Denver Law Review

Volume 15 | Issue 5 Article 3

January 1938

A Voice From the Grave - Dying Declarations in Colorado

Christopher T. O'Neill

A VOICE FROM THE GRAVE

DYING DECLARATIONS IN COLORADO

THE hearsay rule in the law of evidence has long been subject to important exceptions which have more or less vitiated it so that it no longer retains its original vigor. The general rule is that statements made by one not a party in interest, of one not a party to the proceeding and not made under oath are inadmissible since such statements are not subject to cross-examination, are not spoken under the sanction of an oath, and there is no opportunity to investigate the speaker's character and motives or to observe his deportment on the witness stand. An important exception to this rule is the exception by which dying declarations are admissible.

The dying declaration as an exception to the hearsay rule arose in the first half of the eighteenth century when the hearsay rule itself was being systematically recognized and enforced. From that time until about 1800 any person's dying declaration could be used in any case, the theory being that since the person was dead at the time of the trial and his testimony unavailable, his declaration, of necessity, should be received. There was no distinction between civil and criminal cases. Thus McNally, *Evidence* (1802) P. 381, 386, states: "In civil cases the rule of receiving as evidence the dying declaration of a person 'in extremis' hath also been adopted, and on the same principle as in criminal cases." Swift, *Evidence* (1810) is to the same effect.

A distinction between civil and criminal cases was suggested by counsel in *Craig dem. Annesley v. Angelsea,* 17 How. St. Tr. 1161 (1733) (ejectment), but the absence of a settled distinction was conceded in 1744 by Mr. Chute *arguendo* in *Omichund v. Barker,* 1 Atk. 38 (Eng.), a contract case.

Today the rule has come to be that a dying declaration is admissible in cases of homicide only, where the murdered person is the declarant, *and the declaration is made under a sense of impending death.* This restriction arose from a textbook, *Pleas of the Crown,* by East (1803) in which (vol. 1, p. 353) the author stated that in homicide cases, dying declarations were admissible. Although this statement was made in a chapter on homicide, it was not intended to refer only to homicide cases, but, unfortunately, a few nisi prius courts took the language as stating a general rule and thus the declaration came to be limited to homicide cases only. Finally, in 1860, a note by Chief Justice Redfield in his edition of Greenleaf's *Treatise on Evidence* gave the rule the widest credit and led to its general adoption. Redfield said that the necessity of apprehending murderers in homicide cases was the true ground for the rule, and that only this grave necessity overcame such objections to the hearsay rule as the lack of cross-examination and the admission of a statement not made under oath. This note shows how the necessity principle was changed from one allowing dying declarations to be admitted because the testimony of the deceased was not available, to one allowing the declaration only where the court felt some social purpose would be served thereby.

Between 1806 and 1874 all the courts gradually adopted the restrictive rule in force generally throughout the United States and England today.

Colorado has followed the general rule as to the admission of dying declarations, as is illustrated by decisions on the point hereafter set out. The only exception to the rule in Colorado was announced in *Clarke v. People,* 16 Colo. 511, in which the court allowed a dying declaration where the crime of causing an abortion was charged. In this case the court, without discussion, allowed a statement made by the deceased "in extremis" as to the cause of her condition, without apparently realizing that it was departing from the general rule. No other case involving this point has since arisen in Colorado, but in other cases the court has followed the orthodox rule. Thus in *Mora v. People,* 19 Colo. 255, and *Brennan v. People,* 37 Colo. 256, our court held that a dying declaration is admissible only where the death of the declarant is the subject of a charge of homicide in a public prosecution; that it must be made when the declarant is under a sense of impending death, and that it can only relate to circumstances preceding the homicide.

This rule was slightly restricted in *Zipperian v. People,* 33 Colo. 134, again a homicide case, wherein the court held that it was error to refuse an instruction that a dying declaration is to be given the same weight as is given to a statement of a witness not subject to cross-examination. This case also stressed the fact that the dying declaration was an exception to the hearsay rule, and therefore the defendant could not object on the ground that he had no opportunity to cross-examine or confront the witness. The early cases of *McBride v. People,* 5 Colo. App. 91, and *Graves v. People,* 18 Colo, 170, stated that if the person expected to recover, the declaration was inadmissible, since the reason for the admission was that approaching death made the truth of the statement probable. The McBride case also set forth the restriction that the declaration cannot be made in answer to questions put to the declarant, because a declaration must be absolutely uninfluenced.

In *Weaver v. People,* 47 Colo. 617, the court explained the rule further by stating that the fact that the deceased knew he was under sense of impending death could be inferred from circumstances. Subsequent Colorado cases applied the rule to slightly different situations. *Davis v. People,* 77 Colo. 546, stands for the proposition that the declaration is admissible even if the facts can be shown otherwise. *Salas v. People,* 51 Colo. 461, put declarations on the same basis as other witness statements by allowing an impeachment by showing other inconsistent dying declarations. *Jamison v. People,* 52 Colo. 11, stated a peculiar limitation in that it held the statement, "He murdered me," "—is only opinion and therefore inadmissible." This case seems a super-refinement of judicial logic. *Davis v. People,* supra, stated that a dying declaration is admissible to prove defendant's innocence as well as his guilt.

Other cases in accord with the above are *Garcia v. People,* 64 Colo. 172; *Harris v. People,* 55 Colo. 407; *Flor v. People,* 73 Colo. 403; *Reppen v. People,* 95 Colo. 192, all illustrating the orthodox rule.

This rule, that dying declarations are limited to homicide and abortion cases and then only where the deceased is the declarant, and is under a sense of impending death, was finally abrogated in Colorado in 1937. Chap. 145, Session Laws of 1937, provides that dying declarations are admissible in all civil and criminal cases and other proceedings before courts, commissions, and other tribunals, to the same extent and for the same purpose that they might have been admitted if the deceased had survived and been sworn as a witness, subject only to these restrictions: (1) that at the time of making the declaration the deceased was conscious of approaching death and believed there was no hope of recovery; (2) that the declaration was voluntarily made and not through persuasion of any person; (3) that the declaration was not made in answer to questions calculated to lead the deceased to make any particular statement; (4) that the declarant was of sound mind at the time of making the declaration.

This statute puts Colorado in a unique position among the states. The statute was intended to prevent the result of a case such as *Saum v. Friberg*, 82 Colo. 395, a custody case in which the court refused to admit a mother's dying declarations as to the moral character of the father of the children, the statements referring to the unhappy married life of deceased caused by the moral unfitness of the father.

This case was characterized by Wigmore as one which makes our American law of evidence the laughing stock of the civilized world, and it is to Colorado's credit that we are among the foremost to aid in changing the general American rule. Several other states have taken slow steps in the same direction. Oregon and North Carolina allow by statute dying declarations in civil suits for wrongful death as well as in homicide cases. Kansas by judge-made law has allowed dying declarations in civil cases as well as homicide cases (Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625) in a very fine decision in which the true adaptive spirit of the common law is beautifully illustrated.

Colorado, however, has taken the full step and, in keeping with the present tendency toward more liberal rules in the admission of evidence and a more logical system of law, has allowed dying declarations in all cases.

It would seem that if dying declarations are admitted in homicide cases where the accused stands charged with his life, they should also be admissible in cases where only property is concerned or in cases where a crime less than murder is charged. Indeed, if any objection be made in principle to the admission of dying declarations it would seem that it would be to such admission in homicide cases, rather than in ordinary civil suits. Since we have long considered that death is a sufficient insurer of truth in homicide declarations and have left their weight for the jury, it seems logical and better suited to an investigation for the truth such as every trial should be, to allow all evidence to go to the jury and make it the ultimate determinative of truth and falsehood. The Colorado statute is sound and should give this state the basis for a sound law of evidence as well as providing an experimental laboratory from whose findings all the states may profit.

CHRISTOPHER T. O'NEILL.