

1949

## Some Factors Affecting the Admissibility of Dying Declarations

Robert H. Klugman

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Robert H. Klugman, Some Factors Affecting the Admissibility of Dying Declarations, 39 J. Crim. L. & Criminology 646 (1948-1949)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

mate objection can be taken to a measure which only places Cook County on a parity with other counties having one eight-hundredth its population.<sup>89</sup>

### Conclusion

This brief summary of the proposed statutes should indicate that all are necessary in order to improve the administration of criminal justice in Illinois. Indeed, they are but a step toward the complete revision or recodification of the criminal laws of Illinois, a desirable but presently impractical goal. As has been noted above, all of these bills, in somewhat different form, were introduced in the 1947 session of the legislature, but none reached a final vote in both houses. It is to be hoped that the legislature will give more serious attention to these bills when they are introduced in the 1949 session. The changes which have been made in the bills since their original form in 1947 are mostly for the better, and should improve their chances for approval.

WARREN P. HILL  
DANIEL WALKER

### Some Factors Affecting the Admissibility of Dying Declarations

Dying declarations have long been recognized as an exception to the hearsay rule. There are two chief reasons for allowing this exception: first, it is the only evidence available from the deceased, who is often the best and sometimes the only eye witness to the occurrence; secondly, it is thought that one who believes himself about to die has lost all motive for falsehood and will tell the truth "lest he be punished in the Hereafter."<sup>1</sup> The effect of the final words of the deceased as to his assailant is so persuasive to the ordinary juror that courts have adopted numerous safeguards and rigid rules of admissibility for the dying declaration. Unfortunately these rules have had the effect of excluding many trustworthy declarations from the jury. It is very important therefore that certain safeguards be taken when receiving a dying declaration.

The first and most stringent requirement of the courts when deciding the admissibility of dying declarations is a showing that the declarant believed himself beyond recovery and that death was inevitable. The strictness of this rule was illustrated in *People v. Maria*.<sup>2</sup> A statement in that case was dictated by police officers and signed by the declarant. Although it recited that the declarant believed he was about to die and that he had no hope of recovery, there was no evidence that a physician told him so. He asked for a physician prior to the statement but did not request a priest until about an hour after the statement was made. The Illinois Supreme Court held that the dying declaration should not have been admitted, since there was not an adequate showing that the

vened simultaneously only in a district which has a city or borough of at least 300,000 inhabitants, and three grand juries only in the Southern District of New York). This provision was superseded by the Federal Rules of Criminal Procedure.

<sup>89</sup> Cook, population 4,063,342; Putnam (whose grand jury has a permissible life of six months), population 5,289. Figures from 16th census of United States (1940).

<sup>1</sup> *People v. Borella*, 312 Ill. 34, 143 N.E. 471 (1924); *State v. Debnam*, 222 N.C. 266, 22 S.E. (2d) 562 (1942); *State v. Jordan*, 216 N.C. 356, 5 S.E. (2d) 156 (1940).

<sup>2</sup> 359 Ill. 231, 194 N.E. 510 (1935).

declarant had lost hope of recovery. The fact that others around the wounded man did not believe he could survive was irrelevant.

In contrast to this situation, if the declarant has given up all hope of recovery, the fact that he actually does live for considerable time after the statement is made will not invalidate an otherwise admissible statement,<sup>3</sup> although the length of time between the statement and death is often used as further evidence of the declarant's expectation of death.<sup>4</sup> In a prosecution for murder by abortion in *People v. Kreutzer*<sup>5</sup> the declaration was admitted where the decedent stated that it was "what may be my last declaration in life" and witnesses testified to her fixed conviction that death was inevitable, even though she did not believe death was immediate and where she in fact lived some time thereafter.

The rule that the declarant must believe that death is impending or that he cannot recover is the one requisite almost universally accepted by courts and text-book writers.<sup>6</sup> There is, however, some divergence of opinion as to what proof of this belief is necessary.<sup>7</sup> An oral declaration to the effect that all hope of recovery is gone will usually suffice.<sup>8</sup> A doctor's statement to the declarant that he will die is strong evidence. A decedent's request for the last rites of his church is also a strong indication not only that he expects to die but also that he is in a solemn religious state of mind. The nature of the injury itself is important if the declarant knows of it and its usual effect. It is probable that some courts stress too strongly the significance of requesting a physician, for often a dying man may ask for a doctor without necessarily changing his belief that death is imminent.

The rule which probably causes the greatest amount of confusion in determining the admissibility of dying declarations is the one excluding opinion evidence. According to this rule the statement of the declarant is treated like the testimony of a witness on the stand in determining admissibility. If an inference can be drawn from the facts stated, the jury can just as well draw this inference, and the conclusion of the declarant is superfluous and inadmissible. If a conclusion is stated which is not inferrable from the facts or the facts on which it is presumably based are not stated, then it is incompetent. Thus under a strict interpretation of this rule, no conclusion or opinion is admissible.

Professor Wigmore advocates abolishing this opinion rule restriction altogether.<sup>9</sup> Since the declarant is dead, no further facts can be obtained from him, and his testimony is not superfluous but indispensable. Most courts do apply the opinion rule to dying declarations, but their degree of application differs widely.<sup>10</sup>

<sup>3</sup> *People v. Denton*, 312 Mich. 32, 19 N.W. (2d) 476 (1945) (11 days); *People v. Kreutzer*, 354 Ill. 430, 188 N.E. 422 (1933) (9 days); *People v. Corder*, 306 Ill. 264, 137 N.E. 845 (1922) (4 days).

<sup>4</sup> *Cotney v. State*, 32 Ala. App. 46, 26 So. (2d) 598 (1945) *aff'd* 248 Ala. 1, 26 So. (2d) 603 (1945).

<sup>5</sup> 354 Ill. 430, 188 N.E. 422 (1933).

<sup>6</sup> 5 Wigmore, Evidence (3d ed. 1940) §1438.

<sup>7</sup> *State v. Brown*, 209 Minn. 478, 296 N.W. 582 (1941). For collected cases, see 5 Wigmore, Evidence (3d ed. 1940) §1442 note 3.

<sup>8</sup> *State v. Brown*, 209 Minn. 478, 296 N.W. 582 (1941). See *Arseneau v. State*, (Tex. Civ. App. 1943) 171 S.W. (2d) 132; but see *People v. Holmes*, 369 Ill. 624, 17 N.E. 2d 562 (1938).

<sup>9</sup> 5 Wigmore, Evidence (3d ed. 1940) §1447.

<sup>10</sup> For collected cases, see 5 Wigmore, Evidence (3d ed. 1940) §1447 note 1.

Many courts have limited the applicability of the opinion rule in cases concerning dying declarations to exclude only statements of conclusion or opinion of which the declarant cannot know and does not state the facts upon which the conclusion or opinion is based. An example of this would be the following statement in *State v. Wilks*:<sup>11</sup> "You go away from me; Virgil (the defendant) killed me; you and he made it up this afternoon to kill me tonight." At the time of the shooting the deceased was in a lighted room, and the shot was fired from the darkness outside through a wire screen, a glass window, and a lace curtain. The deceased could not have seen his assailant, and no facts are stated showing why the defendant was picked as the murderer. The whole statement was held inadmissible. Another example where the exclusion of a statement might be justified on the grounds that it was an opinion only is a case where the deceased tells which of different drinks poisoned him and does not tell on what basis his decision lies.<sup>12</sup>

Following this same line of reasoning, if what is really meant to be a statement of fact is stated in the form of an opinion, it should not be excluded. In *Owens v. State*<sup>13</sup> the deceased said a named person "assassinated" him. The court, in admitting the statement, said that although in a legal sense the word "assassinate" might in some cases be a conclusion, in the light of circumstances surrounding this case it was clear that the decedent merely was stating the fact that the defendant shot him without apparent cause. Similarly the statements that the defendant "was trying to get out his gun" and "was reaching in his pocket for his revolver" have been held statements of fact and not opinion.<sup>14</sup>

In contrast to these cases are many in which courts make fine distinctions between fact and opinion in a field where such distinctions serve no useful purpose. In cases only three years apart the Alabama Appellate Court admitted a statement by the deceased that the defendant "killed" him but excluded one that the defendant "murdered" him.<sup>15</sup> The word "murder" was said to be a conclusion whereas "kill" was a statement of fact. Technically this is correct, but it has little relevancy as regards the admissibility of a dying declaration.

The opinion rule has also led many courts to exclude otherwise admissible statements where the deceased indicated a motive or an absence of motive. Certain courts have time and again excluded the statement that the defendant "shot me for nothing" although they would have admitted the statement if the words "for nothing" had not been added.<sup>16</sup> Fortunately most courts now either allow such a

<sup>11</sup> 278 Mo. 481, 213 S.W. 118 (1919).

<sup>12</sup> *People v. Haber*, 223 N.Y.S. 133 (1927). For a collection of cases in which the admissibility of dying declarations of one poisoned is discussed, see 25 ALR 1370, 1391 (1923).

<sup>13</sup> 11 Ga. App. 419, 75 S.E. 519 (1912).

<sup>14</sup> *Gaines v. State*, (Tex. Crim. Rep. 1910) 127 S.W. 181; *State v. Brown*, 188 Mo. 451, 87 S.W. 519 (1905). See also *State v. Strawther*, 342 Mo. 618, 116 S.W. (2d) 133 (1938).

<sup>15</sup> *Pilcher v. State*, 16 Ala. App. 237, 77 So. 75 (1917) ("murdered"); *Parker v. State*, 10 Ala. App. 53, 65 So. 90 (1914) ("killed").

<sup>16</sup> *Nolan v. Com.*, 261 Ky. 384, 87 S.W. (2d) 946 (1935); *Reno v. Com.*, 258 Ky. 166, 79 S.W. (2d) 692 (1935); *Philpot v. Com.*, 205 Ky. 636, 266 S.W. 348 (1924); *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (1908).

statement or merely exclude the words "for nothing." Yet such statements as "he shot me in cold blood" are still excluded in some jurisdictions.<sup>17</sup>

Closely akin to this rule is the requirement that only facts leading up to or causing the fatal injury are admissible. A full narration of the occurrence causing death is usually allowed, however. In the prosecution of a defendant for manslaughter where death was caused by an illegal abortion, the Illinois Supreme Court held a written dying declaration admissible which contained the decedent's version of occurrences commencing with her first visit to the defendant's office and terminating with a description of her physical condition after the criminal act.<sup>18</sup> All of this was held a material and competent part of the proof of matters connected with the alleged abortion and death. Even the deceased's conclusions regarding her operation did not render the dying declaration inadmissible, since they were based on antecedent facts stated in the declaration.<sup>19</sup>

Where the decedent tells of past acts which would serve as the motive or show bad feelings between defendant and deceased, these are excluded.<sup>20</sup> If the deceased did not know as a fact who killed him, then, since his conclusion as to his assailant would be excluded, there might be justification for also excluding statements of past acts, since a court will not predicate a present assault on the fact of prior assaults; but when the deceased positively identifies the accused as his assailant, the jury should be given the benefit of any declaration of prior acts to show motive or bad feeling. In such a case the accused is not identified as the assailant because of his past acts, and thus the most valid objection to the admissibility of such statements is not present. Narrations of occurrences not connected with the fatal act are excluded by most courts, however.

Occasions have arisen where the declarant has died before he could complete his dying statement. Some courts have excluded the portions of the statements made on the ground that the declarant, had he been able to complete the statement, might have qualified what he said.<sup>21</sup> It is immaterial in such a case how much of the affair is told as long as the declarant told all he intended.<sup>22</sup> Many courts severely limit this rule by applying it only to matters of substance, however.<sup>23</sup>

The question of what form is preferable often arises in respect to dying declarations. The fact that a declaration is written or sworn to neither adds to nor detracts from its admissibility. Where there is a written declaration, it will not preclude testimony of additional oral

<sup>17</sup> *Skeggs v. State*, 24 Ala. App. 307, 135 So. 431 (1931) *cert. denied* 223 Ala. 221, 135 So. 433 (1931); *White v. State*, 24 Ala. App. 442, 136 So. 420 (1931).

<sup>18</sup> *People v. Kreutzer*, 354 Ill. 430, 188 N.E. 422 (1933).

<sup>19</sup> *Accord: Com. v. Smith*, 213 Mass. 563, 100 N.E. 1010 (1913). For a resumé of cases discussing the opinion rule in regard to declarations concerning abortions, see 25 ALR 1370, 1380 (1923).

<sup>20</sup> *Webb v. State*, (Tex. Crim. Rep. 1937) 106 S.W. (2d) 683; *State v. Shelton*, 116 W. Va. 75, 178 S.E. 633 (1935); *Freihage v. United States* (C.C.A. Alaska, 1932) 56 F. (2d) 127; *Wolfe v. State*, 200 Ind. 557, 159 N.E. 545 (1928).

<sup>21</sup> *Daughters v. Com.*, 255 Ky. 172, 73 S.W. (2d) 10, 94 ALR 673 (1934).

<sup>22</sup> *State v. Tubbs*, 101 Vt. 5, 139 Atl. 769 (1928); *Kalb v. State*, 195 Ga. 544, 25 S.E. (2d) 24 (1943).

<sup>23</sup> *Ward v. State*, 8 Blackford (Indiana) 101 (1846); *cf. Kalb v. State*, 195 Ga. 544, 25 S.E. (2d) 24 (1943). *But cf. State v. Brinkley*, 183 N. C. 720, 110 S.E. 783 (1922).

declarations. The fact that the declaration, if written, is not in the declarant's words or is not written by him will not render it inadmissible.<sup>24</sup> Nor will the fact that leading questions are asked him invalidate the declaration. Even though the victim can answer only yes or no to questions, such is admissible to the jury for their consideration if other qualifications for admission are met.<sup>25</sup> Should it appear that the statement was really not that of the accused, however, or that he was led to assent to the opinion of another, the court may reject the statement.<sup>26</sup> If an oral statement is copied down, such copy has no greater validity than the account of anyone who witnessed the declaration, but the witness who copied the declaration should be allowed to use it to refresh his recollection. If the written account is signed, however, most courts apply the parol evidence rule to preclude oral testimony. Others admit both the written and the oral testimony.<sup>27</sup>

The admissibility of dying declarations is severely restricted by many rules, some of which are purely arbitrary and some of which are based on reason but which have been carried past the point of value. The legislatures of some states have set about to abolish these restrictions.<sup>28</sup> Progressive courts in other states have themselves done much to alleviate the situation. But until these effects have materially multiplied, it is of the utmost importance that those who receive dying declarations guide the efforts of the declarant to cover those questions requisite to admitting the declaration and to avoid the pitfalls of opinions and conclusions.

ROBERT H. KLUGMAN

<sup>24</sup> *Piercy v. State*, 138 Neb. 301, 293 N.W. 99 (1940).

<sup>25</sup> *People v. Madas*, 201 N.Y. 349, 94 N.E. 857 (1911); *Simpkins v. Com.*, 229 Ky. 348, 17 S.W. (2d) 245 (1929); *State v. Tubbs*, 101 Vt. 5, 139 Atl. 769 (1928).

<sup>26</sup> For collected cases, see 5 Wigmore, *Evidence* (3d ed. 1940) §1445 note 7.

<sup>27</sup> Compare *State v. Elias*, 205 Minn. 156, 285 N.W. 475 (1939) with *Huff v. Com.*, 270 Ky. 36, 108 S.W. (2d) 1044 (1937). See *Gray v. State*, 181 Md. 439, 30 A. (2d) 744 (1943).

<sup>28</sup> Colo. Stat. Anno. (1935) Cum. Supp. (1947) tit. 3, ch. 63, §21; North Carolina Gen. Stat. (1943) ch. 28, art. 19, §28-173; Arkansas Statutes, Acts 1935, p. 90 (followed in *Missouri Pacific R. Co. v. Hampton*, 195 Ark. 335, 112 S.W. (2d) 428 (1938)). For collected cases based on state statutes, see 5 Wigmore, *Evidence* (3d ed. 1940) §1432 notes 4, 5, 6, and 7.