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# Recent Cases

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## EVIDENCE—DYING DECLARATIONS

*Cummings v. Illinois Central Railroad*[1]

The writer for many years has had and he continues to have an exceptionally high opinion of the Supreme Court of Missouri. Its assertion of honest, logical, and practical ideas and its refusal to be shackled to the past has been refreshing. An exceptional example of this was the court's assertion of its right to determine who should be permitted to practice law. In addition, the court has in several situations changed the old rules as to admission of evidence in particular cases, properly broadening those rules.

The question is as to why the court failed to do this in connection with dying declarations.

In its opinion in the case being reviewed, it quoted Wigmore, certainly an outstanding authority on evidence, as saying that the limitation on the admissibility of dying declarations to homicide cases is a heresy of the last century, which has not even the sanction of antiquity.

Further, the court says that it would logically seem that the admissibility of a dying declaration should not hinge upon the type of case in which it is offered in evidence.

Notwithstanding Wigmore's quoted statement and the admitted logic of not limiting the use of dying declarations to homicide cases, the court continued to support the heresy and refused to be logical.

Their justification for this was that dying declarations were reluctantly accepted as an exception to the hearsay rule. This does not seem to be a valid reason for the result. If dying declarations are not properly an exception to the hearsay rule, the court should frankly say so. But if dying declarations should be such an exception, the declarant should certainly be treated as telling the truth as to relevant statements concerning any kind of a case.

Not only was the supreme court unwilling to act logically, but it refused to assert its right and duty to determine what types of evidence are admissible. Rather, it relinquished this duty to the legislature. This, the writer claims, is very unfortunate.

Clearly, it is proper for legislatures to consist of people in various walks of life, as they do. However, this very fact makes a legislature unqualified to determine what types of evidence should be admissible, for many of them have no training

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1. 269 S.W.2d 111 (Mo. 1954).

to qualify than for voting intelligently on this problem. Such unqualified persons should not pass on the admissibility of evidence even though they followed the suggestion of lawyer legislators. Their vote would have no proper basis, as one's vote should not be based wholly on the suggestion of another. Though Wigmore suggests that legislatures broaden their law, it is believed that he felt that this should be done only if the courts would not do it. If this is not true, the writer thinks that, for reasons already stated, he was incorrect in his conclusion.

This decision of our supreme court is, to the writer, out of character and it is hoped that it will be corrected at the earliest opportunity.

CARL C. WHEATON*

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## EVIDENCE—DYING DECLARATIONS—JURY'S DUTY

*State v. Proctor*[1]

The decision of our supreme court to the effect that a jury may pass on the facts which are essential to make a statement a dying declaration, even though the court has already passed on them is interesting because of the basis of the decision. Since this holding is based directly on *State v. Custer*,[2] let us investigate the reasoning in that case.

The court admits that it is the approved practice, at least if so requested, for the court first to hear evidence of the facts and circumstances surrounding the alleged dying declaration. This is, of course, correct, since the court should determine the admissibility of evidence.

Not only is this true, but the usual rule is that the court alone does that. The evidence, if admissible, is heard by the jury, which determines what credibility should be given the evidence. That credibility is determined by what the jurors hear and see of the witness, without consideration of what was told the court in order that it might determine the admissibility of the evidence.

It is at this point that the court in the *Custer* case goes astray. It says that whether the declaration was made under a sense of impending death is a question affecting the credibility of the declaration. If that is true, in all cases involving the admissibility of hearsay, the jury should be permitted to pass on the facts which determine whether the statement is admissible on the ground that the credibility of the declarations depends in part on those facts.

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1. 269 S.W.2d 624 (Mo. 1954).
2. 336 Mo. 514, 517 (1), 80 S.W.2d 176, 177 (1, 2) (1935).

But this is not the law in Missouri and was not the law when the *Custer* case was decided. Why should there be an exception to the usual rule in the case of dying declaration? The writer sees no reason for such an exception and is opposed to it.

Another reason given for this exceptional holding is that the majority of courts outside of Missouri have given juries the right to pass on the question whether the dying declaration was made by one under a sense of impending death. This reason is not a weighty one. The question is not what courts of other states have decided, but what is the correct holding. Our court has not in recent years hesitated to make decisions squarely in opposition to the holdings in other states and even in Missouri.

It seems that here is a situation in which the former Missouri rule, contrary to the present one, should be readopted.

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## TORTS—LIABILITY OF LANDOWNER TO CHILD TRESPASSER

*Wells v. Henry Kuhs Realty Company*[1]

Plaintiffs brought this action to recover damages for their son's wrongful death allegedly caused by defendant's negligence. Deceased, who was eleven years old while playfully chasing a flying bug along an alley which adjoined defendant's unimproved tract of land, strayed three feet onto defendant's premises, where he tripped and fell on a privately maintained dump impaling himself on broken glass. Prior to this, children in the neighborhood had habitually resorted to defendant's premises and the alley for play. Defendant had knowledge of this fact. A city ordinance prohibited the deposit of refuse on any property not operated under permit and subject to inspection. Defendant violated the ordinance in that it never applied for a permit. There was no warning sign or barrier separating the dump from the alley. The line of demarcation between the alley and defendant's land was obscured by debris. The lower court dismissed the action with prejudice on the ground that the petition did not state a claim upon which relief could be granted. The Missouri Supreme Court upheld the claim, not on the basis of violation of the ordinance, but in accordance with the common law governing the relationship of plaintiff's son to defendant.

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1. 269 S.W.2d 761 (Mo. 1954).

The precise duty owed by a possessor to persons coming on his property depends on the existing relationship between the injured party and the possessor at the time the injury occurs.[2] The Missouri decisions classify persons who enter land in the possession of another as invitees, licensees, and trespassers. A landowner owes a duty to invitees to exercise ordinary care to have the premises in a reasonably safe condition, and, if there are hidden dangers, he must use ordinary care to warn thereof.[3] A bare licensee takes the premises as he finds them, barring wantonness or some intentional wrong or active negligence of the landowner.[4] As a general rule, a landowner owes no duty to a trespasser going on his land to maintain it in a particular condition for the trespasser's benefit or safety.[5]

In the instant case the child who entered defendant's land was a trespasser.[6] The above stated rule of no duty on the part of landowners has long been the general rule in this state. There are, however, a few exceptions to this general statement: 1) An owner of land is liable for concealed spring guns or other hidden traps intentionally put out to injure trespassers.[7] 2) A property owner is liable to children who are injured when the trespasses were caused by the attraction of an instrumentality or condition which is inherently dangerous and they were injured by the same instrumentality or condition.[8] 3) An owner of a lot abutting a convenient or accustomed route is under an obligation to guard it so as to render it secure for those using the route.

This latter exception, sometimes known as the hard-by-the-public-way rule, is well grounded in Missouri.[9] Essentially, it modifies the general rule of nonliability to trespassers by placing a duty on landowners who make changes in their land which is so hard by a public way as to put travelers in danger who inadvertently step therefrom into the danger. Because of the well known tendency of children to deviate in their play, a wider area of deviation is allowed them than is adults.[10]

In the instant case, the question might be raised as to whether the child inadvertently stepped or intentionally strayed onto the defendant's premises. If it were the latter, it seems that the child's parents would not be allowed recovery because there is only a duty on the landowner to anticipate inadvertent deviation, and not intentional deviation. The argument that the child intended to go after

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2. Jennings v. Industrial Paper Stock Co., 248 S.W.2d 43 (Mo. App. 1952).
3. Ilgenfritz v. Missouri Power & Light Co., 340 Mo. 648, 101 S.W.2d 723 (1937); Murphy v. Cullers, 241 S.W.2d 13 (Mo. App. 1951).
4. Oliver v. Oakwood Country Club, 245 S.W.2d 37 (Mo. 1951).
5. Berry v. St. Louis, M. & S. E. R.R., 214 Mo. 593, 114 S.W. 27 (1908); Kelly v. Benos, 217 Mo. 1, 116 S.W. 557 (1909).
6. A trespasser is one who comes on the premises without the consent of the possessor and without a privilege to do so created by the law. Twine v. Norris Grain Co., 226 S.W.2d 415 (Mo. App. 1950).
7. Kelly v. Benos, *supra*, n. 5.
8. Holifield v. Wigdon, 361 Mo. 636, 235 S.W.2d 564 (1951).
9. Buesching v. The St. Louis Gaslight Co., 73 Mo. 219 (1880); Dutton v. City of Independence, 227 Mo. App. 275, 50 S.W.2d 161 (1932).
10. Shannon v. Kansas City Light and Power Co., 315 Mo. 1136, 287 S.W. 1031 (1926).

the bug, regardless of where it went, could possibly have validity insofar as defeating the contention of an inadvertent deviation, making it intentional. Other than the attractive nuisance cases, the Missouri courts have not held that a duty exists on the part of the landowner to anticipate children intentionally trespassing, except in cases where children intentionally climb trees and are injured by wires of an electric company.[11] In those cases the courts held that there was a duty on the part of the companies to anticipate childrens' natural instinct to climb trees if wires were strung through the trees, thus holding them liable. These electric company cases seem to constitute the only extension to the rule that there is liability only for inadvertent stepping off the public way.

The court, in this case, added another extension onto the already existing hard-by-the-public-way rule.[12] Thus, as the law now stands, a landowner is liable to young children injured on his premises by dangerous conditions because of their tendency to deviate from the frequented path.[13]

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11. Godfrey v. Kansas City Light & Power Co., 299 Mo. 472, 253 S.W. 233 (1923); Shannon v. Kansas City Light and Power Co., *supra*; Williams v. Springfield Gas & Electric Co., 274 Mo. 1, 202 S.W. 1 (1918).

12. The court relies heavily upon Witt v. Stifel, 126 Mo. 295, 28 S.W. 891 (1894) in reaching its decision. In the Witte case, defendants were not held liable for a child's death caused by his pulling an unmortored stone down upon himself because the defendants did not have knowledge of the children habitually playing on their land. The present case adopts the statement from the Witte case that states that he who owns property must so use it as not to unnecessarily injure others. This is a rule of law applicable to *nuisance* actions and not to negligence actions. However, in deciding the principle case, the court quoted the above statement from the Witte case, and thus derived a duty to use care, a breach of which would make defendant liable for *negligence*. It could more appropriately be based on the cases supporting hard-by-the-public-way rule.

13. RESTATEMENT OF TORTS, § 369. A possessor of land abutting upon a public highway is subject to liability for bodily harm caused to young children by an excavation or other artificial condition maintained by him thereon so close to the highway that it involves an unreasonable risk to such children because of their tendency to deviate from the highway.