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Hearsay Rule: Time Element in Spontaneous Exclamations

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to mean that in these cases officers will not be held to as strict a rule in similar cases as they have been in the past. The rule in the *Zap* case is fairly definite and serves as a *caveat* to persons contracting with the Government. The rule in the *Davis* case is not so definite, as it only creates a presumption against the use of unreasonable force in the case of certain types of property under certain circumstances. Nevertheless, the latter rule gains in importance when its possible repercussions are considered, and these effects are accentuated instead of being diminished by the uncertainty of the rule. As a trend in search and seizure decisions these cases seem to find the court realizing the importance of convicting guilty defendants, when the evidence shows that they are guilty, without as much attention as they have previously given to how the evidence was procured.

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The Hearsay Rule: Time Element in Spontaneous Exclamations

In *State v. Stafford*,[1] in which the defendant was prosecuted for assault with intent to murder his wife, statements made by her to her sister and brother-in-law *fourteen* (14) hours after the alleged offense were admitted into evidence as part of the *"res gestae."* Defendant's wife had been severely beaten, almost beyond recognition, and seriously injured in a pasture near their home. She escaped and hid out during the night, wandering about until early morning when she made her way to her sister's home three miles distant. Her statements as to what had happened were held by the court to be a "spontaneous exclamation" and as such admissible in evidence.

The hearsay rule forbids the use of an assertion made out of court *as testimony to the truth of the fact asserted,* unless it has been open to test by cross examination or an opportunity thereof.[2] The reason hearsay is excluded is because of potential infirmities as to the observation, narration, and veracity of the one who made the statement; and unless he is available for cross examination the statement is generally considered untrustworthy.[3] To the rule itself there are, of course, numerous recognized exceptions.[4] All of these exceptions rest on some special ground, however, and have evolved, historically, independently of each other. But underlying them all are two basic thoughts: 1) that some special situation exists that lessens the risk of untrustworthiness (in effect overcoming the requirement of cross examination), and 2) that there is a *special necessity* for using the particular statement.[5]

Along with this principle establishing the various exceptions to the rule another, and elementary, principle admits statements attrib-

[1] ——Iowa——, 23 N.W. (2d) 832 (1946).

[2] Wigmore on Evidence, (3rd ed., 1940) §§1361-1362.

[3] Morgan, "The Law of Evidence, 1941-1945," 59 Harv. L. R. 541 (1946).

[4] Examples: 1) Dying Declarations, 2) Statements of Facts Against Interest, 3) Statements about Family History, 4) Attesting Witness's Statements, 5) Regular Entries in the Course of Business, 6) Statements about Private Land Boundaries, 7) Statements of Decedents in General, 8) Reputation about Land, Character, Marriage, etc., 9) Scientific Treatises, 10) Affidavits, 11) Commercial and Professional Lists, etc., 12) Statements of Physical Sensation and Mental Condition, 13) Official Statements, and 14) Spontaneous Exclamations under Excitement. Wigmore, *supra* note 2.

[5] Wigmore, *supra* note 2, at §1749.

uted to persons not in court for cross examination whenever the statements are offered without reference to the truth of the matter asserted. Those utterances that form a part of the issue, or are relevant as circumstantial evidence, or form a verbal part of the act[6] (usually referred to as the "verbal act" doctrine) are thus admissible, for it follows that when the words are received *not* as evidence of the truth of what was declared, but because the speaking of the words *is the fact*, or part of the fact, to be investigated then the hearsay rule would not apply. Words spoken concurrently with an act done are often a part of the act, and give it a precise and peculiar character, and therefore must be considered as evidence—not to show that the words are true, but to show that they were, in fact, spoken.[7]

The doctrine of "spontaneous exclamations"[8] (an exception to the hearsay rule) and the "verbal act" doctrine (rule is not applicable here) are fundamentally different both as to their applications and their requirements. The great confusion that does exist here is due largely to the fact that the courts have used the term *"res gestae"*—the literal translation of which is "things done," or "thing transacted"—as a convenient rule of thumb to admit or reject evidence without first analyzing the problem in the light of the actual scope and purpose of the hearsay rule. Thayer pointed out that the term *"res gestae"* was first used by "Garrow and Lord Kenyon — two famously ignorant men."[9] This term, if useful at all, is of value only as to those statements admitted under the second principle, where the hearsay rule is not even applicable. Yet the courts have constantly used the term indiscriminately. Thus, in many cases, while the doctrine of "spontaneous utterances" controls, it appears in the form of a development of the *"res gestae"* doctrine. The courts justify this by holding that there is a "causal connection" between the accident or act and the utterance, the latter supposedly "springing from" the act. There are "connecting circumstances," and thus the declarations are construed as "a part of the transaction."[10] There are very few cases which refrain from using this catch-all phrase ("as a part of the *res gestae*"), yet most authorities[11] favor either a complete abolition, or at most a very restricted use of the term. The eminent Judge Learned Hand, in a recent case, stated:

> ". . . as for *'res gestae'* it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."[12]

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[6] *Id.* at §1761.

[7] Cherry v. Slade, 9 N.C. 400 (1823).

[8] Jones terms this doctrine "Spontaneous Utterance under Stress," Jones, Comm. on Evid. (2nd Ed.) §1750.

[9] Thayer, Legal Essays (1927 Ed.) 244.

[10] *See* for illustrations: Hill's Case, 2 Gratt 604 (Va.) (1845); Merkle v. Bennington, 58 Mich. 163 (1885); Galena & C.U.R.R.Co. v. Fay, 16 Ill. 568 (1855).

[11] Prof. Morgan believes the courts using it are avoiding an analysis of the situations involved. Morgan, A Suggested Classification of Utterances Admissible as *Res Gestae* (1922) 31 Yale L. J. 229. Dean Wigmore states that it ought never be used. Wigmore, *supra* note 2, at §1767. Prof. Thayer considers the phrase a "catch-all." Thayer, *loc. cit. supra* note 9.

[12] United States v. Matot, 146 F. (2d) 197, 198 (C.C.A. 2nd, 1944).

The essentials of the doctrine of "spontaneous exclamations" were first used by Lord Holt in 1693 in an action for assault and battery upon the wife of the plaintiff.[13] Lord Ellenborough later enveloped the statement in a fog of *"res gestae"*; and, though this doctrine was repudiated in *Bedingfield's Case*,[14] it was widely recognized in England before being so recognized here. In the United States few gave any weight directly to the element of spontaneity or its emphasis,[15] until after Dean Wigmore produced his monumental treatise on Evidence, whereupon the courts recognized the doctrine of "spontaneous exclamations" generally.[16] Dean Wigmore's concept of the scope and reason of the exception is that *spontaneity* and not contemporaneousness is the test of admissibility. The statement must be unreflective, and made before the declarant has time to contrive anything to his advantage.[17] The Arizona Supreme Court recently defined a spontaneous exclamation as a statement made immediately after some *exciting* occasion by a participant or spectator asserting the circumstances of that occasion as he observed it.[18]

For an utterance to be admissible under the "spontaneous exclamation" doctrine it must meet these three requirements: 1) a startling occasion; 2) a statement made before time to fabricate; and 3) relation to the circumstances of the occurrence.[19] The statement does not have to be contemporaneous with the act. On the other hand, however, one of the four limitations imposed on the "verbal act" doctrine is that the words must be precisely contemporaneous with the act.[20] Thus we see that the fallacy that under the "spontaneous exclamations" doctrine the utterances must be contemporaneous with the exciting cause, arises, where it does, as the result of the mistaken application of the "verbal act" doctrine. The true test of a spontaneous remark is not *when* the exclamation was made, but whether under all the circumstances of the act the speaker can be considered as having said it under the stress of nervous excitement and shock, or whether this nervous excitement had sufficiently died down so that the utterance was made under reflection. One court aptly stated: "What the law altogether distrusts is not after-speech, but after-thought."[21] For example, where one is beaten into unconsciousness, the courts should admit into

[13] Lord Holt "allowed that what the wife said immediately upon the hurt received, and before she had time to devise or contrive anything for her own advantage, might be given in evidence." Thomson v. Trevanion, Skinner 402 (1693).

[14] R. v. Bedingfield, 14 Cox Cr. 341 (1879).

[15] The term found early judicial use in Mitchum v. State, 11 Ga. 621 (1852).

[16] Dean Wigmore first formulated the Spontaneous Exclamation doctrine in 1898 when he edited the 16th edition of Greenleaf on Evidence.

[17] For an interesting article as to the value of "truth and accuracy" of spontaneous utterances *see* Hutchins and Slesinger, State of Mind to Prove an Act, (1929) 38 Yale L. J. 283. *See also*, Spontaneity as Basis of an Exception to Hearsay Rule (1931) 6 Rocky Mt. L. R. 391, and Note (1938) 22 Minn. L. R. 391.

[18] Lockwood, J., in Keefe v. State, 50 Ariz. 293, 72 P. (2d) 425 (1937).

[19] Wigmore, *supra* note 2, at §1750.

[20] The other three limitations are: 1) There must be a main or principal act, relevant under the issue; 2) The words must genuinely elucidate or give character to this act; 3) The words must be by the actor himself. Wigmore, *supra* note 2, at §1752.

[21] Traveler's Ins. Co. v. Sheppard, 85 Ga. 751, 775, 776, 12 S.E. 18 (1898).

evidence any spontaneous statements made by him after regaining consciousness, though these statements be made several days later. "There can be *no definite and fixed* limit of time. Each case must depend upon its own circumstances."[22] Most authorities agree that the time element must and does vary with the circumstances of each case.[23]

The facts in *State v. Buck*,[24] a New Mexico case, were similar to those in the principal case. There the defendant husband had beaten and severely wounded his wife, fracturing her skull and beating her face to a pulpy mass. She escaped and ran to her neighbor's home two miles away where she related what had happened. She also told these facts to the doctor who treated her some 4 hours later. Upon her husband's trial she refused to testify, but both statements were admitted under the spontaneous exclamation doctrine. The New Mexico court felt that, although sufficient time may have elapsed for her to appraise her situation and for reflection, yet in view of her feelings of pain, resentment, humiliation, and grief it was doubtful that she was capable of coherent thought, connected reasoning, or deliberate utterances. These emotions are the very ones meant to be given predominance in any unreflective statements. It is easy to believe that under the immediate influence of a horrible experience it was her physical and mental distress that caused her to make the statements. For, as the court points out, after reflection and deliberation (after conjugal love had overcome resentment) Mrs. Buck refused to testify regarding the incident.[25]

The same reasoning can be applied to the instant case. After escaping, Mrs. Stafford's only thoughts were to avoid being found again by her husband. It is easy to imagine that one, under those circumstances, would lie hidden in one spot, numbed with fear and pain, for a considerable length of time, unable to think clearly, much less move. Then also, the utterances she did make were the first words spoken after the beating. The factor of pain alone should be sufficient to give credence to the statements as being unreflective.[26]

Upon these considerations the court in the present case adopted the liberal view advocated by Dean Wigmore and left the determination of spontaneity to the discretion of the trial court. For it is the trial court which, from all the circumstances surrounding the case, is in the best position to determine whether the statements were spontaneous or otherwise. Though this court pays lip service to the term *"res gestae"* it applies the doctrine of "spontaneous exclamations," holding as the true test, not whether the declarations were contemporaneous, but whether these statements were unre-

[22] Wigmore, *supra* note 2, at §1750.

[23] Jones stated: "admissibility depends more on circumstances than on time." Jones, *supra*, note 7, at §1197. Wharton stated: "There are no limits of time within which the *'res gestae'* can be arbitrarily confined. These limits vary, in fact, with each particular." Wharton, Crim. Evid. (11th Ed.) Vol I, §495.

[24] 33 N.M. 334, 266 Pac. 917 (1927).

[25] *Ibid.*

[26] "Instead of struggling weakly for the impossible, they (the courts) should decisively insist that every case be treated upon its own circumstances. They should, if they are able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial court." Wigmore, *supra* note 2, at §1750.

flective, and spoken during a state of excitement. And for its determination they leave much to the discretion of the trial court.[27]

The action of this court evinces quite a change in the attitude of appellate courts today as compared to the days of Justice Coleridge. In an opinion written in 1838, Coleridge frankly admitted that the appellate courts feared leaving this evidence to the discretion of the trial court.[28] The change in this attitude was expressed by David D. Field while preparing a draft of the New York Code of Civil Procedure.[29] He stated that the fundamental difference between the system of evidence provided for, and that previously used, was that the present plan tries to admit all the light possible, while the previous theory was that of exclusion of light upon the feeling that it might deceive someone.

A proper consideration of the hearsay rule in a case such as the instant one would render unnecessary the use of the term *"res gestae."* The term is very confusing and ought to be abolished or at least restricted to the "verbal act" doctrine where it is perhaps applicable. Cases like the subject one should be considered under the doctrine of "spontaneous exclamations." The problem of when a particular utterance is spontaneous should be left to the discretion of the trial court.

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[27] "Whether a statement or declaration is part of the *res gestae* should be left to the trial court's discretion, and, where no abuse of discretion appears, trial court's ruling must stand." Musgrave v. Karis, ——Ariz.——, 163 P. (2d) 278 (1945). *See accord*: Christopherson v. Chgo. M. & St. P. R.R. Co., 135 Iowa 409, 109 N.W. 1077, 1080, (1907); Benton v. Regeser, 20 Ariz. 273, 179 Pac. 966 (1919); Perry v. Haritos, 100 Conn. 476, 124 Atl. 44, (1924); State v. McCrady, 152 Kan. 566, 106 P. (2d) 696, (1940); Page v. City of Osceola, 232 Iowa 1126, 5 N.W. (2d) 593, (1942).

[28] Wright v. Doe d. Tatham, 5 Ct. & Fin. 670 (1838).

[29] New York Code Civil Procedure (1850), §1708, p. 715.