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The Questionable Use of Res Gestae–Daws v. Commonwealth

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The opinion in *Sterling* v *Weinstein,* allowing self-help as the only remedy for intruding trees, is certainly contrary to the majority rule. The reasonable solution to the problem is to make the remedy depend upon the extent of injury If the action is "groundless and vexatious," not showing any real injury, the remedy of self-help would appear to be sufficient. When the injury is increased so as to be classified as a "sensible injury" one should have an action at law for the actual damages caused. If, however, the injury is serious and threatens to involve many successive law suits for the continuing trespass, or threatens to become serious, one should have, besides an action at law for the actual damages sustained, an action in equity to enjoin planting or force removal.

ROBERT C. MOFFIT

THE QUESTIONABLE USE OF RES GESTAE – DAWS v COMMONWEALTH

One of the most controversial subjects in the field of evidence is *res gestae.* This legal concept was introduced into the law to admit statements surrounding the commission of an act so that the nature of the act could be clearly understood. If the words surrounding an act are not admitted, the act alone may be incomplete and ambiguous. The Kentucky court has applied the term *res gestae* to at least five distinct rules of evidence: verbal act, spontaneous exclamation, circumstantial evidence, mental and physical condition, and admissions of an agent.[1] Since it has been extended to include more than one rule of evidence, the courts and lawyers have tended to intermingle some of the elements of these well defined principles and created a great deal of confusion as to the exact grounds upon which certain utterances are admitted or excluded.

Res gestae is a Latin phrase which means "things done."[2] In its use in the law it has been defined as "Matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might not be prop-

[1] Mann v. Cavanaugh, 110 Ky. 776, 62 S.W 854 (1901) (verbal act); Norton s Adm r v. Winstead, 218 Ky. 488, 291 S.W 723 (1927) (spontaneous exclamation); Sterns Coal Co. v. Evans Adm r, 33 Ky. L. Rep. 755, 111 S.W 308 (1908) (circumstantial evidence); Louisville & N. R. Co. v. Owens, 164 Ky. 557, 175 S.W 1039 (1915) (mental and physical condition); *see* Niles v. Steiden Stores, Inc., 301 Ky. 80, 190 S.W 2d 876 (1945) (admissions of an agent).

[2] WEBSTER S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2d ed. 1944).

erly understood."[3] As is frequently the case with a general definition, it has been extended to include some pre-existing rules of evidence which were recognized before the phrase came into use. The most frequent examples are the spontaneous exclamation and the verbal act. Since the verbal act and the spontaneous exclamation are closely related, it is the purpose of this note to examine the principles underlying each and consider them as applied in *Daws* v *Commonwealth*.[4]

The verbal act is defined by Wigmore as an utterance accompanying an independent and ambiguous legal act, and is admitted merely to explain the legal act.[5] Without the words a clear understanding of the act may not be possible. In order to be admissible, the utterance must satisfy four limitations: (1) the act must be independently material, (2) the act must be equivocal, (3) the words must give legal significance to the act, (4) the words must accompany the act.[6] An example is a policeman placing his hand upon a person s shoulder. Any person may testify as to what the policeman said while doing the act, for the act itself is ambiguous. He may be arresting that person or merely greeting him. Since the object is to give legal effect to a certain act, the utterance must be made by the actor to be admissible. It must not only accompany the act, but it must be precisely contemporaneous. If it is not precisely contemporaneous, it will merely be an assertion relating to a past act and be inadmissible.

A spontaneous exclamation is defined "as a statement or exclamation made immediately after some exciting occasion by a participant or spectator and asserting the circumstances of that occasion as it is observed by him."[7] Since the statements are made under stress of nervous excitement, they are admitted to prove the truth of the fact asserted, because they are made without time for reason and reflection and therefore tend to preclude fabrication. Before statements will be admitted under this rule, three factors must exist:[8] (1) some occurrence startling enough to produce a nervous excitement which renders the utterance spontaneous and unreflecting; (2) the utterance must be made while under the influence of shock and excitement so as to preclude fabrication; (3) the utterance must relate to the occurrence. The time element, while not as critical as in the verbal act, is important in determining the continuance of the shock or excitement. A good example of a spontaneous exclamation occurred in *Demeter* v

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[3] BALLENTINE S LAW DICTIONARY (1930).
[4] 314 Ky. 265, 234 S.W 2d 953 (1950).
[5] 6 WIGMORE, Evidence 191 (3d ed 1940).
[6] *Id.* at 192.
[7] Keefe v. State, 5 Ariz. 293, — 72 P 2d 425, 427 (1937).
[8] Showalter v. Western Pac. R. Co., 16 Col. 2d 460, 106 P. 2d 895, 900 (1940).

Rosenberg[9] where the decedent was found at the bottom of a flight of stairs and remained unconscious for an hour and a half. As soon as she regained consciousness she told her daughter, "I missed my step and fell down the stairs." The daughter was permitted to testify to what the decedent said although the statement was made an hour and a half after the accident. From this case it is apparent that the declaration need not be precisely contemporaneous with the act, but the person making the statement must remain in a state of shock or excitement from the time the act was committed until the statement is made. It must also be noted that a statement by a bystander is admissible under this rule.[10]

From the above analysis it is apparent that the verbal act and the spontaneous exclamation are separate and distinct principles. An utterance made by a bystander is admissible as a spontaneous exclamation but not as a verbal act. The utterance must be precisely contemporaneous under the verbal act doctrine. Under the spontaneous exclamation rule, the true test as to time is not when the exclamation was made but is whether, under all the circumstances, the speaker may be considered as speaking under stress of nervous excitement or whether the excitement has abated. Since the courts include both these rules under the term res gestae, there has been a tendency to apply the time limitations of the verbal act to spontaneous exclamations.

The recent case of *Daws* v *Commonwealth*[11] will serve as a good illustration of the confusion of the various elements of the rules included under res gestae. In that case, Daws was convicted of malicious shooting and the statements made by an arch enemy were instrumental in identifying Daws as the one who shot at Daulton. Daws allegedly shot at Daulton about 100 to 125 yards from a church. After the shot Daulton drove slowly to the church and approximately three minutes after he arrived he said "that Daws shot at him." Two witnesses were permitted to testify as to what Daulton said. On appeal this evidence was held inadmissible as not part of the *res gestae* and the judgment was reversed. Whether this testimony was held inadmissible under the verbal act rule or under the spontaneous exclamation rule cannot be readily determined for the court applied limitations applicable to both. In one part of the opinion the court said the declaration "must be substantially contemporaneous with the shooting and illustrate, elucidate, or explain the manner in which the shooting

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[9] 114 N.J.S. 43, 175 Atl. 621 (1934).
[10] Bennett v. Seattle, 22 Wash. 2d 445, 156 P. 2d 685 (1945).
[11] 314 Ky. 265, 234 S.W 2d 953 (1950).

was done." In another part of the opinion the court said the act "'must be the apparently spontaneous result of the occurrence operating upon the perceptive senses of the speaker. "[12] In these two sentences the court is expounding two distinct principles; the first applies to the verbal act and the second refers to a spontaneous exclamation. In applying these two principles the court found that the statement was not spontaneous nor substantially contemporaneous.

After finding that the statement was not spontaneous nor substantially contemporaneous, the court distinguished the present case from *Norton's Adm'r v. Winstead.*[13] In that case, Winstead shot and fatally wounded Norton. Witnesses heard Norton cry out and they reached him within three minutes after the shooting. The lower court refused to let the witnesses testify as to what Norton said, but on appeal the evidence was held admissible. The court stated:

> "The admission of statements as a part of the res gestae is not controlled wholly by the question of time, but probably the controlling question is whether or not there was an opportunity to deliberately make up a statement between the happening of the event and the time of making the statement. Before a statement can be admitted as a part of the res gestae, the nervous excitement produced by the happening must still predominate, and the reflective processes of the mind must be in abeyance."[14]

From this statement it is apparent that the evidence was admitted as a spontaneous exclamation. However, the court distinguished the *Daws* case from the *Norton* case on the grounds that in the *Daws* case the statements were not made at the scene of the shooting while they were in the *Norton* case. An inference can be drawn from this distinction that if Daulton had remained at the scene of the shooting his statement would have been admissible.

Even if we assume that Daulton made the statement at the scene of the shooting and three minutes afterwards, it is doubtful if it should have been admissible. In the *Norton* case, Norton was mortally wounded and believed death to be imminent. There were sufficient facts in that case to conclude that Norton was in a state of shock and nervous excitement. In the *Daws* case, the court does not mention that Daulton may have been in a state of excitement. It is a logical inference that if some men were shot at and narrowly escaped death, they would be in a state of excitement far in excess of three minutes. It is surprising that this point was not made since it seems to afford the only basis for the admission of the evidence. Evidently the attor-

[12] *Id.* at 267, 234 S.W. 2d at 954.
[13] 218 Ky. 488, 291 S.W. 723 (1947).
[14] *Id.* at 489, 291 S.W. at 723.

neys did not offer any evidence to show that Daulton may have been in a state of excitement, but proceeded to put forth some elements of the various rules which are included within the phrase *res gestae.*

Although the courts use the term *res gestae,* the problem still remains to find the particular exception to the hearsay rule under which the evidence is admitted or excluded. No matter what labels the courts apply it still must be determined what the courts actually do. Since that can only be determined by resorting to independent rules of evidence, what purpose does the phrase *res gestae* serve? This writer has failed to find any worthwhile purpose and can only conclude that it has created a great deal of confusion. The definition of the term is broad and ambiguous. It has not been applied to any rules of evidence which have not been previously named and defined. Since it has not been extended to any new principle of evidence, it is not of any value. If resort still must be had to the independent rules of evidence, the phrase *res gesta^* should be discarded for more exact definitions and terms.

ERNEST W RIVERS

REMAINDER TO GRANTOR'S HEIRS IN KENTUCKY

In the recent case of *Powell* v *Childers,*[1] the Court of Appeals of Kentucky seems to have permitted the creation of a remainder in the heirs of the grantor contrary to the so-called Doctrine of Worthier Title. It is the purpose of this note to determine the present status of this common law rule in Kentucky and to point out how it might have been applied in the *Powell* case.

The case in issue arose when D. D. Wilder and his wife conveyed real property to one Childers by deed of general warranty Upon an examination of title, a deed by Wilder to his wife was discovered which contained the following granting clause:

> " unto the party of the second part, for and during her natural life, with remainder to the heirs of the first party."

The habendum clause contained this language:

> "It is understood that second party already owns an undivided one-half interest in and to said real estate and first party desires now, and has by this writing conveyed to second party, his wife, his undivided one-half interest therein, same to be and belong to second party during her natural life, and upon her death said property, or at least the one-half undivided interest of first party therein, and now conveyed, shall go to the heirs of first party."

[1] Powell v. Childers, 314 Ky. 45, 234 S.W 2d 158 (1950).