

Washington University Law Review

Volume 28 | Issue 1

January 1942

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Recommended Citation

Evidence—“Res Gestae”—Spontaneity of Statement, 28 WASH. U. L. Q. 045 (1942).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol28/iss1/14

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EVIDENCE—"RES GESTAE"—SPONTANEITY OF STATEMENT—[Missouri].—The plaintiff sued the owners and drivers of two trucks which, it was alleged, parked on opposite sides of the highway but so closely together, that her decedent had insufficient room to pass between them in his truck. On the trial, the plaintiff offered oral testimony to prove a statement by one of the drivers of the parked trucks, to the effect that he had stopped his truck to give aid to the other. On appeal, it was contended that it was error to admit this evidence as against the company which owned the truck and employed the driver. Held, that the evidence was admissible as against the employer, as part of the *res gestae*. *Brinkley v. United Biscuit Co. of America*.¹

The Missouri Supreme Court recently discussed the basis of the *res gestae* rule in the well considered case of *Sconce v. Jones*² and pointed out that "the true test is neither the time nor the place of a statement, but whether it is a *spontaneous statement produced by the event itself*."³ The general rule as to the need for spontaneity of the statement is that "the utterance must have been *before there has been time to contrive and misrepresent*, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance."⁴ The statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided that there has not been sufficient time for the exciting influence to lose its sway and to be dissipated.⁵

A statement made may be admissible as within the *res gestae* if made by a person who is in a state of nervous excitement, shock, or pain so as to make this statement spontaneous,⁶ but in order to be a part of the *res gestae* it must not be merely a narrative of past events,⁷ nor can it be an opinion or conclusion of fact reached by reasoning from other facts.⁸

1. (Mo. 1942) 164 S. W. (2d) 325.

2. (1938) 343 Mo. 362, 121 S. W. (2d) 777.

3. (1938) 343 Mo. 362, 371, 121 S. W. (2d) 777, 782.

4. 6 Wigmore, Evidence (3 ed. 1940) 142, §1750.

5. 6 Wigmore, Evidence (3 ed. 1940) 142, §1750.

6. *Sconce v. Jones* (1938) 343 Mo. 362, 121 S. W. (2d) 777; *Vaughn v. St. Louis & San Francisco Railroad Company* (1914) 177 Mo. App. 155, 164 S. W. 144 (statement held admissible where brakeman who had both legs cut off and was lying where he fell told the first who came to his rescue that as he was stepping from the car to the tender the engine suddenly started up, causing him to fall); *Roach v. Kansas City Public Service Co.* (Mo. 1940) 141 S. W. (2d) 800 (statement of injured man made immediately after injury while in state of shock that he slipped and fell when he was going to catch bus held admissible).

7. *Sconce v. Jones* (1938) 343 Mo. 362, 121 S. W. (2d) 777; *Koenig v. Union Depot Ry. Co.* (1903) 173 Mo. 698, 73 S. W. 637; *Ruschenberg v. Southern Electric R. Co.* (1900) 161 Mo. 70, 61 S. W. 626; *Woods v. Southern Ry. Co.* (Mo. 1934) 73 S. W. (2d) 374; *Leahey v. Cass Ave. & F. G. Ry. Co.* (1888) 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300.

8. *Sconce v. Jones* (1938) 343 Mo. 362, 121 S. W. (2d) 777; *Wiedanz v. May Department Stores Co.* (Mo. App. 1941) 156 S. W. (2d) 44 (statement that "she was very sorry, that it wasn't her fault, it was the fault of the door," held, conclusion and therefore not admissible); *Atkinson v. American School of Osteopathy* (1912) 240 Mo. 338, 144 S. W. 816; *Grotjan v. Thompson* (Mo. App. 1940) 140 S. W. (2d) 706.

There can be no definite or fixed time limit within which the statement is regarded as spontaneous, but each case must be decided on its own circumstances,⁹ and the time element is material only as bearing on the spontaneity of the statement.¹⁰ The tendency of the courts however is to broaden the scope of the *res gestae*.¹¹

In the instant case the opinion fails to state the facts sufficiently to show why the statements were within the *res gestae* principle. The court dismisses the point in one short paragraph,¹² citing one case.¹³ Since the burden is on the party offering the evidence to prove that it is admissible,¹⁴ a full development of the facts would have been desirable. Moreover, the

9. *Russell v. Metropolitan Life Ins. Co.* (Mo. App. 1941) 149 S. W. (2d) 432 (statement of mother-in-law who had just shot deceased on street and had then entered house, hid pistol, and waited in doorway for police, held, not admissible though only short period of time had elapsed before statements made to police); *Vaughn v. St. Louis & San Francisco R. Co.* (1914) 177 Mo. App. 155, 164 S. W. 144 (the court said that a statement made when the "impulse would be to tell the cause of the accident without thought of its effect or time in which to form a design in regard thereto, would be a part of *res gestae*, while another and a second statement, made 20 minutes later, would be hearsay"); *Brownell v. The Pacific Railroad Company* (1871) 47 Mo. 239; *Harriman v. Stowe* (1874) 57 Mo. 93; *Giles v. Missouri Pacific Railway Co.* (1913) 169 Mo. App. 24, 154 S. W. 852 (spontaneous statement made by dying person, such as "If they had not stopped so soon this would never have happened" was admissible as part of *res gestae*); *Smith v. Producers Cold Storage Co.* (Mo. App. 1939) 128 S. W. (2d) 299.

10. *State ex rel. Smith v. Trimble* (1926) 315 Mo. 166, 285 S. W. 729 (truck driver's statement immediately after hitting bicyclist held admissible); *Lynch v. Missouri-Kansas-Texas R. Co.* (1933) 333 Mo. 89, 61 S. W. (2d) 918 (statement by driver of car made three minutes after collision with train "What was that; a train? I didn't see it." Held, admissible as part of *res gestae*); *Downing v. St. Louis-San Francisco Ry. Co.* (1926) 220 Mo. App. 260, 285 S. W. 791 (statement made to conductor of train as soon as he reached injured woman after train had stopped, held, too long to be part of *res gestae*); *Rosenzweig v. Wells* (1925) 308 Mo. 617, 273 S. W. 1071 (ten seconds intervened between time of injury and statement of conductor, held, no time had intervened for the natural wariness of an employee in this position to assert itself); *Koenig v. Union Depot Ry. Co.* (1903) 173 Mo. 698, 73 S. W. 637 (immediately after stopping car which ran over child, motorman came back to where child was and in answer to question, "Are you blind to run over a child like that?" replied, "I didn't see the child—I was looking at the car coming east," held, not admissible as *res gestae* but was a narration of a past event); *Ruschenberg v. Southern Electric Co.* (1900) 161 Mo. 70, 61 S. W. 626 (remark of motorman made immediately after alighting from car to help extricate deceased's body from under car, held, not a part of *res gestae* and was properly excluded as narrative of past event); *Barz v. Fleischmann Yeast Co.* (1925) 308 Mo. 288, 271 S. W. 361 (statement made one hour and thirty minutes after the accident was held admissible as *res gestae* as explanatory of the business in which he was then engaged).

11. Comment 24 WASHINGTON U. LAW QUARTERLY 273; 3 Mo. Bull. 45.

12. *Brinkley v. United Biscuit Co. of America* (Mo. 1942) 164 S. W. (2d) 325, 330.

13. *Sconce v. Jones* (1938) 343 Mo. 362, 121 S. W. (2d) 777, 782.

14. *Woods v. Southern Ry. Co.* (Mo. 1934) 73 S. W. (2d) 374; *Brashear v. Missouri Pac. R. Co.* (Mo. App. 1928) 6 S. W. (2d) 650.

opinion apparently is based upon the idea that the time element was the only material factor.¹⁵ This, however, is a departure from the sound rule of *Sconce v. Jones*, holding that the time element is one, but not the only, type of evidence for proving the spontaneity of the statement.

R. H. E.

TAXATION—INTEREST ON “OVERPAYMENTS”—RECOVERY OF INTEREST ON VOLUNTARY PAYMENTS IN EXCESS OF AMOUNT DUE—[Federal].—On the date of federal estate tax and return were due, a thirty day extension for filing the return was granted, and the trustee sent a check for the estimated amount of the tax, which upon filing of the return was found to be excessive. The taxpayer sued for interest on the excess from the due date to the date of the refund. *Held*: This was a voluntary remittance based on the taxpayer's own estimate and not an “overpayment” within the meaning of the statute governing payment of interest. *Busser v. United States*.¹

The Internal Revenue Act provides that “interest shall be paid upon any overpayment in respect of any internal revenue tax at the rate of six per cent per annum.”² The Supreme Court has not yet determined the application of this statute to a factual situation similar to the principal case. The decisions of the lower federal courts have split into two lines of authority. In the case of *Moses v. United States*,³ a district court held that such a voluntary remittance was a deposit rather than an overpayment, and that consequently the taxpayer could recover no interest on it.⁴ The court reasoned that the payment was entirely voluntary, a benefit to the taxpayer, and an accommodation rather than a requirement by the government. Accordingly, it decided that the government should not have to pay interest, especially since the amount was based solely upon the taxpayer's estimate and since any excess was the result of his own inaccuracy. This view seems to be analogous to earlier state decisions on state tax laws,⁵ although the

15. *Brinkley v. United Biscuit Co. of America* (Mo. 1942) 164 S. W. (2d) 325, 330.

1. (C. C. A. 3, 1942) 130 F. (2d) 537.

2. Internal Revenue Act (1928) 45 Stat. 876, c. 852, §614(a); 26 U. S. C. A. §3771(a).

3. (D. C. S. D. N. Y. 1939) 28 F. Supp. 817.

4. *Moses v. United States* (D. C. S. D. N. Y. 1939) 28 F. Supp. 817, 818. The court said that although it might regard the sum as a payment to the extent of the actual liability, any excess over that amount could not be considered a discharge of a valid obligation.

5. Cf. *Socolow v. Murphy* (1927) 219 App. Div. 184, 219 N. Y. S. 78, where the court held that a voluntary estimated payment permits more leisurely settlement to the benefit of the taxpayer, and that to allow interest would offer a convenient method for an executor to deposit funds. But note that there was no directly applicable statute in this case, and that the executor had not determined the amount for five years; it might well be inferred that interest could be allowed under different circumstances; *Kaemmerling v. State* (1924) 81 N. H. 405, 128 Atl. 6. No interest was allowed, but the statute in this case provided that the time for payment could be extended until the amount was determined, without any penalty or increased liability for the delay, and did not specifically provide for interest on the amount of the overpayment.