To tolerate this exceptional rule, the declarant ought to be, at the time of making the declarations, under the impression of almost immediate dissolution, and without any hope of recovery.

When that has departed—when he is conscious he is, in a moment, to be among the dead, and his soul to take its flight from the body, thus circumstanced, it might be said, his declarations, understandingly made, were of equal force with his testimony delivered in a court of justice; and entitled to be received, and justly, were it not for the fact, the accused was not present, and had no opportunity to cross-examine him.

The bed of death affords no opportunity for this; and the accused may become the victim of statements, which, by reason of the fading condition of the body, in which the mind must in in some degree participate, of him who makes them, *depriving* them of that clearness, distinctness and correctness which should characterize them, and, destitute of which, human life should not be sacrificed by them.

In looking into the books, we find that such declarations are restricted to cases of homicide, not those resulting from accident or mischance, but felonious homicide.

The cases, in England, in which they were received, and not in cases of felony, were the case cited by appellee, in 3 Burrows 1244, *Wright, lessor of Clymer*, v. *Little*. The declarations admitted in that case were the confessions of the forger himself, made on his death-bed, and Lord Mansfield said he should admit them as evidence, but that no general rule could be drawn from it.

The same was the case of *Aviston* v. *Lord Kinnaird*, 6 East, 195. These two cases, the learned author (Phillips on Evidence) thinks, were overruled by the case of *Stobart* v. *Dryden*, 1 Meeson, and Welsby 615, and one not supported by the deliberate judgment of any court; but that the disposition of courts was rather to restrict the admissibility of dying declarations, even in criminal cases.

The true foundation of the rule, that they were admissible in cases of felonious homicide, was policy and necessity, since that crime is usually committe : in secret ;and it cannot be allowed to such an offender to commit the crime, and, by the same act, still forever the tongue of the only person in the world which could speak his crime.

That they are not admitted in civil cases, is held by most courts in this country and in England.

The only case to the contrary, is the one referred to by appellee, as decided in N. Carolina, *Falcon* v. *Shaw*, 2 N. Car. Law R. 102.

This was a case for seduction, brought by the father, and he was permitted to give in evidence the dying declarations of his daughter, that the defendant was her seducer.

the leading case in this country against this admissibility, in civil cases. is *Wilson* v. *Bowen*, 15 Johns. 286, opinion of the court by Thomson, Ch. J., referring to the case of *Jackson* v. *Kniffen*, 2 ib. 35, opinion of Livingston, J. The same rule was held in *Gray* v. *Goodrich*, 7 ib. 95, which appellee has cited, were it is said the law require the sanction of an oath to all parol testimony.

It never gives credit to the bare assertion of any one however high his rank or pure his morals.

The cases of pedigree, prescription or custom, are exceptions to this rule. What a deceased person has been heard to say, except upon oath, or in extremis when he came to a violent end, never has been considered as competent evidence.

This clearly, has no reference to a civil case but to a criminal prosecution for a felonious homicide. See also *Kent* v. *Walton*, 7 Wend. 256.

We think it may be safely said, that the rule at present prevailing in this country and in England on this subject is, that in no case, save that of a public prosecution for a felonious homicide, can dying declarations of the party killed be received in evidence, and to this extent, and no further are we inclined to go.

In civil cases they are not admissible. To admit the dying declarations in this case was error, and for that error the judgment must be reversed and the cause remanded.

SUPERIOR COURT OF CINCINNATI.

Bailey v. Berry et al.

Joint Trespassers.

Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence.

A release to one of several joint trespassers will discharge all, but it must be a technical release, not merely a covenant not to sue, or other instrument amounting to a release by implication merely.

Where plaintiff sued joint trespassers and then made an agreement with a portion of them to withdraw the suit as to them for a certain sum of money, and in pursuance of this agreement made an entry on the record that he was unwilling further to prosecute his action against the parties named, and as to them the action was dismissed; *Held*, that the others were not discharged, but they were entitled to have the jury instructed, in making up their verdict, to deduct the amount received already by plaintiff from the amount of damages sustained by him.

This was a case reserved from special term upon the pleadings and the evidence contained in the bill of exceptions.

In February, 1860, the plaintiff filed his petition against J. Q. A. Foster and fifteen other persons, for an alleged trespass upon his property, in Campbell county, Ky., and in March, in the same year, by leave, filed his amended petition, claiming damages for the injury described in the former pleading.

Five of the defendants—B. Taylor, Hallam, Piner, Root and Winston, filed demurrers to the petition, which, after argument, were overruled. On the 16th of June, 1862, Charles Air answered whith a general denial of the allegations of the petition.

While the action was pending, an entry was made upon the minutes by the plaintiff, that he would not further prosecute his claim against four of the defendants, James Taylor, Jr., Barry Taylor, John Taylor, and James R. Hallam, as to whom the action was dismissed.

Subsequent to this Berry, Winston, Root and Air filed answers, to portions of which the plaintiff demurred, and his demurrer was afterwards overruled. In March, 1866, the plaintiff, by leave, filed an amended petition, in which he set forth that in October, 1859, at Newport, Ky., he was the owner and in possession of several printing presses, and divers articles attached to his printing establishment, including a large quantity of type, of the value of ten thousand dollars,