CHAPTER IX.

OF DYING DECLARATIONS.

§ 156. A *fourth exception* to the rule, rejecting hearsay evidence, is allowed in the case of *dying declarations*. The general principle, on which this species of evidence is admitted, was stated by Lord Chief Baron Eyre to be this, — that 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 Justice.[1] It was at one time held, by respectable authorities, that this general principle warranted the admission of dying declarations in all cases, civil and criminal; but it is now well settled that they are admissible, as such, only in cases of homicide, "where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations."[2] The reasons for thus restricting it may be, that

[1] Rex *v.* Woodcock, 2 Leach's Cr. Cas. 556, 267; Drummond's case, 1 Leach's Cr. Cas. 378. In the earliest reported case on this subject, the evidence was admitted without objection, and apparently on this general ground. Rex *v.* Reason et al. 6 State Tr. 195, 201.

[2] Rex *v.* Mead, 2 B. & C. 605. In this case the prisoner had been convicted of perjury, and moved for a new trial, because convicted against the weight of evidence; after which he shot the prosecutor. Upon showing cause against the rule, the counsel for the prosecution offered the dying declarations of the prosecutor, relative to the fact of perjury; but the evidence was adjudged inadmissible. The same point was ruled by Bayley, J. in Rex *v.* Hutchinson, who was indicted for administering poison to a woman pregnant, but not quick with child, in order to procure abortion. 2 B. & C. 608, note. This doctrine was well considered, and approved in Wilson *v.* Boerem, 15 Johns. 286. In Rex *v.* Lloyd et al. 4 C. & P. 233, such declarations were rejected on a trial for robbery. Upon an indictment for the murder of A. by poison, which was also taken by B., who died in consequence, it was held that the dying declarations of B. were admissible, though the prisoner was not indicted for murdering her. Rex *v.* Baker, 2 M. & Rob. 53.

credit is not in all cases due to the declarations of a dying person; for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest.[1] These, or the like considerations, have been regarded as counterbalancing the force of the general principle above stated; leaving this exception to stand only upon the ground of the public necessity of preserving the lives of the community, by bringing manslayers to justice. For it often happens, that there is no third person present to be an eye-witness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed.[2] But in thus restricting the evidence of dying declarations to cases of trial for homicide of the declarant, it should be observed, that this applies only to declarations offered on the sole ground, that they were made *in extremis;* for where they constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible as in other cases; irrespective of the fact, that the declarant was under apprehension of death.[3]

[1] Jackson *v.* Kniffen, 2 Johns. 31, 35, per Livingston, J.

[2] 1 East, P. C. 353.

[3] Ante, § 102, 108, 109, 110, 147, 148, 149. To some of these classes may be referred the cases of Wright *v.* Littler, 3 Burr. 1244; Aveson *v.* Ld. Kinnaird, 6 East, 188; and some others. It was once thought that the dying declarations of the subscribing witness to a forged instrument were admissible to impeach it; but such evidence is now rejected, for the reasons already stated. Ante, § 126. See Stobart *v.* Dryden, 1 Mees. & W. 615, 627. In Regina *v.* Megson et al., 9 C. & P. 418, 420, the prisoners were tried on two indictments, one for the murder of Ann Stewart, and the other

§ 157. The persons, whose declarations are thus admitted, are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath. It follows, therefore, that where the declarant, if living, would have been incompetent to testify, by reason of infamy, or the like, his dying declarations are inadmissible.[1] And, as an oath derives the value of its sanction from the religious sense of the party's accountability to his Maker, and the deep impression that he is soon to render to Him the final account; wherever it appears that the declarant was incapable of this religious sense of accountability, whether from infidelity, imbecility of mind, or tender age, the declarations are alike inadmissible.[2] On the other hand, as the testimony of an accomplice is admissible against his fellows, the dying declarations of a *particeps criminis* in an act, which resulted in his own death, are admissible against one indicted for the same murder.[3]

§ 158. It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were *made under a sense of impending death;* but it is not necessary that they should be stated, at the time, to be so made. It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances

for a rape upon her. In the former case, her declarations were rejected, because not made *in extremis;* and in the latter so much of them as showed that a dreadful outrage had been perpetrated upon her, was received as part of the outrage itself, being, in contemplation of law, contemporaneous; but so much as related to the identity of the perpetrators was rejected. See also Regina *v.* Hewett, 1 Car. & Marshm. 534.

[1] Rex *v.* Drummond, 1 Leach's Cr. Cas. 378.

[2] Rex *v.* Pike, 3 C. & P. 598; Phil. & Am. on Evid. 296; 1 Phil. Evid. 289; 2 Russell on Crimes, 688.

[3] Tinckler's case, 1 East, P. C. 354.

of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind.[1] The length of time which elapsed between the declaration and the death of the declarant, furnishes no rule for the admission or rejection of the evidence; though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief, that his dissolution was or was not impending. It is the *impression* of almost immediate dissolution and not the rapid succession of death in point of fact, that renders the testimony admissible.[2] Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible.[3] On the other hand, a belief that he will not recover, is not in itself sufficient, unless there be also the prospect of "almost immediate dissolution."[4]

[1] Rex *v.* Woodcock, 2 Leach's Cr. Cas. 567; John's case, 1 East, P. C. 357, 358; Rex *v.* Bonner, 6 C. & P. 386; Rex *v.* Van Butchell, Id. 631; Rex *v.* Mosley, 1 Moody's Cr. Cas. 97; Rex *v.* Spilsbury, 7 C. & P. 187, per Coleridge, J.; Reg. *v.* Perkins, 2 Mood. Cr. Cas. 135.

[2] In Woodcock's case, 2 Leach's Cr. Cas. 563, the declarations were made forty-eight hours before death; in Tinckler's case, 1 East, P. C. 354, some of them were made ten days before death; and in Rex *v.* Mosley, 1 Mood. Cr. Cas. 97, they were made eleven days before death; and were all received. In this last instance it appeared that the surgeon did not think the case hopeless, and told the patient so; but that the patient thought otherwise. See also Regina *v.* Howell, 1 Dennis. Cr. Cas. 1. In Rex *v.* Bonner, 6 C. & P. 386, they were made three days before death.

[3] So ruled in Welborn's case, 1 East, P. C. 358, 359; Rex *v.* Christie, 2 Russ on Crimes, 685; Rex *v.* Hayward, 6 C. & P. 157, 160; Rex *v.* Crockett, 4 C. & P. 544; Rex *v.* Fagent, 7 C. & P. 238.

[4] Such was the language of Hullock, B. in Rex *v.* Van Butchell, 3 C. & P. 629, 631. See acc. Woodcock's case, 2 Leach's Cr. Cas. 567, per Ld. C. B. Eyre; Rex *v.* Bonner, 6 C. & P. 386; Commonwealth *v.* King, 2 Virg. Cases, 78; Commonwealth *v.* Gibson, Ib. 111; Commonwealth *v.* Vass, 3 Leigh, R. 786; The State *v.* Poll et al., 1 Hawks, 442; Regina *v.* Perkins, 9 C. & P 395; 2 Mood. Cr. Cas. 135, S. C.; Rex *v.* Ashton, 2 Lewin's Cr. Cas. 147.

§ 159. The declarations of the deceased are admissible *only to those things, to which he would have been competent to testify*, if sworn in the cause. They must therefore in general speak to facts only, and not to mere matters of opinion; and must be confined to what is relevant to the issue. But the right to offer them in evidence is not restricted to the side of the prosecutor; they are equally admissible in favor of the party charged with the death.[1] It is not necessary, however, that the examination of the deceased should be conducted after the manner of interrogating a witness in the cause; though any departure from this mode may affect the value and credibility of the declarations. Therefore it is no objection to their admissibility, that they were made in answer to leading questions, or obtained by pressing and earnest solicitation.[2] But whatever the statement may be, it must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received.[3]

§ 160. The *circumstances* under which the declarations were made are to be *shown to the Judge;* it being his province, and not that of the Jury, to determine whether they are admissible. In *Woodcock's* case, the whole subject seems to have been left to the Jury, under the direction of the Court, as a mixed question of law and fact; but subsequently it has always been held a question exclusively for the consideration of the Court; being placed on the same ground with the preliminary proof of documents, and of the competency of witnesses, which is always addressed to the Court.[4] But after

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1 Rex *v.* Scaife, 1 Mood. & Ro. 551; 2 Lewin's Cr. Cas. 150, S. C.

2 Rex *v.* Fagent, 7 C. & P. 238; Commonwealth *v.* Vass, 3 Leigh, R. 786; Rex *v.* Reason et al. 1 Stra. 499; Rex *v.* Woodcock, 2 Leach, Cr. Cas. 563.

3 3 Leigh, R. 797.

4 Said per Ld. Ellenborough, in Rex *v.* Hucks, 1 Stark. R. 521, 523, to

the evidence is admitted, its credibility is entirely within the province of the Jury, who of course are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the Judge, and to give the testimony only such credit as, upon the whole, they may think it deserves.[1]

§ 161. If the statement of the deceased was *committed to writing, and signed by him*, at the time it was made, it has been held essential, that the writing should be produced, if existing; and that neither a copy, no parol evidence of the declarations, could be admitted to supply the omission.[2] But where the declarations had been repeated at different times, at one of which they were made under oath, and informally reduced to writing by a witness, and at the others they were not, it was held, that the latter might be proved by parol, if the other could not be produced.[3] If the deposition of the deceased has been taken, under any of the statutes on that subject, and is inadmissible, as such, for want of compliance

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have been so resolved by all the Judges, in a case proposed to them. Welborn's case, 1 East, P. C. 360; John's case, Ib. 358; Rex *v.* Van Butchell, 3 C. & P. 629; Rex *v.* Bonner, 6 C. & P. 386; Rex *v.* Spilsbury, 7 C. & P. 187, 190; The State *v.* Poll et al., 1 Hawks, 444.

1 2 Stark. Evid. 263; Phil. & Am. on Evid. 304; Ross *v.* Gould, 5 Greenl. 204; Vass's case, 3 Leigh, R. 794. See also the remarks of Mr. Evans, 2 Poth. on Oblig. 256, (294), App. No. 16, who thinks that the Jury should be directed, previous to considering the effect of the evidence, to determine, — 1st, whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred; — 2d, whether the inference, deduced from such circumstances or expressions, is correct; — 3d, whether the deceased did make the declarations alleged against the accused; — and 4th, whether those declarations are to be admitted as sincere and accurate. Trant's case, McNally's Evid. 385.

2 Rex *v.* Gay, 7 C. & P. 230; Trowter's case, P. 8 Geo. 1, B. R. 12 Vin. Abr. 118, 119; Leach *v.* Simpson et al. In Scac. Pasch. 1839, 1 Law & Eq. R. 58.

3 Rex *v.* Reason et al. 1 Str. 499, 500.

with some of the legal formalities, it seems it may still be treated as a dying declaration, if made *in extremis*.[1]

§ 162. Though these declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances, in respect of which the deceased was not likely to have been mistaken, are entitled to great weight, if precisely identified; yet it is always to be recollected, that the accused has not the *power of cross-examination*, — a power quite as essential, to the eliciting of all the truth, as the obligation of an oath can be; — and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger, and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements; especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn. And it is further to be considered, that the particulars of the violence, to which the deceased has spoken, were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed; and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.[2]

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[1] Rex *v.* Woodcock, 2 Leach, Cr. Cas. 563; Rex *v.* Callaghan, McNally's Evid 385.

[2] Phil. & Am. on Evid. 305, 306; 1 Phil. Evid. 292; 2 Johns 35, 36, per Livingston, J. See also Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255, (293); 2 Stark. Ev. 263. See also Rex *v.* Ashton, 2 Lewin's Cr. Cas. 147, per Alderson, B.

CHAPTER X.

OF THE TESTIMONY OF WITNESSES SUBSEQUENTLY DEAD, ABSENT, OR DISQUALIFIED.

§ 163. In the *fifth class* of exceptions to the rule rejecting hearsay evidence, may be included *the testimony of deceased witnesses, given in a former action, between the same parties;* though this might, perhaps, with equal propriety, be considered under the rule itself. This testimony may have been given either orally, in Court, or in written depositions, taken out of Court. The latter will be more particularly considered hereafter, among the Instruments of Evidence. But at present we shall state some principles applicable to the testimony, however given. The chief reasons for the exclusion of hearsay evidence, are the want of the sanction of an oath, and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties.[1] It is also received, if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party.[2] But testimony thus offered is open to all the

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[1] Bull. N. P. 239, 242; Mayor of Doncaster *v.* Day, 3 Taunt. 262; Glass *v.* Beach, 5 Verm. 172; Lightner *v.* Wike, 4 S. & R. 203.

[2] Bull. N. P. 239, 243; 1 Stark. Evid. 264; 12 Vin. Abr. 107, A. b. 31; Godb. 326; Rex *v.* Eriswell, 3 T. R. 707, 721, per Ld. Kenyon. As to the effect of interest subsequently acquired, see post, § 167. Upon the question, whether this kind of evidence is admissible in any other contingency, except the death of the witness, there is some discrepancy among the