under such circumstances, ought to be considered by the jury as being made under the impression of her approaching dissolution, when the case showed, by the most positive proof, she had no impressions upon the subject.

Having no such impression, how could her conscience have been touched?

The prisoner was convicted and executed, thus adding one more to the judicial murders which blacken the page of history.

And this is the leading case in support of the exception.

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 committed 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, *Fulcon* 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. 85, 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.

UNITED STATES SUPREME COURT.

Durant v. Essex Company.

A decree dismissing a bill in an equity suit in the Circuit Court of the United States, which is absolute in its terms, unless made upon some ground which does not go to the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties.

Where words of qualification, such as "without prejudice," or other terms indicating the right or privilege to take further legal proceedings on the subject, do not accompany the decrees, it is presumed to be rendered on the merits.

Where the judges of the Supreme Court of the United States are equally divided in opinion upon the questions of law or fact involved in a case before the court on appeal or writ of error, the judgment of affirmance, which is the judgment rendered in such a case, is as conclusive and binding, in every respect, upon the parties, as if rendered upon the concurrence of all the judges upon every question involved in the case.

Appeal from the Circuit Court for the District of Massachusetts.

The Constitution vests appellate jurisdiction in the Supreme Court under such regulations as Congress shall make; and Congress, by the act of March 3, 1803, authorizing appeals, provides that "the said Supreme Court shall be, and hereby is, authorized and required to receive, hear, and determine such appeals."

With these provisions in force, Durant filed a bill in October, 1847, against the Essex Company, seeking to hold it liable for certain real estate. The bill was finally "dismissed." An appeal was taken to this court, where, after hearing the case, the judges were equally divided in opinion; and, in conformity with the practice of the court in such cases it ordered that the decree of the court "be affirmed, with costs."

The complainant, conceiving that as the judgment in this court was by a bench equally divided, there had been no decision of his case by the court of last resort, filed another bill—the bill in the court below—for the same relief in the same matter as he had filed the one before.