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Spontaneous Exclamations v. Res Gestae

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suffered by the lessee if apportionment were required on the basis of the production of each parcel of the premises no such apportionment should be allowed without the consent of the lessee, for the simple reason he should not be compelled to perform substantially more than he has contracted to perform.

As to the matter of development it is clear the lessee can be compelled to develop the premises leased with reasonable diligence and his duty in this respect cannot be changed without his consent. It was suggested in the previous note that in *Campbell v. Lynch* the plaintiff's tract of land was so large that he possibly would not be without remedy against the lessee if there was failure to develop his portion. The lessee was bound to develop the whole tract reasonably and if he developed five tracts and did not drill any wells on the sixth tract (which contained over eighty acres) certainly the owner of such tract should have relief in equity because this would be a breach of the implied covenant to develop the entire tract diligently. Courts which have established an exception to the settled rule of law that a court of equity will not enter a decree in aid of a forfeiture would not be likely to deny relief in such a case at suit of the assignee of a portion of the leased premises because of an old and technical rule of law as to the enforcement of rights of entry for condition broken.

—J. W. S.

SPONTANEOUS EXCLAMATIONS *v.* RES GESTAE.—Perhaps no phrase in the whole field of evidence is the subject of so much misuse as the mystic shibboleth "*res gestae.*" For many years the phrase has been quite generally used as a convenient "catch-all" to cover, for purposes of admissibility, many hearsay statements which the courts, by a sort of judicial intuition, have felt should be admitted, but, at the same time, have failed to assign as a reason for their admission any more satisfactory explanation than the time-worn, empty assertion that they are "a part of the *res gestae.*"¹ The phrase seems to be a relic of the days (not long since) when there was a general belief in so-called solving words and juristic conceptions—a belief, which, as a matter of legal history, generally obtains in the early periods of legal growth. In the development of the law, however, changes in conditions require changes in legal rules and conceptions, and, hence the modern tendency to break

¹See James Bradley Thayer, 15 AM. L. REV. 1, 5 *et seq.*

away from the early belief in the all sufficiency of mere solving words and juristic conceptions.² In view of this fact, then, is there any justification for the modern reluctance of the judiciary to break away from its early belief in the solving power of the mystic words *res gestae*?

A recent case before the Supreme Court of Appeals of West Virginia admirably illustrates the problem. In that case, *Starcher v. South Penn Oil Co.*,³ A, upon hearing a loud report as if from an explosion, approached the locality from which the report came, and found B lying unconscious near a severed, high-pressure, gas pipe line. After an unascertained length of time B regained consciousness, and A asked him what hurt him; whereupon B, pointing to the broken pipe line, said, "That hurt me, it struck me in the back." B died immediately afterwards. In an action for personal injury caused by negligently maintaining an unsafe, high-pressure pipe line it appeared that B was on the premises by the invitation of the defendant. *Held*, that the hearsay statement was admissible "as a part of the *res gestae*."

The principal case is all the more interesting because of the fact that in another rather recent case, substantially on all fours with the principal case, the Supreme Court of Louisiana reached a directly opposite conclusion.⁴ In fact precedents in point are in such hopeless conflict and confusion that an eminent Chief Justice not long since remarked that "there are few problems in the law of evidence more *unsolved* than what things are to be embraced in those occurrences that are designated in the law as *res gestae*."⁵ If, then, what we may call the solving words, *res gestae*, do not solve, at any rate do not solve with sufficient certainty and adaptability to varying circumstances it would seem that the courts would here, as elsewhere, be justified in breaking away from their early belief in the all sufficiency of mere words and conceptions. But first, what is meant or supposed to be meant by the mystic words *res gestae*? It is generally said that hearsay statements are admissible as "a part of the *res gesta*" or "*res gestae*" [*i. e.*, as an exception to the hearsay rule], provided (1) that there is some [non-verbal] *act (res gesta)* that is itself admissible under the issue, (2) that the hearsay statements characterize or explain the

²See Pound, Foreword to EWART, WAIVER DISTRIBUTED.

³95 S. E. 28 (W. Va. 1918).

⁴*Blonto v. Illinois Cent. R. Co.*, 125 La. 147, 51 So. 98 (1910).

⁵Mr. Chief Justice Beasley in *Hunter v. State*, 40 N. J. L. 495, 536 (1878).

act and (3) that the statements and the act accompany each other, *i. e.*, are *contemporaneous*.⁶ But when is a statement so contemporaneous with an admissible *act* that it is a part of the act and, therefore, admissible as a part of the so-called *res gestae*? In the principal case the *act (res gesta)* was the accident and the statement was made not at the time of the accident but after the lapse of an unascertained period of time, including an unascertained period of unconsciousness. Now, in the very nature of things—in logic, law or what-not—it would seem to be impossible for a statement to be *actually a part* of a wholly-past, complete and severable act, here the accident.⁷ It seems clear, therefore, that the statement in the principal case cannot possibly be a part of the accident or act, and, hence, unless there is some other ground than the alleged “*res gestae*” reason the statement is excluded by the hearsay rule.

May the evidence, then, be admitted on any other ground? In dealing with this general problem Mr. Wigmore in his great work on Evidence ably advocates the total abolition of the use of the empty phrase *res gestae* and the substitution of a rational principle of law—a principle which the learned author calls the doctrine of “Spontaneous Exclamations.” Nor is Mr. Wigmore’s doctrine without judicial sanction. In fact it has been rather recently expressly adopted by the New York Court of Appeals⁸ in a strong opinion in which the *res gestae* doctrine was thrust aside and the doctrine of spontaneous exclamations was expressly sanctioned and followed. Perhaps the latter doctrine may be best explained in the apt language of its author:⁹

“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

⁶See *Sample v. Consolidated, etc. Co.*, 50 W. Va. 472, 478, 40 S. E. 597 (1901). See 3 WIGMORE, EVIDENCE, §§ 1753, 1754, 1756.

⁷*People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908).

⁸*People v. Del Vermo*, *supra*. See also *Lander v. People*, 104 Ill. 248, 256 (1882); *Mitchum v. State*, 11 Ga. 615 (1852). In fact the principal case, while purporting to follow the *res gestae* doctrine, also quotes and purports to follow the passage from Wigmore which lays down the doctrine of spontaneous exclamations.

⁹WIGMORE, *op. cit.*, § 1747.

senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by 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."

Applying this principle to the facts of the principal case it seems quite clear that (with a possible qualification to be mentioned hereafter) the hearsay statement in question was made by the decedent under the immediate influence of the "external shock" while his reflective faculties were stilled and before he had time to contrive a false statement. Hence, the evidence, though not a part of the *res gestae*, is a *spontaneous utterance* and admissible under the doctrine of spontaneous exclamations. The possible qualification to this conclusion is that it does not appear whether the deceased declarant was unconscious during the whole of the *unascertained* period of time which elapsed between the time of injury and the time when he was found, and if the declarant remained conscious for a considerable time before he became unconscious, during which period of consciousness his reflective faculties were not stilled by the shock so that he had time to reflect and contrive a false statement, the mere fact that he subsequently became unconscious would not render the statement made by him immediately upon regaining consciousness a spontaneous exclamation. In order, then, to admit the statement as a spontaneous exclamation it would seem that it should be made to appear to the satisfaction of the court that the period of time between the happening of the exciting cause and the making of the statement was such that, taking into consideration a possible or probable intermediate period of consciousness, the total period would "presumably preclude fabrication." Apparently, however, the period of time between the happening of the "exciting cause" and the discovery of the injured declarant was so brief that even if substantially the whole period was a period of consciousness the statement was still made under the immediate influence of the exciting cause and, hence, was admissible as a spontaneous exclamation.

One of the several objections to the *res gestae* doctrine is that under that doctrine the hearsay statement is not admissible unless the *act* which it accompanies and characterizes is also admissible under the issue. It is quite clear, however, that this limitation is

not founded upon sound principle.¹⁰ Thus, suppose that the principal case had been a proceeding to probate an alleged will of the deceased and the issue had been whether the will was a forgery, and the evidence offered was that immediately upon regaining consciousness the declarant exclaimed: "Great Heavens! I wish I had made a will." The death being admitted, the *act* (accident) being irrelevant would not be admissible. Hence, if we adhere to the *res gestae* doctrine the statement is inadmissible, but it is quite clear that there is no distinction, upon principle, between the supposititious case and the principal case and that the statement should be admitted, but in order to admit it in the supposititious case the *res gestae* doctrine must be abandoned and the spontaneous exclamation doctrine adopted.

Another objection to the *res gestae* doctrine (the only other which space permits taking up) is that the doctrine, strictly applied, excludes all statements made *after* the *act* has occurred, for otherwise the statement cannot be said to be "a part of the act," *i. e.*, "a part of the *res gestae*." Thus, as was stated by Bartlett, J., in *People v. Del Vermo*,¹¹ speaking of a case¹² in which such "after-made" statements were admitted as a part of the *res gestae*:

"Strictly speaking the spontaneous declaration there under consideration did not really form part of the *res gestae*. for the exclamation was uttered after the act had been wholly completed although it is true that the time which had elapsed was very short. The decision, therefore, is clearly an authority for the admissibility of proof of such exclamations relative to an injury provided they are of the character and made under the conditions which have already been stated [*viz.*, provided they are spontaneous exclamations], although they are subsequent in point of time to the infliction of the injury."

Similarly in the case in which the above-mentioned statement occurred, an extra-judicial statement of an injured person made immediately *after* he was injured was admitted below "as a part of the *res gestae*"; but Bartlett, J., in the Court of Appeals said:

"The statement was admitted as a part of the *res*

¹⁰See 3 WIGMORE, *op. cit.*, § 1753.

¹¹*Supra*.

¹²*Commonwealth v. Hackett*, 2 Allen 136 (Mass. 1861).

gestae in the broadest sense of the term. I think that it must be deemed to have been properly received under the exception to the general rule excluding hearsay evidence, which is treated by Professor Wigmore under the convenient term of 'spontaneous exclamations.' (3 WIGMORE ON EVIDENCE, §1745). That exception may be stated as follows . . . It will be observed that this exception contemplates and permits proof of declarations by an injured person made *after* the event, so that it cannot fairly be said that the words spoken really constitute a part of the thing done."

So in the principal case the statement in question, having been made not at the time of the act but after a lapse of an unascertained length of time, cannot be admitted as a part of the act, *i. e.*, as a part of the *res gestae*, though, subject to the above-mentioned qualification, it is admissible as a spontaneous exclamation. The case, then, when considered with the afore-mentioned Louisiana case to the contrary and the many other confused cases *pro* and *con*,¹³ would seem to justify the following vigorous language by the foremost authority on the subject of evidence:¹⁴

"The phrase *res gestae* is, in the present state of the law, not only entirely useless, but even positively harmful. 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 and can be explained in the terms of that 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. It should never be mentioned. No rule of evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rules of evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision."¹⁵

—T. P. H.

¹³See a discussion of some of the cases in *Sample v. Consolidated, etc. Co.*, *supra*. See, also, 3 WIGMORE, *op. cit.*, §§ 1745 *et seq.*

¹⁴3 WIGMORE, *op. cit.*, § 1795.

¹⁵Many extra-judicial statements which are not spontaneous exclamations are generally admitted on the ground that they are "a part of the *res gestae*," but, as Mr. Wigmore points out, they are "utterances to which the [hearsay] rule is in its nature not applicable." As to this class of utterances see 3 WIGMORE, *op. cit.*, §§ 1745, 1768-1797.