Kentucky Law Journal

Volume 39 | Issue 2 Article 4

1950

Res Gestae in Kentucky

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from and the plaintiff has the burden in the sense of producing evidence to the judge to overcome this presumption in order to succeed. It seems that Kentucky has followed the general pattern set forth by Wigmore without adopting the language therein.

In conclusion, perhaps a few words should be said as to the justice of the above deductions. Who ought to have the burden of proving contributory negligence? Should the plaintiff be required, as an element of his cause of action, to negative contributory negligence on his part in his plea, and prove that he was in the exercise of due care? It has been argued that "When a plaintiff seeks to possess himself of money from a defendant's pocket, that plaintiff should be saddled with a complete and not merely a partial duty to show that he is entitled to that money. If he was negligent, and if his negligence contributed to the happening of the accident, he should not be entitled to a cent. Contributory negligence on his part would be no less effective than freedom from negligence on the defendant's part to defeat his action. Absence of contributory negligence no less constitutes a part of his cause of action than does negligence of the defendant."[92] It might, however, be argued with equal force and more reason that the burden ought to be on the defendant. Just how many elements must the plaintiff negative to make out a cause of action? If the plaintiff is required to negative contributory negligence, should he also be required to anticipate his possible failure to succeed on this point and plead last clear chance? How many possibilities must the plaintiff anticipate and negative in order to make out a cause of action for negligence? It seems that evidence of contributory negligence in most cases would be equally available to the defendant and it is no more than just to place the burdens of pleading and proving such matter on him to defeat the plaintiff's case.

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RES GESTAE IN KENTUCKY

The use of Latin words and phrases is very often the only means by which a concept can be designated or described in the legal profession. The subpoena, mandamus and habeas corpus are of such nature. This is due to the fact that for many years Latin was the exclusive language in the legal profession, and there is no English equivalent for such terms. Fundamentally there is no sound objection to their use when they convey a clear and distinct legal meaning. They become objectionable when their meaning is obscured by attempting to include within the term numerous different and distinct legal principles. Subject to such an objection is the term *res gestae* as used in connection with the admission of hearsay evidence. The Kentucky Court of Appeals has used this term freely. With a view toward at least discovering the sense in which it is used by the Court, or possibly advocating that it be discarded, the writer proposes to examine some Kentucky cases wherein the term has been used.

Res gestae is defined by Ballentine 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

[92] 1 SHEARMAN AND REDFIELD ON NEGLIGENCE sec. 124 (Rev. ed. 1941).

which the main fact might not be properly understood. "[1] According to Webster it is "things done; deeds; exploits; esp. *Law,* the facts which form the environment of a litigated issue; the things or matters accompanying and incident to a transaction or event. They are admissible in evidence as illustrating or explaining it."[2] The Kentucky Court attempted to define the term in *Louisville Ry.* Co. v. Johnson s Adm r, as follows:[3]

> "But, generally speaking, the rule in this State is that declarations which would otherwise be incompetent to be admissible as a part of the res gestae must be made by one of the actors in the affair, contemporaneous in point of time with the principal transaction under consideration, be made at or near to the place of its occurrence, and illustrate or explain how or what caused it to happen. "

An examination of these definitions reveals that the term contains only two distinct and separate principles of evidence – the verbal act and spontaneous exclamation. Yet many of the courts have included within the term at least six separate principles.[4] In Kentucky it seems that the principles included are: (1) verbal act, (2) spontaneous exclamation, (3) circumstantial evidence, (4) mental and physical condition, and (5) admissions of an agent. Perhaps it would be advisable to give a brief definition of these principles along with the reason why each constitutes an exception, if in fact it does, to the hearsay rule, and discuss Kentucky cases which seemingly employ each principle.

It should be pointed out that the main objection to the admission of hearsay evidence is that the person making the statement was not under oath and not subject to cross-examination. Therefore, in order for it to be admitted for its truth there must be (1) a necessity, and (2) a circumstantial guaranty of its truth. Both elements are present in the true exceptions to the hearsay rule, but are not necessarily present in all the principles included within the term *res gestae.* For instance, the circumstantial guaranty of truth need not be present in a statement which is admitted as a verbal act, because it is not admitted for its truth but to explain the legal act.

(1) Verbal act. According to Wigmore, the verbal act, which is broadly defined as the utterances accompanying an independent and ambiguous legal act, is not an exception to the hearsay rule because it is not admitted for its truth but merely to explain the legal act. A good example is A handing money to B and making the statement that it is in payment of a debt. C who heard A make this statement is permitted to testify as to what A said because it is not offered for its truth but to explain the equivocal act of passing money. Logically, the position that the hearsay rule is not applicable to the verbal act, seems sound. Such evidence is original and not subject to the limitations of the hearsay rule.

The verbal act concept was recognized and used by the Kentucky Court in the early case of *Howk* v. *McManama.*[6] In that case the plaintiff sued on a note allegedly executed by the defendant who denied making it. A statement made by the plaintiff as he started to leave that he intended to settle with the de-

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[1] BALLENTINE S LAW DICTIONARY (1930).
[2] WEBSTER S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2d ed. 1944).
[3] 131 Ky. 277, 281, 115 S.W 207, 209 (1909).
[4] 6 WIGMORE, EVIDENCE secs. 1768, 1769 (3d ed. 1940).
[5] 6 *id.* sec. 1772.
[6] 4 Ky. Opin. 234 (1870).

fendant even if he had to take his note, was held admissible. The Court quoted Greenleaf as follows; "Declarations made at the time of the transaction, and expressive of its character, motive or object, are regarded as "verbal acts indicating a present purpose and intention, and are therefore admitted in proof like any other material facts." Thus it is seen that the Court recognized the term as a separate principle of evidence, and possibly considered it not as an exception to the hearsay rule, but rather as original evidence.

In *Mann* v. *Cavanaugh*,[7] the defendant in an ejectment action was permitted to testify as to statements he made to others with reference to giving them permission to enter upon the land in dispute for the purpose of cutting trees. This was held competent as a part of the *res gestae*. The Court seemed to place emphasis on the fact that the statements were made within the boundaries of the disputed land. Apparently, it was felt that this was a verbal act, the equivocal act being the continuous possession, and the statements were admitted to explain this act, if this conclusion, which seems to be the only logical one to justify the admission,[8] is correct, the term *res gestae* has not been extended to include a principle not already recognized. Furthermore, the case seems to stand for the proposition that the hearsay rule is not applicable to the verbal act. This observation follows from the statement being admitted even though there was no circumstantial guaranty of truth due to the fact that it was self-serving and made by the witness himself.

The term verbal act was used in the case of *Owensboro City Ry. Co.* v. *Rowland*,[9] but the statement was also referred to as being a part of the *res gestae*. The statement admitted was made by a repairman after he inspected defendant's car. It was held admissible as a verbal act. Since the repairman was an agent of defendant and was acting within the scope of emplopment in making the inspection, it would seem to be admissible as a vicarious admission and not as a verbal act because statement was made after the act was completed.

Five years later in the case of *Barrett's Adm r* v. *Brand*,[10] in admitting statements made by a doctor as he performed an operation, the Court merely referred to it as being part of the *res gestae*. However, in discussing the *res gestae* rule the Court said: "This rule renders competent statements, acts, or conduct accompanying or so nearly connected with the main transaction as to form a part of it."[11] In addition a rule was quoted from Ruling Case Law which stated that such statements were of the nature of verbal acts. It would, therefore, appear that the verbal act was still recognized as a separate principle, but had been placed along with other principles under the elusive and catch-all phrase *res gestae*. The Court's discussion pointed out that there are many exceptions to the hearsay rule provided the circumstantial guaranty of truth is present. Since the Court apparently regarded the statements in this case as a verbal act, it would appear that the verbal act was considered an exception to the hearsay rule.

Other situations where the statement was admitted as *res gestae*, but which could obviously be classified as a verbal act are: a statement a conductor made to the deceased as he handed him a piece of paper;[12] a statement made by the

[7] 110 Ky. 776, 62 S.W 854 (1901).
[8] 6 WIGMORE, EVIDENCE sec. 1778 (3d ed. 1940).
[9] 152 Ky. 175, 153 S.W 206 (1913).
[10] 179 Ky. 740, 201 S.W 311 (1918).
[11] *Id.* at 745, 201 S.W at 333.
[12] Chesapeake & Ohio Ry. Co. v. McDonald, 239 Ky. 258, 39 S.W 2d 253 (1931).

deceased as he touched a wire;[13] and declarations made by a buyer relative to and contemporaneous with his acts in removing goods.[14]

Although there is a conflict in some of the cases discussed, it seems that the Kentucky Court does recognize the principle of a verbal act, but in most cases and especially the later ones it has been included in the term *res gestae*. Apparently the present view of the Court is that the verbal act is an exception to the hearsay rule, notwithstanding the implication in the earlier cases to the contrary and the fact that admissions have been allowed under this theory when there was an absence of a circumstantial guaranty of truth.

(2) Spontaneous exclamation. The spontaneous exclamation is described as a true exception to the hearsay rule and must contain the following elements: (1) an occurence startling enough to produce a nervous excitement which renders the utterance spontaneous and unreflecting; (2) the utterance must be made while under influence of shock and excitement so as to preclude fabrication; (3) and the utterance must relate to the occurence.[15]

The Kentucky Court recognizes the spontaneous exclamation as an exception to the hearsay rule, but like many other distinct principles it has been included in the term *res gestae*. As pointed out previously the definition of *res gestae* as given in *Louisville Ry. Co.* v. *Johnson's Adm'r*,[16] employs the language of spontaneous exclamation but limits to declarations made by actors in the occurrence and excludes those made by bystanders.[17]

In *Norton's Adm'r* v. *Winstead*,[18] the brother of the deceased who reached him three minutes after defendant had allegedly shot him was allowed to testify in a civil case as follows: "My brother said he was sitting in the seat. Winstead jumped on the horse and started to shoot him again, and he put his hands up and begged him not to, said he had already killed him, and he jumped on his horse and ran through the field."[19] The whole statement was admitted as res gestae, but the reasons given definitely indicate that it was recognized as a spontaneous exclamation. The Court in effect said that the statement had all the attributes of a "dying declaration," which it stated would not be admissible in civil actions unless a part of the *res gestae* or against interest.[20] It would seem to be less confusing if the statements were designated as a spontaneous exclamation rather than placed under the indefinite term *res gestae*.

Convincing proof that the Court recognized the principle is evidenced in the case of *Consolidated Coach Corp.* v. *Earl's Adm'r*;[21] where statements made by the

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[13] Ky. & W Va. Power Co. v. Brown's Adm'x, 281 Ky. 133, 135 S.W 2d 70 (1939).

[14] Weil v. Silverstone, 69 Ky. 698 (1869).

[15] 6 WIGMORE, EVIDENCE sec. 1750 (3d ed. 1940).

[16] See note 3 *supra*.

[17] Louisville & Cincinnati Packet Co. v. Samuels Adm'x, 22 Ky. L. Rep. 979 (1900) seems to hold that the spontaneous exclamation of a bystander is admissible; but the Court in Louisville Ry. Co. v. Johnson's Adm'r, note 3 *supra*, made the observation that except for the misleading statement in L. & N. R. R. Co. v. Carothers, 23 Ky. L. Rep. 1673, 65 S.W 833 (1901), there were no cases which had admitted bystander's exclamations. In Brandenburg v. Commonwealth, 260 Ky. 70, 74, 83 S.W 2d 862, 864 (1935), the Court merely stated that there was a conflict in the Kentucky decisions on this point.

[18] 218 Ky. 488, 291 S.W 723 (1927).

[19] *Id.* at 489, 291 S.W at 723.

[20] Prudential Ins. Co. v. Keeling's Adm'x, 271 Ky. 558, 561, 112 S.W 2d 994, 996 (1938).

driver of defendant's bus five minutes after the accident and while he was still pinned under the bus were admitted as *res gestae*. The following excerpt wherein the term spontaneous expression is used seems conclusive: " under the immediate influence of the principal transaction and as a *spontaneous expression* of the thought created by or springing out of the transaction itself, and so near in point of time as to exclude the presumption that it was the result of premeditation or design."[22] (Italics writer's)

Further illustrations of this recognition is the admission of a driver's statement made about one minute after an accident to the effect that it was her fault because the brakes failed.[23] Clearly, this would be admissible as a spontaneous exclamation or as an extrajudicial admission, but the Court in quoting from the *Consolidated Coach Corp.* case left no doubt that it was considered a spontaneous exclamation. In *Commonwealth Life Ins. Co.* v. *Clarke*,[24] a declaration by the insured to the effect that he shot himself made immediately after he was shot, was admitted as a part of the *res gestae* and as a declaration against interest. All the elements of a spontaneous exclamation are present. It could also be classified as a declaration against interest because the policy provided that it was void if insured met death by his own hand within a year from the date of the policy, and it also provided that he could change the beneficiary. Since the beneficiary had no vested interest until the death of the insured without change of beneficiary, the statement that he shot himself was against the pecuniary and proprietary interest of the insured. The Court pointed out that a declaration against interest was admissible even though not a part of the *res gestae*. A final illustration is the admission of a statement made by insured about fifteen minutes after the alleged injury that caused his death, and while he was apparently in great pain and under the influence of shock.[25] Here the Court stressed spontaneity rather than nearness of time as the determining factor.

From the foregoing discussion of cases it is safe to conclude that the Kentucky Court does recognize the separate principle of spontaneous exclamation, and has designated it as "spontaneous expression." Therefore, there is no valid reason why cases involving this principle should be classified under the term *res gestae*. It deserves a separate recognition. Should such recognition be accorded it, the term *res gestae* would be clarified at least to the extent of removing one element therefrom.

(3) Circumstantial Evidence. Circumstantial evidence means that the principal facts in issue are only inferred from one or more circumstances which have been established directly.[26] This principle is certainly recognized by the Kentucky Court in many cases without reference to the term *res gestae*.[27] However, in two cases involving accidents, purely circumstantial evidence was admitted as part of the *res gestae*. The first case, *Sterns Coal Co.* v. *Evans Adm'r*,[28] was an

[22] 263 Ky. 814, 94 S.W 2d 6 (1936).
[22] *Id.* at 818, 94 S.W 2d at 8.
[23] Sparks Bus Line Inc. v. Spears, 276 Ky. 600, 124 S.W 2d 1031 (1939).
[24] 276 Ky. 151, 123 S.W 2d 811 (1938).
[25] National Life & Accident Ins. Co. v. Hedges, 233 Ky. 840, 27 S.W 2d 422 (1930).
[26] Perry's Adm'x v. Inter-Southern Life Ins. Co., 248 Ky. 491, 58 S.W 2d 906 (1933). 1 WIGMORE, EVIDENCE sec. 25 (3d ed. 1940).
[27] Aubrey's Adm'x v. Kent, 292 Ky. 740, 167 S.W 2d 831 (1932); Smith v. Ward, 280 Ky. 173, 132 S.W 2d 762 (1939); Harkey v. Haddox 244 Ky. 380, 50 S.W 2d 955 (1932).
[28] 33 Ky. L. Rep. 755, 111 S.W 308 (1908).

action for death caused by a coal dust explosion. Evidence that several persons were killed by the explosion was admitted as part of the *res gestae* to show its force and deadly character, and as a circumstance tending to establish defendant's negligence. This evidence could have been admitted without reference to the term *res gestae,* but since it was closely connected with an accident the use of the term was apparently considered essential. The second case, *Throton* v. *Phillips,*[29] involved a collision between the defendant's truck and the plaintiff's car. Evidence as to the length, width, height, weight of the truck, and absence of lights was admitted as *res gestae.* Since these were only facts from which the main fact in issue, the defendant's negligence, could be inferred, they were admissible as circumstantial evidence eliminating the need for using the term *res gestae.*

Certain evidence relative to intention or state of mind may be admitted as circumstantial evidence. This is particularly true where the condition of the mind is attempted to be shown by the conduct of the person, and is also true of utterances which are indirect assertions of the state of mind, *e.g.,* "I am Napoleon." Such assertions to which the hearsay rule is actually inapplicable, are to be distinguished from direct assertions of a state of mind, *e.g.,* "I did not intend to injure Doe," are objectionable as hearsay.[30] The direct assertions to be admissible must come within the exception showing mental or physical conditions. This exception as recognized by the Kentucky Court will now be discussed.

(4) Mental and Physical Condition. The exception is broadly designated as showing the mental or physical condition of the declarant.[31] Both are included within the term *res gestae* as used by the Kentucky Court. In *Louisville & N. R. Co.* v. *Owens,*[32] an action for malicious prosecution, the statements made by the defendants agent while he held the plaintiff in custody, were admitted as *res gestae.* The agent was a guard in the yards and had arrested the plaintiff on suspicion of stealing whiskey from one of the cars. There would seem to be multiple admissibility since the statements could have been admitted under any of following three principles: verbal act, admission by an agent, or state of mind. From the language of the opinion it is apparent that the Court relied on the two latter principles, with perhaps a slight preference toward the state of mind exception in order to prove malice of the agent.

Another case in which the statements were apparently admitted as showing intent or state of mind or possibly a verbal act is *Glisson* v. *Paducah Ry. & Light Co.*[33] There the plaintiff was injured when the defendant's street car ran into his wagon. He was taken to the defendant's physician for treatment, but before the physician would give treatment he secured a written release from plaintiff. Statements made by the physician in connection with the act of obtaining the release were admitted as *res gestae.* If the execution of the release is considered the main fact in issue, statements made or said in connection with its execution could be admitted as a verbal act. Perhaps this was the basis for the admission, but in order to prove the release was secured fraudulently, it seems that the physician s intent at the time could be shown by statements made by him. Therefore, it would appear that there were two principles under which the evidence could have been admitted.

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[29] 262 Ky. 346, 90 S.W 2d 347 (1936).
[30] 6 WIGMORE, EVIDENCE sec. 1715 (3d ed. 1940).
[31] 6 *id.* sec. 1716.
[32] 164 Ky. 557, 175 S. W 1039 (1915).
[33] 27 Ky. L. Rep. 965, 87 S.W 305 (1905).

Statements and letters expressing an intention to commit suicide have been admitted as *res gestae*.[34] Doubtless this is within the state of mind exception. However, it is submitted that where there are only acts or conduct of the deceased, *e.g.*, previous attempted suicide, such evidence would be admissible as circumstantial evidence without regard to the hearsay rule.

In the other part of this exception, showing physical condition, the statement of injured or sick persons to a physician and his expression or statement as to pain made to or witnessed by a layman, will be considered. Any statement made to a physician which is necessary for the proper diagnosis and treatment of the declarant is admissible as an exception to the hearsay rule. The reason is stated as follows in *Chesapeake & Ohio Ry. Co.* v. *Wiley:*

> " because it is believed that the motive for telling the doctor the truth as to his sensations of pain, suffering or history of his ailment, so as to enable the doctor to relieve the suffering, or save the life of the patient, is greater than could be the motive of making merely a self-serving statement to be used in his behalf by the man in some other affair."[35]

It was also stated in that case that any natural, spontaneous and usual expression indicating pain or suffering may be shown by any observer, provided the expression flows immediately and naturally from the pain. This is admitted of necessity because aside from the testimony of the injured or sick person it is the only means to determine the existence of pain, and being made under such circumstances such expressions are in all probability true. The Court in discussing these statements and expressions did not refer to the term *res gestae,* but pointed out that in addition to being admissible under the exception it could also come in under *res gestae* as a verbal act. Thus, the implication is that an expression or statement of pain was considered a separate exception and not under *res gestae.* This observation, at least as far as the statement to a physician is concerned, is somewhat weakened by an earlier case, *Shades Adm r* v. *Covington-Cincinnati Elevated Bridge Co.*[36] There statements made to a physician were not admitted because they were not necessary for proper treatment. But the Court stated that those necessary for adequate treatment would be admissible as part of the *res gestae.*

Again in *Louisville & N. R. Co. v. Scalf,*[37] such statements made to a physician were referred to as *res gestae,* and the Court quoted at length from the *Shades Adm r* case on this point. The rule admitting usual and natural expressions of pain was reaffirmed without reference to *res gestae.*

Summarizing the mental and physical condition exception the following conclusions may be made. Statements showing intention or state of mind are recognized as a true exception to the hearsay rule, and are admitted as part of the *res gestae* when the elements of necessity and circumstantial guaranty of truth are present. Any statement made to a physician which is necessary for him to render proper care is also admitted as *res gestae.* But a statement as to physical pain

[34] Jefferson Standard Life Ins. Co. v. Hewlett, 307 Ky. 171, 210 S.W 2d 352 (1948) (statment); Mutual Life Ins. Co. of N. Y. v. Louisville Trust Co., 207 Ky. 654, 269 S.W 1014 (1925) (letter).

[35] 134 Ky. 461, 481, 121 S.W 402, 408 (1909).

[36] 119 Ky. 592, 84 S.W 733 (1905).

[37] 155 Ky. 273, 159 S.W 804 (1913).

not made to a physician for the purpose of securing treatment is not admissible, unless it falls within some other recognized exception, such as verbal act or spontaneous exclamation, in which case it is designated as *res gestae*. Apparently a usual and natural expression of pain is recognized as an exception to the hearsay rule and is admitted without reference to the term *res gestae*.

(5) Admissions of an Agent. The last principle included in the term *res gestae* is the admission of an agent. It is difficult in some cases to determine whether the evidence is admitted because it was said in the course of employment, or due to the fact that it is a spontaneous exclamation, verbal act, etc. Where immediately after an accident the agent makes a statement tending to indicate it was his fault, it is admitted against the principal as part of the *res gestae*.[38] Usually, the underlying principle is spontaneous exclamation, because in only rare instances is the statement made within the scope of employment.

In *Brumfield* v. *Consolidated Coach Corp.*,[39] the distinction is not so clear. The plaintiff in that case was denied passage on the defendant's bus which contained vacant seats. Evidence that the driver in denying her passage acted in an impudent and insulting manner was admissible as *res gestae*, even though the action was not based on the tortious conduct but rather on an alleged breach of contract. Two possible principles seem applicable: the verbal act, which would permit the conduct in denying passage to be admitted in order to explain such equivocal act, or as an act done by an agent in the course of his employment.

A recent case, *Niles* v. *Steiden Stores, Inc.*,[40] demonstrates that the admission of an agent in the course of his employment is admissible as *res gestae*. In that case the plaintiff was injured when she slipped and fell on defendant's floor. A butcher of the defendant assisted the plaintiff to her feet, and in response to her statement that the floor was slippery he acknowledged such fact to be true. This was held not admissible because not a part of the *res gestae*. The Court stated that the declarant had nothing to do with oiling the floors, and the admissions of an agent were not competent against the principal unless made in the course of employment.

The term *res gestae* in connection with the admission of such evidence seems unnecessary. If the statement was made in the course of employment the principles of agency should apply, and where it falls within the classification of a verbal act or spontaneous exclamation it could be designated as such.

It must be confessed that it was the expectation of the writer, in examining the decisions wherein the term *res gestae* is used, to find at least one case where evidence was admitted under this term which could not be justified under some recognized principle of evidence. This expectation was not realized, but in several instances where the term was used the evidence could have been admitted under one or more of the several principles. The failure of the Court to designate the exact principle under which the evidence is admitted, is unfortunate, and is probably the result of the principle of stare decisis operating to continue the use of the term. There seems to be no other explanation why such an elusive term is used to designate several distinct principles of evidence. Perhaps the Court is not certain which exact principle is applicable, but realizes that the evidence

[38] Youngblood Truck Lines v. Hatfield, 304 Ky. 600, 201 S.W 2d 567 (1947); Wimsatt's Adm x v. Louisville & N. R. Co., 235 Ky. 405, 31 S.W 2d 729 (1930); Louisville Ry. Co. v. Broaddus Adm r, 180 Ky. 298, 202 S.W 654 (1918).

[39] 240 Ky. 1, 40 S.W 2d 356 (1931).

[40] 301 Ky. 80, 190 S.W 2d 876 (1945).

is admissible under some principle and that it is safe to admit it as part of the *res gestae*. Every principle included within the term *res gestae* is recognized by the Court as a separate principle of evidence. Therefore, it is apparent that the use of the term *res gestae* is unnecessary.

From the foregoing it would seem obvious that the most desirable course of action on the part of the Court would be the abandonment of the term *res gestae*, and substituting therefor those separate exceptions to the hearsay rule that have been pointed out as comprising the general term. The least that should be done is that the Court should verbalize a recognition of a definition of *res gestae* as being a categorical term including the five separate exceptions to the hearsay rule which have been discussed herein; namely;

1. Verbal act
2. Spontaneous exclamation
3. Circumstantial evidence
4. Mental or physical condition
5. Admissions made by agent

HOLLIS E. EDMONDS

PARTIALLY DISCLOSED AGENCY AND ITS SIGNIFICANCE

One of the purposes of this note is to determine when and to what extent the distinction between "undisclosed" agency and "partially disclosed" agency is material in the actual determination of the legal rights and liabilities of principal, agent and third party. Another purpose is to discuss the duties of the parties as to disclosure of, and inquiry into, the agency relationship, and determine the consequences of the failure to carry out these duties. A brief discussion also will be devoted to the theories behind the duties of the parties and the soundness of these theories in the light of their application.

I. DEFINITION OF TERMS AS USED IN THIS ARTICLE.

A. *Agency.* A relationship between one party (the agent) and another party (the principal), the purpose of which is to create, modify, terminate and otherwise affect contractual relations between the principal and third persons.

B. *Fully Disclosed Agency.* The relationship where the fact of agency and the identity of the principal are known by both the agent and the third party.

C. *Partially Disclosed Agency.* The relationship where the fact of agency is known by both the agent and the third party, but the name of the principal is unknown by the third party.

D. *Undisclosed Agency.* The relationship where the fact of agency is unknown to the third party.

II. LIABILITY OF THE PRINCIPAL OR AGENT.

One who deals with a fully disclosed agent must normally look only to the principal for legal responsibility in matters arising out of such dealings, in the absence of any open pledge of the agent's credit.[1] This rule is basic in the law of agency. Furthermore, where the relation of principal and agent legally exists,

[1] Whitney v. Wyman, 101 U.S. 392, 396, 25 L. Ed. 1050 (1879); *See* Gordon v. Brinton, 55 Wash. 568, 104 Pac. 832, 833 (1909). Throughout this note, cases where agent acts in excess of his authority are excluded.