



1936

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Recommended Citation

Ireton, Robert E. (1936) "Verbal Acts and Spontaneous Declarations," *Kentucky Law Journal*: Vol. 24 : Iss. 2 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol24/iss2/2>

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VERBAL ACTS AND SPONTANEOUS DECLARATIONS

By ROBERT E. IRETON*

I.

Notwithstanding the multitude of American judicial decisions on the question of *res gestae* and declarations forming part thereof, few may be found in which a definite, logical reason is given for the admission in evidence of such statements. It is, of course, a simple matter for a judge to say that a statement, declaration or exclamation, subsequent to an act, is a part of *res gestae* and therefore receivable in evidence. It is more difficult to offer a convincing explanation. And it would seem to be an utter impossibility for the average jurist to point out a definite legal principle as a sanction for the action. Our courts are not blameless for this unsatisfactory condition. When the phrase was first used they knew that it was ambiguous, yet few attempted to analyze it, accepting its application in the first cases in which it appeared as a sort of reliable certification of its authenticity and wide coverage. Let an event, happening, occurrence or disaster be presented for judicial inquiry, and let it embrace a declaration, proximate or remote, the stage was set immediately for the employment of this unintelligible phrase, which other high priests in the temple of justice had read into the law's ritual, and presto! an intellectual prostration seemed to follow, while a judicial chorus, in ever ascending and increasing volume, rose up in praise of the empiric novelty.

That original and independent facts are admissible in proof of an issue is a principle so fundamental as to need no comment; yet when the question of admissibility involves a declaration and an act to which it is proximately or remotely related, the basic rule is so frequently disregarded and the talismanic *res gestae* seized upon as the solution, it seems, the foreign

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phrase is to lawyers and judges what the adverb is to all philologists—a common sink: Any word which defies classification otherwise is an adverb; a declaration of questionable admissibility is *res gestae!*

To define precisely this foreign expression is clearly beyond the range of either legal skill or judicial ability. Implanted in our system of jurisprudence for approximately three centuries,¹ it has caused more argument, as to its meaning and scope, and more diversity in judicial utterance than any other single question known to the common law. Truly may it be said that it is a question upon which no principle has been stated with authority, and is one upon which single judges have given different opinions. It is an indefinite, inexact and vague expression and should never have been admitted to our legal terminology. An alien product of the civilians, it has no rightful place in English law, and, had it been in vogue in the year 1236, it would have been cast forth by the stern men of Merton, who emphatically declared that English law should remain unchanged.²

Although Hampden's counsel used the phrase with seeming familiarity and with no attempt to explain it, in the case cited, from which it might be inferred that it was not a stranger to the ears of the Exchequer judges on that historic occasion, no one seems to have unearthed its subsequent employment for more than a century and a half. Then it came to light in the trial of Horne Tooke for high treason, in 1794.³ It found favor

¹ Proceedings in the Case of Ship-Money, between the King and John Hampden, Esq., in the Exchequer, 13 Charles I. a. d. (1637), 3 Howell's State Trials 825, 988. In the second day argument of Mr. Holborne, on behalf of Mr. Hampden, on page 988, he states, "My Lords, to prove this is an act, Walsingham entered it in his time, who did not write very long after it. Though it hath been said that he was a monk, and what he wrote he took up in the street and market place; yet I will not think so of Walsingham, who was ever held an historian of very great credit. And no historian whatsoever durst set down any thing for an act of parliament, if he had not a sure warrant for it. It had been little less than forgery.

"In the next place it hath been said, histories are no good authorities in law. True, they shall not tell me what the law is, yet they are good to tell us of *res gestae*, whether or no there hath been such things done."

² Provisions of Merton, enacted by the King, in 1236, with the consent of the nobles and prelates.

³ 25 Howell's State Trials 1. In the Trial of John Horne Tooke, Clerk, for High Treason, before the Court holden under a Special Com-

with our own jurists in the beginning of the nineteenth century and is today a fixture in our modern law of judicial evidence. Gilbert, who gave us our first book on Evidence, in 1726, did not mention it, probably because he knew nothing about it.⁴ Peake, his immediate successor as a writer on that subject, was equally oblivious.⁵ Phillips was next to write and he was plainly in a quandary. He found the phrase both troublesome and refractory. In his first edition we find it used, abandoned in the second and succeeding editions, but readopted in the eighth.⁶ It was used freely by all later writers⁷—with one exception. That was Stephen, whose knowledge of the Law of Evidence has never been surpassed. He dismissed the expression *res gestae* with the caustic criticism that it was a term “of convenient obscurity,” and avoided its use in his valuable Digest, preferring the sensible and intelligible word “transaction,” in his discussion of the basic doctrine of relevant facts.⁸

Phillips had also used this word, when he had made the change previously mentioned, and had he continued to use it instead of the expression *res gestae*, our situation in the present might be less confusing. Phillips gave the profession an excellent treatise—in fact, the first that could be styled authoritative and it is more than likely that the writers who came after him would have followed his well-beaten path. Not one of them but understood the definite legal meaning of the word “transaction,” but the same cannot be inferred concerning their acquaintance with our civilian borrowing, *res gestae*. Best perceived in its use a frequent source of error through mistaking hearsay for original evidence.⁹

mission of Oyer and Terminer, at the Sessions House in the Old Bailey, on the Monday 17th, Tuesday 18th, Wednesday 19th, Thursday 20th, Friday 21st, and Saturday 22nd, of November: 35 George III. a. d. 1794. Mr. Garrow, counsel for the Crown, on page 440 states: “That letter your lordships have received, and, I believe, without any objection from this side of the table, probably upon the ground, that as it is an answer to an act which is charged against the prisoner, it is fit to be received as part of the *res gestae* upon the subject!”

⁴ Lord Chief Baron Gilbert. *The Law of Evidence*. 1726.

⁵ Thomas Peake. *The Law of Evidence*. 1801.

⁶ S. March Phillips. *A Treatise on the Law of Evidence*. 1819. Vol. 1, 202.

⁷ Starkie, Best, Taylor, Greenleaf.

⁸ Sir James Fitzjames Stephen. *Digest of the Law of Evidence*. 2nd Am. ed., article 3, 8.

⁹ W. M. Best. *Law of Evidence*, Vol. 2, section 495, 6th ed.

Holdsworth makes no reference to the doctrine of *res gestae*, in his able and well-documented chapters on the rise and meaning of evidence, although he discusses the question of relevancy at some length, and emphasizes the principles of reasoning as the groundwork of the Law of Evidence.¹⁰ In Halsbury's great work there is but brief mention of it and little discussion.¹¹ He says: "Facts which form part of the *res gestae*, and are consequently provable as facts relevant to the issue, include acts, declarations, and incidents which themselves constitute, or accompany and explain the facts or transaction in issue." Again, he writes: "These constituent or accompanying incidents are in law said to be admissible as forming part of the *res gestae* or main fact; and when they consist of declarations accompanying an act, are subject to three important qualifications: (1) They must not be made at such an interval as to allow of fabrication, or to reduce them to the mere narrative of a past event; (2) they must relate to, and can only be used to explain, the act they accompany, and not independent facts prior or subsequent thereto; and (3) though admissible to explain, or corroborate, they are not, in general, to be taken as any proof of the truth of the matters stated: they are consequently not in any sense, to be classified as exceptions to the hearsay rule."¹²

¹⁰ Professor W. C. Holdsworth. *History of English Law*, Vol. 9, 127, 1926.

¹¹ Earl of Halsbury. *Laws of England*, Vol. 13, 529. 2nd ed., 1934.

¹² *Rouch v. Great Western Railway Co.* (1841), 1 Q. B. 51, 113 English Reports, 1049; *Thompson v. Trevanion* (1693), Skin. 402; 14 Dig. 397, 4172; *The Schwalbe* (1859), Sw. 521, 523, 166 E. R. 1244 (collision action: statement by pilot after his ship was cut away and while she was backing, "The damned helm is still astarboard," received); *Agassiz v. London Tramway Co.* (1872), 21 W. R. 199; 22 Dig. 58, 321 (action against tramway company for injury to passenger: remark by fellow passenger to conductor, a few minutes after the collision: "The driver ought to be reported" and the conductor's reply, "He has already been reported, for he has been off the line five or six times today," rejected, the transaction being over, and the remark referring not to the *res*, but to the past acts of the driver); *Tustin v. Arnold & Sons* (1915), 84 L. J. (K. B.) 2214; 22 Dig. 92, 622 (a written statement made by the driver of a vehicle after a collision with another is not a part of the *res gestae*, i. e. the collision, so as to make it admissible in evidence in proceedings concerning the accident in which the driver's employer is a party). "In such a case words, even spoken words, do not become part of the *res gestae*, unless they are made at the time and are the natural consequences of the collision—words which spring out of the fact of the collision, so to speak—inevitably and almost without the will of the speaker, and are at any rate, spontaneous. . . . If I have correctly stated the characteristics which words must have in

Swift, who was America's first writer on the Law of Evidence, makes mention of this foreign phrase;¹³ but it proved altogether too much for our perspicacious and usually meticulous Greenleaf. His attempt to explain it is, perhaps, the outstanding weakness of his great work.¹⁴ In approaching it he displays a hesitation and an uncertainty not elsewhere noticeable in his learned and convincing discussion. Professor Wigmore has criticized Greenleaf's explanation and—what is infinitely worse—holds that the cases resting on it are lacking in principle and without basis.¹⁵ Thayer had a lively contempt

order to form part of the *res gestae* of a collision, it follows that a written statement can never do so."—Bailhache, J., at page 2216. *Holmes v. Newman* (1931), 2 Ch. 112 (action to establish charge on land by deposit of title deeds: Memorandum signed contemporaneously with and to record delivery of deeds, admitted); *Smith v. Blakey* (1867), L. R. 2 Q. B. 326; 22 Dig. 105, 754 (question as to terms on which A's country agent bought goods from B: letter to A by the agent, immediately after the sale, stating the terms, rejected); *Regina v. Bedingfield* (1879), 14 Cox C. C. 341; 14 Dig 397, 4175 (charge of murder: exclamation of deceased, while rushing with her throat cut out of a house entered by prisoner a minute or two before, of "Oh, aunt, see what Bedingfield has done to me," rejected, the transaction being over). In *R. v. Bedingfield*, *supra*, Cockburn, C. J., is generally considered to have applied the rule too strictly; on the other hand, the dictum of Lord Denman, C. J., in *Rouch v. Great Western Rail. Co.*, *supra*, that "concurrence of time, though material is not essential," seems to err in the opposite direction, the weight of authority favoring a substantial, though not a literal contemporaneousness. Where, however, the act is of a continuous nature, declarations made at any time during its currency may properly be received. *Doucet v. Geoghegan* (1878), 9 Ch. Div. 441, C. A.; *Re Grove*, *Vaucher v. Treasury Solicitor* (1888). 40 Ch. Div. 216, C. A.

¹³ Swift's Digest of the Law of Evidence in Civil and Criminal Cases, 127, 1810.

¹⁴ "There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestae*, may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."—Dr. Simon Greenleaf. *Evidence*, Vol. I, Sec. 108.

¹⁵ Professor John H. Wigmore. *Evidence*, Vol. 3, section 1757.

for the phrase and for its possibilities for error;¹⁶ and Wigmore believes that it has no place in the Law of Evidence and serves no useful purpose.¹⁷

That the authority which first used this expression had an opportunity to say what it meant, goes without question; but that the English jurist was reluctant to commit himself is altogether too evident. We know that, as late as the year 1837, Mr. Justice Bosanquet asked: "How do you translate *res gēstae? gestae*, by whom?" He was answered by another eminent jurist: "The acts by whomsoever done are *res gestae*, if relevant to the matter in issue. But the question is, what facts are relevant?"¹⁸ From this, we may assume, that, although the expression had been in use since Horne Tooke's case, or for more than forty years, its vagueness had not been reduced to certainty, nor had any attempt been made to define it. And whatever its scope and meaning might prove to be, that the English jurist was going to adhere to *Relevancy*, as his test of admissibility, is fairly deducible from the utterances quoted. That was an established principle with which he was familiar, and he had neither inclination nor desire to limit its usefulness and indispensability in the trial of disputed causes, by undue emphasis upon an inexplicit foreign phrase, which added noth-

¹⁶ "If it is true, as it seems to be, that the phrase (*res gestae*) first came into use in evidence near the end of the last century, one would like to know what started the use of it just then. That is matter for conjecture rather than opinion. It would seem probable that it was called into use mainly on account of its 'convenient obscurity.' . . . The law of hearsay at that time was quite unsettled; lawyers and judges seem to have caught at the term '*res gestae*,' . . . which was a foreign term, a little vague in its application, and yet in some applications of it precise,—they seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one—some things belonged there, other things might for purposes of present convenience be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity multiplied its capacity; it was a larger 'catch-all'. To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."—Professor James B. Thayer, *American Law Review*, Vol. XV, 5, 81; 1881.

¹⁷ Professor John H. Wigmore. *Evidence*, Vol. 3, section 1767.

¹⁸ *Wright v. Doe*, 7 A. & E. 353, 112 E. R. 488; 4 Bing. N. C. 548, 132 E. R. 877; Stephen, *op. cit.* Appendix of Notes, 5.

ing of value to the Law of Evidence. Comment has been made upon the infrequency of cases involving declarations to prove objective facts in the English reports.¹⁹ An explanation might be found in the consistent attitude of English jurists to deal with such questions on the basis of relevancy alone and to avoid in every case possible a reference to an inexact and misleading expression.

Indeed, this disinclination on the part of the English jurist to use the expression is manifest from the very beginning. Said Mr. Justice Williams: "Declarations accompanying acts are a wide field of evidence and to be carefully watched."²⁰ No blind or hurried acceptance of *res gestae*, here! In a celebrated case, previously cited, Mr. Justice Coltman said: "When an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon it or qualifies the act."²¹ *Muttum in parvo*. In a few but clear and convincing words this learned jurist gives us the basic doctrine of verbal acts, without reference to the barbarous *res gestae*. And Starkie showed similar caution in avoiding it. Said he: "Declarations accompanying an act, when the nature and quality of that act are in question, are either to be regarded as part of the act itself, or as the best and most proximate evidence of its nature and quality."²² In a case, involving the price to be paid for sheep sold to defendant, declarations of the latter's wife in paying plaintiff's agent for the sheep were received as verbal acts.²³ So, where a letter accompanied a promissory note, the declarations in the former were received to explain the writer's purpose.²⁴ But, perhaps, no case shows the English jurist's aversion to the *res gestae* doctrine more convincingly than *Regina v. Bedingfield*.²⁵ Therein, Lord Chief Justice Cockburn rejected a declaration because "it was not part of anything done, or something said while something was being done, but something said after something done."

Here, the declaration was an utterance of a victim of a

¹⁹ Professor Edward W. Hinton. *Cases on Evidence*, 615 n.

²⁰ *Queen v. Bliss*, 7 A. & E. at 566 (1837), 122 E. R. 577.

²¹ *Wright v. Tatham*, *supra*, at 361.

²² Thomas Starkie. *Law of Evidence*, Vol. 1, *62, 7th Am. ed.

²³ *Walters v. Lewis*, 7 C. & P. 344 (1836), 173 E. R. 153.

²⁴ *Bruce v. Hurly*, 1 Starkie's C. 23 (1814), 171 E. R. 390.

²⁵ 14 Cox C. C. 341 (1879). *Vide*, 14 Am. L. Rev. 817.

murderous assault, as she ran from her assailant, but the brief interval of time, between the infliction of the wound and the utterance, negated the assumption that the declaration was a verbal act, that is, a part of the principal act. Lord Cockburn was strictly logical in his reasoning and wholly consistent with the English judicial view that declarations should be "carefully watched," and admitted only when a part of an act. If we translate *res gestae* as "things done," then, a declaration which is a verbal act is beyond question a part of the "thing done," or transaction, because it is a *verbal part of the act in question*. In such a case, it is original evidence, admissible in proof of the issue. Hence, to speak of such a declaration as part of the *res gestae* would be precise. But the real ground of admissibility for such a declaration is its logical relationship to the principal act, which it accompanies and explains; in other words, its *relevancy*. On this ground alone there never is—and never was—a reason for the introduction of the foreign phrase discussed as a factor in judicial decision; and one has read without profit or discovery, the English judicial opinions hereon, if he has failed to realize a deep-rooted purpose among their writers to let Relevancy be their guide in all questions of admissibility.

II.

In the year 1808, in what is believed to be the earliest American case²⁶ in which the expression *res gestae* appears, counsel argued that declarations made long after a deed had been executed, and not at the time of signing, could not be admitted as part of the *res gestae*. His use of the phrase in this connection was correct, for he clearly intimates that such a declaration to be admissible should be precisely concurrent with the principal act and constitute a verbal part of it. The court did not mention the phrase but upheld counsel's contention plainly on the ground of relevancy. A few years later, in 1820, Chief Justice Hosmer, of Connecticut, refused to receive declarations made by a witness *after* a note had been given, as not having been made "at the time of the act done."²⁷

²⁶ Bartlet v. Delprat, 4 Mass. 702 (1808).

²⁷ Enos v. Tuttle, 3 Conn. 247 (1820). *Vide*, also, Mima Queen v. Hepburn, 7 Cranch 290 (1813), and The King v. Eriswell, 3 T. R. 707 (1790); 100 E. R. 815. In this case there is a very sound discussion of hearsay, at a period when that rule had not been fully developed.

In 1823, the meaning of *res gestae* was well understood in North Carolina. In his argument, that year, in *Cherry v. Slade*,²⁸ Mr. Gaston (afterward Judge) opposing the admission of certain declarations, said: "It is sometimes said that there is an exception when words are the *res gestae* or part of *res gestae*. But this seems not to be accurate. The words are there 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 . . . The 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 testified, not to show that the words spoken are true, but to show that they were in fact spoken."

In 1826, Massachusetts had to pass on this question again, and it adhered to the principle earlier expressed. It admitted declarations of one, who had absconded, while doing an act, saying: "This was an act or transaction, and Schofield's declarations made a part of it."²⁹ The Supreme Judicial Court of Maine was equally clear on this question. In 1828, it held admissible declarations of a pauper on leaving one place for another, the court saying: "His intention can be known only to himself, except so far as it is communicated by his declarations. And these declarations are legal evidence of his intention. When it is necessary to show the nature of an act, or the intention with which it is done, proof of what was said by the party, at the time of doing the act is admissible."³⁰

Another New England tribunal, the Supreme Court of Judicature of New Hampshire, in 1835, affirmed a lower court's ruling, admitting declarations of a servant at the time of leaving his employer, on the ground that they were so connected with his act as to derive a degree of credit therefrom and become a part of the transaction.³¹ Chancellor Walworth, of New York, made a similar ruling, in 1842, saying: "Declarations of parties and other attending circumstances, in order to render them admissible in evidence as a part of the *res gestae*,

²⁸ 2 Hawks 400 (1823). Wigmore, Cases on Evidence, No. 398. Third edition, 1932.

²⁹ Pool v. Bridges, 4 Pick. 378 (1826).

³⁰ Inhabitants of Gorham v. Inhabitants of Canton, 5 Greenl. 266 (1828), 17 Am. Dec. 231.

³¹ Harley v. Carter, 8 N. H. 40 (1835).

must be contemporaneous with the main fact under consideration and to which they are intended to give character.”³² The same question of principle is found, in 1847, in a decision of the Supreme Judicial Court of Massachusetts, where declarations were held to be unimportant because they “were not made by a party while doing any act, but were a recital of past transactions and past purposes.”³³ In the same year, a Georgia opinion held that declarations of a party are not admissible unless they grow out of the principal transaction, illustrate its character and are contemporary with it.³⁴ In 1851, the Massachusetts court of last resort delivered a vigorous opinion involving the nature of *res gestae*. In excluding the declarations of a deceased physician, who had examined the plaintiff, *after* the accident in which she had been injured, the court said: “It is a well-established principle of the law, that declarations which form part of the *res gestae* and are to be considered as a part of the transaction, do not come under the head of hearsay, but are admissible as original evidence.”³⁵

The Court of Appeals of New York, in 1858, made a correct ruling with reference to declarations of an agent to bind his principal. Said the court: “Where his acts will bind, his statements and admissions respecting the subject-matter of those acts will also bind the principal, if made at the same time and so that they constitute a part of the *res gestae*. To be admissible they must be in the nature of original and not of hearsay evidence.”³⁶ Chief Justice Redfield of Vermont, in 1859, in passing on the admissibility of declarations of a woman as to the purpose of an intended journey, which journey was completed, said: “The declarations were of the same force as the act of going, and were admissible as part of the act.”³⁷ And to the same effect is the opinion of Chief Justice Beasley of New Jersey, in 1878, who said the test of admissibility was the coincidence of the declaration with the act in such a way “as to have become incorporated with it.”³⁸

³² In the Matter of Taylor, 9 Paige *617 (1842).

³³ *Inhabitants of Salem v. Inhabitants of Lynn*, 13 Metc. 544 (1847).

³⁴ *Carter v. Buchannon*, 3 Ga. 513 (1847).

³⁵ *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36 (1851).

³⁶ *Luby v. Hudson River Railroad Company*, 17 N. Y. 131 (1858).

³⁷ *State v. Howard*, 32 Vermont 380, at 401 (1859).

³⁸ *Hunter v. State of New Jersey*, 40 N. J. L. 495 (1878). Said the

In these early American decisions, representative of judicial opinion in several states, there is substantial uniformity of principle. They all emphasize the doctrine of contemporaneity of act with statement or declaration, to render the latter admissible. In other words, the principle they unfold is what in modern phraseology, would be termed a "verbal act," that is, a precisely contemporaneous part of the main act or transaction. This is not clearly understood by some of our jurists, who seem to think that any declaration admitted as "part of the *res gestae*," is an exception to the Hearsay rule. In numerous decisions what was plainly original evidence—declarations constituting verbal acts—was admitted as if it were hearsay but was saved by virtue of the magic coverage of "*res gestae*." Hence we find contradictory explanations in different jurisdictions. To illustrate, the Supreme Court of Illinois says:

"Statements, however, made by an injured party which form a part of the *res gestae*, constitute an exception to the general rule and are admitted, etc."³⁹

On the other hand, the Supreme Judicial Court of Massachusetts correctly states the principle thus:

"It is a well established principle of the law, that declarations which form a part of the *res gestae* and are to be considered as a part of the transaction, do not come under the head of hearsay, but are admissible as original evidence."⁴⁰

Lord Halsbury's statement of the rule⁴¹ and Mr. Gaston's explanation, previously mentioned,⁴² coincide with the Massachusetts opinion, and afford the only correct solution. To cite numerous cases showing wide divergence in judicial opinion on the question discussed herein, would be a task of supererogation.

Chief Justice: "In the present instance the test thus indicated, will be found, I think, in the rule that such declarations as these are admissible, because they are so connected with an act, itself admissible as a part of the *res gestae*, as to have become incorporated with it. The declaration and the act must make up one transaction. The theory justifying this course is that, when such declarations are thus coupled with a provable act, they receive confirmation from it; but if they stand alone, without such support, they depend altogether for their credence on the veracity of the utterer, and thus conditioned, they are pure hearsay, and inadmissible."

³⁹ Greinke v. Chicago City Railway Company, 234 Ill. 564, 85 N. E. 327 (1908).

⁴⁰ Lund v. Inhabitants of Tyngsborough, *supra*, note 35.

⁴¹ *Supra*, note 11.

⁴² *Supra*, note 28.

It would be to labor a point unhappily too well known to the profession at large. But what the bench has said thereon, to a limited extent, may be set down. At an early date, 1826, Chief Justice Parker, of Massachusetts, said: "But where declarations are admitted as part of the *res gestae*, there is hardly any distinct rule as to what will constitute the *res gestae* which will support such declarations."⁴³ Chief Justice Beasley, of New Jersey, in 1878, with the added guidance of half a century's ruling wrote: "Now I think I may safely say that there are few problems involved in the law of evidence more unsolved than what things are to be embraced in these occurrences that are designated in the law as the *res gestae*. The adjudications on the subject, more especially those in this country, are perplexingly variant and discordant. I can readily find judicial rulings by force of which this testimony would be excluded; but I can as readily find other rulings of equal weight, that would sanction its admission. This result has grown out of the difficulty of applying, with anything like precision, general rules to a class of cases of infinite variety."⁴⁴ Said Chief Justice Bleckley, of Georgia, in 1879: "The difficulty of formulating a description of the *res gestae* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait that shall enable the possessor to recognize every member of a very numerous family."⁴⁵ From Mr. Justice Wanamaker, of Ohio, as recently as 1914, in reversing the Court of Appeals, on an evidentiary issue involving *res gestae*, comes, an apology which is pregnant: "We feel however, that it is but just to say that the judgment of the Court of Appeals in this case finds abundant warrant in the former decisions of this court in analagous cases."⁴⁶

Much confusion has resulted in a regrettable tendency

⁴³ Pool v. Bridges, *supra*, note 29.

⁴⁴ Hunter v. State of New Jersey, *supra*, note 38.

⁴⁵ Cox v. State, 64 Ga. 374, 410.

⁴⁶ State v. Lasecki, 90 Ohio 10, 106 N. E. 660, L. R. A. 1915 E, 203, Am. Cas. 1916 C, 1182. For conflicting views in relatively similar fact-situations, *vide*: Travelers Ins. Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437; Selz-Schwab & Co. v. Ind. Com., 326 Ill. 120, 156 N. E. 763; Railroad v. O'Brien, 119 U. S. 99; Railroad v. Coyle, 55 Pa. 396; Waldele v. Railroad, 95 N. Y. 275; Luby v. Railroad, 17 N. Y. 131; McCarrick v. Kealy, 70 Conn. 642, 40 Atl. 603; Morse v. Railway, 81 Conn. 395, 71 Atl. 533; Perry v. Haritos, 100 Conn. 476, 124 Atl. 44; Rockhill v. Bus. Co., 109 Conn. 706, 145 Atl. 504.

among jurists to "overexplain" in interpreting the *res gestae* doctrine. Their language is frequently erroneous. They seem to borrow, without discrimination, from precedents that sound persuasively convincing, and thus we find language identified with the verbal act theory employed to admit a spontaneous declaration or exclamation. Such a foggy perspective is due to plain misunderstanding. A declaration which is a verbal act accompanies a principal act as an inseparable part of it, is precisely contemporaneous therewith, and is *never* offered as a testimonial assertion but only as a part of the act in issue. A spontaneous declaration is *always* offered in a testimonial sense, to wit: as the true explanation of the subject of inquiry. It is because of this characteristic that it infringes the Hearsay rule. The declaration constituting a verbal act serves merely to characterize, explain or elucidate a principal act, so as to show its true nature or quality. Such a declaration is in no sense hearsay, but is always original evidence. It is either material to the issue, a part of the issue, or circumstantial evidence of an existing condition. To the elements of contemporaneousness and characterization, there is added another pre-requisite to make a declaration a verbal act: the principal act must be equivocal.⁴⁷

An illustration of the "over-explanation" referred to may be found in the courts' reasoning in *Correia v. Boston Moter Tours, Inc.*, which leaves one in doubt as to whether the declaration was admitted because it was a verbal act and, therefore, *res gestae*, or because it was a spontaneous exclamation made without reflection or fabrication. The opinion writer, with questionable generosity, blends indiscriminately the reasoning of both principles. Said he:

"In view of the high degree of care owed the plaintiffs by the defendant, it was admissible as a part of the *res gestae* because it was contemporaneous with the collision, was spontaneous to a degree which reasonably negated premeditation or possible fabrication, and tended to qualify, characterize and explain the causal relation, if any, between the accident and the conduct of the operator of the omnibus immedi-

⁴⁷ *State Bank v. Hutchinson*, 62 Kan. 9, 61 Pac. 443; *State v. Wentworth*, 27 N. H. 217; *Lund v. Tyngsborough*, 9 Cush. 42; *Ins. Co. v. Mosley*, 8 Wall. 411, 19 L. Ed. 437; 22 C. J. 259, sec. 362; *Holyoke v. Est. of Holyoke*, 110 Maine 469, 87 Atl. 40; *State v. Mortensen*, 26 Utah 312, 73 Pac. 562; *Gresham v. Manning*, Irish Rep. 1 C. L. 125; *Com. v. Chance*, 174 Mass. 245; *Avery v. Clemons*, 18 Conn. 306; *Halsbury*, op. cit., *supra*, note 11; *Wigmore*, op. cit., 1772.

ately before the accident, and thereby to throw light upon the issue of whether or not the driver exercised the highest degree of care for the safety of the plaintiffs, which was consistent with the defendant's undertaking."⁴⁸

Surely, the force of reasoning could not further go!

Just when the "broadening" of the rule began is problematical, but Mr. Justice Thayer puts the blame on a case decided in Massachusetts in 1849. Said he: "The line of authorities in this country which maintain its admissibility seems to have commenced with the case of *Commonwealth v. McPike*, 3 Cushing 184. The courts that have followed the ruling in that case have frequently manifested a sort of hesitancy as to its correctness, but have concluded that such statements were a part of the *res gestae*, and been content to place their decisions on that ground."⁴⁹ This case and another, *Commonwealth v. Hackett*,⁵⁰ decided in 1861, also by Massachusetts, certainly paved the way for much loose judicial reasoning and numerous erroneous opinions, in the last seventy-five years. The declaration admitted "as part of the *res gestae*," in each case, was plainly hearsay, and did not accompany the act. If receivable at all, it should have been admitted as a spontaneous exclamation, and, then, only as an exception to the Hearsay rule. There will be found in every jurisdiction, today, lawyers who were grounded in their student days, in the belief that the *McPike* and *Hackett* cases were the clearest illustrations in the books of *res gestae*, while the *Bedingfield* ruling, *supra*, was an inexcusable error.

But other important decisions and judicial observations contributed likewise. And among these a decision of the Supreme Court of the United States went far afield to widen the

⁴⁸ 270 Mass. 88 (1930), 169 N. E. 775.

⁴⁹ *Sullivan v. Oregon R. & N. Co.*, 12 Ore. 392 (1885), 53 Am. Rep. 364. Joseph Thayer offered this sapient advice:

"It occurs to me that courts at *nisi prius* would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestae*, or incompetent upon the ground that they were only hearsay, if they would consider whether the transactions to which they were relating were continuous when they were made, or terminated at the time, and make that the test of the matter; and I believe that much of the embarrassment they labor under in applying the rule in such cases, has arisen in consequence of an attempt that has frequently been made to stretch the *res gestae* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon the subject."

⁵⁰ 2 Allen 136 (1861).

breach.⁵¹ In that case, the court held that statements made by a husband to his wife, who had left his bed between twelve and one o'clock, and later returned, to the effect, that he had fallen down the back stairs and almost killed himself, were admissible as a part of the *res gestae*. The court did not concern itself with the important fact that, apart from this recital of declaration by one deceased, there was no proof whatever of a "principal act" in this case. Furthermore, the opinion declared: ". . . The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine." The opinion writer was influenced, doubtless, by an observation of Mr. Justice Park, in 1824, in the famous English case of *Rawson v. Haigh*,⁵² as to the admissibility of declarations of a bankrupt who had departed the realm to escape his creditors, while his absence continued. Said the English jurist: "It is impossible to tie down to time the rule as to the declarations; we must judge from all the circumstances of the case; we need not go the length of saying, that a declaration made a month after the fact would of itself be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole *res gestae*." Of course the declarations of the bankrupt therein were admissible, for they accompanied and explained his flight, which was one continuous act from the moment of his departure until his return. They were the verbal parts of that single act. This feature, however, has been overlooked by courts, who regarded merely the first sentence quoted, and missed the context which made it clear. A striking illustration of judicial misunderstanding on this very point will be found in *Keyser v. Grand Trunk Railroad*,⁵³ in which the Supreme Court of Michigan held a report made by an engineer in line of duty, concerning an accident caused by the locomotive operated by him, close to an hour after the accident in question, admissible as part of the *res gestae*!

⁵¹ *Travelers' Ins. Co. v. Mosely*, 8 Wall. 397, 19 L. Ed. 437 (1869).

⁵² 2 Bing. 99.

⁵³ 66 Mich. 390 (1887). For an intelligent and discriminating opinion, *vide* *Stewart v. Commonwealth*, 235 Ky. 670, 32 S. W. (2d) 29 (1930), in which Stanley, C., discusses the relevancy of several declarations of the victim of a shooting affray, all made after the occurrence and over a period of several hours. These statements involved a consideration of *res gestae*, spontaneous declarations, and as well that shadowy distinction between *fact* and *opinion*.

III.

In the earliest case on the subject of spontaneous declarations, decided in the King's Bench, in 1694,⁵⁴ an exclamation of a victim of mayhem, "immediate upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage," was received in evidence. The objectionable phrase, *res gestae*, was not employed, but the court gave full recognition to the *spontaneous* character of the victim's exclamation or statement, and no court in any jurisdiction today, where the common law is respected, would question the correctness of this ruling. No better example, or illustration, of spontaneity may be found in the books, and the *res gestae* doctrine was not the sanction for the admissibility of the victim's observation. If such statements were admitted in evidence generally, because of their spontaneity, although subsequent to the main fact, as a genuine and recognized exception to the Hearsay rule and *not on any other ground*, our difficulty would be largely surmounted. This element of spontaneity involves a consideration of certain factors which must be present to warrant its inference. As to this there is practical unanimity: The declaration must be made at the moment of the particular occurrence, when, it may be assumed, the speaker's mind was so controlled by the event as to force from him an involuntary utterance, either without his will, or against his will, and without time or opportunity for reflection or fabrication. Such an utterance negatives an inference as to its being a self-serving statement, and when so considered, is receivable in evidence.⁵⁵ Anything resembling narrative is fatal to a declaration's admissibility.

If this sound doctrine had not been misinterpreted, as it was by Lord Ellenborough,⁵⁶ in 1805, who elected to see in it the

⁵⁴Thompson v. Trevanion, Skin. 402 (1694). One may read with entertainment and profit an exceedingly interesting psychological inquiry concerning spontaneous declarations, in 28 Columbia Law Review, 433, 1928, by Robert M. Hutchins and Donald Slesinger, entitled "Some Observations on the Law of Evidence." Doctor Hutchins is now president of the University of Chicago.

⁵⁵U. S. v. King, 34 Fed. 314 (1888).

⁵⁶Aveson v. Kinnaird, 6 East 188 (1805), 102 E. R. 1258. This distinguished jurist's rulings and opinions have not been always followed but have met with frequent criticism. *Vide*, In re Ferdinand, L. R. 1 Ch. Div. 107 (1921), opinion by Lord Sterndale, M. R.; R. E. Ireton, Mistake of Law, 57 U. S. Law Review 405-414 (1933); Cf. his ruling in Wilkinson v. King, 2 Camp. 335 (1809), 170 E. R. 1175, with that in Pickering v. Busk, 15 East 38 (1812), 104 E. R. 758.

comparatively new *res gestae*, and who did not hesitate to say that Lord Chief Justice Holt had admitted the wife's exclamation, in the preceding case, "because it was *res gestae*," a line of demarcation might have been then established which, on one side, would admit a declaration *precisely contemporaneous* with an act done, as a part of the act; and, on the other, would admit a declaration, *after* the act, which was *spontaneous*, as an exception to the Hearsay rule. But Ellenborough's blunder, which is inexcusable and indefensible, since Holt never used the words *res gestae*, has had a most lamentable effect as a precedent. More than sixty years later—in 1869—the Supreme Court of the United States accepted his conclusion without question.⁵⁷ And it is too *evident*, the combined effect has made for further misunderstanding and confusion.

Despite this, however, there are to be found in the books, sound judicial opinions which recognize the distinction between a verbal act and a spontaneous declaration, in other words, between original and hearsay evidence. Judge Willard Bartlett, of New York, stands pre-eminent among our jurists who think aright on this question. His criticism of the Massachusetts ruling in the Hackett case, *supra*, is clear, courageous and convincing.⁵⁸ Another New York judge had an adequate grasp of this subject. Said he: "If a man, being wounded, calls out, 'John has stabbed me', the declaration in no way qualifies or explains the act of the person who stabbed him. In reality, testimony to the declaration is pure hearsay, and is admissible in evidence only upon the great improbability that the spontaneous utterance of the instant should be false."⁵⁹ To the same effect is the opinion of Judge Gray, of the New York Court of Appeals, in *Greener v. General Electric Company*,⁶⁰ where the question in-

⁵⁷ "In *Aveson v. Kinnaird*, it was said by Lord Ellenborough that the declarations were admitted in the case in *Skinner* (*Thompson v. Trevanion*) because they were a part of the *res gestae*."—Mr. Justice Swayne in *Ins. Co. v. Mosley*, *supra*, note 51.

⁵⁸ *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (1908). "Strictly speaking, the spontaneous declaration there under consideration did not really form part of the *res gestae*, as being itself a verbal act contemporaneous with the principal occurrence; for the exclamation was uttered after the act of stabbing had been wholly completed and after the assailant had fled, although it is true that the time which had elapsed was very short."

⁵⁹ Justice Cullen, afterward Chief Judge of the New York Court of Appeals, in *Patterson v. Hochster*, 38 App. Div. 398, 56 N. Y. Supp. 467.

⁶⁰ 209 N. Y. 135, 102 N. E. 527, 46 L. R. A. (N. S.) 975 (1913).

volved the admissibility of a reply by the victim of an accident to a query put to him by a fellow laborer, two feet away from the scene of the accident, in excluding such testimony. In support of his ruling, this jurist said: "The distinction to be made is in the character of the declaration, whether it be so spontaneous, or natural an utterance as to exclude the idea of fabrication, or whether it be in the nature of a narrative of what had occurred. In the present case, the declaration of the deceased was not spontaneous; it was called forth by the inquiry as to 'what had happened' and was distinctly narrative."

In the preceding pages the writer has endeavored to point out: (1) the utter uselessness of the expression *res gestae*; (2) the nature of a verbal act and its admissibility as original evidence; (3) the absurdity of referring to such an act as "a part of the *res gestae*" to justify its admissibility, when that is determined alone by its relevancy to the main act; (4) the confusion and misunderstanding that the use of this foreign expression has occasioned; (5) the resulting failure of many courts to distinguish hearsay from original evidence; (6) the correctness of the doctrine of spontaneous declarations when properly received; and (7) the misunderstanding prevailing as to what constitutes a spontaneous declaration (a by-product of the existing false notion of *res gestae*) as shown in its admission as *res gestae*, not as an exception to the Hearsay rule. Because he believes that the test of relevancy would serve every purpose where *res gestae* is now the yardstick, he respectfully recommends to the serious consideration of the profession, bench, bar and reformers, that a restatement of the Law of Evidence should:

(1) Abolish the phrase *res gestae* and substitute for it the word "transaction";

(2) Determine all questions of admissibility by the logical rule of Relevancy; and

(3) Retain the doctrine of Spontaneous Declarations, but only as a valid exception to the Hearsay rule.