Evidence--Hearsay--Spontaneous Exclamation

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trial it should be remembered that a demand for a possible special use need not necessarily be shown before the jury can consider it as indicative of worth. *Illinois Light & Power Co. v. Bedard*, 343 Ill. 618, 175 N. E. 351 (1931). And property should not be deemed worthless, as respects compensation of the owner in eminent domain proceedings, merely because he allows it to go to waste or is unable to put it to any use, *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403 (1878).

J. W. B.

Evidence—Hearsay—Spontaneous Exclamation.—Plaintiff was injured when struck by a truck driven by an employee of defendant. In an action to recover damages for personal injury, witnesses were permitted “on the theory that it was part of the res gestae” to testify over objection that they heard a fellow employee of the driver who was in the truck with him say, immediately following the accident, that he told the driver just before the accident that he was driving too fast. After verdict and judgment for plaintiff, admission of such statement in evidence was assigned as error. Held, not error to admit the statement. Judgment affirmed. *Jones v. Ambrose*, 38 S. E. (2d) 263 (W. Va. 1946).

The subject of res gestae is in theory simple. Every circumstance or declaration which grows out of the main transaction, is contemporaneous with it, and serves to illustrate its character, is admissible. Cf. *State v. Prater*, 52 W. Va. 122, 43 S. E. 230 (1902); *Sample v. Consolidated etc. Co.*, 50 W. Va. 472, 40 S. E. 597 (1901). Relevant circumstances not consisting of statements may usually be proven, but when accompanying utterances are offered to prove the truth of the facts asserted, a more difficult problem is presented. By the orthodox view, hearsay statements are admissible as part of the res gestae if (1) there is some nonverbal act that is itself admissible under the issue, (2) the statements characterize or explain the act and (3) the statements and the act accompany each other, i. e. are contemporaneous. *Sample v. Consolidated, etc., Co.*, 50 W. Va. 472, 40 S. E. 597 (1901); Hardman, *Spontaneous Exclamation v. Res Gestae* (1918) 25 W. Va. L. Q. 341. Declarations merely narrative of a past occurrence, though made ever so soon after the event, cannot be received as proof of the event since they are not contemporaneous with the main transaction. *Hawker v. Baltimore & Ohio P. R.*, 15 W. Va. 628 (1879); *Corder v. Talbot*, 14 W. Va. 277
(1878). Yet courts have admitted utterances under the badge of *res gestae* even though statement and act were not strictly contemporaneous, *Jack v. Mutual Reserve Fund Ass'n*, 113 Fed. 49, 53 (C. C. A. 5th 1902); *Industrial Commission v. Diveley*, 88 Colo. 190, 294 Pac. 532 (1930). The statements are deemed admissible "as part of the *res gestae*" where they appear to be spontaneous and a sincere response to actual sensations produced by excitement from the transaction in issue. *Collins v. Equitable Life Ins. Co.*, 122 W. Va. 171, 8 S. E. (2d) 825 (1940); *Slarcher v. South Penn Oil Co.*, 81 W. Va. 587, 95 S. E. 28 (1918). As the cases show the true basis for admitting spontaneous statements related to some exciting cause is their superior trustworthiness to ordinary hearsay. For this reason Wigmore objects to the phrase *res gestae* as being too vague. See 6 WIGMORE, EVIDENCE (3d ed. 1940) §1745. He reasons that two classes of utterances are admissible in this connection—the spontaneous utterance, admitted as an exception to the hearsay rule, and the verbal act which never came within it. The latter consists of statements accompanying otherwise equivocal acts and characterizing them, the statement thus being part of the act. The admissibility of the spontaneous statement as an exception to the hearsay rule is based on the experience that, under the stress of excitement, the reflective faculties may be stilled and the utterance would thus be the sincere unreflecting expression of the speaker's belief as to the facts observed by him. In the instant case, on this analysis, the statement not having been made at the time of the act (the *res gestae*) but an unascertained length of time before the time element would seem to prevent its being part of the *res gestae*, but since it was made in response to the excitement caused by the excessive speed at which the truck was running just before the accident, it would be admissible as a spontaneous utterance. Cf. *Mercer Funeral Home v. Addison*, 111 W. Va. 616, 163 S. E. 439 (1932). It has been suggested that if utterance before as well as those at or after the act are to be admitted indiscriminately as *res gestae*, if made under the existence of an exciting cause, this vague term might well be discarded as the badge of admissibility and the spontaneous exclamation test, which provided a rational basis for the admissibility of such statements, applied. See Hardman, supra at 346; cf. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae* (1922) 31 YALE L. J. 229.

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