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Thomas P. Hardman  
*West Virginia University College of Law*

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SPONTANEOUS DECLARATIONS (*RES GESTAE*)

THOMAS P. HARDMAN*

In a comparatively recent case in which counsel contended that certain extrajudicial assertions were inadmissible on the ground that they were not "a part of the *res gestae,*" Judge Learned Hand dismissed the argument with the observation that *res gestae* "is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology."¹ In somewhat similar vein the supreme court of California has said that "Definitions of *res gestae* are as numerous as prescriptions for the cure of rheumatism and generally about as useful."² The appropriateness of these trenchant observations is strikingly attested by many West Virginia cases in which slightly differing definitions or conceptions were adopted and decidedly differing conclusions were reached.³ Indeed, a consecutive reading of the numerous decisions in point suggests that the reader is witnessing a melee of conflicting theories which are, so to speak, engaged in a struggle for the survival of the fittest.

Realizing the dangers inherent in the so-called *res gestae* doctrine, the West Virginia Supreme Court of Appeals has, on at least

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* Dean of the College of Law, West Virginia University.


² Melvin, J., in In re Gleason's Estate, 164 Cal. 756, 762, 130 Pac. 872, 875 (1913).

one occasion, undertaken the task of stripping the concept of the beveiling verbiage which has shrouded it for more than a century, and restating it as a reasonably definite principle with a sound psychological rationale by which to determine its scope and applicability. Unfortunately, however, the court retained the old "res gestae" label for the revamped principle, with the result that retention of the old name has at times been regarded as a retention of the old rationale and, consequently, of some if not all of the old dangers: few tyrannies are more tenacious and vicious than the tyranny of words. Accordingly it is herein proposed to discuss the more important of the modern West Virginia decisions in point, in an effort to fit the cases into an acceptable theory and, to such extent as this may not seem practicable, to attempt some clarifying comment on recalcitrant decisions.

To begin with, a word must be said as to what is most commonly supposed to be meant by the orthodox res gestae doctrine. Stated in what may be called its traditional form, and the only form which it seems necessary to consider here, the doctrine is, in effect, that extrajudicial assertions are admissible as a part of the res gestae if (1) the assertions characterize and explain some act which is independently admissible and (2) they are contemporaneous with the act. But what situations does this proposition cover? For example, what kind of "act" must there be? Must it be the main act in the case? Must it be a startling occurrence? Must the declarant be a participant in the act?

One of the most cited of the West Virginia decisions in point is Reynolds v. W. T. Grant Co., decided in 1936. In that case, on an issue as to whether the defendant negligently maintained a slippery floor which caused the plaintiff to fall and sustain an injury, a hearsay declaration made by a bystander immediately after the event, stating that someone else had fallen at the same place earlier in the day, was offered in evidence. The court correctly excluded the statement because it did not appear that the declarant had personally observed the matter to which the declaration related (or had opportunity so to observe)—a generally

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5 See, e.g., Sample v. Continental Light & Ry., 50 W. Va. 472, 40 S.E. 597 (1901). See also, THAYER, CASES ON EVIDENCE 641-672 (2d ed. 1900).
6 117 W. Va. 615, 186 S.E. 603 (1936).
recognized requirement. In passing upon the admissibility of this evidence the court said (among other things):

"The holdings under, and discussions of, the doctrine of res gestae appear to contain a preponderance of confusion, so that it is almost impossible to reach a conclusion with reference to it that cannot at least partially be undermined by decided cases and text comments. A part of this confusion seems to come from seeking to apply the rule where there is no necessity to invoke it because of the fact that the proof offered is not hearsay at all . . . The proper restriction of the term confines it to those declarations . . . 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 . . .

" . . . If the declarant is laboring under stress of emotion or excitement so that his declaration relating to the occurrence from which that excitement or emotion sprang was spontaneous in a way that precludes the reflection upon which falsehood is based, then the declaration falls truly within the res gestae exception . . . "

This rationalization of the exception is perhaps the best brief expression of the principle to be found in the West Virginia decisions, although it is not very clarifying as to just how mentally distracting an occurrence must be in order that a declaration relating to it may be regarded as spontaneous, i.e., unreflective. Where, as in the Reynolds case, and in most West Virginia decisions in point, a so-called startling occasion is the cause of the requisite unreflectiveness, there is pretty general acceptance, in the American decisions, of the reasoning of the court in the instant case, although, as we shall see, there is considerable diversity of opinion as to the limitations of the principle. But does the Spontaneous Declarations exception, as some contend, apply only to that class of cases?

Preliminarily, however, there must be dismissed from consideration two groups of decisions in which the res gestae terminology is, completely without justification, frequently found. These groups are: (1) cases in which the offered extrajudicial assertion does

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7 See WIGMORE, EVIDENCE § 1751 (3d ed. 1940).
8 117 W. Va. at 619, 620.
9 See WIGMORE, EVIDENCE § 1750.
not violate the hearsay rule at all—in general, cases in which the challenged assertion is usable without regard to its truth or falsity as being in itself “an operative or materially relevant fact or circumstantial evidence of a material fact;”¹⁰ and (2) cases in which the assertion as offered violates the hearsay rule (being offered to prove the truth of the fact asserted),¹¹ but is admissible under some established exception other than the one herein considered, unless the situation is such that the challenged assertion is admissible both under such other exception and under the Spontaneous Declarations doctrine.¹² By way of explaining the last clause of the preceding sentence, it should be noted that not infrequently a challenged hearsay declaration may be admissible under more than one well-established exception to the hearsay rule. For example, an extrajudicial assertion made by an agent while acting within the scope of his authority may also have been made while he was under such stress of nervous excitement as would clearly make his assertion a Spontaneous Declaration.¹³ In which case his statement might be admissible either as a Spontaneous Declaration or as a Vicarious Admission. Similarly the same assertion may be both a Spontaneous Declaration and a Declaration Evidencing Physical or Mental Condition.¹⁴ In such situations a decision sanctioning admissibility of the statement may be a citable precedent supporting two equally applicable exceptions, although under some circumstances it might of course not be an “authoritative” precedent for admissibility under one of the exceptions, perhaps not even under either exception—it might be only a dictum.

With respect to the remaining American decisions in point, apart from some indefensible pronouncements, the adjudications may be regarded as falling into two fairly definite classifications. These two groups of cases have been aptly classified as follows by the American Law Institute’s distinguished Committee on Evidence, Edmund M. Morgan, of the Harvard Law School, Reporter:

A. Situations in which the challenged “hearsay statement was made while the declarant was perceiving the event or con-

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¹¹ That the hearsay rule applies only when the extrajudicial assertion is offered to prove the truth of the fact asserted, see e.g., State v. Paun, 109 W. Va. 606, 155 S.E. 656 (1930). See also Wigmore, Evidence, § 1766.
¹³ See Wigmore, Evidence § 1756 (a). But see dictum by Kenna, J., in Reynolds v. W. T. Grant Co., supra note 4, at 620.
¹⁴ See, e.g., Wigmore, Evidence § 1781.
dition which the statement narrates or describes or explains, or immediately thereafter."¹⁶

B. Situations in which the challenged "hearsay statement was made while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains."¹⁰

For reasons of convenience in discussing some of the West Virginia decisions, and for other reasons hereinafter indicated, it is proposed to consider first the general principle of the cases represented by Classification B, which deals with situations in which the event or condition is a "startling" one. Not the least of the reasons for giving preliminary consideration to this principle is the fact that the leading textbook on Evidence⁷ and many decisions seem to limit the Spontaneous Declarations (Res Gestae) exception to cases falling within this classification.

The theory which purports to confine the exception to situations in which there is a so-called startling occasion has come to be widely known as the Wigmorean theory.¹⁸ And it must be conceded that under the influence of Wigmore's great learning and prestige most American adjudications during the last few decades seem to support his restrictive theory.¹⁹ But a large number of American decisions do not support such a limitation.²⁰ Moreover, many if not most modern writers of renown do not approve that restriction. Among those who do not so confine this exception to the hearsay rule are two or three who have become nationally accepted as masters of the law of Evidence, the foremost of whom in point of time — and one of the greatest legal scholars of all time — is James Bradley Thayer.²¹ The more inclusive doctrine may therefore be called the Thayer theory.

¹⁵ MODEL CODE OF EVIDENCE, Rule 512 (a) (1942). The Institute's definition of "statement" is set out in n. 41 infra.
¹⁰ Id. Rule 512 (b). See also Rule 501 (1) and (2).
¹⁷ WIGMORE, EVIDENCE §§ 1747, 1750.
¹⁸ See, setting forth this theory, WIGMORE, EVIDENCE §§ 1747, 1750.
²⁰ See Note, Spontaneous Exclamations in the Absence of a Startling Event, 46 Col. L. Rev. 490 (1946), assembling a number of cases pro and con. For some additional cases, and valuable discussion, see Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922); Morgan, Res Gestae, 12 Wash. L. Rev. 91 (1937); Morgan, supra note 19 at 568-576.
²¹ Although Thayer's great reputation in this field of law rests to a large extent on his masterful Preliminary Treatise on Evidence (1898), he dealt
The present writer has heretofore, in the pages of this *Review*, commented to some extent upon the Wigmorean reasoning. Hence it is proposed in this discussion to deal rather selectively with the West Virginia decisions falling within Classification B, and to consider more particularly the question of the applicability of the exception to those situations in which the occurrence or condition, which the challenged declaration narrates or describes or explains, is not necessarily a startling one.

What then is the Wigmorean theory? How far does it limit this exception to the hearsay rule?

Fortunately one of the better-reasoned and most enlightening of all American decisions in point is the West Virginia case of *Starcher v. South Penn Oil Co.*, decided in 1918. In that case the exciting event was an explosion of a high-pressure gas pipeline. Soon after the explosion the declarant was found lying near the severed line; he was seriously injured and unconscious. When he regained consciousness, he was asked what hurt him. Immediately thereafter he (1) pointed to the severed pipeline, and (2) said, “That hurt me, it struck me in the back.” In holding this evidence admissible under the *res gestae* exception, the court, without citing any cases, quoted the following passage from Wigmore on Evidence:

“This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by

more particularly with this problem in a famous law review article: Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae*, 14 Am. L. Rev. 817 (1880); 15 id. 1, 71 (1881). Another nationally acknowledged master of the law of evidence who accepts this view is Edmund M. Morgan, some of whose writings on the subject are hereinafter referred to and quoted from in the body of this article. See also, *McCormick and Ray, Texas Law of Evidence* § 430 (1937).

22 Note, *Spontaneous Exclamations v. Res Gestae*, 25 W. Va. L.Q. 341 (1918). To some extent it must be conceded that the views expressed in the present discussion may plausibly be regarded as differing somewhat, in one respect, from the reasoning in the Note published in 1918. What was said in the Note is, however, still believed to be sound as applied to a situation involving a startling event, which was the only situation dealt with in that Note.

23 81 W. Va. 587, 95 S.E. 28 (1918).
reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."^24

But having quoted, approvingly, this Wigmorean reasoning, the court then quoted, also approvingly, the following passage from Jones on Evidence:

"The declarations are admitted when they appear to have been made under the immediate influence of some principal transaction, relevant to the issue, and are so connected with it as to characterize or explain it. It should appear that they were made without premeditation or artifice, and without a view to the consequences; that they are the spontaneous utterances, the natural result of the act they characterize or elucidate..."^25

This quotation from Jones, which is set out in full in the accompanying footnote, and which, the court says, "lays down very nearly the same rule as that quoted above from Wigmore," certainly does not contain the Wigmorean limitation. The general reasoning in the entire passage quoted from Jones represents on the whole, though none too accurately, the Thayer theory. Indeed, at the end of the quoted passage, Jones cites a leading discussion of the res gestae exception by Thayer.

The Starcher case is probably the leading post-Wigmorean decision in West Virginia; and it is submitted that by and large the court's reasoning in the case is even more representative of the Thayer theory than of the Wigmorean limitation: the basic tenor of the rationale is trustworthiness of utterances based on unreflectiveness. Moreover, the case really falls within Classification A: the assertion "was made while the declarant was perceiving the event or condition, which the statement narrates or describes or

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^24 Id. at 599-600, 95 S.E. at 33.

^25 Jones, Evidence § 344 (2d ed. 1908). The court continued the quotation as follows from Jones: "Of course, the act must be relevant to the issue, but when relevant, the declarations are not rejected merely because there may be other competent testimony. It is hardly necessary to add that when the declarations form part of a contract or the performance of a contract, they are relevant and will be received. In the celebrated case in which Lord George Gordon was on trial for treason, the cries of the mob which accompanied the defendant during the acts complained of were received for the purpose of showing that his intentions were unlawful and treasonable. On the same principle, the complaints and statements of an injured party made at the time of the occurrence both as to bodily suffering and the circumstances of the occurrence are frequently received."
explains, or immediately thereafter", as the period of unconsciousness of declarant must be eliminated, so that the case apparently comes within the Thayer theory.

Furthermore, it is believed that neither the opinion nor the syllabus can be fairly construed as purporting to limit the exception to situations in which a startling occasion is the cause of the requisite spontaneity. Indeed, had the court in this case unequivocally attempted to impose the Wigmorean limitation upon this exception, the decision would not have been an authoritative precedent for such a purported limitation; for the facts of the case involved a startling event, and it is elementary that a decision is not a controlling precedent for propositions broader than the facts of the case warrant: as to such unwarranted propositions a court's pronouncements are only *obiter dicta*. But this is a point which can be given only passing consideration here. It is, however, a doctrine which should always be borne in mind in considering any decision involving a so-called startling occasion.

Perhaps it should also be noted here, more or less parenthetically, that in the *Starcher* case the court treated as a Spontaneous Declaration the injured person's nonverbal act of pointing to the severed pipeline. Since this physical act of pointing was in response to a question as to what hurt him, the injured party's nonverbal response must be regarded as hearsay—as having in it the same basic hearsay vice (untrustworthiness) as if he had said: "That pipeline hit me." The case therefore holds in effect that "assertive" extrajudicial nonverbal conduct (offered to prove the truth of the facts asserted) may be admissible as a Spontaneous Declaration if the circumstances are such that it may reasonably be regarded as unreflective. The case also holds that an assertion may be spontaneous even though it is in response to a question.

In short then the principle of the *Starcher* case would seem to be either (1) that, where there is a so-called startling occasion, a hearsay declaration is admissible if it occurred while the declarant was under such stress of excitement, caused by his perception of the

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27 As to when extrajudicial conduct may be regarded as so assertive that it is, or should be, treated as a hearsay assertion, see e.g., Morgan, *Hearsay and Non-Hearsay*, 48 Harv. L. Rev. 1138 (1935); McCormick, "The Borderland of Hearsay", 39 Yale L.J. 489 (1930); Falknor, *Silence as Hearsay*, 89 U. of Pa. L. Rev. 192 (1940).
event or condition, that there is reasonable assurance that his assertion is unreflective—the Wigmorean theory; or (2) that, whether the occasion is startling or not, a hearsay declaration is admissible if it was made while the declarant was perceiving the occurrence or condition which the statement narrates or describes or explains, or immediately thereafter, so that because of the resultant mental distraction there is reasonable assurance that the utterance is unreflective—the Thayer theory.

The general principle underlying the decision is quite simple. But in the interpretation and application of the doctrine the West Virginia cases raise numerous difficult problems, an adequate investigation of all of which would far exceed the legitimate scope of an article: nothing short of a treatise could hope to be fully exhaustive. Hence only a few of the most basic questions can be considered in the present discussion, and, to a large extent, even these must be dealt with more suggestively than exhaustively.

1. **What constitutes a startling occurrence or condition?**

It seems clear that an explosion seriously injuring the declarant, as in the Starcher case, is such an occurrence. But the declarant need not be injured at all. That too is clear. The typical startling event is a traffic accident involving trains, streetcars, automobiles or other vehicles. An airplane crash would unquestionably suffice. Violent crimes may cause the requisite excitement. And in the recent case of **Gilmore v. Montgomery Ward & Co.**—an important decision hereinafter discussed at considerable length—a rather ordinary fall on a storekeeper's floor, injuring someone other than the declarant, was held to be sufficient to make an observer's declaration spontaneous. Indeed, there seems to be no limit whatever to the nature of the so-called startling occurrence or condition: it is sufficient that the declarant, at the time of making the assertion, is under such a stress of mental distraction, caused by the occurrence or condition, that his declaration may reasonably be regarded as unreflective. The unreflectiveness of the utterance is the assurance of its trustworthiness. Or as our court has recently expressed it, “spontaneity rather than contemporaneity is now the

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29 See *e.g.*, Sample v. Consolidated Light & Ry., 50 W. Va. 472, 40 S.E. 597 (1901).
31 56 S.E.2d 105 (W. Va. 1949).
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generally recognized test of admissibility. "The spontaneity of the utterance is the guaranty of its trustworthiness."

2. Must the occurrence or condition, which the challenged declaration narrates or describes or explains, really be a startling one?

The answer to this query is, in West Virginia at least, inextricably tied into another question which, though it should logically be considered later on in this discussion, must, for reasons of convenience, be examined in connection with question No. 2. This question may be stated thus:

3. Must the declarant be a participant (or "actor") in the so-called startling occasion, or may he be a bystander?

Until quite recently the West Virginia court generally either assumed or held that a bystander's declarations are inadmissible under the \textit{res gestae} exception. And, when the court employed the traditional \textit{res gestae} argument that the declaration to be admissible must be a part of the act [event or condition], the utterances of a mere bystander could not by any reasonable stretch of the imagination be considered a part of the act. But in the most recent square decision by our court on this question, \textit{viz.}, \textit{Gilmore v. Montgomery Ward \& Co.}, decided in 1949, the court, relying exclusively on the \textit{Reynolds} case, held that a bystander's utterances are admissible. This conclusion is believed to be thoroughly sound, and is in accord with the weight of authority in other jurisdictions.

The event involved in the case was, as hereinbefore intimated, a rather commonplace fall by a shopper on a shopkeeper's floor, and the declarant was an unidentified employee of the shopkeeper. Perhaps such an occurrence may be regarded as startling to a mere bystander, although many a bystander might easily regard such an incident as more amusing than startling, at least until it appeared, if it did, that the person who slipped or tripped was actually injured.

\footnote{32 Hatcher, J., in Collins v. Equitable Life Ins. Co., 122 W. Va. 171, 173, 8 S.E.2d 825 (1940).}
\footnote{33 The court-approved inner quotation is by Wheeler, C. J., in Perry v. Haritos, 100 Conn. 476, 484, 124 Atl. 44 (1924).}
\footnote{34 See, e.g., Mercer Funeral Home v. Addison Brothers \& Smith, 111 W. Va. 616, 163 S.E. 439 (1932), holding a bystander's declaration inadmissible, without assigning a reason.}
\footnote{35 56 S.E.2d 105 (W. Va. 1949). Coates v. Montgomery Ward \& Co., 57 S.E. 265 (W. Va. 1949), a somewhat later case, is not believed to be a square holding on the particular point.}
\footnote{36 See \textit{Wigmore, Evidence} § 1775.}
At any rate, since the declarant was not only uninjured but unidentified, and since it was not clear as to how far, if at all, she was startled rather than mentally distracted, it would seem safe to say that the occurrence or condition need not be particularly startling from the standpoint of the declarant (a bystander)—and of course it is the declarant’s unreflectiveness that is determinative. Which brings us back to the principal question, namely: Does the Spontaneous Declarations exception include situations in which the event or condition is not a startling one, or, rather, is not necessarily startling?

Answering this question in the affirmative are not only a large number of American cases and a considerable number of eminent authors but the American Law Institute in its Model Code of Evidence. The rule as adopted and promulgated by the Institute applies to both groups of situations, and reads as follows:

"Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made

(a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter; or

(b) while the declarant was under the stress of a nervous excitement caused by his perception of the event or condition which the statement narrates or describes or explains."  

Because of the diversity of opinion as to Clause (a) of this rule, it would seem to be appropriate, before discussing additional

37 See n. 20 supra and n. 41 infra. In addition to the authorities herein discussed, a good recent case admitting a declaration in such situations is Marks v. I. M. Pearlstine & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943).
38 See authors and works cited supra, n. 21.
40 MODEL CODE OF EVIDENCE, Rule 512 (1942).
41 Id. The Institute's official Comment on the rule contains this: "Clause (a) is in accord with the theory and result of a large number of cases. It expresses what Professor James Bradley Thayer believed to be the rule applied in the so-called res gestae exception to the hearsay rule. . . . The event or condition may or may not be exciting to the declarant. Clause (b) also is in accord with the theory and result of a large number of cases. It expresses what Dean Wigmore believes to be the rule applicable in the res gestae exception, and is accepted in a large majority of the modern opinions. The two clauses are not co-extensive in operation. In a multitude of cases the application of either would bring the same result; but in a goodly number, this would not be true. . . ." The Institute's Rule 501 contains this definition: "A statement includes both conduct found by the judge to have been intended by the person making the statement to operate as an assertion by him and conduct of which evidence is offered for a purpose requiring an assumption that it was so intended."
West Virginia cases in point, to examine pretty carefully the justification advanced for admitting the evidence in the first group of situations. And since Mr. Morgan, Reporter for the Institute's Committee on Evidence, and perhaps the greatest living authority on the law of evidence, strongly supports the Thayer theory, it is believed to be appropriate to quote at some length from a legal publication in which Mr. Morgan sets out rather fully what is believed to be the best reasoning yet offered in favor of admitting the evidence in situations falling within Classification A.

"Here [in these situations]," says Morgan, "the utterance is offered to prove its truth and is obnoxious to the hearsay rule. Is there any justification for admitting it? What substitutes for the oath and cross-examination can be found to give it reliability? A statement by a person as to external events then and there being perceived by his senses is worthy of credence for two reasons. First, it is in essence a declaration of a presently existing state of mind, for it is nothing more than an assertion of his presently existing sense impressions. As such it has the quality of spontaneity. All the reasons supporting the decisions in the . . . [cases covering the exception for Declarations Evidencing Mental Condition] are equally applicable here. Second, since the statement is contemporaneous with the event, it is made at the place of the event. Consequently the event is open to perception by the senses of the person to whom the declaration is made and by whom it is usually reported on the witness stand. The witness is subject to cross-examination concerning that event as well as the fact and content of the utterance, so that the extra-judicial statement does not depend solely upon the credit of the declarant. . . . It is to be noted that the spontaneity of the utterance is warranted by its contemporaneity with the event and by the presence of another capable of observing the phenomena which the declarant is reporting. Consequently it is not at all essential that the event should be of a startling or exciting nature or that it should shock or alarm the declarant. For example, where the declarant was in his home, and in a perfectly normal way witnessed a train enter a nearby cut, his contemporaneous remark, that the train was entering the cut without first stopping, was held competent."

In another penetrating discussion of this group of cases, the same author persuasively fortifies the above argument with this observation: "In such situations, the less exciting or disturbing the

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42 See Morgan, A Suggested Classification of Hearsay, 31 Yale L.J. 229, 236-237 (1922).
event, the more trustworthy the declaration because, as the psychologists assure us after abundant investigation, the greater the excitement or other mental perturbation, the less accurate the operation of the perceptive faculties."

This reasoning seems unanswerable. The test, both in Situations A and in Situations B, would seem to be whether a distracting occurrence or condition has rendered the declaration unreflective. To be sure, there is in one respect a very real difference as to the criteria of admissibility in the two classes of situations: the duration of the requisite mental distraction is as a rule only momentary where the event or condition causing the distraction is not a startling one, whereas an exciting occurrence may considerably prolong the duration of the distraction, depending upon the circumstances of the particular case. Hence a declaration to be admissible in Situations A must be practically contemporaneous with the occurrence or condition, although to insist on exact contemporaneity would be foolish if not futile; for, in the very nature of things, perception must precede any narration, description or explanation of the matter perceived.

An interesting judicial acceptance of the rule adopted by the American Law Institute is to be found in the recent well-reasoned case of Houston Oxygen Co. v. Davis. In that case there was an issue as to whether X was driving negligently when his car collided with another; and the offered extrajudicial assertion was that just before the collision, as X's automobile was passing the one in which the declarant was riding, the declarant commented in effect that the driver must be drunk and that the declarant and her companion would find the driver "somewhere on the road wrecked" if he "kept that rate of speed up." In holding this declaration admissible the court quoted with approval the following noteworthy passage from a recent textbook:

"In one class of cases the requirement of spontaneity is somewhat attenuated. If a person observes some situation or happening which is not at all startling or shocking in its nature, nor actually producing excitement in the observer, the observer may yet have occasion to comment on what he sees (or learns from other senses) at the very time that he is receiving the impression. Such a comment, as to a situation then before the

44 See, supporting this proposition, Hutchins and Slesinger, op. cit. supra n. 39—an enlightening discussion of the problem.
45 139 Tex. 1, 161 S.W.2d 474 (1942).
46 McCORMICK AND RAY, TEXAS LAW OF EVIDENCE § 430 (1937).
declarant, does not have the safeguard of impulse, emotion, or excitement, but there are other safeguards. In the first place, the report at the moment of the things then seen, heard, etc., is safe from any error from defect of memory of the declarant. Secondly, there is little or no time for calculated misstatement, and thirdly, the statement will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement. Consequently, it is believed that such comments, strictly limited, to reports of present sense-impressions, have such exceptional reliability as to warrant their inclusion within the hearsay exception for Spontaneous Declarations."

A modern West Virginia case in point—and one which calls loudly for explanation—is Mercer Funeral Home v. Addison Brothers & Smith,47 decided in 1932. In that case, essentially like Houston Oxygen Co. v. Davis, there was an issue as to whether an automobile was being driven negligently when it collided with a truck causing damage to the automobile. A bystander was permitted by the trial court to testify that, as the automobile passed her and her companion, just before the crash, she said to her companion that "if he [the driver of the automobile] didn't kill someone or himself it was not his fault." The Supreme Court of Appeals held that the trial court had erred, and disposed of the hearsay problem in one short sentence, citing only one case—not a West Virginia case. Said the court: "Her [the bystander's] remark was not a part of the res gestae and was clearly inadmissible. Gouin v. Ryder, (R.I.) 94 Atl. 670."48

Since the Rhode Island case, decided in 1915, is the only authority cited by the West Virginia court in support of this cryptic decision, an examination of that case should be revealing as to the principle for which the West Virginia case stands (if it still stands). The case cited, like the West Virginia case, involved a declaration by a bystander, and the decision of the Rhode Island court probably represents the view that a bystander's utterances cannot be a part of the res gestae. Said the court, among other things: "We think the testimony was properly excluded. There is some authority that the exclamations of a bystander, contemporaneous with an occurrence, is [sic] a part of the res gestae. . . ."49 The Rhode Island case cites no authority; and one cannot be sure as to what proposition the case stands for: although it

47 111 W. Va. 616, 163 S.E. 439 (1932).
48 Id. at 619.
49 38 R.I. 31, 34, 94 Atl. 670 (1915).
seems to rest on the basis that the declarant was not a participant in the act, it possibly rests on the theory that the declaration preceded the exciting event.

Is the *Funeral Home* case then law today? It is clearly not law as to the bystander angle; for, as we have already seen, the recent decision in the *Montgomery Ward* case holds that declarations of bystanders are admissible under this exception. Hence the subsequent *Montgomery Ward* case, although it does not cite the *Funeral Home* case, must be regarded as overruling the case *sub silentio*, at least as to the inadmissibility of a bystander's declarations. And in this connection it is interesting to note that the *Funeral Home* case does not seem to have been cited on the *res gestae* doctrine during the twenty years since it was decided although the West Virginia court has handed down many *res gestae* decisions during that period. In fact, in *Scales v. Laundry*, a case decided soon after the principal case, the court distinguished the *Funeral Home* case on the ground that the court had held in that case that the excluded hearsay was irrelevant. Said the court: "In that case, [the challenged] testimony of speed five hundred yards from the place of the accident was excluded, this court stating that the speed of the automobile at another place under different circumstances was immaterial." Thus the court seems to explain the case completely out of the domain of hearsay. Hence, so far as *res gestae* vitality is concerned, the *Funeral Home* case may be deemed to be dead and buried: it should not be disinterred.

It may perhaps be contended that *Elswick v. Charleston Transit Co.*, decided in 1945, is an authoritative holding to the effect that the *res gestae* exception does not apply where there is no startling event. In that case there was an issue as to whether one Stogdon was negligently driving a car when it collided with a bus. Just before the collision the driver had stopped at an inn where Mrs. Neilson was manager. A witness testified that Stogdon was intoxicated when he stopped at the inn shortly before the collision. An employee at the inn was asked this question: "You didn't sell him any more beer because Mrs. Neilson told you he was drinking and not to sell him beer?" To this question there

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50 The case was cited two or three times, soon after it was decided, but (apparently) not on the *res gestae* doctrine.
51 114 W. Va. 352, 171 S.E. 902 (1933).
52 Id. at 357.
was the following answer: “That's right, because she told me not to.” This evidence the Supreme Court of Appeals declared to be inadmissible under the *res gestae* doctrine. It is to be noted that in the *Elswick* case, as in the *Funeral Home* case, the challenged declaration (by Mrs. Neilson) was made by a bystander. What then is the true *ratio decidendi* of the *Elswick* case? The answer is, it is believed, clearly indicated in the following language used by the court: “The declarations or acts of a person, *not a party to*, *actor in*, or witness to the transaction or occurrence upon which an action or suit is based are not admissible in evidence under the *res gestae* doctrine.” The decision therefore seems to be merely another case purporting to support the proposition that a bystander's declarations are inadmissible under the Spontaneous Declaration exception—a proposition which, as we have seen, has been clearly overruled by the subsequent decision in the *Montgomery Ward* case. It is submitted therefore that the *Elswick* case should be classed with the *Funeral Home* case as having been overruled *sub silentio*.

Before concluding the discussion of problem No. 2, it is necessary to inject another question apparently raised in the *Elswick* case and, by dictum at any rate, in several cases in other states. The question is this:

4. *Must the event or condition, which the declaration narrates or describes or explains, be “the main or principal act” involved in the litigation?*

It may be thought by some that the *Elswick* case, though it be regarded as overruled with respect to declarations of bystanders, is still citable for the proposition, seemingly advanced by the court, that the event characterized by the challenged declaration must be the “main” event. But is it the law in West Virginia, or generally in other jurisdictions, that a declaration to be admissible under this exception must relate to the main event or condition? Wigmore says: “This form of expression [that the declaration must so relate] is frequent enough. But there seems to be in the United States no ruling turning directly upon the supposed limitation.” Whatever the law may be elsewhere, it is submitted that the supposed limitation, which Wigmore condemns as a “spurious” one, is not

54 *Id.* Point 2 of the syllabus. Italics supplied. Almost the same language appears in the court's summing up in the opinion, at p. 249.

55 *Wigmore, Evidence* § 1753.
law in West Virginia. The case of State v. McKinney,\textsuperscript{56} decided before the Elswick case, is directly in point.

In the McKinney case, D was indicted for maliciously shooting X, the husband of D's sister. Evidence was offered that, shortly before the shooting, D's sister had been seriously injured (severe lacerations of the knee, loosened teeth, etc.), and that she had said at the time that it had just been inflicted by her husband (the person shot). Here the main or litigated act was obviously the shooting of X by D. But, according to the theory on which the case was tried, the infliction of injury upon D's sister by X was relevant, and the court held that it was reversible error to exclude this declaration. This is a square holding that a declaration may be admissible under the res gestae exception, although it does not relate to the main act. Interestingly the Elswick case does not cite the McKinney case; indeed, it does not cite any case: it cites only Jones on Evidence. Does the Elswick case overrule the McKinney case sub silentio? It would seem not, for the Elswick case, like the Funeral Home case, is explainable on the then supposedly sound ground that the declaration was by one not a participant in the act. But in the McKinney case the declarant was a participant—but not in the main act. Besides, as we have seen, it seems pretty clear that the Elswick case should be regarded as overruled. It is submitted that State v. McKinney is sound and that we do not have in this jurisdiction the spurious limitation that the declaration must relate to the main event or condition involved in the litigation.

But let us return to the unfinished discussion of problem No. 2, viz., whether the event or condition must be a startling one. Interestingly—perhaps importantly—in the very same volume of West Virginia Reports in which the Elswick case appears, there is reported a later case, Jones v. Ambrose,\textsuperscript{57} whose facts are quite similar to those in the Funeral Home case, and not essentially unlike those in the Elswick case. In the Ambrose case there was an issue as to whether one Staubs was negligently driving a truck when an iron bar extending beyond the edge of the truck struck and injured P. A hearsay declaration was offered to the effect that a passenger in the truck had warned the driver of the truck just before the accident that he was driving too fast. This declaration (by a bystander) was admitted, over objection, on the theory that it came within the

\textsuperscript{56} 88 W. Va. 400, 105 S.E. 894 (1921).
\textsuperscript{57} 128 W. Va. 715, 38 S.E.2d 263 (1946).
res gestae doctrine. Exception was taken to the ruling, and there was an assignment of error purporting to cover this ruling. The Supreme Court of Appeals affirmed the judgment of the trial court. The decision of the appellate court in the Ambrose case, though apparently contra to the Elswick case, is not, however, a very satisfactory precedent in point, for the reason that the assignment of error relating to the ruling contained a partially inaccurate description of the challenged evidence. Therefore the court side-stepped the assignment of error. But the inaccuracy was fully cleared up by the record which the appellate court had obviously read. Therefore, although the court was not technically under a duty to pass upon the assignment of error, no reason is perceived why it could not have done so had it regarded the evidence as inadmissible. And it is highly probable that the court would have passed upon the admissibility of this important evidence if the court had deemed the evidence inadmissible under the res gestae exception. At any rate, it is submitted that the trial court was right in Jones v. Ambrose: the evidence was clearly admissible under the Thayer theory which finds acceptable support in the West Virginia decisions.

Quaere: Did not the Supreme Court in the Ambrose case side-step the assignment of error, thereby in effect upholding the admission of important evidence, because the court deemed the evidence admissible under the res gestae exception? At any rate, such a careful treatise as Wigmore on Evidence cites the Ambrose case as a precedent for the admissibility of the evidence in West Virginia. The West Publishing Company's Virginia and West Virginia Digest also cites the case as a precedent in point. And it is to be hoped that the case is so citable, though technically it probably is not. In any event, the supreme court did in fact refuse to exclude the challenged declaration. So whatever the "law in books" may be, perhaps it is "law in action" in West Virginia that such evidence is now admissible.

The best-reasoned West Virginia decision handed down in pre-Wigmorean days is believed to be Sample v. Consolidated Light & Ry., decided in 1901. In that case a declaration relating to the occurrence was made, in the language of the court, immediately after the accident "if it can be said at all to be after the accident."

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58 § 1750, 1951 Pocket Supplement.
59 EVIDENCE, § 123 (10), 1951 Pocket Supplement.
60 50 W. Va. 472, 40 S.E. 597 (1901).
The case would therefore seem to fall within Classification A, where
the occurrence or condition is not necessarily a startling one. In
admitting the evidence as a part of the res gestae the court quoted
with approval the following statement of the doctrine: "The rule is
that evidence of words or acts may be admissible... on the ground
that they form part of the res gestae, provided that the act which
they accompany is itself admissible in evidence, and that they reflect
light on or qualify that act."

Thereupon, after a discussion of
numerous authorities, including an explanation of a West Virginia
case which did not involve an exciting event, but which the court
did not distinguish on that ground, the court said and held that
the case at bar "is clearly brought within the rule as laid down in
the authorities cited as being a 'spontaneous utterance of thoughts
created by or springing out of the transaction itself, and so soon
thereafter as to exclude the presumption that they are the result of
premeditation and design.' This is essentially the Thayer
theory, not the Wigmorean limitation. There is nothing in the
court's reasoning requiring that the occasion be a startling one. The
nearest approach to the Wigmorean limitation is a quotation with-
out comment from Greenleaf on Evidence, saying that the excep-
tion rests on the notion that the circumstances of the occasion so
excite and control the mind of the speaker that his statements are
natural and spontaneous and therefore sincere and trustworthy.”
And, indeed, this is a very good description of the notion on which
the exception rests. But this quotation can hardly be interpreted
to mean that the event must be a startling one. The mind can be
momentarily “excited and controlled” by nonstartling distracting
occurrences or conditions. The case is therefore believed to be a
citable West Virginia precedent for the Thayer theory.

Another interesting decision, State v. Baker, seems important
enough to be considered on this point. In that case there was an
issue as to whether the defendant had bought and received stolen
goods, including certain billiard balls. It seems to have been
satisfactorily established by competent evidence that witness W
had tendered delivery of the billiard balls to the defendant; so
we have in the case the revelant nonverbal event of tendered deliv-

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61 Id. at 478.
63 50 W. Va. 472, 481, 40 S.E. 597 (1901).
64 1 GREENLEAF, EVIDENCE § 162 (g) [16th ed. (semble) 1899].
SPONTANEOUS DECLARATIONS

ery. Consequently W was asked this pertinent question: "What occurred between you and Baker [the defendant] when you delivered to him the poker chips and the billiard balls...?" The attorney for the defense stated that he expected the following answer: "...this stuff might be stolen—Lieutenant Fleming told me a little while ago that someone had... stolen some billiard balls and these might be the property; that he better see the officers and let them known about it." This evidence was excluded by the trial court on the ground that it was a self-serving assertion. Is it a spontaneous declaration? The supreme court held the evidence admissible, quoting with approval the following language: "It is not... necessary that such declarations, to be part of the res gestae, should be precisely concurrent with the act under trial; it is enough if they spring from it and are made under circumstances which preclude the idea of design."68

Here the event, to which the declaration relates, is clearly a nonstartling one, as the defendant had not yet been charged with having bought or having received stolen goods. And the case has not been overruled. To be sure, the decision can be explained under the exception for Declarations Evidencing Mental Condition, for the self-serving declaration, if usable, threw material light on the issue of the defendant's knowledge. But if there were no such other exception—and the court did not even mention any other exception—is not the decision justifiably explainable under the res gestae doctrine which the court did expressly consider and apply? And in this connection it should be remembered that, as hereinbefore indicated, it not infrequently happens that an assertion may be admissible under either of two exceptions. This would seem to be especially appropriate where, as here, the two equally applicable exceptions have the same basic rationale, viz., spontaneity or the equivalent. Indeed, one of America's most distinguished judges has recently characterized the Mental Condition exception to the hearsay rule as "the generally accepted exception in favor of spontaneous expressions of pain or the like."67

Although there are several additional cases in this jurisdiction which, arguably at least, are more or less in point,68 there seems

68 Id. at 157. The court incorporates the quotation almost verbatim in the syllabus.
67 Learned Hand, J., in Meaney v. United States, 112 F.2d 538, 539 (2d Cir. 1940).
68 Few, if any, of them are, however, noteworthy enough to justify much discussion. See, e.g., Beckwith v. Mollohan, 2 W. Va. 477 (1868).
to be only one other decision worthy of detailed consideration. In that case, *State v. Coram*, an outstanding case decided in 1935, the defendant had been found guilty of an assault on a young girl. There was no reasonable doubt that an assault had been committed, and in the appellate court the decision turned on the identification of the assailant. The girl's description of the occurrence, made immediately after the event, was held, and correctly, to be admissible as a Spontaneous Declaration. And the really important hearsay question was whether, after she had become mentally and emotionally composed, her extrajudicial identification of the suspect, made to a police officer, was also admissible even though because of her tender years she did not (could not) take the witness stand. The trial court admitted the evidence. And, significantly, the appellate court clearly thought the Spontaneous Declarations exception to be applicable, although the court ultimately disregarded the identifying statement partly because the court considered it too indefinite, but chiefly because the officer had apparently asked a leading question. The quotation *infra* from the opinion persuasively indicates that, but for the aforementioned factors, the extrajudicial identification would have been considered good evidence. Said the court (italics ours):

"Different circumstances, however, surround . . . [the victim's] statement to the officer. She had become mentally composed before he started with her to confront defendant. Her identification of him was not voluntary, but in response to a leading question by the officer. Interrogation alone does not exclude a reply from the res gestae; but the question should not prompt the answer. . . ."\(^70\)

Finally the court said, "For modern view . . . [as to 'extrajudicial identification'] see Wharton . . . [Criminal Evidence], sec. 439."\(^71\) This section, thus approved by the court, contains the following pertinent passage:

"*Extrajudicial identification of accused.* There is a wide diversity of opinion on the question of the competency of evidence of extrajudicial identification in a trial where the identity of the accused as the person guilty of the crime is in dispute. Formerly, the rule excluding such testimony was applied by far the greater number of courts. In recent years,

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\(^69\) 116 W. Va. 492, 182 S.E. 83 (1935).

\(^70\) Id. at 495.

\(^71\) Ibid. The textbook citation is 1 WHARTON, CRIMINAL EVIDENCE (11th ed. 1935).
however, the tendency has been towards the admission of such
testimony both as substantive, and as corroborative evidence,
so that now there exists a fairly balanced weight of authority
on the question, with a slight preponderance of jurisdictions
favoring admission. . . .”

Perhaps no better type of case can be found than State v.
Coram as an illustration of the need for judicial recognition of the
applicability of this exception to nonstartling occasions. Testi-
mony given in court identifying the accused is generally conceded
to be extremely unreliable because the final testimonial identifi-
cation can largely be taken for granted: the conspicuous presence
of the accused in the courtroom strongly suggests his identity, so
that even the most conscientious identification witness will have
his mind dangerously preconditioned in regard to the issue. 72
Accordingly the better modern decisions admit the extrajudicial
identification, almost always, however, as “supporting a witness,”
i.e., where the person making the extrajudicial identification testi-
fies at the trial. 73 But should not such an identification be admis-
sible where as in the instant case the person making the identifica-
tion does not (cannot) take the witness stand?

An extrajudicial identification made while the declarant is
actually perceiving the features and other identifying attributes
of the suspect comes substantially within the Spontaneous Declara-
tions doctrine, for such an identification is, in essence, a shorthand
expression of present sense-impressions with respect to the person
observed and a simultaneous or instantaneous comparison with
past sense-impressions as to the same or supposedly same person.
To be sure, the contemporaneous comparison constitutes a slight
variation of the usual situation involved in this exception; but the
reason for the exception would seem to be present in substance,
viz., a reasonable assurance of trustworthiness of the utterance be-
cause of the spontaneousness of the identification 74—and it seems
clear enough that the West Virginia court took this view. The
Coram case is therefore believed to be a citable precedent favoring
the proposition that an extrajudicial identification of a suspect, if

72 See Wigmore, Evidence § 1130 and authorities there cited. See also
73 In the Note, supra n. 72, by Morgan and Maguire the extrajudicial
identification statement is characterized as a “spontaneous” identification, and
there is this suggestion: “May not this reasoning operate entirely apart from
witness impeachment and rehabilitation?”
74 Cf. n. 78 supra.
unprompted and reasonably definite, is admissible under this exception, even after the occasion has ceased to be a startling one.

It must be conceded of course that, from the applicable precedents in this jurisdiction, one can hardly argue with assurance as to just what a trial court should hold with respect to the principal question herein discussed, or as to what the decision on appeal would be. What is the *causa causans* of all this uncertainty?

The primary though obviously not the sole cause would seem to be this: the courts sometimes use the reasoning of the Spontaneous Declarations principle and sometimes resort to the more restrictive terminology of the orthodox *res gestae* concept. Indeed, in the two most recent West Virginia cases in point, apparently identical twins, born only five weeks apart, the court uses the modern rationale of spontaneity in the first case and the more restrictive and more slippery terminology of the old concept in the second case—with decidedly variant results, variant, however, in regard to a problem alien to the scope of the present discussion and reserved for future comment.77 Until a definite choice is made between these competing theories, each with a technically different rationale and coverage, it will not be possible to predict with reasonable assurance as to just what declarations are admissible under this exception.

The view herein taken with respect to the principal question—and the view seemingly supported by the more authoritative West Virginia precedents—is further buttressed by what is believed to be a basic philosophy underlying the modern law of evidence, *viz.*, that an adequate securing of the various interests involved in a case requires that all relevant evidence be considered unless there is a clear legal reason for excluding it. In situations in which the arguments for and against admissibility might well be regarded as in equilibrium the doubt should generally be resolved in favor of receiving relevant evidence.78 The gradual expansion, in comparatively recent years, of most of the exceptions to the hearsay rule is an excellent example of this view. And, apart from the controversial nonstartling-event cases, no more striking illustration

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77 An explanation of these two cases, together with a number of other *res gestae* cases, will be attempted in a forthcoming issue of the *Review*.
78 *Cf.* THAYER, A PRELIMINARY TREATISE ON EVIDENCE 530 (1898): All “logically probative” evidence “should come in, unless a clear ground of policy or law excludes it.”
of this trend can be found than in the so-called *res gestae* exception which in the earlier decisions usually did not admit extrajudicial declarations unless they were "contemporaneous" with the event or condition;\(^7\) whereas of late the test is, increasingly, the much more inclusive theory of spontaneity. The general philosophy of the law in this regard is neatly expressed as follows in a recent decision by the United States Supreme Court:\(^8\) "The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.' Thayer, A Preliminary Treatise on Evidence."\(^9\) (Thayer, however, put it thus, and better: "everything which is . . . [logically] probative should come in, unless a clear ground of policy or law excludes it."\(^10\)) It would irrationally reverse this trend for courts to refuse to admit relevant evidence under the generally approved Spontaneous Declarations exception in situations in which the rationale of the exception is applicable.

If all courts in the United States would adopt the simplified and scientifically sound principle as enunciated by the American Law Institute's distinguished Committee on Evidence, what a vast amount of dangerous uncertainty and irrationality, not to mention unnecessary labor by both judges and lawyers, would be eliminated from the trial of cases!—and from the writing of opinions, and articles for law reviews! So far as West Virginia is concerned, here is one important legal reform which, it is submitted, can be easily and quickly accomplished without legislation and without departing from the ordinary doctrine of stare decisis—'tis a consummation devoutly to be wished.

(To be continued.)

\(^7\) See, e. g., Corder v. Talbott, 14 W. Va. 277 (1878).
\(^8\) Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 497 (1951), *per* Mr. Justice Frankfurter.
\(^9\) Thayer, *op. cit.* supra note 78.
\(^10\) Ibid.