

June 1941

Evidence--"Res Gestae"--Spontaneous Exclamations

J. S. M.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Evidence Commons](#)

Recommended Citation

J. S. M., *Evidence--"Res Gestae"--Spontaneous Exclamations*, 47 W. Va. L. Rev. (1941).

Available at: <https://researchrepository.wvu.edu/wvlr/vol47/iss4/12>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.

for *P*'s claim that she has the right to use the information collected by the state for her own personal advantage.

The privilege of state secrets is not so governed by fixed rules as the attorney-client or husband-wife privilege,¹¹ since it is one which at the discretion of the judge may be disregarded. It appears to be based chiefly on the need for governmental efficiency and freedom of action, but if there are other aspects of public interest in favor of disclosing the information which outweigh the policy of secrecy, the judge may order that the records be opened to the petitioner.

A. A. A.
N. E. S.

EVIDENCE — "RES GESTAE" — SPONTANEOUS EXCLAMATIONS.

— One morning after parking his car four blocks from his place of business at 7:20, the decedent, a vigorous man in good health, entered his office about 7:30, moaning and groaning, apparently much upset and in pain, stating that he had slipped on the icy pavement and fallen. Similar statements were made about an hour later at a near-by store where he had been taken. His wife sued on an insurance policy, seeking double indemnity, which depended upon death resulting from bodily injury caused exclusively by accidental means. The trial court admitted testimony relative to the decedent's statements in both instances. *Held*, that testimony as to the first statement made in his office is admissible as part of the "res gestae," but the admission of the statement made an hour later is erroneous. *Collins v. Equitable Life Ins. Co.*¹

The term "res gestae" is used by courts generally as an evidentiary device to admit various types of evidence, some coming within the hearsay rule, others not.² The early West Virginia

¹¹ *Thomas v. First National Bank*, 166 Va. 497, 186 S. E. 77 (1936); *Sullivan v. Hill*, 73 W. Va. 49, 79 S. E. 670 (1913); 8 WIGMORE, EVIDENCE §§ 2332-2341, 2290-2329.

¹ 8 S. E. (2d) 825 (W. Va. 1940). The basis for admitting the first statement was that it had been spontaneously uttered while the decedent was still subject to the nervous excitement of the event which caused his suffering, giving to his utterance sufficient guaranty of trustworthiness. Admission of the second statement made an hour later was held to be erroneous because of the interval of time which had elapsed and the circumstances under which the statement had been made. However, since it was the same as that made at the office and merely cumulative, the court did not consider its admission as prejudicial.

² 6 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1768, 1769, lists five such types of cases, and two instances in substantive law, where "res gestae" is used

cases accepted as "a well settled rule that declarations as parts of *res gestae*, made at the time of the transaction, are regarded as verbal acts . . ."³ and included within the general term a variety of factual situations, such as are categorized by Wigmore and other writers on the subject.⁴ This comment deals only with one class of evidence admitted under the *res gestae* doctrine. Where there is some non-verbal act that is itself admissible under the issue, the orthodox doctrine of *res gestae* as constituting an exception to the hearsay rule admitted hearsay statements characterizing and giving color to such act, provided that the statements and the non-verbal act were contemporaneous.⁵

While the first cases considering the question required strict contemporaneity between the act established and the declarations constituting the *res gestae*,⁶ subsequent decisions indicated a tendency to relax this strictness.⁷ However, this lack of contemporaneity necessitated some guaranty of trustworthiness of the hearsay, before it could be admitted as an exception. It was this factor that gave rise to the new form of the "*res gestae*" doctrine, as exemplified by the instant case.

Psychologically, an utterance made under the influence of some exciting cause, being a spontaneous response to an external shock, is likely to be sufficiently trustworthy to overcome the vices

as the basis for admitting evidence. See Morgan, *Res Gestae* (1937) 12 WASH. L. REV. 91 ("seven classes of cases"); Catteral, *Res Gestae in Virginia* (1935) 21 VA. L. REV. 725 ("a half a dozen different meanings"); Buchanan, *Res Gestae—The Judicial Football* (1939) 8 KAN. BAR J. 367 ("five general classes of cases").

³ Beckwith v. Mollohan, 2 W. Va. 477, 484 (1868).

⁴ See note 3, *supra*. Beckwith v. Mollohan, 2 W. Va. 477 (1868) (declarations made by *D* while assaulting *P*, tending to show that *D* tied *P*'s hands behind him); Thompson v. Updegraff, 3 W. Va. 629 (1869) (on an issue of the nature of papers destroyed by a testator, his declarations made at the time as to their character); Ellis v. Dempsey, 4 W. Va. 126 (1870) (on an issue of jointness of a trespass, a declaration by one of the defendant trespassers as to his purpose and intent in going on the land); State v. Abbott, 8 W. Va. 741 (1875) (on an issue of murder, threats made by the deceased near the time of the killing admitted as part of the *res gestae*); Reiser v. Lawrence, 96 W. Va. 82, 123 S. E. 451 (1924) (an unsigned memorandum of contract, ordinarily inadmissible, if read over to the party, and assented to by him, is admissible as part of the *res gestae*).

⁵ See Hardman, *Spontaneous Exclamations v. Res Gestae* (1918) 25 W. VA. L. Q. 341.

⁶ Corder v. Talbott, 14 W. Va. 277 (1878); Lawrence v. DuBois, 16 W. Va. 443 (1880); Williams v. Belmont Coal & Coke Co., 55 W. Va. 84, 46 S. E. 802 (1904); 1 GREENLEAF, EVIDENCE (11th ed. 1863) 149.

⁷ State v. Prater, 52 W. Va. 132, 43 S. E. 230 (1902) ("These incidents [the *res gestae*] may be separated from the act by a lapse of time more or less appreciable . . ."); State v. Baker, 84 W. Va. 151, 99 S. E. 252 (1919) (need not be precisely concurrent).

— or what Thayer calls the “curse”⁸ — of hearsay. The recognition which courts generally have accorded to this theory has led Wigmore to discuss it as a “genuine exception to the hearsay rule,” which he calls the “Spontaneous Exclamations Doctrine.”⁹ This exception includes the following elements: (1) a startling occasion; (2) a statement made while the declarant is still under the influence of the exciting cause, while his reflective powers are in abeyance; and (3) the utterance must, perhaps, relate to the circumstances of the occurrence just preceding it.¹⁰ Jones, on the other hand, considers this exception as a type of “*res gestae*,” using as the test of admissibility substantially the same elements that Wigmore adopts in his “spontaneous exclamations” doctrine.¹¹

Whatever terms are used, the indisputable fact is that courts do admit such evidence, and it is with the limitations of the doctrine that we are here concerned. Since the case of *Starcher v. South Penn Oil Co.*,¹² the West Virginia court has regarded “*res gestae*” in a new light. The decisions still speak in terms of “*res gestae*,” but often admit statements that occur a considerable time after the act itself, provided that the exciting cause still exists.¹³ Thus, some of the earlier cases refusing to admit the evidence due to lack of contemporaneity might have held contra under the present test of admissibility.¹⁴ In the principal case the

⁸ THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 523.

⁹ 6 WIGMORE, EVIDENCE § 1746.

¹⁰ *Id.* at §§ 1750, 1754.

¹¹ 1 JONES, EVIDENCE (4th ed. 1938) §§ 345, 346.

¹² 81 W. Va. 587, 95 S. E. 28 (1918). This is the first important case applying the “spontaneous exclamations” theory, indicating a change of attitude toward the old *res gestae* limitations.

¹³ *Ambrose v. Young*, 100 W. Va. 452, 453, 130 S. E. 810 (1925). In admitting declarations of a driver of a car, made twenty minutes after an accident, that he was driving 45 miles an hour, the court stated: “This statement of Young appears to have been a spontaneous, undesigned and illustrative incident and part of the litigated act. These are the tests of admissibility under the *res gestae* rule.”

¹⁴ *Crookham v. State*, 5 W. Va. 510 (1871) (on a sub-issue of how the decedent had received his wounds, his dying declaration that it was hard “to die by the hand of another” held inadmissible as part of the *res gestae* because it was too remote from the transaction); *Hawker v. Baltimore & Ohio R. R.*, 15 W. Va. 628 (1879) (statements of an engineer one hour after hitting cattle while driving the engine, tending to show negligence on his part, held inadmissible).

The time when a hearsay statement is made and its relation to the non-verbal act continues to be an important element. “. . . it is an important fact to be considered in deciding whether a particular statement was a spontaneous one, and consequently part of the *res gestae*.” *State v. Johnson*, 107 W. Va. 216, 219, 148 S. E. 4 (1929); *State v. Hicks*, 107 W. Va. 418, 148 S. E. 131 (1929) (declarations made by D three or four hours after his alleged assault on X, professing his friendship for X, held inadmissible. The court stated that while the element of time is not always controlling in determining

lapse of time was about ten minutes. Under the old rule requiring strict contemporaneity, the declarations would not be admissible. But the court, though speaking in terms of "*res gestae*," let the evidence in as a "spontaneous exclamation."

If the use of "*res gestae*" as a generic term were frankly abandoned, it would constitute, it is believed, little more than a clarifying change in form. The case of *Reynolds v. Grant Co.*¹⁵ represents a step in this commendable direction. "The proper restriction of the term," says the court, "confines it to those declarations which are not only considered to be a part of the thing done, but which depend for their admission in evidence upon the fact that the declarant at the time of making the declarations was, as a consequence of the thing done, under such stress of emotion or excitement as to render the declarations spontaneous to the point of being almost involuntary, precluding the reflection that gives rise to falsehood."¹⁶

J. S. M.

MARRIAGE AND DIVORCE — ALIMONY IN ANNULMENT PROCEEDINGS. — After a ceremonial marriage in Maryland, *H* and *W*, residents of West Virginia, returned to this state, but never cohabited as husband and wife. *H*, an infant, by next of friend, sued to have a decree entered to annul the marriage. *Held*, that although under our statute the court has no jurisdiction to annul

whether a statement is a part of the *res gestae*, the particular circumstances and the mental and physical condition being of considerable importance, it is often a vital fact in ascertaining whether a declaration is a spontaneous and contemporaneous one. Here, because of the indefiniteness of time and the absence of facts and circumstances which might bring the alleged statements within the hearsay rule, the declarations should not have been admitted). *Cf. State v. McKinney*, 88 W. Va. 400, 106 S. E. 894 (1921) (a statement made by *D* several hours after an alleged offense, admitting the act and stating a motive, held inadmissible, it being no part of the *res gestae*).

¹⁵ 117 W. Va. 615, 186 S. E. 603 (1936) (in excluding remarks of a store manager made when a customer had slipped and fallen on the floor, that another person had fallen at the same place that morning, because it was not shown that he himself had seen such person fall, the court stated that this was no more than "hearsay evidence of hearsay evidence").

¹⁶ *Id.* at 620. The court's definition continues: "It is thought that in all instances where such circumstances do not exist, while the declaration in question may be admissible in evidence either because the hearsay rule does not properly apply to exclude it or because it comes within some other exception to that rule, it is not, correctly speaking, admitted because it is a part of the *res gestae*."

Cf. 1 JONES, EVIDENCE 638: "The judicial trend is towards relaxation of the rule of absolute and identical contemporaneity and a substitution in its place of the test of spontaneity and logical relation to the principal event." See page 638, n. 19, citing cases and law review articles.