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Res Gestae and the Excited Utterance: An Explanation of the Kentucky Approach

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RES GESTAE AND THE EXCITED UTTERANCE: AN EXPLANATION OF THE KENTUCKY APPROACH

It is a widely accepted rule of evidence that both hearsay and nonhearsay statements are admissible into evidence through the broad concept of res gestae.[1] One area of difficulty under this rule, however, is the confusion surrounding nonhearsay verbal acts and the hearsay exception for excited utterances.[2] Many courts have used the res gestae concept to describe both of these distinct evidentiary principles, thereby creating uncertainty as to the elements necessary to admit each type of statement.[3]

The Kentucky Court of Appeals has not been immune from this problem. In the 1964 case of *Hemphill v. Commonwealth*,[4] the Court held that only the statements of actors in an event are admissible under the excited utterance hearsay exception. The statements of bystanders were totally excluded from the scope of the exception. However, as will be more fully developed below, the requirement that the declarant be an actor is properly applied *only* to a verbal act. The Court's error in *Hemphill* can be traced to its reliance on *Louisville Railway Co. v. Johnson's Administrator*,[5] a case which ruled that statements of bystanders could not be admitted under the res gestae doctrine.

In an attempt to resolve the confusion, the Court of Appeals held in *Preston v. Commonwealth*[6] that it is unnecessary to determine whether the declarant is an actor or a bystander

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[1] Res gestae is defined literally as a "matter incidental to the main part and explanatory of it." BLACK'S LAW DICTIONARY 1469 (4th ed. 1968).

[2] *See* 6 J. WIGMORE, EVIDENCE § 1755 (3d ed. 1940) [hereinafter cited as WIGMORE].

[3] Keefe v. State, 72 P.2d 425, 427 (Ariz. 1937), in which the court stated: "It is generally due to a confusion of these two classes of evidence and the principles governing their admissibility that the conflict between the many apparently irreconcilable decisions has arisen."

[4] 379 S.W.2d 223 (Ky. 1964), *cited erroneously in* 29 AM. JUR. 2D *Evidence* § 723 (1967) as a case allowing the admission of bystanders' statements under the excited utterance exception.

[5] 115 S.W. 207 (Ky. 1909).

[6] 406 S.W.2d 398 (Ky. 1966), *cert. denied*, 386 U.S. 920 (1967).

in order to admit his statement under the excited utterance exception.[7] The *Preston* holding would have sufficiently clarified this area of evidence law had the Court not expressly declined to overrule *Hemphill*, qualifying its decision with the notation "See, however, Hemphill v. Commonwealth."[8] Thus, although recent cases have followed the *Preston* rationale, the express reference to the *Hemphill* decision may breed uncertainty.

The ambiguity inherent in *Preston* and the potential for misinterpretation by the practicing attorney necessitate an examination of the proper application of both the excited utterance exception to the hearsay rule and the verbal act doctrine. Such an examination must begin with an understanding of the requirements and rationale of each principle.

I. THE EXCITED UTTERANCE EXCEPTION

An excited utterance is a spontaneous extrajudicial statement introduced in court as true. Although such a statement is hearsay, it has long been recognized[9] that excited utterances have special reliability due to the suspension of the declarant's powers of reflection and fabrication through excitement.[10] Consequently, the courts have created an exception to the hearsay rule for these spontaneous statements.[11]

The basic test of an excited utterance is whether, under the facts and circumstances of the case, the declarant's statement is an accurate reflection of the facts concerning the act or event in question as he perceives them without resort to recollection or interpretation.[12] In order for a statement to pass

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[7] *Id.* at 401.

[8] *Id.*

[9] The excited utterance exception dates back at least to the seventeenth century case of Thompson v. Trevanion, 90 Eng. Rep. 179 (N.P. 1694). In this action for assault and battery, the utterances of the victim made immediately upon sustaining the injury and before she had time to contrive anything for her own advantage were admitted in evidence despite their hearsay nature.

[10] C. MCCORMICK, EVIDENCE § 764 (2d ed. 1972).

[11] Hughes, *Misapplication of the Res Gestae Doctrine*, 2 AM. LAW. S. REV. 541, 542 (1911).

[12] Commonwealth v. Van Horn, 41 A. 469 (Pa. 1898). *See also* Thayer, *Bedingfield's Case—Declarations as a Part of the Res Gestae*, 15 AM. L. REV. 71 (1881).

this test, the following elements must be present: 1) a startling occurrence which produces nervous excitement sufficient to render the utterance spontaneous and unreflecting; 2) an utterance made while so under the influence of such excitement that fabrication is precluded; and 3) an utterance that relates to the occurrence.[13] Any statement meeting these criteria should be admitted as an excited utterance unless the declarant's opportunity to personally observe the occurrence is adequately impeached.[14]

The Kentucky Court of Appeals commonly relies upon the broad concept of res gestae in admitting spontaneous declarations into evidence. Nevertheless, the rationale of the excited utterance exception is sufficiently revealed in the cases to support the conclusion that the exception has been accepted by the Court.

An early Kentucky case applying the excited utterance exception was *McLeod v. Ginther's Administrator*,[15] in which the plaintiff brought an action to recover for the wrongful death of her husband in a collision allegedly caused by the negligence of the defendant railroad in sending conflicting dispatches to the conductors of two trains which were to run over the same track on the same day. A statement made by the defendant's conductor a few seconds after the accident claiming that he had received a dispatch authorizing his use of the track was held admissible as part of the res gestae. The Court justified admission of the statement, despite its hearsay nature, by explaining that the declarant "had no time to contrive or devise a falsehood by which to exonerate himself from blame, and his declaration was so connected with the circumstances then surrounding him, and which form a part of [the] case" as to be admissible under the res gestae exception.[16] Although it classified the statement as part of the res gestae, the Court's language and requirement of contemporaneity clearly indicate an acceptance of the excited utterance exception.

Consolidated Coach Corp. v. Earl's Administrator[17] repre-

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[13] 6 WIGMORE § 1750.

[14] *See, e. g.*, Towne v. Northwestern Mut. Life Ins. Co., 70 P.2d 364 (Idaho 1937).

[15] 80 Ky. 399 (1882).

[16] *Id.* at 405.

[17] 94 S.W.2d 6 (Ky. 1936).

sented Kentucky's acceptance of the excited utterance exception in the form recognized in the majority of jurisdictions.[18] The Court abandoned contemporaneity as a requirement, interpreting it as merely an index of the determinative element—spontaneity.[19]

From the foregoing discussion, it is safe to conclude that the Kentucky Court of Appeals has adopted the excited utterance exception and that spontaneity is the primary prerequisite to admission under the exception. It logically follows that no distinction should be made between the excited utterances of participants in an event and those of bystanders, as long as the requisite "special reliability" is provided by the presence of spontaneity. However, prior to *Preston*,[20] Kentucky chose to make just such a distinction.

II. THE VERBAL ACT DOCTRINE

It is an accepted proposition that the hearsay rule is not applicable to various types of utterances which are proven as operative facts.[21] The verbal act doctrine encompasses statements made by an actor which are admissible in evidence to explain an independent and ambiguous act. Thus, when a witness testifies to statements uttered by an actor, and such testimony is offered solely for the purpose of explaining the actor's equivocal conduct, it is not deemed to be hearsay evidence.[22]

The test of whether a declaration is admissible under the verbal act doctrine requires that four elements coexist: 1) there must be a main or principal act relevant to the issue, the significance of which needs to be made more definite; 2) the words must explain the character of the act; 3) the statement must be made by the actor himself; and 4) the words must be precisely contemporaneous with the act.[23] As an illustration of the verbal act doctrine, consider *A* marking through one clause of

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[18] *See* C. CHAMBERLAYNE, EVIDENCE § 838 (1919).

[19] Sparks Busline, Inc. v. Spears, 124 S.W.2d 1031 (Ky. 1939).

[20] 406 S.W.2d 398 (Ky. 1966), *cert. denied*, 386 U.S. 920 (1967).

[21] Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229 (1922).

[22] 6 WIGMORE § 1752.

[23] 6 WIGMORE §§ 1773-76.

his will and stating that he wants the bequest or devise to now descend to his heirs. *B*, who heard *A* make the statement, is permitted to testify concerning *A*'s statement. The purpose of *B*'s testimony is not to prove the truth of *A*'s statement but to explain the stated purpose in *A*'s equivocal act of changing the will.[24]

That the verbal act concept has long been recognized and applied by the Kentucky Court of Appeals is indicated by the 1870 case of *Howk v. McManama*.[25] In an action on a note which the defendant denied making, the plaintiff's statement that he intended to settle with the defendant even if he had to take his note and sue on it was held admissible. In explanation of its holding, the Court remarked: "Declarations made at the time of the transaction, and expressive of its character, motive or object, are regarded as 'verbal acts' indicating a present purpose and intention, and are therefore admitted in proof like any other material facts."[26] The Court obviously recognized the proper limitations on the verbal act doctrine and realized that statements coming within its purview are not exceptions to the hearsay rule.

The basic rationale of *Howk* has remained virtually unchanged throughout its application by the Kentucky Court of Appeals, although the Court has characterized verbal acts in particular cases as "part of the res gestae."[27] However, the Court was perhaps using the term in its generic sense,[28] rather than referring to an exception to the hearsay rule.[29]

The preceding analyses of the verbal act doctrine and the excited utterance exception reveal three clear distinctions be-

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[24] For a precise statement of the principle, *see* Travelers' Ins. Co. v. Mosley, 75 U.S. (8 Wall.) 397, 411 (1869) (dissenting opinion).

[25] 4 Ky. Opin. 234 (1870).

[26] *Id.* at 235, *citing* 1 S. GREENLEAF, EVIDENCE § 10 (11th ed. 1863).

[27] *See, e.g.*, Barrett's Adm'r v. Brand, 201 S.W. 331 (Ky. 1918); Owensboro City Ry. v. Rowland, 153 S.W. 206 (Ky. 1913).

[28] As indicated in note 1, *supra*, "res gestae" literally means "matter incidental to the main part and explanatory of it." BLACK'S LAW DICTIONARY 1469 (4th ed. 1968).

[29] *See, e.g.*, Kentucky & W. Va. Power Co. v. Brown's Adm'r, 135 S.W.2d 70 (Ky. 1939) (statement of deceased as he touched a wire); Chesapeake & Ohio Ry. v. McDonald, 39 S.W.2d 253 (Ky. 1931) (statement of conductor as deceased handed him a piece of paper); Weil v. Silverstone, 69 Ky. (6 Bush) 698 (1869) (declarations by a buyer relative to and contemporaneous with his act of removing goods).

tween the two principles. First, an excited utterance must be precipitated by an exciting event, whereas a verbal act may accompany and explain any equivocal act. Secondly, an excited utterance must be uttered without deliberation or reflection. A verbal act must be deliberate. Finally, the declarant of a verbal act must be a participant in the event. Any observer of an event may make an excited utterance.[30]

III. THE AMBIGUITY IN KENTUCKY

As has been demonstrated, for many years the Kentucky Court of Appeals has approved and employed the rationale of the verbal act doctrine as well as that of the excited utterance exception, albeit under the guise of res gestae. Nevertheless, under the Court's approach to these principles, the excited utterances of bystanders were excluded from evidence prior to *Preston v. Commonwealth*.[31] In *Preston* the Court held that "[the] nervous excitement which renders an utterance admissible may exist equally for a mere *bystander* as well as for the injured or injuring person, and therefore the utterances of either, concerning what they observed, are equally admissible."[32] Had the Court stopped at this point, there would be no doubt as to the state of the law concerning excited utterances. The Court, however, added the notation, "See, however, Hemphill v. Commonwealth."[33] The holding of *Hemphill* is in direct conflict with *Preston*. Why did the Court not overrule *Hemphill* instead of placing this curious notation in *Preston*? In order to answer this question, the reasoning behind the *Hemphill* decision must be examined.

Hemphill was merely a reaffirmation of the Court's earlier opinion in *Louisville Railway Co. v. Johnson's Administrator*.[34] In the latter case, the plaintiff administrator brought an action against the defendant railway company for a wrongful death

[30] Note, *Res Gestae in Virginia*, 21 VA. L. REV. 725 (1935). Although the distinction concerning the bystander is still somewhat unclear in a few jurisdictions, a logical analysis of the divergent theories supports the distinction.

[31] 406 S.W.2d 398 (Ky. 1966), *cert. denied*, 386 U.S. 920 (1967).

[32] *Id.* at 401, *citing* 6 WIGMORE § 1755.

[33] *Id.*

[34] 115 S.W. 207 (Ky. 1909).

allegedly caused by the failure of the defendant's agents to see the victim on the track. The plaintiff sought to introduce the statement of the defendant's conductor admonishing the engineer to say nothing about the accident. The Court of Appeals reasoned that, because the conductor had no part in causing the accident, he was merely a bystander, and that the admission of bystanders' statements would "open wide the door for the admission of reckless or thoughtless or ill-considered exclamations."[35] In explaining its theory for excluding the evidence, the Court noted:

> [T]he rule in this state is that declarations . . . to be admissible as part of the *res gestae* must be made by one of the actors in the affair, contemporaneous in point of time with the principal transaction under consideration, be made at or near the place of its occurrence, and illustrate or explain how or what caused it to happen . . . . [If made] by a bystander or third party, the declaration is not admissible as substantive evidence or as part of the *res gestae*.[36]

The Court's statement of theory is an excellent exposition of the verbal act doctrine. The Court's test for admission requires a contemporaneous statement by an actor to explain the character of an equivocal act. These factors are exactly those required for a verbal act. The difficulty with the *Johnson* decision is that the statement concerned is an excited utterance, not a verbal act. The conductor's statement easily passes the excited utterance test. It is a spontaneous statement relating to a startling occurrence made while under the influence of the excitement generated by the occurrence. The Court's concern about "thoughtless or ill-considered exclamations" confirms this categorization. It is precisely this characteristic which accords the statement its special reliability.[37] Thus, the Court obviously applied the limitations and rationale of the verbal act doctrine to an excited utterance.

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[35] *Id.* at 210.

[36] *Id.* at 209, *citing* 1 S. GREENLEAF, EVIDENCE § 107 (11th ed. 1863); *accord*, 1 B. ELLIOT & W. ELLIOT, EVIDENCE § 542 (1942).

[37] *See, e.g.*, PROPOSED FED. R. EVID. 803(b), Advisory Comm. Notes at 115 (1973); Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224, 242 n.88 (1961).

Through its total reliance upon *Johnson*, the Court of Appeals perpetuated its error in *Hemphill*. It appears that the primary source of this mistake was the Court's usage of the broad term res gestae, which lacks the exactitude necessary to delineate specific evidentiary principles and therefore creates confusion.

The *Preston* decision was a proper exposition and application of the excited utterance exception. In view of the Court's obvious recognition of the proper scope of the exception, the only apparent explanation for the *Hemphill* caveat in the opinion is that the Court intended to cite a proper description of the verbal act doctrine and warn that bystanders' statements cannot be admitted as verbal acts. The Court's decisions subsequent to *Preston* appear to support this contention. In *Jett v. Commonwealth*,[38] the Court admitted the contents of a telephone call made to a sheriff by a rape witness. In *Wilson v. Commonwealth*,[39] a bystander's statement to the perpetrator of a crime was admitted. Following the *Preston* rationale even more closely, *Roland v. Beckham*[40] made no attempt to categorize the declarant as an actor or bystander. This decision simply emphasized that the statement of a bus driver placing the blame for the accident on the other driver was spontaneous and related to the event. Each of these cases involved excited utterances and in none of the cases was the *Hemphill* verbal act limitation applied. These opinions clearly indicate that the Court of Appeals now correctly applies the hearsay exception for excited utterances to admit the statements of bystanders as well as those of participants in an event.

IV. CONCLUSION

The verbal act doctrine and the excited utterance exception to the hearsay rule are two separate evidentiary principles which, despite their differing requirements and limitations, have often been confused through use of the broad res gestae concept. The Kentucky Court of Appeals sought to eliminate

[38] 436 S.W.2d 788 (Ky. 1969).
[39] 492 S.W.2d 450 (Ky. 1973).
[40] 408 S.W.2d 628 (Ky. 1966).

this confusion in *Preston v. Commonwealth*[41] but instead created additional uncertainty by referring to, but failing to overrule, the conflicting decision of *Hemphill v. Commonwealth*.[42]

The reasoning behind *Hemphill* and the cases subsequent to *Preston* allow the conclusion that the Court's caveat in *Preston* was merely intended to serve warning that the statements of bystanders are not within the verbal act doctrine. The ambiguity inherent in this warning is dissipated if *Preston* is treated as an excited utterance case and *Hemphill* is interpreted as a proper statement of the verbal act doctrine. In order to insure precision and clarity in the future, it is suggested that the Court of Appeals abandon all use of the overly broad term "res gestae."

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[41] 406 S.W.2d 398 (Ky. 1966), *cert. denied*, 386 U.S. 920 (1967).

[42] 379 S.W.2d 223 (Ky. 1964).