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## Dying Declarations in Louisiana Law

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## Dying Declarations in Louisiana Law

Generally, out-of-court statements offered as proof of their substantive content are inadmissible because of the hearsay rule.<sup>1</sup> A well-recognized exception to the hearsay rule allows dying declarations to be admissible as evidence under specified conditions. The purpose of this Comment is to examine the Louisiana jurisprudence concerning dying declarations and to compare it with that of other American jurisdictions. It is hoped that this study will be helpful in drafting a Code of Evidence for Louisiana.<sup>2</sup> Dying declarations will be discussed from three aspects: (1) dying declarations as an exception to the hearsay rule, (2) general rules of evidence as applied to dying declarations, and (3) procedural aspects involving the use of dying declarations.

Louisiana has no statutory definition of the "dying declaration" exception. However, from an analysis of the Louisiana jurisprudence a definition similar to that of other American jurisdictions can be constructed.<sup>3</sup> A dying declaration is a statement of material facts concerning the cause and circumstances of the declarant's death made while the declarant is *in extremis*, having abandoned all hope of recovery, and fully conscious of his swift and impending doom.

### *Dying Declaration as an Exception to the Hearsay Rule*

The two requisites for the creation of an exception to the hearsay rule are necessity and circumstantial probability of trustworthiness.<sup>4</sup> Discussion of the jurisprudence will be focused around these two elements.

*Necessity.* A general requirement for most exceptions to the hearsay rule is that the declarant be unavailable for testimony at the trial.<sup>5</sup> For obvious reasons, this requirement is normally easily satisfied with respect to dying declarations.<sup>6</sup>

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1. For a thorough analysis of the hearsay rule in Louisiana, see Comment, 14 LOUISIANA LAW REVIEW 611 (1954).

2. La. Acts 1956, No. 87, § 2: "The Louisiana State Law Institute is instructed to prepare a comprehensive projet for a Louisiana Code of Evidence, covering the rules of evidence for both criminal and civil cases."

3. MCCORMICK, EVIDENCE 555, § 258 (1954): 5 WIGMORE, EVIDENCE 218, § 1430 *et seq.* (3d ed. 1940).

4. 5 WIGMORE, EVIDENCE §§ 1421-22, 1431, 1438 (3d ed. 1940).

5. *Id.* § 1421.

6. MCCORMICK, EVIDENCE 556 (1954).

Another reason given for admitting dying declarations has been described as the "public necessity of preserving the lives of the community, by bringing Manslayers to justice."<sup>7</sup> The ordinarily secretive nature of the crime of homicide argues for the necessity of admitting dying declarations since the victim is often the sole witness against his slayer. Although this rationale of the necessity requirement has been severely criticized by text writers,<sup>8</sup> it is adhered to generally in Louisiana<sup>9</sup> as well as in other American jurisdictions.

As a result, dying declarations are generally inadmissible in civil suits,<sup>10</sup> except possibly in workmen's compensation cases.<sup>11</sup> In absence of statutory modification, their use is further restricted to criminal prosecutions for homicide.<sup>12</sup> An article of the Louisiana Code of Criminal Procedure<sup>13</sup> has slightly modified this rule by allowing dying declarations to be admitted to prove charges of procuring or attempting to procure abortions contained in murder or manslaughter indictments.

Another generally recognized restriction limits the admissibility of dying declarations to statements by the victim whose

7. GREENLEAF, EVIDENCE § 156 (1868).

8. McCORMICK, EVIDENCE § 260 (1954); 5 WIGMORE, EVIDENCE § 1432 (3d ed. 1940).

9. Willis v. Kern, 21 La. Ann. 749 (1869); McCORMICK, EVIDENCE § 260 (1954); 5 WIGMORE, EVIDENCE § 1431 (3d ed. 1940).

10. Marler v. Texas & Pacific Ry., 52 La. Ann. 727, 27 So. 176 (1900) (the court showed unusual candor in observing that dying declarations given with a view toward civil proceedings might be influenced by concern for welfare of the declarant's family, whereas such a motive would not ordinarily be as influential in the typical homicide situation); Willis v. Kern, 21 La. Ann. 749 (1869). See McCORMICK, EVIDENCE § 260 (1954); 5 WIGMORE, EVIDENCE § 1432 (3d ed. 1940).

11. LA. R.S. 23:1317 (1950): "The court shall not be bound by the technical rules of evidence or procedure other than as herein provided, but all findings of fact must be based upon competent evidence." See Clifton v. Arnold, 87 So.2d 386 (La. App. 1st Cir. 1956). In addition, even if deceased's out-of-court statement is held to be inadmissible by way of the dying declaration exception to the hearsay rule, since these are civil cases, it might be admitted by way of the *res gestae* exception considering the very liberal rulings of what constitutes *res gestae* in a workman's compensation suit. See Temple v. Martin Veneer Co., 200 So. 676 (La. App. 1st Cir. 1941); Butler v. Washington-Youree Hotel Co., 160 So. 825 (La. App. 2d Cir. 1935); Armour Fertilizer Works, 8 La. App. 720 (Orl. Cir. 1928).

12. McCORMICK, EVIDENCE § 260 (1954); 5 WIGMORE, EVIDENCE § 1432 (3d ed. 1940).

13. LA. R.S. 15:249 (1950): "An indictment for murder or manslaughter may contain also a count for procuring or attempting to procure an abortion and the jury may convict of either offense. Dying declarations shall be admissible in evidence in proof of either count."

A few Anglo-American jurisdictions have similar statutes or have accomplished the same result by judicially modifying the majority rule. See *Annots.*, 91 A.L.R. 560 (1934), 49 A.L.R. 1282 (1927).

death is the subject of the indictment even where another is killed in the same affray.<sup>14</sup> This restriction was rejected in the first Louisiana case to face the issue, *State v. Wilson*.<sup>15</sup> In that case the state sought to convict the defendant of the murder of one victim by introducing the dying declaration of another killed in the same affray. The Louisiana Supreme Court squarely held that the dying declaraton was admissible even though it was not made by the victim whose death was the subject of the charge. However, the clear holding in the *Wilson* decision was not even mentioned in the subsequent case of *State v. Black*,<sup>16</sup> where the court adhered to the common law principle that the death of the declarant must be the subject of the charge for a dying declaration to be admissible. The *Wilson* decision would appear to be further weakened by dicta in *State v. Simon*.<sup>17</sup> However, the *Wilson* opinion still seems valid because it apparently was not called to the court's attention in deciding *Black*, and the pertinent language in the *Simon* decision was not necessary to the disposition of the case.

Another limitation restricts the use of dying declarations to a description of immediate facts and circumstances surrounding the criminal act.<sup>18</sup> Behind this limitation is the rationale that it is only with regard to these facts and circumstances that other witnesses are not ordinarily obtainable. Hence, dying declarations concerning such matters as prior threats on the life of the decedent by the accused have been held inadmissible.<sup>19</sup> Louisiana has accepted this restriction by limiting the use of dying declarations "to facts connected with the circumstances which caused the mortal wound."<sup>20</sup> Dying declarations containing other facts will not necessarily be excluded,<sup>21</sup> but those parts which

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14. 5 WIGMORE, EVIDENCE § 1433 (3d ed. 1940).

15. 23 La. Ann. 558 (1870). *Contra*, *Willis v. Kern*, 21 La. Ann. 749 (1869) (dictum).

16. 42 La. Ann. 861, 8 So. 594 (1890).

17. 131 La. 520, 59 So. 975 (1912). The defendant killed his wife and mother-in-law, but was only indicted for the murder of his wife. The defense counsel stated in his summation to the jury that the mother-in-law had made a dying declaration claiming responsibility for having fired the first shots. The trial court sustained the objection by the prosecution that no dying declaration had been introduced. In affirming this action the Supreme Court stated that even if there had been a dying declaration it would have been inadmissible because not made by the person whose death was the subject of the indictment.

18. 5 WIGMORE, EVIDENCE § 1434 (3d ed. 1940).

19. *Jones v. State*, 94 Okla. Crim. 359, 236 P.2d 102 (1951).

20. *State v. Black*, 42 La. Ann. 861, 864, 8 So. 594, 595 (1890). See *State v. Harris*, 112 La. 937, 36 So. 810 (1904); *State v. Wilson*, 23 La. Ann. 558 (1871).

21. *State v. Peace*, 121 La. 1071, 47 So. 28 (1908); *Dellinger v. Elliot Bldg.*

concern facts not connected with the fatal act will be deleted upon specific objection by the opposing party.<sup>22</sup>

Several rules relating to dying declarations are not entirely consistent with the notion that the necessity for the exception is bringing manslaughter to justice. For example, it is uniformly held that dying declarations are admissible when introduced by the defendant.<sup>23</sup> Similarly, the fact that the killing was not secret, or that other pertinent and adequate testimony as to the circumstances surrounding the crime is available, or that the defendant has admitted killing the deceased will not operate to bar the admissibility of a dying declaration on the ground of lack of its necessity.<sup>24</sup>

*Circumstantial probability of trustworthiness.* A necessary element to the introduction of any out-of-court statement as an exception to the hearsay rule is that it be made under circumstances which indicate that it is particularly reliable or trustworthy. In dying declarations this circumstantial probability of trustworthiness is supposedly furnished by the declarant's consciousness of "swift and impending doom."<sup>25</sup> The presumption is that such knowledge produces in the declarant a state of mind in which the ordinary motives inspiring falsehood are rendered inoperative.<sup>26</sup> Therefore, the party seeking admission of a dying declaration must first lay a foundation sufficient to support an inference that the declarant was conscious, to a certainty, of his approaching demise. The common law and Louisiana generally

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Co., 187 N.C. 845, 123 S.E. 78 (1924); Jones v. State, 94 Okla. Crim. 359, 236 P.2d 102 (1951).

22. State v. Crump, 116 La. 978, 41 So. 229 (1906); Dellinger v. Elliot Bldg. Co., 187 N.C. 845, 123 S.E. 78 (1924); Jones v. State, 94 Okla. Crim. 359, 236 P.2d 102 (1951).

23. State v. Ashworth, 50 La. Ann. 94, 23 So. 270 (1898); McCORMICK, EVIDENCE § 261 (1954). In the case of State v. Daniels, 115 La. 59, 38 So. 894 (1905) the Supreme Court, in dicta, went so far as to suggest that the *Ashworth* case stood for the proposition that the rules of admissibility with reference to dying declarations should be liberally applied when the declaration sought to be introduced favors the defendant. The language of the *Ashworth* case concerns the issue of whether or not the dying declaration in question would be excluded because of a strict application of the rule prohibiting opinion testimony. It extends only to the independent technical rules of evidence such as the opinion rule and not to the rules peculiar to dying declarations prescribing the proper foundation to be laid in order for them to be admissible.

24. State v. Williamson, 145 La. 9, 81 So. 737 (1919); State v. Peace, 121 La. 1071, 47 So. 28 (1908); State v. Carter, 107 La. 792, 32 So. 183 (1902). The above are cases where defendant conceded that he had killed deceased. See also 5 WIGMORE, EVIDENCE § 1435 (3d ed. 1940).

25. 5 WIGMORE, EVIDENCE § 1438 (3d ed. 1940).

26. *Ibid.*; State v. Jones, 38 La. Ann. 792 (1886); State v. Price, 6 La. Ann. 691 (1851).

agree that in order to establish a foundation for the introduction of a dying declaration the offering party must prove that the decedent was *in extremis*, that he was fully conscious of his condition, and that he made the declaration while under a sense of impending death, after having abandoned all hope or expectation of recovery.<sup>27</sup>

The actual physical condition of the declarant at the time the statement was made is material and relevant insofar as it casts light on the state of mind of the declarant, but it is not essential that he be actually at the point of death.<sup>28</sup> The pivotal question should be the declarant's belief as to his physical condition, not what it actually was. Consequently, a subsequent temporary revival or complete recovery will not of itself bar the admission of a dying declaration.<sup>29</sup> Practically speaking, however, it has been pointed out that the wider the disparity between the declarant's apparent belief of his approaching doom and his actual physical condition, the less probable it is that he actually believed the end was near.<sup>30</sup>

It is impossible to describe exactly the state of mind which a declarant must be in before his dying declaration will be clothed with an aura of circumstantial trustworthiness; but a description of certain qualities intrinsic to that state of mind may be helpful. The declarant must not merely consider himself in grave danger, but must have abandoned even the slightest hope of recovery.<sup>31</sup> However, the fact that at another time, either before or after the declaration was made, the declarant had entertained hopes of recovery will not of itself be a sufficient reason to exclude a dying declaration.<sup>32</sup> Although it has been stated that the declarant must believe that his death is immediate and impending,<sup>33</sup> one Louisiana court<sup>34</sup> refused to exclude a dying declaration on the ground that the declarant thought he would

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27. *State v. Daniels*, 115 La. 59, 38 So. 894 (1905); McCORMICK, EVIDENCE § 259 (1954).

28. *State v. Daniels*, 115 La. 59, 38 So. 894 (1905); *State v. Newhouse*, 39 La. Ann. 862, 2 So. 799 (1887); *State v. Keenan*, 38 La. Ann. 660 (1886).

29. *State v. Newport*, 178 La. 459, 151 So. 770 (1933); *State v. Robertson*, 162 La. 641, 110 So. 888 (1926); *State v. Clark*, 142 La. 305, 76 So. 722 (1917); *State v. Brown*, 111 La. 696, 35 So. 818 (1904). See 5 WIGMORE, EVIDENCE § 1441 (3d ed. 1940).

30. *State v. Augustus*, 129 La. 617, 56 So. 551 (1911).

31. *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904); 5 WIGMORE, EVIDENCE § 1440 (3d ed. 1940).

32. *State v. Newport*, 178 La. 459, 151 So. 770 (1933).

33. *State v. Molisse*, 36 La. Ann. 920 (1884); *State v. Judge Spencer*, 30 La. Ann. 362 (1878); 5 WIGMORE, EVIDENCE § 1441 (3d ed. 1940).

34. *State v. Moore*, 165 La. 163, 115 So. 445 (1928).

survive another six or seven hours. The court said that it was not "necessary to prove expressions implying apprehension of immediate danger, if it be clear that the party does not expect to survive the injury."<sup>35</sup>

The best proof that the declarant believed his death to be both certain and imminent is a direct statement by the declarant himself to that effect. Such statements may come immediately before or after the dying declaration itself,<sup>36</sup> and may even be separated from the making of the declaration by a short lapse of time.<sup>37</sup> Wherever the declarant's wound is obviously fatal and the declarant states unequivocally that he believes his death is both near and certain, contradictory expressions of hope of recovery by those attending the declarant,<sup>38</sup> including his physician,<sup>39</sup> have not operated to exclude the declaration. However, where the declarant himself makes contradictory statements, one moment stating that death is upon him and the next expressing in direct terms the belief that he will recover, his declaration has been excluded.<sup>40</sup> A more difficult problem presents itself where the declarant states unequivocally that he believes he is about to die and has no hope of recovery, then makes an apparently inconsistent request such as asking for a doctor or to be sent to a hospital. On two occasions a Louisiana court has refused to exclude a dying declaration merely because the declarant called for a doctor.<sup>41</sup> It was reasoned that such a request was not necessarily indicative of hope of recovery because he may have been seeking only relief from pain. However, a request to be taken to a *hospital* has been held to belie a declarant's prior statement that he believed death to be near and certain.<sup>42</sup> This result has not been reached where the declarant did not know where he was being taken,<sup>43</sup> had not consented to be taken,<sup>44</sup> or where the request was for reasons other than for purposes of treatment towards recovery.<sup>45</sup>

35. *Id.* at 165, 115 So. at 446.

36. *State v. Willis*, 181 La. 154, 158 So. 826 (1935).

37. *State v. McCollum*, 135 La. 432, 65 So. 600 (1914); *State v. Sadler*, 51 La. Ann. 1397, 26 So. 390 (1899).

38. *State v. Moore*, 165 La. 163, 115 So. 445 (1928).

39. *State v. Brady*, 124 La. 951, 50 So. 806 (1909).

40. *State v. Molisse*, 36 La. Ann. 920 (1884).

41. *State v. Boyd*, 157 La. 854, 103 So. 190 (1925); *State v. Bordelon*, 113 La. 690, 37 So. 603 (1904).

42. *State v. Price*, 192 La. 615, 188 So. 718 (1939); *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904).

43. *State v. Rosette*, 163 La. 481, 112 So. 372 (1927).

44. *State v. Brady*, 124 La. 951, 50 So. 806 (1909).

45. *State v. Newport*, 178 La. 459, 151 So. 770 (1933); *State v. Howard*,

Both Louisiana and other American jurisdictions agree that express statement by the declarant of his state of mind is not indispensable and that the necessary state of mind may be inferred from all the circumstances and facts concerning the making of a declaration.<sup>46</sup> The impact of his physical condition upon the declarant's mind judged by the nature of the wound itself and his appearance,<sup>47</sup> statements by the declarant to others,<sup>48</sup> and conversations among those within earshot of the declarant<sup>49</sup> are all factors to be considered.

Finally, it remains to determine exactly why courts attribute trustworthiness to the declarations of a man who thinks his end is near. Professor Wigmore lists the three explanations most often advanced by courts:

"(1) The declarant, being at the point of death, 'must lose the use of all deceit' — in Shakespeare's phrase. There is no longer any temporal self-serving purpose to be furthered.

"(2) If a belief exists in a punishment soon to be inflicted by a Higher Power upon human ill-doing, the fear of this punishment will outweigh any possible motive for deception, and will even counterbalance the inclination to gratify a possible spirit of revenge.

"(3) Even without such a belief, there is a natural and instinctive awe at the approach of an unknown future — a physical revulsion common to all men, irresistible, and independent of theological belief."<sup>50</sup>

Apparent motive of revenge has been held in Louisiana not to be a ground for excluding a dying declaration, but only a factor to be considered by the jury.<sup>51</sup> It is not clear whether lack of

120 La. 311, 45 So. 260 (1907) (consented to treatment at hospital for the sake of his wife and children's feelings).

46. *State v. Scott*, 12 La. Ann. 274 (1857); 5 WIGMORE, EVIDENCE § 1442 (3d ed. 1940).

47. *State v. Newport*, 178 La. 459, 151 So. 770 (1933); *State v. Boyd*, 157 La. 854, 103 So. 190 (1925); *State v. Augustus*, 129 La. 617, 56 So. 551 (1911); *State v. Smith*, 48 La. Ann. 533, 19 So. 452 (1896).

48. *State v. Newhouse*, 39 La. Ann. 862, 2 So. 799 (1887) (Roman Catholic calling for priest given as example of statements by declarant from which it can be inferred that he expected to die); *State v. Spencer*, 30 La. Ann. 362 (1878) (told children goodbye and asked his wife to take care of them). See also *State v. Buchanan*, 140 La. 420, 73 So. 253 (1916); *State v. Smith*, 48 La. Ann. 533, 19 So. 452 (1896); *State v. Somnier*, 33 La. Ann. 237 (1881).

49. *State v. Boyd*, 157 La. 854, 103 So. 190 (1925) (doctor told bystander declarant was mortally wounded).

50. 5 WIGMORE, EVIDENCE § 1443 (3d ed. 1940).

51. *State v. Moore*, 165 La. 163, 115 So. 445 (1928).



belief in divine retribution would be a bar to the admission of a dying declaration in Louisiana. *State v. Black*<sup>52</sup> listed "a sense of religious accountability" as a necessary element. However, in a later case, *State v. Blount*,<sup>53</sup> the court stated in dicta that lack of a sense of religious accountability would not preclude admission of a dying declaration, though it might be used to impeach the credibility of the decedent. The court reasoned that since a lack of religious belief does not render a witness incompetent in Louisiana, a dying declaration should not be excluded on that ground.<sup>54</sup> Further confusion is added to the picture by a Louisiana opinion expressing the view that repeated cursing was no indication that the declarant was not in the proper frame of mind, stating that persons addicted to profanity will use it even on the most solemn occasions.<sup>55</sup> Since a substantial number of jurisdictions where lack of religious belief does not render a witness incompetent<sup>56</sup> are in accord with the rule stated in *Blount*, Louisiana probably would not exclude a dying declaration merely because the declarant lacked a feeling of religious accountability.

#### *General Rules of Evidence as Applied to Dying Declarations*

A useful generalization at this point is that once a statement is found to be admissible as a dying declaration it is treated as if the declarant himself had given it from the witness stand and, with a few exceptions which will be noted later, such a declaration is subject to all the rules of evidence applicable to testimony in court.<sup>56</sup> Thus the declarant must have been in all respects a competent witness:<sup>57</sup> infancy,<sup>58</sup> insanity,<sup>59</sup> or irrationality<sup>60</sup> at the time of declaration will be grounds for exclusion.

Louisiana and other American jurisdictions generally hold that a dying declaration is open to impeachment by all means

52. 42 La. Ann. 861, 8 So. 594 (1890).

53. 124 La. 202, 50 So. 12 (1909).

54. The opinion referred to *State v. Williams*, 111 La. 179, 35 So. 505 (1903), which interpreted Act 29 of 1886.

55. *State v. Brady*, 124 La. 951, 50 So. 806 (1909).

56. *State v. Rankins*, 211 La. 791, 30 So.2d 837 (1947). See also 5 WIGMORE, EVIDENCE §§ 1443-45 (3d ed. 1940).

57. *State v. Blount*, 124 La. 202, 50 So. 12 (1909).

58. *State v. Rankins*, 211 La. 791, 30 So.2d 837 (1947); *State v. Frazier*, 109 La. 458, 33 So. 561 (1903).

59. *State v. Rankins*, 211 La. 791, 799, 30 So.2d 837, 839 (1947) ("in a doubtful case, the question of sanity should be left to the jury").

60. In *State v. Rankins*, 211 La. 791, 30 So.2d 837 (1947), the court quoted common law texts to the effect that a witness to the sanity, consciousness, or irrationality of the declarant need not be an expert and that a liberal attitude should be taken in deciding when a declarant is rational. See also 5 WIGMORE, EVIDENCE § 1445(1) (3d ed. 1940).

which can be utilized to discredit the testimony of living witnesses.<sup>61</sup> More specifically, evidence of bad reputation for truth and veracity and prior contradictory statements are admissible in order to detract from the weight of dying declarations.<sup>62</sup> Such impeaching statements need not themselves be dying declarations.<sup>63</sup> Prior consistent statements are admissible in order to rebut impeaching evidence.<sup>64</sup> Other grounds for impeaching dying declarations, as pointed out earlier, are evidence of a revengeful feeling toward the accused and lack of religious belief.<sup>65</sup>

The prohibition against opinion testimony applies to dying declarations. Therefore, lack of knowledge of facts on the part of the declarant should serve to exclude a dying declaration just as it would the testimony of a living witness.<sup>66</sup> Courts state that dying declarations are subject to the opinion testimony rule,<sup>67</sup> but there is a noticeable reluctance to exclude dying declarations solely on this ground.<sup>68</sup> As a matter of fact, no Louisiana case has been found excluding a dying declaration on the ground that it was opinion testimony. This reluctance seems justifiable. To expect a person who believes himself at the brink of death to compose his statements in the unfamiliar vernacular of pure fact is fanciful. Furthermore, if courts are willing to disregard rights of confrontation of witnesses, oath, and cross-examination in order to obtain the benefit of a dying declaration, it would seem unreasonable to exclude it on the basis of a highly technical rule of evidence which is of much less value in promoting justice.<sup>69</sup>

61. *State v. Charles*, 111 La. 933, 36 So. 29 (1904); *State v. Burt*, 41 La. Ann. 787, 6 So. 631 (1889); 5 WIGMORE, EVIDENCE § 1446 (3d ed. 1940).

62. *State v. Burt*, 41 La. Ann. 787, 6 So. 631 (1889).

63. *State v. Charles*, 111 La. 933, 36 So. 29 (1904).

64. *State v. Burt*, 41 La. Ann. 787, 6 So. 631 (1889). See 5 WIGMORE, EVIDENCE § 1446 (3d ed. 1940).

65. *State v. Moore*, 165 La. 163, 115 So. 445 (1928); *State v. Blount*, 124 La. 202, 50 So. 12 (1909); 5 WIGMORE, EVIDENCE § 1446 (3d ed. 1940).

66. 5 WIGMORE, EVIDENCE § 1445(2) (3d ed. 1940). Although no Louisiana case has been found where a proffered dying declaration was excluded solely because of a lack of knowledge on the declarant's part, in *State v. Cutrera*, 143 La. 738, 79 So. 322 (1918), the court's exclusion of the declaration seems to be based, in part, upon considerations of this nature. Where there is room for doubt, the better view would seem to be to admit the declaration and submit the issue of sufficiency to the jury. See *Bland v. State*, 210 Ga. 100, 78 S.E.2d 51 (1953).

67. McCORMICK, EVIDENCE § 262 (1954); 5 WIGMORE, EVIDENCE § 1447 (3d ed. 1940). See *State v. Black*, 42 La. Ann. 861, 8 So. 594 (1890).

68. *State v. Clifton*, 187 La. 62, 174 So. 109 (1937); *State v. Pierfax*, 158 La. 927, 105 So. 16 (1925); *State v. Peace*, 121 La. 1071, 47 So. 28 (1908); *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904); *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898); *State v. Trivas*, 32 La. Ann. 1086 (1880); *Haney v. Commonwealth*, 5 Ky. L. Rep. 178 (1883); *State v. Saunders*, 14 Ore. 300, 12 Pac. 441 (1886).

69. See *State v. Carter*, 107 La. 792, 32 So. 183 (1902).

Generally, the rule which prohibits eliciting testimony by means of leading questions has no application to dying declarations.<sup>70</sup> Thus a dying declaration may be elicited by leading questions.<sup>71</sup> This departure from the general rule that dying declarations are subject to the same objections as in-court testimony seems justifiable since very often the declarant may be so close to death that he has but a few words left. Furthermore, a leading question cannot be rephrased after objection as is possible when examining a witness in the courtroom. However, the situation is usually one in which memory may be very easily supplied rather than stimulated. Hence, courts should be careful that a statement is really that of the declarant and not of his interrogator.

There is no sacramental requirement of the form in which a dying declaration may be made either as to words used or means employed in communicating them.<sup>72</sup> Also the thought need not even be expressed in words.<sup>73</sup>

If a dying declaration is in writing, some formality does creep into the picture by application of the parol evidence rule.<sup>74</sup> Where a dying declaration is recorded by a witness, it may be proved either by the written memorandum or by oral testimony of one present when the declaration was made.<sup>75</sup> However, where the memorandum is signed or otherwise verified by the declarant, oral testimony contradictory to the signed statement is inadmissible under the parol evidence rule.<sup>76</sup> Where two separate and distinct statements were made at different times — one orally and one written — it is uniformly held that the written declaration does not exclude proof of the one made orally.<sup>77</sup>

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70. 5 WIGMORE, EVIDENCE § 1445 (3d ed. 1940).

71. *State v. Pierfax*, 158 La. 927, 105 So. 16 (1925); *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898); *State v. Parham*, 48 La. Ann. 1309, 20 So. 727 (1896).

72. 5 WIGMORE, EVIDENCE § 1445 (3d ed. 1940).

73. *State v. Pierfax*, 158 La. 927, 105 So. 16 (1925) (no requirement that it be expressed in particular words); *State v. Parham*, 48 La. Ann. 1309, 20 So. 727 (1896); *State v. Daniel*, 31 La. Ann. 91 (1879) (no need that the declaration be sworn or in writing); 5 WIGMORE, EVIDENCE § 1445(4) (3d ed. 1940).

74. Professor Wigmore deplors the application of the parol evidence rule to a signed dying declaration since it is not a contract or other legal act between two parties. 5 WIGMORE, EVIDENCE § 1450(B) (3d ed. 1940).

75. *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904); 5 WIGMORE, EVIDENCE § 1450(A) (3d ed. 1940).

76. 5 WIGMORE, EVIDENCE 253 (3d ed. 1940).

77. *Id.* at 254.

The parol evidence rule does not exclude parol proof of a written declaration which has been lost or destroyed.<sup>78</sup> It should also be noted that the parol evidence rule has been held not to exclude parol proof of the frame of mind of a declarant even though contradictory to a statement made in an instrument offered as a written dying declaration.<sup>79</sup> Such proof governs whether or not an instrument qualifies as a dying declaration and is not concerned with guilt or innocence of the accused.

Dying declarations must conform to the principle of completeness before they are admissible.<sup>80</sup> Thus, where a statement is unfinished to such an extent that it appears probable that the declarant meant to qualify it by some further statement, it is inadmissible. Similarly, the offering party must tender the whole of a dying declaration and not just those parts favorable to his cause. A witness testifying as to the substance of a dying declaration need not relate all the statements made by the deceased in his presence and the precise language used by the declarant need not be used. It is only necessary that the witness heard and remembered the substance of all statements addressed by the declarant to the witness personally or as a member of a group.<sup>81</sup>

### *Procedural Aspects in the Use of Dying Declarations*

If the prosecution plans to introduce a dying declaration, the opening statement must mention this and detail facts intended to be established by it.<sup>82</sup> Whenever a dying declaration is tendered, it is the function of the trial judge to pass upon its admissibility on the basis of the foundation laid by the proponent of the declaration.<sup>83</sup> Once the trial judge has ruled the declaration admissible, it is the function of the jury to determine what weight should be attached to the declaration,<sup>84</sup> and

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78. *State v. Clark*, 142 La. 305, 76 So. 722 (1917); *State v. Rector*, 35 La. Ann. 1098 (1883). For two earlier cases in which the problem was present but not raised, see *State v. Somnier*, 33 La. Ann. 237 (1881); *State v. Viaux*, 8 La. Ann. 514 (1852).

79. *State v. Molisse*, 36 La. Ann. 920 (1884).

80. 7 WIGMORE, EVIDENCE 466 (3d ed. 1940).

81. *State v. Ashworth*, 50 La. Ann. 94, 23 So. 270 (1898); *State v. Parham*, 48 La. Ann. 1309, 20 So. 727 (1896). See 5 WIGMORE, EVIDENCE 251 (3d ed. 1940).

82. *State v. Newport*, 178 La. 459, 151 So. 770 (1933).

83. *State v. Trivas*, 32 La. Ann. 1086 (1880). See also *State v. Buchanan*, 140 La. 420, 73 So. 253 (1916), which held that it was reversible error for the judge to refuse to hear the evidence offered by the opponent to weaken the foundation laid. See 5 WIGMORE, EVIDENCE 256 (3d ed. 1940).

84. *State v. Trivas*, 32 La. Ann. 1086 (1880); 5 WIGMORE, EVIDENCE § 1451(B) (3d ed. 1940).

the evidence used as a foundation should be resubmitted in order to aid the jury.<sup>85</sup> The foundation should be laid out of the presence of the jury.<sup>86</sup> Failure to object to admissibility when a foundation is being laid does not preclude objection when the statement itself is offered to the jury as a dying declaration. However, on appeal it does raise the inference that the trial judge was correct in ruling the declaration admissible.<sup>87</sup> It is not error for a witness to state to the jury parts of the declaration which he failed to mention to the judge when the foundation was being laid, provided the declaration would have been nevertheless admissible.<sup>88</sup>

### *Conclusion*

The Louisiana Supreme Court has stated emphatically that a theological belief in a future state of rewards and punishment is *not* a prerequisite to the admissibility of a dying declaration.<sup>89</sup> Also it has been held that temporal motives such as hatred or revenge on the part of the declarant will not prevent admission of a dying declaration.<sup>90</sup> Therefore, justification of the admission of dying declarations in Louisiana today must rest on the theory that the prospect of death paralyzes the ordinary stimuli to prevaricate,<sup>91</sup> much in the same manner that spontaneous reaction justifies the *res gestae* exception. Whether or not this judicial belief is justified is not to be found in law books. The answer must lie in the fields of psychology and physiology. What is needed is not legal research, but scientific research.

Withering criticism of the law of dying declarations has been leveled at the rules which limit their use to criminal prosecutions for homicide where the death of the declarant is the subject of the charge, and limit their contents to circumstances surrounding the homicide. As pointed out earlier, these rules developed from the view that the necessity justifying the admission of dying declarations is the difficulty of otherwise ascertaining the truth concerning homicides. However, it seems that the science of criminology has largely obviated this necessity by development of new techniques such as fingerprinting, ballis-

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85. *State v. Bordelon*, 113 La. 690, 37 So. 603 (1904).

86. *State v. Rankins*, 211 La. 791, 30 So.2d 837 (1947); *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904).

87. *State v. Bordelon*, 113 La. 690, 37 So. 603 (1904).

88. *State v. Smothers*, 168 La. 1099, 123 So. 781 (1929).

89. *State v. Blount*, 124 La. 202, 50 So. 12 (1909).

90. *State v. Moore*, 165 La. 163, 115 So. 445 (1928).

91. See text at note 50 *supra*.

tics and the like. True, evidence by these means is largely circumstantial, but it cannot be seriously doubted that it is ordinarily more reliable than statements of a man whose faculties may be greatly impaired by a mortal wound and thoughts of approaching death.

Several states have, in varying degrees, moved in the direction of loosening the restrictions on the admissibility of dying declarations. As early as 1914, Kansas discarded the restriction limiting the use of dying declarations to criminal proceedings.<sup>92</sup> Arkansas and North Carolina have enacted statutes permitting the use of dying declarations in civil cases for wrongful death injuries.<sup>93</sup> Colorado has gone one step further, statutorily, by admitting dying declarations "in all civil and criminal trials and other proceedings."<sup>94</sup> The furthest departure from the common law rule has occurred in Massachusetts which permits any statements of a deceased person made under "unsuspicious circumstances" to be admitted in civil proceedings, thereby removing even the need for a foundation to be laid by the offering party.<sup>95</sup> The Uniform Rules make no distinction between civil and criminal cases. They provide for the admission of a "statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery."<sup>96</sup>

The experiences of the jurisdictions noted above under their relatively liberal rules relating to the use of dying declarations might well be studied by the drafters of Louisiana's proposed Code of Evidence. Such a study would give some idea of what impact these various reforms of the law of dying declarations would have on litigation in this state if adopted.

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92. *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625, 50 L.R.A.(N.S.) 1167 (1914).

93. ARK. STAT. § 28-712 (1947); N.C. GEN. STAT. § 28-173 (1950).

94. COLO. STAT. ANN. ch. 63, § 21 (1935).

95. MASS. ANN. LAWS ch. 233, § 65 (1956).

96. UNIFORM RULE OF EVIDENCE 63(5). See also the provisions of Rule 63(4), providing that if a "declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action," the declaration would not be barred by the hearsay rule.

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