rule laid down by Eyre, L. C. J. and affirmed by Lord Mansfield. The facts in this case do not show that the witness McCree (witness to a will) made his statements *in extremis* but while he was well and strong, and in reason could not be likened to the case of *Wright v. Littler*. They were merely statements of a person since deceased. But Parke, B. went far afield and expressly included it in his opinion with disastrous results. *Stobart v. Dryden* was probably correctly decided on its merits for the circumstantial guarantee of trustworthiness seemingly was not present. The solemn occasion of an impending death was absent. But Baron Parke with one stroke reached out when there was no occasion for it and struck down an orthodox rule of evidence and made it unorthodox, and in its stead established as Wigmore says, "an orthodox heracy,"—No declaration of a dying person may be admitted in a civil law suit.

J. G. Phillimore writing in 1850 uses this strong language in censuring Baron Parke and the whole court for rendering this decision—"I now come to a case which, to the scandal of our jurisprudence, has been overruled; though I still hope, for the honour of the Bar, that such a triumph over reason will not be considered final. I allude to the case of *Wright on the demise of Clymer v. Littler,* in which Lord Mansfield admitted evidence of the dying declarations of a witness that he had forged a will. Inconceivable as the narrowness of our judges often is, and shocking as the consequences are to which it leads, I do not know any case, from Lord Coke downwards, in the whole disgusting series of judicial bigotry, that exemplifies it in a manner more humiliating than that of *Stobart v. Dryden,* in which this case was overruled."[5]

Thus has gone into the legal discard by the process of arbitrary limitation one great source of evidence in civil

[4]Exchequer 1836, 1 M. & W. 615.

[5]History and Principles of the Law of Evidence, 554 (1850).

litigation; a source grounded in necessity, and under circumstances which have the earmarks of truth and almost perfect trustworthiness—all done by judicial legislation which amounts to well-nigh usurpation.

Likewise has the original rule in regard to dying declarations in criminal actions suffered, and strange as it may seem, this limitation in criminal actions got its inspiration from a treatise writer[6] and not from the courts. Sergeant East in his Pleas of the Crown, was writing on homicide. In the course of his argument he stated that dying declarations are admissable in homicide to show the cause of the injury to the declarant, when the latter was under the sense of impending death, and has since died; this is so in order that the manslayer may not escape punishment by removing the only witness to his wrong doing. This is based on the principle of necessity. Many commentators on this statement of Sergeant East hold that it is a misunderstood statement, that he did not intend it to be a statement of limitation of the rule of dying declarations to homicide cases only. It was a natural statement for him to make when dealing with that subject. It certainly should apply to homicide at all events, however many other crimes to which it might be applied. This is the notion of Wigmore[7] and other text writers on this famous so-called dogma of Sergeant East.

But the courts seized on it as if they were eager and waiting for a good opportunity to do so.[8] This seemingly accidental and innocent statement of a treatise writer was the occasion for arbitrarily limiting a rule of evidence to the single case of homicide which formally applied to all crimes. Society, however, needs protection from robbery, arson, rape and the whole category of heinous crimes, as well as from homicide.

Upon what conceivable basis has so radical a change been brought about? Some and perhaps most have based it upon the fact disclosed by experience that some really do not tell the truth even in *articulo mortis,* and hence it is argued that it is deemed safer to exclude such statements except when the exclusion might let a murderer go free. If this was ever honestly deemed the basis of the change, it lacks the merit of logic or consistency, for many, we know from experience also, do not tell the truth on the witness stand in open court. More than that, if this kind of evi-

[6]Pleas of the Crown I, 353 (1803).

[7]2 Wigmore on Evidence, Sec. 1431, note 3

[8]Rex v. Mead, 2 B. & C. 605.

dence is of such doubtful character as is claimed, how much less should it be received, or at least more charily where liberty, and above all, where life is at stake?[9]

It is a long journey from a rule that included dying declarations in all cases, civil and criminal, down to only one class, criminal cases, and still further to only one kind in that one class, and that is the declarations must be in regard to the declarant's own injury.

Two persons are attacked, husband and wife; the husband is killed instantly. The wife lingers long enough to make dying statements in regard to the attack made upon both. The killers are tried for the murder of the husband. The statements made by the dying wife are not admissible against the slayers,[10] simply because, forsooth, it does not fall within the rule. It is hearsay evidence. It would seem that the more the killings, the less valuable are the dying declarations.

On February 14th seven men were lined up in a garage in Chicago and shot down like dogs. The eighth man was thought to be mortally wounded. Suppose he had been and had made a dying statement as to his injuries and the whole affair. Seven prosecutions would have been deprived of the dying statement as evidence. Kill by wholesale and they may not convict you. Kill but one and they may. What more shocking and at the same time ridiculous situation can be imagined? All this comes of slavery to precedent. Wigmore contends that a rule that brings about such and like situations is barbarous[11] and one the legislatures will have to correct.

The arbitrary limitations on the rule of dying declarations lack the humane element. It is said that dying declarations are of too doubtful a character to be admitted against accused persons except in the sole case of homicide as indicated above. If the reason for the rule is the concern for the accused, why not admit dying confessions in his favor? Once more reverting to the case of *Donnelly v. United States,*[12] the dying confession of Joe Dick, that he was the slayer of Chickasaw, the Indian, was excluded. If it is a good policy to admit a dying declaration to prevent

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[9]Thurston v. Fritz, (1914); 91 Kas. 468; 138 Pac. 625.

[10]Brown v. Comm. 73 Pa. 329. These states hold that dying declarations of others injured by the same act as the one whose death is the subject of inquiry vis—La., S. C. are admissable. In 1837, Rex. v. Baker, 2 M. & R. 53 it was held the same way.

[11]2 Wigmore on Evidence, Sec. 1477.

[12]See 228 U. S. 243; 33 Sup. Ct. 449 (1913).

a slayer going free, it certainly is humanitarian to admit a dying confession to prevent the conviction of an innocent person. If it is right to admit this kind of evidence to destroy a life, it is humanitarian to admit the same kind of evidence to save a life.

But some say that a dying person might lie while he is dying to save a friend. That is no more probable than that he will lie when dying to avenge an enemy. Of the two possibilities, the latter is more likely than the former. At any rate the element of mistake is more likely to occur in the case of the injured person identifying his assailant, than that a confessor is mistaken in whether he committed a crime or not. The minority Justices, Holmes, Hughes and Lurton, in their dissenting opinion in the Donnelly case contended that the dying confession should have been admitted on the ground of a statement against interest. The majority holding was that it could not be admitted on that ground because the interest must be a pecuniary or a proprietary one. An interest which is purely spiritual, even though an eternal spiritual interest, did not fall within the comprehension of the rule. So this confession of a man going into eternity to confront his Maker, believing that he must give account of the deeds done in the body, with all earthly interests and hopes gone, and with nothing to gain and everything to lose in eternity, is excluded, and the accused must suffer the loss of his freedom and might have lost his life, as a victim to a rule of evidence which is illogical and unreasonable.

The minority seemingly weakened their case when they relied on the adverse interest doctrine but utilized a spiritual reasoning. Had they stood upon the broad principle upon which Eyre, L. C. J. based dying declarations they would have made a stronger case to do down to posterity.

Baron Eyre's basis for such declarations is purely spiritual, as the basis of the common law oath is religious and spiritual. The common law courts might well have gone a little farther and held that the circumstances under which dying declarations are given are not only equivalent to an oath, but that there is an oath. When all the essential elements are present, consciousness of impending death, belief in future rewards and punishments, repentance of all wrong doing, one of two things may be imputed—either the Great God has administered an oath, or authorized the confessor to self-administer one.

How long will this condition of things obtain? With Phillimore, and Wigmore and Justices Holmes, Hughes

and Lurton we trust it will not be for long. Legislatures will have to enter this field, for it is a fruitful one, and sweep away with a strong hand this intolerable state of affairs. In a number of states this has been done in the case of abortion.[13] Dying declarations have been extended to this class of crimes—whether the death be embraced in the charge or not. Courts here and there are breaking away gradually from this senseless rule and refusing to be bound by *stare decisis* which is not founded in reason.

Says the Kansas Court,[14] "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. The doctrine of *stare decisis* does not preclude a departure from precedent established by a series of decisions clearly erroneous, unless property complications have resulted, and a reversal would work a greater injury and injustice than would ensue by following the rule".

In the Donnelly case seven other cases were cited and not one of the seven were in point to support it. In not a single one was a dying confession involved. They were simply cases where statements were made by persons who had since died. In one the declarant was unaccounted for. How can such cases be in point as authority in this case when at the time four of them were decided dying declarations were admissable in all cases, civil and criminal? *Queen v. Hepburn*[15] decided in 1813 could not be in point for dying statements were not involved; the same is true of *Davis v. Wood (1816), Scott v. Ratliffe (1831)*, and *Ellicutt v. Pearl (1836)*. When all of these were decided *Wright v. Littler* was still in force admitting dying confessions in all cases. In 1836 *Stobart v. Dryden* had just been decided abolishing the use of such confessions in civil suits, but it is

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[13]Mass., New York, S. D., Pa., and Ohio include abortion in dying declarations. S. D. also includes rape.

[14] See Thurston v. Fritz, supra.

[15]Queen v. Hepburn, 7 Cranch 290, (1813); Davis v. Wood, 1 Wheat. 6 (1816); Scott v. Ratliffe, 5 Pet. 81 (1831); Ellicutt v. Pearl, 10 Pet. 412 (1836); Wilson v. Simpson, 9 How. 109 (1850); Hopt v. Utah, 110 U. S. 574 (1884); U. S. v. Mulholland, 50 Fed. 413.

unlikely that the news of it had reached this side of the water to influence the case of *Ellicutt v. Pearl.*

Justice Marshall in *Queen v. Hepburn.*[16] as quoted at some length by Justice Pitney. He says, "It was very justly observed by a great judge[17] (dying declarations in full force in 1790) that all questions upon rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured from their antiquity and the good sense in which they are founded." Yes, and here was a poor unfortunate woman of a different color than his who loved liberty as well as Justice Marshall did, who attempted to use an exception to that rule of antiquity almost as old as the rule itself, and gain her freedom, but Justice Marshall denied her the privilege. Mima Queen tried to prove her pedigree by hearsay which is an exception to the rule, and incidentally prove her right to freedom. She claimed ancestors running back to England. Instead of Mima Queen attempting to establish a new exception, Justice Marshall was guilty of striking a blow at an old established exception to the hearsay rule.[18] There was one order and degree of mankind not included in that high sounding doctrine.

Justice Pitney should have cited better authority than any of the seven he did cite to uphold the Donnelly Case. If what Justice Holmes alleged in one statement be true, which is vouched for by Justices Hughes and Lurton, he could not cite any better authority. Here is the statement, "There is no decision by this Court against the admissibility of such a confession."

There was a book published some years ago entitled, "Put Yourself in His Place", that created a sensation. If the majority judges in this case could have been present and

[16]Queen v. Hepburn, supra.

[17]Lord Kenyon C. J. in Rex v. Eriswell (1790).

[18]The writer is not unmindful of the fact that pedigree must be the primary fact in issue before hearsay will be admitted. But there is a very large minority which holds that if another fact is closely related, or that fact is primarily in issue and pedigree is closely related, hearsay evidence may be admitted. When a judge quotes such high-sounding altruistic sentiments as Justice Marshall did in the Queen case, he might have deviated slightly and given a human liberty right the benefit of the doubt in preference to a mere property right. It is a great wonder that the "Dred Scott doctrine" was not proclaimed in this case in 1813 before Chief Justice Taney had a chance at it forty-one years later.

heard the confession of the dying Indian, they would then have realized that after all under these circumstances it is more a question of credibility of the persons hearing the confession and also of the confessor than competency. They could not and would not repudiate what they saw and heard when impressed with the truthfulness of the confession and sincerity of the confessor. They could see in the dying man that some thing had taken place in his spiritual being. They could see that a Higher Power had been working and an oath had been taken and the dying testimony was the result. If something of this kind had not taken place then Lord Chief Justice Eyre was talking lunar politics or something like it when he gave out his famous saying quoted at the beginning of this note and which is found in all the books wherever the English language is spoken and printed.

It is sometimes contended that no dying declaration should be admitted in evidence in these days when religion has practically died out among the criminal classes,[19] and the sentiment is like this, "I am about to die, why tell the truth? I will say that which suits my purpose." That purpose may be to shield a friend or get even with an enemy. This theory does not tally with the reports of hardened dying criminals. Here is an example of how it is working. Recently a gangster in the East was dying from a mortal wound received from another gangster. A police captain was questioning him as to who had been his assailant. Here is the answer, "Oh, Cap., cut it out and let me die in peace." The idea seems to prevail among them as by tacit agreement, not to be a squealer when they get the worst of it.

That point may be met by the well-known rule of impeaching the declarant on the question of religious belief as to the credibility. The jury should know this fact and give no credence at all or very little in making up their verdict.

This problem of dying declarations can be solved by the legislatures restoring these statements to their original status, civil and criminal, subject to the sound discretion of the court, in connection with the facts and circumstances of each individual case corroborating the dying statements, and also by the court giving wide latitude to the opposition in impeaching both the declarant and the reporter.

ELLAHUE A. HARPER

[19] 24 Harvard L. Rev. 485.