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HEARSAY: "SELF-SERVING" DECLARATIONS

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Many West Virginia cases purport to deal with "self-serving" declarations on the theory that there is a principle of Evidence especially excluding such assertions; indeed, some cases seem to assume that this supposedly special doctrine condemns the use of such extrajudicial statements even though they come within one of the exceptions to the hearsay rule or do not violate the rule. For example, in *Rowan v. Chenoweth*,¹ in a dictum sometimes cited as a precedent,² the principle, as applicable to writings at least, is referred to as a "fixed" doctrine, and, as if to make it not only fixed but look fixed, it was stated in Latin and then liberally translated. Said the court: "*Scriptura pro scribente nihil probat* is a fixed maxim.³ 'A party's self-serving declarations cannot be put in evidence in his own favor whether he be living or dead at the trial.'"⁴

On the other hand, there are many West Virginia decisions admitting such declarations, usually with little or no mention of the fact that they are self-serving. Accordingly it is the purpose of this discussion to examine the more significant cases in point (some

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¹ 49 W. Va. 287, 38 S. E. 544 (1901).

² See, e.g., *Reiser v. Lawrence*, 96 W. Va. 82, 91, 123 S. E. 451, 455 (1924). This case is hereafter explained in the body of this article in connection with note 56.

³ The maxim, *Scriptura pro scribente nihil probat* (a writing proves nothing in favor of the writer) seems to have been derived from the Roman law doctrine, *nullus idoneus testis in re sua intelligitur* (no witness is to be considered suitable in his own behalf). See 2 WHARTON, EVIDENCE 1100, 1101 (1877), which our court cites as an authority for the "fixed maxim" and for the interpretation. Significantly, however, Wharton notes exceptions to the "rule".

⁴ At p. 292, 38 S. E. at 546. This statement is only a dictum for the reason that the court went on to hold that the evidence did not come within the rule as to an "entry made in due course of business"—an exception to the hearsay rule. To support its decision, the court cited 1 GREENLEAF, EVIDENCE §§120a, 120b, and 1 WHARTON, EVIDENCE §§681, 683 (1877), dealing with Regular Entries Made in the Course of Business and with Party's Shopbooks as exceptions to the hearsay rule.

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of them in the footnotes⁵) with a view to determine whether there is such an exclusionary principle, or whether so-called self-serving assertions are merely hearsay with a vituperative epithet, so that the only rationale needed or pertinent in dealing with the problem is to be found in the hearsay rule and its recognized exceptions, and in the related doctrines as to when the hearsay rule does not apply.⁶

Perhaps the case most commonly regarded as authoritative on the general question in West Virginia is *Scott v. Norfolk & Western Ry.*,⁷ in which the only point adjudicated by the court turned on the admissibility of certain evidence which the court excluded, purportedly on the sole basis that it was a self-serving statement.⁸ The court cited no precedent to support its ruling, but, relying exclusively on Jones on *Evidence*, 2d ed.,⁹ laid down the following proposition: "It is a general rule of broad application that self-serving declarations are not admissible in behalf of the declarant."¹⁰

Does the *Scott* case, however, or any other West Virginia decision authoritatively enunciate any such special rule? If the facts of the *Scott* case do not warrant such a sweeping proposition, and if there are prior inconsistent West Virginia cases which are not overruled, it would seem to follow, in accordance with well-recognized principles of *stare decisis*, that the proposition is not the real *ratio decidendi* of the case,¹¹ at least if there are no prior decisions authoritatively laying down such a doctrine. And if, in addition, there are subsequent West Virginia decisions, not overruled and inconsistent with such supposedly special doctrine,

⁵ See particularly notes 54 and 59 *infra*, in which several cases not commented upon in the body of this article are briefly discussed. The list, however, is not intended to be exhaustive as many of the judicial expressions are too inconsequential to justify detailed examination.

⁶ Cf. 3 WIGMORE, EVIDENCE §1765 (2d ed. 1923). As hereafter briefly discussed in the body of this article, §1765 is omitted from the third edition. But cf. 6 WIGMORE, EVIDENCE §1732 (3d ed. 1940).

⁷ 104 W. Va. 461, 140 S. E. 329 (1927). In the latest West Virginia case in point, *Show v. Mt. Vernon Farm Dairy Products*, 128 W. Va. 598, 37 S. E.2d 459 (1946), the only case cited by our court was the *Scott* case.

⁸ The court quoted with approval a passage from JONES, EVIDENCE (2d ed. 1908) which seems to refer to the argument sometimes made that to admit self-serving declarations would permit a party to "make evidence for himself," *i.e.*, manufacture evidence. This question-begging fallacy is dealt with in the body of this discussion.

⁹ Section 895.

¹⁰ This statement, which is in the syllabus, is copied almost verbatim from JONES, EVIDENCE §895.

¹¹ As to what constitutes the *ratio decidendi* of a case and how it is determined, see GRAY, THE NATURE AND SOURCES OF THE LAW c. 2 (2d ed. 1929); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161 (1930); Hardman, *Stare Decisis and the Modern Trend*, 32 W. VA. L. Q. 163 (1926); Hardman, *The "Law" in West Virginia*, 47 W. VA. L. Q. 23 (1940).

may it not be concluded that the existence of such a doctrine in this jurisdiction has been effectively negated?

But before attempting to deduce a workable principle from our seemingly inconsistent decisions, it is believed to be worth while to bear in mind that, although at common law a party to an action could not testify as he was disqualified because of interest, today by statute he can testify on the stand in his own behalf, except of course in regard to that limited class of situations as to which the so-called Dead Man's statute applies.¹² Quære, then, whether the supposedly special rule excluding self-serving declarations is anything more than a die-hard survival of the now-abolished common-law notion that a party's "interest" disqualifies him as a witness. At any rate since he can now testify self-servingly on the witness stand, why should his self-serving extrajudicial statements be regarded as anything other than mere hearsay from the point of view of admissibility as distinguished from weight? Of course the fact that such statements are self-serving is a consideration going to the weight of the evidence, just as the fact that a witness on the stand is "interested" or otherwise biased is a matter affecting the weight of his testimony. But, if the self-serving declaration comes within some exception to the hearsay rule, should not such declaration be regarded as hearsay, and nothing more, for purposes of admissibility? And if, for any reason, such evidence does not violate the hearsay rule, why should it be excluded?

An important decision in point is *Stevens v. Friedman*.¹³ In that case, a civil action to recover damages for assault and battery, the plaintiff offered her parents to testify as to statements made by the plaintiff to her parents with respect to her then existing pain and the effects of the injury sustained. That such statements are self-serving is obvious. Yet our court held them to be admissible, apparently on the ground—an undoubtedly sound one—that though hearsay they come in under the exception for Declarations Evidencing Physical or Mental Condition.¹⁴ The court, relying on Greenleaf on *Evidence*¹⁵ and Wigmore on *Evidence*,¹⁶ and citing

¹² See, e.g., *Strode v. Dyer*, 115 W. Va. 733, 117 S. E. 878 (1934), discussing the West Virginia statute. See also Donley, *Personal Transactions with Persons Deceased at the Time of Trial*, 41 W. VA. L. Q. 256 (1935).

¹³ 58 W. Va. 78, 51 S. E. 132 (1906).

¹⁴ To sustain its conclusion, the court cites, *inter alia*, GREENLEAF, EVIDENCE 162b (16th ed. 1899) and 3 WIGMORE, EVIDENCE §1718 (1904), which treat such admissibility as an exception to the hearsay rule.

¹⁵ See note 14 *supra*.

¹⁶ See note 14 *supra*.

several out-of-state decisions,¹⁷ said: "The weight of authority seems to sustain the admissibility of this evidence in civil cases."¹⁸ And as to this conclusion, there can be no doubt.¹⁹ But how about criminal cases? Are self-serving declarations ever admissible in such cases in this jurisdiction?

Fortunately we have some criminal cases squarely in point. For example, in *State v. Abbott*,²⁰ a prosecution for murder in which the defendant had shot the deceased and in which there was an issue of self-defense, the circuit court had refused to permit the defendant to prove his declarations made at the time of the shooting and stating the reasons why he had shot the deceased. In holding that it was error to refuse to admit these self-serving statements of the accused, the court said, quoting with approval from a Georgia case:²¹ "In general, what a party says is not evidence in his favor . . . but when the declarations of the party . . ." are a part of the *res gestae*, "they are admissible." Significantly this case seems to be the earliest West Virginia decision specifically dealing with the admissibility of self-serving declarations, and interestingly the court held them admissible. Interestingly, too, in a comparatively recent case, *State v. Baker*,²² an indictment for receiving stolen goods, knowing them to be stolen, the circuit court had excluded a similar extrajudicial statement on the ground that it was self-serving. Nevertheless, the Supreme Court of Appeals, after noting the fact that the evidence was self-serving, held the statement admissible as a part of the *res gestae*. Said the court: "It matters not that the declaration was evidence in his [the declarant's] favor." The actual conclusion reached by our court in these cases is in accord not only with the weight of authority but with sound principle. Of course, though, the modern view is that such evidence is admissible under the exception to the hearsay rule known as Declarations Evidencing Physical or Mental Condition.²³ Incidentally, in *Corder v Talbott*,²⁴ per-

¹⁷ *Kuney v. Dutcher*, 56 Mich. 308, 22 N. W. 866 (1885); *Towle v. Blake*, 48 N. H. 92 (1868); *Roosa v. Boston Loan Co.*, 132 Mass. 439 (1882).

¹⁸ 58 W. Va. at 83, 51 S. E. at 134. To be sure, as the court pointed out, there are limitations to this exception.

¹⁹ See 6 WIGMORE, EVIDENCE §1718 *et seq.* (3d ed. 1940), collecting authorities as to the exception in general.

²⁰ 8 W. Va. 741 (1875).

²¹ *Monroe v. Georgia*, 5 Ga. 85 (1848).

²² 84 W. Va. 151, 99 S. E. 252 (1919); *accord*, *State v. Goldstrohm*, 84 W. Va. 129, 99 S. E. 248 (1919). Here, too, there is a statement in the syllabus that such declarations are admissible "both for and against" the declarant.

²³ See 6 WIGMORE, EVIDENCE §1732 (3d ed. 1940).

²⁴ 14 W. Va. 277 (1878).

haps the earliest West Virginia case purporting to exclude self-serving declarations and a case sometimes regarded as a precedent for the proposition that such declarations are inadmissible, the court in reality excluded the statements on the ground that they did not come within the *Res Gestae* doctrine—an exception to the hearsay rule. Moreover, what is more important, the court stated specifically that such declarations of a party are admissible in his behalf if they are a part of the *res gestae*. The reference to the evidence as self-serving was therefore only a dictum. In other words, extrajudicial self-serving assertions are admissible in West Virginia in both civil and criminal cases if they come within this exception to the hearsay rule.

To be sure, it is sometimes argued that to permit the introduction of self-serving declarations would allow a party to "make evidence in his behalf." But as a recent Virginia case,²⁵ in accord with these West Virginia cases, ably answers this alleged reason, such argument begs the question: it assumes that the statements are false.²⁶ In the Virginia case, *Parsons v. Commonwealth*,²⁷ a prosecution for murder, there was an issue as to whether the offense constituted murder in the first degree or a homicide of a lesser grade; and one question was whether the accused could offer his extrajudicial assertion, made prior to the killing, that he was afraid of the deceased. This hearsay is clearly self-serving, and the court frankly conceded that it was. Yet the court admitted the evidence. In a statement worthy of quotation the court said:

"While the cases [in point] are few, their logic is unanswerable. Wigmore, that master of the subject, adheres fully to this view. With trenchant phrase, apt illustration and sound reason, he thus expresses himself:²⁸ 'To hold that every expression of hatred, malice, and bravado is to be received, while [no self-serving statement] no expression of fear, goodwill, friendship, or the like, can be considered, is to exhibit ourselves the victims of a narrow whimsicality, which might be expected in the tribunal of a Jeffreys, going down from London to Taunton with his list of intended victims already in his pocket But it was not to have been anticipated in a legal system which makes so showy a parade of the presumption of innocence and the rights of the accused. This question-begging fallacy about "making evidence for himself"

²⁵ *Parsons v. Commonwealth*, 138 Va. 764, 121 S. E. 68 (1924).

²⁶ See 3 WIGMORE, EVIDENCE §1732 (2d ed. 1923).

²⁷ Cited *supra* note 25.

²⁸ 3 WIGMORE, EVIDENCE §1732 (2d ed. 1923).

runs through much of the judicial treatment. There is no reason why a declaration of an existing state of mind, if it would be admissible against the accused, should not also be admissible in his favor, except so far as the circumstances indicate plainly a motive to deceive.'"²⁹

The reasoning of the Virginia court, and the actual conclusions reached in the above-mentioned West Virginia cases (apart from the *Scott* case hereinafter to be discussed), seem so eminently sound that it is difficult to understand how such evidence could be excluded on the question-begging theory that the party must not be allowed to "make evidence for himself."³⁰

Another enlightening illustration of admissible self-serving declarations in this state is found in *Starcher v. South Penn Oil Co.*,³¹ in which our court, relying largely on Wigmore, admitted such evidence under the Spontaneous Exclamations exception to the hearsay rule, alias *Res Gestae* in this jurisdiction.³² The conclusion reached in this liberal decision is in accord with the great weight of American authority although some out-of-state cases seem to take a contrary view.³³ It should be pointed out perhaps that in this particular decision the declarant was dead at the time of the trial and the statement was offered by his administrator. But, as has already been noted, such an assertion is generally regarded as coming within the supposed interdiction against self-serving declarations.³⁴

Perhaps the most conspicuous examples of admissible self-serving evidence are Parties' Shopbook Entries or Account Books and, under certain circumstances, ordinary Business Entries. But here, for some reason, such evidence even though self-serving is admitted with little or no objection on that score, provided of course that the entries fall within the recognized limitations to the Shopbook doctrine and the Business Entries doctrine (so far

²⁹ 138 Va. 764, 780-781, 121 S. E. 68, 72.

³⁰ And yet a few out-of-state courts have actually excluded such evidence. See, citing some cases and discussing the point *en passant*, Note, 22 MINN. L. REV. 391, 402 *et seq.* (1938). See also 6 WIGMORE, EVIDENCE §1732 (3d. ed. 1940).

³¹ 81 W. Va. 587, 95 S. E. 28 (1918).

³² See, discussing the case, Hardman, *Spontaneous Exclamations v. Res Gestae*, 25 W. VA. L. Q. 341 (1918).

³³ See, *e.g.*, *Collins v. Equitable Life Ins. Co.*, 122 W. Va. 171, 173, 8 S. E.2d 825 (1940). ("Spontaneity rather than contemporaneity is now the generally recognized test of admissibility"); and see Note, 22 MINN. L. REV. 391, 402 *et seq.* (1938), discussing some contrary decisions.

³⁴ See, *e.g.*, *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544 (1901).

as those doctrines are separable in this jurisdiction).³⁵ Illustrative West Virginia cases sanctioning the admission of such evidence are cited in the accompanying footnote.³⁶

Additional illuminating examples of admissible self-serving declarations are to be found in the more or less companion cases of *High's Heirs v. Pancake*,³⁷ and *Wade v. McDougle*.³⁸ Between them, these two cases deal with the general situation in which under an issue of prescription by adverse possession there is a question as to the admissibility of extrajudicial declarations by the occupant of the property, importing a claim of title in himself. In each of these cases our court, per Brannon, J., one of the greatest of our West Virginia judges, ruled in favor of admissibility with respect to two different aspects of the problem.³⁹ And in the first case Judge Brannon conceded in so many words that the declarations were self-serving. The conclusion that such evidence is admissible not only is general law throughout the United States⁴⁰ but is clearly sound for the reason that under an issue of prescription by adverse possession such declarations, though made out of court, not under oath, and not subject to cross-examination, are per se an act of adverseness, "a verbal act," and therefore to admit them does not violate the hearsay rule, for they are not offered to prove the truth of the facts asserted therein,⁴¹ and the hearsay rule excludes extrajudicial assertions only when they are tendered for that purpose.⁴² In the first of these cases our court said: "Declarations of one in actual possession of land, explanatory of the character of his possession—that is, for instance, how he claimed, under what title, and to what limits—are admissible."⁴³

Similarly a party's extrajudicial self-serving statements are admissible when they are offered as being in and of themselves a part

³⁵ See 5 WIGMORE, EVIDENCE §1561, especially n. 5 (3d ed. 1940), indicating that in the West Virginia cases the two doctrines are sometimes "hopelessly confounded," citing *e.g.*, *Vinal v. Gilman*, 21 W. Va. 301, 308 (1883). See also cases cited in note 36 *infra*.

³⁶ See, *e.g.*, *West Virginia Architects & Builders v. Stewart*, 68 W. Va. 506, 70 S. E. 113 (1911); *Motor Car Supply Co. v. Nicholas Hardware & Furn. Co.*, 111 W. Va. 252, 161 S. E. 31 (1931); *Dietz v. McVey*, 77 W. Va. 601, 87 S. E. 926 (1916); *Martufi v. Daniels*, 99 W. Va. 673, 129 S. E. 709 (1925).

³⁷ 42 W. Va. 602, 26 S. E. 536 (1896).

³⁸ 59 W. Va. 113, 52 S. E. 1026 (1906).

³⁹ It should be noted that there are of course limitations to admissibility in such cases. See 6 WIGMORE, EVIDENCE §§1772-1778 (3d ed. 1940).

⁴⁰ *Id.* at § 1778 citing, *inter alia*, these two West Virginia cases.

⁴¹ See *id.* at §§1772-1778.

⁴² See *id.* at §1766.

⁴³ This quotation is from the syllabus in *High's Heirs v. Pancake*, cited *supra* note 37.

of the terms of the legal transaction involved in the case, *e.g.*, the terms of an oral or written contract—a point, however, which is too elementary to justify more than mere mention: normally one would hardly expect an objection to such evidence as self-serving though of course it is.⁴⁴

Here, then, are several important cases admitting self-serving declarations and decided prior to the *Scott* case. It should be remembered, however, that in the *Scott* case, hereinafter to be discussed in some detail, our court did not cite any of the above considered cases, all of which are believed to be irreconcilable with the special-rule theory purportedly enunciated in the *Scott* case.

Before proceeding further, it must be conceded that the supposedly special rule of the *Scott* case somehow found its way into that supposedly very special part of a West Virginia precedent, the syllabus. This is hardly the time, however, to launch a prolonged assault upon the redoubtable notion that the syllabus is the law of the case in West Virginia, for the writer has heretofore ventured a rather extended attack on that hardy idea in the pages of the *Law Quarterly*.⁴⁵ And yet, in order to guard against possible misunderstanding, it seems desirable to recall, quite briefly, what the West Virginia Supreme Court of Appeals said and held in one important case on that question.

In *State v. Burnett*,⁴⁶ our court had written the following syllabus:

"Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. *If they relate to facts to which the declarant could have thus testified, they are admissible.*" (Italics ours.)

In a later West Virginia case, *State v. Graham*,⁴⁷ there was offered in evidence a "dying declaration" importing that the dying declarant and the accused had quarreled about a month before the killing for which the accused was indicted. The State contended that the evidence was admissible under the syllabus in the *Burnett* case. The Supreme Court conceded in effect that this statement

⁴⁴ That such evidence is admissible, see, *e.g.*, *Butts v. Butts*, 81 W. Va. 55, 94 S. E. 360 (1917); 6 WIGMORE, EVIDENCE §1770 (3d ed. 1940).

⁴⁵ See Hardman, "The Law"—*In West Virginia*, 47 W. VA. L. Q. 23 (1940); "The Syllabus Is the Law", 47 W. VA. L. Q. 141 (1941); "The Syllabus Is the Law"—*Another Word*, 47 W. VA. L. Q. 209 (1941); "The Syllabus Is the Law"—*Another Word by Fox, J.*, 48 W. VA. L. Q. 55 (1941).

⁴⁶ 47 W. Va. 731, 35 S. E. 983 (1900).

⁴⁷ 94 W. Va. 67, 117 S. E. 699 (1923).

in the syllabus, if law, would let the evidence come in. And the lower court, perhaps on the ground that the syllabus is the law in West Virginia, admitted the evidence. But the Supreme Court held that it was error to admit it. Said the court:

"A careful examination of . . . [the *Burnett*] case will disclose that the language in the syllabus is broader than the opinion warrants . . . The statement in the syllabus that 'If they [the declarations] relate to facts to which the declarant could have thus testified, they are admissible,' is too sweeping, and taken apart from the facts stated in the opinion is inaccurate. This statement would imply that . . . anything he [the declarant] might say in a dying declaration if he could give it in evidence were he alive, would be competent evidence upon a trial of the accused for his homicide. *This is not the law, and never has been in this state.*"⁴⁸

Here, it should be noted, the West Virginia court in so many words not only repudiated the syllabus of a case purporting to state a proposition of law but repudiated it on the ground that the doctrine laid down in the syllabus was not the law, and never had been in this state—that it never had been the law for the reason that the syllabus was broader than the opinion warranted. Thus, in ultimate analysis, the court found the law of the case, not in the syllabus but elsewhere, and held, in effect, that the proposition set forth in the syllabus, to the extent that it was too broad, was only a dictum.

At this juncture it seems necessary to examine more fully the actual holding in the *Scott* case,⁴⁹ which, as heretofore indicated, seems to be regarded by some of our judges as the principal case on self-serving declarations in this jurisdiction. In that case there was an issue as to whether the plaintiff had been injured by lifting a heavy steel rail, as the defendant claimed, or by being struck by the rail, as the plaintiff claimed. The plaintiff offered in evidence a report of the defendant's claim agent based upon an extrajudicial statement by the plaintiff, made twenty-five days after the accident causing the injury, to the effect that he (the plaintiff) had been struck by the rail. The court held that the evidence was inadmissible, and gave as its sole reason that the statement was a self-serving declaration.

Does the *Scott* case, then, overrule the above-mentioned prior decisions admitting self-serving declarations? Pretty obviously not,

⁴⁸ At 71, 72, 117 S. E. at 700-701.

⁴⁹ Cited *supra* note 7.

partly for the reason that it was unnecessary in the *Scott* case to lay down such a purportedly special rule, as the evidence was hearsay not coming within any of the generally recognized exceptions. It is submitted therefore that the sweeping proposition propounded in the *Scott* case, being broader than the point to be adjudicated warranted, and being inconsistent with many prior West Virginia cases, is nothing more than an obiter dictum.

This conclusion seems to be strongly supported by a rather recent decision by our court in *Wiseman v. Terry*.⁵⁰ In that case, in which an eight-year-old child had been injured by an explosion in connection with the operation of defendant's rock quarry, there was an issue as to whether the defendant had used due care, or whether there had been permission or invitation as charged in the declaration. The evidence was that the defendant had instructed his foreman and all his employees not to allow children or others on or about the operation. It was argued that such instructions, being self-serving, were inadmissible under the rule of the *Scott* case. But the court, distinguishing the *Scott* case, held the evidence admissible—a clearly sound result as such an extrajudicial utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance and therefore, not being offered to prove the truth of any fact asserted, does not violate the hearsay rule.⁵¹

Moreover, if the sweeping proposition propounded in the *Scott* case is more than a dictum, how can the later West Virginia case of *Curfman v. Monongahela West Penn Public Service Co.*⁵² be satisfactorily explained? The *Curfman* case was an action for personal injury. The plaintiff called as a witness her physician who had examined her. The physician testified as to several statements made by the plaintiff and bearing upon the plaintiff's then physical condition. These statements were unquestionably self-serving; and the defendant claimed that they were inadmissible for that reason. Nevertheless our court sanctioned the admission of the evidence, saying, inter alia, that "Representations by a sick person of the nature, symptoms and effects of the malady under which he was laboring at the time . . . are . . . admissible to establish the truth of the matters communicated."⁵³

⁵⁰ 111 W. Va. 620, 163 S. E. 425 (1932).

⁵¹ That such evidence does not violate the hearsay rule, see 6 WIGMORE, EVIDENCE §1789 (3d ed. 1940) citing authorities.

⁵² 113 W. Va. 85, 166 S. E. 848 (1932).

⁵³ At 90, 166 S. E. at 850.

The decision in the *Curfman* case is general law in the United States, the evidence being admissible under the hearsay exception for Declarations Evidencing Physical or Mental Condition; and, since the *Curfman* case, a comparatively recent decision, has not been overruled, it would seem that this case and the other above-considered West Virginia decisions virtually explode the special-rule theory. To be sure, there are West Virginia cases, not heretofore discussed, which purport to exclude self-serving declarations;⁵⁴ but there seems to be no clear-cut decision which cannot be explained (as of the time of the decision⁵⁵) without such supposedly special doctrine, although it must be conceded that in a few instances this supposed principle has been applied almost as if it were a rule of thumb, the discussion being either too summary or esoteric to permit complete assurance as to just what the authoritative holding of the case is. For example, in *Reiser v. Lawrence*⁵⁶ the excluded extrajudicial assertion was apparently banned by the hearsay rule although the exact nature of the proscribed evidence was not revealed by the court, except a pronouncement that it was "self-serving"—such a case being of course practically worthless as a precedent on the point herein considered.⁵⁷ Also, in what seems to be

⁵⁴ Illustrative cases are: *Kinsley v. Monongalia County Court*, 31 W. Va. 464, 7 S. E. 445 (1888) (evidence excluded by hearsay rule); *Crothers' Adm'r v. Crothers*, 40 W. Va. 169, 20 S. E. 927 (1895) (dictum, as court held the witness incompetent because of Dead Man's statute); *Vale v. Suiter & Dunbar*, 58 W. Va. 353, 52 S. E. 313 (1905) (hearsay: not part of the *res gestae*); *Crawford v. Workman*, 64 W. Va. 19, 61 S. E. 322 (1908) (hearsay: not within any exception); *Jefferson v. Simpson*, 83 W. Va. 274, 98 S. E. 212 (1919) (evidence excluded by hearsay rule); *State v. McKinney*, 88 W. Va. 400, 106 S. E. 894 (1921) (hearsay: not within *res gesta* exception); *Depue v. Steber*, 89 W. Va. 78, 108 S. E. 590 (1921) (evidence excluded because not within the *res gestae* exception; also some "self-serving" evidence admitted "for the purpose of proving . . . mental condition"); *Farrar v. Goodwin*, 98 W. Va. 215, 126 S. E. 922 (1925) (hearsay: not within any exception); *Sponaule v. Warner*, 98 W. Va. 532, 127 S. E. 403 (1925) (same as last case); *Carter v. Walker*, 121 W. Va. 81, 1 S. E.2d 483 (1939) (dictum, as court finally declared the declaration in effect irrelevant); *Slater v. United Fuel Gas Co.*, 126 W. Va. 127, 27 S. E.2d 436 (1943) (dictum; hearsay not shown to be within any exception; court frankly conceded that the self-serving statement was inadmissible as hearsay).

⁵⁵ Some of the hearsay exceptions have been considerably broadened since our court first began to condemn extrajudicial self-serving declarations. This is particularly true as to the so-called *res gestae* doctrine under which many self-serving statements have been admitted. See, e.g., *Collins v. Equitable Life Ins. Co.*, 122 W. Va. 171, 173, 8 S. E.2d 825, 826 (1940) ("Spontaneity rather than contemporaneity is now the generally recognized test of admissibility").

⁵⁶ 96 W. Va. 82, 123 S. E. 451 (1924).

⁵⁷ Moreover, the court seemed to indicate that the defendant's excluded "self-serving" statement may have been irrelevant. Said the court (at page 91): "and besides, we do not see how, with all his oral evidence in, he was prejudiced. It would have shed no additional light on the real issues before the jury."

the latest case on the question, *Show v. Mt. Vernon Farm Dairy Products*,⁵⁸ the extrajudicial assertions condemned as "self-serving" were offered to prove the truth of the facts asserted and were therefore excluded by the hearsay rule as they did not come within any exception;⁵⁹ and interestingly our court cited only Jones on *Evidence*, 2d ed.,⁶⁰ and the *Scott* case. Moreover, Wigmore on *Evidence*, in his first and second editions,⁶¹ categorically denies that there is any such rule; and, in his latest voluminous and all but authoritative edition, he does not seem to discuss the supposed rule as such, although he does admit that there are some cases which follow such a rule, purportedly at least.⁶² Significantly, too, Jones on *Evidence*, 4th ed., considerably modifies the sweeping proposition set out in the second edition, and completely eliminates the passage quoted by our court in the syllabus of the *Scott* case.⁶³

In arriving at the same conclusion as that reached by the West Virginia court in the *Curfman* case, Judge Learned Hand, one of America's greatest living jurists, speaking for a unanimous Circuit Court of Appeals, Second Circuit, in *United States v. Matot*,⁶⁴ has recently delivered what should be regarded as a telling blow to those who contend that there is a special rule for self-serving declarations. In that case, a prosecution for willfully misapplying the moneys of a federal bank, there was an issue as to the good faith of the accused in making overdrafts on the bank. On direct examination, the accused was asked a question intended to disclose his offer to the president of the bank to make an immediate sale of his real estate in order to cover the overdrafts. The circuit court

⁵⁸ 128 W. Va. 598, 37 S. E.2d 459 (1946).

⁵⁹ The courts, however, disposed of the objection to the evidence in one short paragraph and made no reference to the fact that, according to the orthodox view, the evidence was hearsay. As another example of rule-of-thumb treatment, without citation of authority, see *Dickinson Fuel Co. v. Glenn Coal Co.*, 103 W. Va. 366, 137 S. E. 539 (1927) (hearsay: apparently not within any exception). See also cases referred to in note 54 *supra*.

⁶⁰ Section 895.

⁶¹ Section 1765.

⁶² Although §1765 is omitted from the third and latest edition, the only index reference to "self-serving" declarations in the 3d edition is to §1732 which deals with the admissibility of "Statements By An Accused" under the exception to the hearsay rule for Declarations Evidencing Physical or Mental Condition, citing some unsound decisions excluding such self-serving declarations. However, as already indicated in the body of this article, the pertinent West Virginia cases admit such declarations when they come within this exception to the hearsay rule. See *Worth v. Worth*, 48 Wyo. 441, 468, 469, 49 P.2d 649, 659 (1935), saying there is no special rule excluding self-serving declarations.

⁶³ See 1 JONES, EVIDENCE §235 (4th ed. 1938).

⁶⁴ 146 F.2d 197 (2d Cir. 1944).

had excluded this assertion. In discussing the admissibility of this evidence, Judge Hand said:

"The prosecution seeks to defend the exclusion on the theory that the testimony would have been 'self-serving,' and that it was not part of the 'res gestae.' What else but 'self-serving' the testimony of an accused person on his direct examination is likely to be, we find it difficult to understand; and 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."⁶⁵

The court thereupon held that the exclusion of this self-serving statement was reversible error, the evidence being admissible of course under the orthodox hearsay exception for Declarations Evidencing Physical or Mental Condition,⁶⁶ or on the theoretically sounder ground, supported by a little authority, that the evidence does not violate the hearsay rule at all as the declarant is now testifying on the stand, under oath and subject to cross examination, with respect to his "extrajudicial" statement.⁶⁷

In conclusion then, and by way of summary, what is the West Virginia law on the question? Clearly it is not possible to reconcile all our cases on the theory that there is a principle of evidence especially excluding extrajudicial self-serving declarations; for we have many cases, not overruled, admitting such declarations which either come within one of the exceptions to the hearsay rule or do not violate the rule. Moreover, as has already been noted, no clear-cut decision has been found whose conclusion cannot be justified merely by invoking the hearsay rule and its exceptions, or the doctrines dealing with situations in which the hearsay rule is not violated. It would seem to follow therefore that, notwithstanding some judicial dicta to the contrary, the real *ratio decidendi* of our cases—the sole authoritative element in the decisions—can be spelled out only in terms of the hearsay rule, together with the estab-

⁶⁵ At 198.

⁶⁶ See 6 WIGMORE, EVIDENCE §1732 (3d ed. 1937 Supp.), considering the evidence in this case as coming within this exception to the hearsay rule.

⁶⁷ As to the theoretical soundness of the view that such evidence does not violate the hearsay rule at all, and as to the little authority supporting this theory, see Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 at 192-196 (1948). That such evidence, rightly analyzed, is not hearsay, see *Thomas v. State*, 185 Md. 596, 47 A.2d 43 (1946). The orthodox view, however, is contra. See *Bridges v. Wixon*, 326 U.S. 135 (1945).

lished exceptions and related doctrines. To adopt Dean Pound's famous distinction between "law in books" and "law in action,"⁶⁸ in West Virginia it may be law in books, according to some but not all cases, that there is a special rule excluding self-serving declarations; but in this jurisdiction the law in action—the law actually enforced in the courts, whatever language may be used—is that the real objection to so-called self-serving assertions is that they are hearsay and therefore, when they are offered to prove the truth of the facts asserted, they violate the hearsay rule; but they are admissible if they come within any of the recognized exceptions or if they do not violate the rule: by this rationale, and by this rationale only, can our various decisions in point be harmonized and generalized into workable principles.

⁶⁸ See Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).