Volume 38 | Issue 1 Article 16

December 1931

Evidence--Res Gestae--Suicide Notes

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lessee. The stipulation as to forfeiture in the agreement was for the purpose of securing to *S* the payment of the rental during the years the lease was to continue. If *P* could have the forfeiture set aside he would have a fair chance to establish his claim on the final hearing. As a general rule equity will set aside a forfeiture for the non-payment of rent where compensation can be made.[8] In West Virginia specific provision is made for relief from a forfeiture for non-payment of rent,[9] and in a recent case relief from such forfeiture was granted in which the court relied definitely on this statutory provision.[10] Thus it appears that *P* might secure relief from the forfeiture and in order to secure his interests it would seem that the injunction should not have been dissolved.

—FREDERICK H. BARNETT.

EVIDENCE — *Res Gestae* — SUICIDE NOTES. — In a suit on a war risk insurance policy, the beneficiaries contended that *C*, the veteran insured therein, disappeared from his Norfolk home on January 8, 1921, and died before the lapse of the policy on March 1, 1921. *C* left his employer's office on the morning of January 8 with a man who had just shown him a paper and had given him a short time on the same day within which to make good some obligation. In the afternoon mail, *C's* wife received a suicide note dated that morning.[1] Later a man was seen by a boy to leave his coat on a bridge platform twenty miles from Norfolk and to walk away. The boy took the coat home and in its pocket found a second note which was forwarded to the wife within the week and which

such answers, ought to have dissolved the injunction if, as was the case, the allegations of the bill were unsupported by proof. It is true there are various exceptions to this general rule as where the plaintiff would lose all the benefit which would otherwise accrue to him should he finally succeed in the cause, or where the facts disclosed by the bill and answer afford strong presumption that the plaintiff will establish his claim for relief on the parol hearing, and it appears that he will suffer great and immediate injury by a dissolution of the injunction, or when a dissolution of the injunction would in effect amount to a complete denial of the relief sought." Shonk v. Knight, 12 W. Va. 667, 683 (1878).

[8] Wheeling & E. G. Ry. Co. v. Triadelphia, 58 W. Va. 487, 516, 52 S. E. 499, 511 (1905); Spies v. Ry. Co., 60 W. Va. 389, 55 S. E. 464 (1906); Pheasant v. Hanna, 63 W. Va. 613, 60 S. E. 618 (1908); South Penn Oil Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43 (1900); Lynch v. Versailles Fuel Gas Co., 165 Pa. St. 518, 30 Atl. 984 (1895).

[9] W. VA. REV. CODE (1931) c. 37, art. 20, § 6.

[10] Beech Fork Coal Co. v. Pocahontas Corporation, 109 W. Va. 39, 152 S. E. 785 (1930).

[1] This note, signed "Billie", simply told of intended suicide.

read: "Have taken Cyanide of Potash and jumped in the River ending a wasted life every one will be better off by my passing out".[2] The wife could not positively identify, as her husband, a body found along the North Carolina seashore several months later. *Held,* that the two notes were properly admitted in evidence either as a part of the *res gestae* tending to prove a time of death prior to the lapse of the policy, or under another hearsay exception "closely akin to *res gestae*" as statements of intention; and that the other evidence tended to establish *C's* death. *United States v. O'Brien.*[3]

The *res gestae* doctrine has been correctly and vigorously criticized, judicially and otherwise, because it is vague, useless and even harmful.[4] A declaration, admissible under this doctrine, must characterize and be contemporaneous with a principal non-verbal act, independently established;[5] but, while giving lip-service to the requirement of contemporaneity, the courts have stretched the doctrine beyond recognition.[6] The principal case illustrates the continued reluctance of courts to break away from this unfortunate phrase.[7] Although giving the alternative ground for the admissibility of the notes as statements of intent, citing

[2] It was signed with the insured's full name.

[3] 51 F. (2d) 37 (C. C. A. 4th, 1931).

[4] "It is useless, because every rule of evidence to which it has ever been applied exists as a part of some other well-established principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology." 3 WIGMORE, EVIDENCE (1904) §§ 1795-97; Hardman, *Spontaneous Exclamations v. Res Gestae* (1918) 25 W. VA. L. Q. 341; (1921) 28 W. VA. L. Q. 155; People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908).

[5] WIGMORE, EVIDENCE (1904) §§ 1753, 1754, 1756.

[6] *Supra* n. 5. Starcher v. South Penn Oil Co., 81 W. Va. 587, 95 S. E. 28 (1918) (declaration admitted as part of *res gestae* made immediately on recovery of consciousness although some time after an explosion; the court also quoted Mr. Wigmore's language with reference to spontaneous exclamations.)

[7] The *res gestae* doctrine is applied in the following cases: Ambrose v. Young, 100 W. Va. 452, 130 S. E. 810 (1925) (declaration of car driver on scene of collision within 20 minutes after accident that he was driving 45 miles per hour at a point 1/8 mile from place of collision, admissible); Wallace v. Prichard, 92 W. Va. 352, 115 S. E. 415 (1922) (where broker, verbally surrendering previous contract, agreed owner could deal directly with customer in consideration of owner's agreement to pay stipulated compensation, original contract admissible); DePue v. Steber, 89 W. Va. 78, 108 S. E. 590 (1921) (declaration of alleged donee that a ring had been given to him, made on day of alleged gift and very soon afterwards but not at place thereof, not admissible; but declarations of ownership of property while in his possession are admissible); Robertson v. Ry. Co., 87 W. Va. 106, 104 S. E. 615 (1920) (decedent's declaration when removed from beneath cars that on entering tracks he looked and saw no train in either direction admissible); Blagg v. Ry. Co., 83 W. Va. 449, 98 S. E. 526 (1919) (engineer's statement just after accident that he saw decedent in

the famous Hillmon case,[8] the decision creates the impression that the emphasis is in justifying the admissibility under the *res gestae* exception. In fact, the syllabus speaks only of *res gestae.*

The difficulty in applying the *res gestae* doctrine appears in the very opinion of the court. To the contention that to admit these notes under that doctrine is to allow the independent fact of death, which the notes are to explain, to be proved by the notes themselves, the court answers: "We do not think that the admission of the notes on the *res gestae* doctrine is limited to any such narrow view".[9] Narrow or not, the contention was sound, for the other evidence to establish death was rather slight.[10] Moreover, to say the notes were "written shortly before actual suicide" is to assume a knowledge of the precise time of the alleged suicide. Finally, the court refers to the notes as spontaneous statements, remarking that they were "written when the insured was in the act of leaving his home and business and when shown to be in financial and perhaps criminal difficulty".[11] Despite the court's express statement to the contrary,[12] spontaneity has no applica-

tracks and blew for him but he did not seem to hear alarm apparently because of another passing train admissible); Starcher v. South Penn Oil Co., *supra* n. 6; Phenix Fire Insurance Co. v. Virginia-Western Power Co., 81 W. Va. 298, 94 S. E. 372 (1917) (statement of defendant's lineman immediately after power house apparatus indicated three short circuits that wires were tangled up and that plant must be shut down admissible); Stone v. Campbell's Creek Ry. Co., 66 W. Va. 417, 66 S. E. 521 (1909) (engineer's statement to boy jumping from train and run over by it, made 3 or 4 minutes after injury, admissible); Sample v. Consolidated Ry. Co., 50 W. Va. 472, 40 S. E. 694 (1901) (motorman's declaration made while still on deceased child's body admissible); Deck v. Tabler, 41 W. Va. 332, 23 S. E. 721 (1895) (husband's declarations admissible to show his intention in making gift or settlement and to raise resulting trust); Hawker v. B. & O. Ry. Co., 15 W. Va. 628 (1879) (engineer's statement one hour after accident and several hundred yards away not admissible); Corder v. Talbot, 14 W. Va. 277 (1878) (husband's statements to wife concerning his conversation with a man just few minutes prior thereto not admissible); Beckwith v. Mollohan, 2 W. Va. 477 (1868) (defendant's declarations at time of tying plaintiff's hands forcibly as to reasons therefor admissible).

[8] Mutual Life Insurance Co. v. Hillmon, 145 U. S. 255, 12 S. Ct. 909 (1892).

[9] *Supra* n. 1, at 40.

[10] Insurance Co. v. Mosley, 8 Wall. (U. S.) 397 (1869), declarations of insured decedent that he had fallen down stairs and injured himself admitted as part of *res gestae.* Maguire, *The Hillmon Case—Thirty-Three Years After* (1925) 38 HARV. L. REV. 708, 712, n. 16, similarly criticizes this case because other evidence tending to prove a fall was slight or entirely lacking.

[11] *Supra* n. 1, at 40.

[12] *Supra* n. 1, at 41. Such confusion of the *res gestae* and spontaneous exclamation doctrines exists in our own cases. Ambrose v. Young, *supra* n. 7, at 458; Blagg v. Ry. Co., *supra* n. 7, at 453; Starcher v. South Penn Oil Co., *supra* n. 7, at 600.

tion to *res gestae;* it is the requisite of an exception for spontaneous exclamations which Mr. Wigmore has substituted for the *res gestae* doctrine.[13] Besides the evidence was quite vague as to the exact nature of the threatened prosecution, if any, so that it may be said that there was not a sufficiently clear startling occurrence under the influence of which the notes would gather unto themselves trustworthiness within the spontaneous exclamation exception.[14]

The two suicide notes were clearly admissible under the hearsay exception for statements of present existing intention or state of mind.[15] So limited, the statements must refer to future acts.[16] The second note here was couched in the past tense but under the circumstances it must certainly have indicated an intention to do a future act.[17] No difficulties are encountered, for the notes come in as independently material evidence of intention and the inquiry to establish the fact of death has no bearing on admissibility as it would seem to have under the *res gestae* doctrine.[18] It is difficult to understand why a court, which in the same opinion recognizes the rather easily applied doctrine of the Hillmon case,[19] should struggle with the unsound *res gestae* doctrine.

—BERNARD SCLOVE.

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[13] 3 WIGMORE, EVIDENCE (1904) §§ 1745-60.

[14] "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 actual sensations and perceptions already produced by the external shock." 3 WIGMORE, EVIDENCE (1904) § 1747. Besides the fact that a startling occurrence was not clearly established, it would also seem that a threatened prosecution is not strictly within the above rule. For a typical case within the rule, involving an explosion, see Starcher v. South Penn Oil Co., *supra* n. 7.

[15] Prof. Wigmore anticipates the present case, characterizing the use of *res gestae* here as the wrong reason for a correct conclusion. 3 WIGMORE, EVIDENCE (1904) § 1726(2); State v. Hayward, 62 Minn. 474, 65 N. W. 63 (1895).

[16] 3 WIGMORE, EVIDENCE (1904) §§ 1725-34. The doctrine of the Hillmon case has been criticized by Hutchins and Slesinger, *State of Mind to Prove An Act* (1929) 38 YALE L. J. 283, making a logical extension of the doctrine to admit statements of present existing state of mind to prove past and present facts as well, when corroborated; see also Seligman, *An Exception to the Hearsay Rule* (1912) 26 HARV. L. REV. 146; Maguire, *The Hillmon Case—Thirty-Three Years After, supra* n. 10.

[17] The court so considered it. *Supra* n. 1, at 39.

[18] WIGMORE, *op. cit. supra* n. 15.

[19] *Supra* n. 8.