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THE MYSTERIES OF VIRGINIA'S RES GESTAE RULE

By James W. Payne, Jr.*

Along with many laymen, this writer has long shared the suspicion that lawyers occasionally harbor a reverence for words or phrases that suggest mystery and wisdom simply because of their sounds or their ambiguity. It must be conceded, however, that this language often can be attributed to respect for age, to a conservative and often laudable disinclination to depart from safe and familiar language, or, less laudably, to the understandable preference for verbal solutions to problems when close analysis seems too tediously difficult or far fetched. In the latter case, intuition often suggests a desirable answer and a camouflage word or phrase can be used to good purpose. The language, perhaps, is also more attractive if it is in a foreign tongue (preferably Latin), although it must be admitted that the words "collateral," "proximate," and "remote" have done yeoman service in the solution of many a thorny problem. The reader can furnish his own illustrations by the legion.

This article is concerned with the rules, and primarily the Virginia rules, relating to the admissibility of evidence as part of the res gestae. This so-called solving phrase may be used alone or in conjunction with similar phrases as a basis for admissibility. The problems involved in admitting evidence under this Latin shibboleth have been subjected to excellent analysis by Professors Wigmore and Morgan. Wigmore suggests that:

"The phrase res gestae is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless because every rule of evidence to which it has ever been applied exists as a part of some other well established principle, and can be explained in the terms of that principle. It is harmful because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated as a vicious

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2 Wigmore, Evidence § 1767 (3d ed. 1940).

3 Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229 (1922).
element in our legal phraseology. It should never be mentioned. No rule of evidence can be created or applied by the mere utterance of a shibboleth.”

The Virginia cases to 1935 have been dealt with in an excellent article by Judge Ralph T. Catterall.5

It is not the purpose of this paper to deal exhaustively with every case in the Virginia Reports admitting evidence or excluding evidence under the res gestae principle. Rather it is hoped that these cases will demonstrate what Wigmore has stated to be true, i.e., these cases can be dealt with under established and more clearly defined rules of evidence and the use of the res gestae notion serves more to confuse than to clarify. Some additional problems will be noted and suggestions made for their solution with a view to clarifying the law in this area.

Throughout the discussion, it may prove helpful to keep in mind the traditional definition of hearsay and the reasons usually offered in support of this exclusionary rule. To oversimplify a bit, we can state that the hearsay rule, as generally applied in Virginia, prohibits the introduction into evidence of any extrajudicial assertion as evidence of the truth of the matter therein asserted.6 The rule as stated is designed to guard against three principal sources of unreliability—inaccurate perception, lying, and faulty memory. It seeks to achieve this result by requiring the witness on the stand to be an eyewitness to the subject matter of his testimony (or so much thereof as is offered to persuade the trier of fact that what is said is true) and while under oath, to submit to cross-examination by the opposing party and scrutiny by the trier of fact. The exceptions to the rule are, for the most part, predicated upon considerations of necessity or circumstantial evidence of reliability or a combination of these two factors.7 Here a rather obvious relationship between the hearsay rule and the first hand knowledge rule is suggested; and here, too, insofar as the hearsay rule places reliance on the efficacy of cross-examination as a device for pointing out factors that enable a jury to appraise the testimony of a witness, a relationship is suggested with the opinion rule, insofar as the latter rule requires a recital of fact instead of opinion, whenever feasible. The latter relationship will be discussed further in a later section of this paper.

5 Wigmore, Evidence § 1767 (3d ed. 1940).
7 Maguire, op. cit. supra note 1, at 150.
AN ANALYSIS OF THE CASES

For the most part, evidence which is admitted or excluded under the res gestae formula can be grouped under the following very broad classifications:

1. Cases In Which Hearsay Is Not Involved.

For a refinement of this topic a convenient reference can be made to the article previously noted by Professor Morgan in which he has listed the classes of cases in which the res gestae rule is most frequently employed as governing the admissibility of evidence.\(^8\)

First, "Cases in which the utterance is an operative fact."\(^9\) Here the statement has legal consequences merely by virtue of the fact that it is made, without regard for its truthfulness or its falsity. Thus in a case in which there was controversy as to whether A and B had entered into a contract, no hearsay would be involved in W's testimony concerning a statement which W heard made by A to B and which, under the circumstances, would amount to an offer.

Second, Professor Morgan notes, "Cases in which the utterance, regardless of its truth, has probative value upon the question of the existence or non-existence of a material fact."\(^1\) Thus in an action for fraud and deceit, in which A sued B for damages alleging that B sold him a stone, falsely representing it to be a diamond, B could testify that he purchased the stone from a jeweler upon the latter's warranty that it was a diamond to establish good faith and avoid punitive damages. Here the statement made by the jeweler to B is admittedly false. Our concern is with the fact that the statement was made and nothing more, since this evidence alone would tend to establish B's good faith in the sale to A. No hearsay is involved under this line of reasoning.\(^11\)

Third, "Cases in which the operative fact of non-verbal conduct depends upon the verbal conduct accompanying it."\(^12\) The conduct which is material, standing alone, is ambiguous. Spoken or written language, merely by virtue of the fact that it is uttered, resolves the

\(^8\)Morgan, op. cit. supra note 3.
\(^9\) Id. at 231.
\(^10\) Id. at 231-32.
\(^11\)See, e.g., McAfee v. Travis Gas Corp., 137 Tex. 314, 153 S.W.2d 442 (1941), holding that A's statement to P that he, A was an agent for the gas company could be admitted as bearing on the reasonableness of P's conduct in accompanying A on an inspection of a leaky gas line.
\(^12\)Morgan, op. cit. supra note 3, at 232.
ambiguity. Thus if A delivers money to B, potentially the transaction may be a gift, loan, bailment, or payment. If A states in apparent seriousness that a gift is intended, as a matter of law the transaction becomes a gift and a witness could testify to this language without running afoul of the hearsay rule.\textsuperscript{13}

By way of brief digression and parenthetical comment, reference should also be made to Professor Morgan's fourth classification: "Cases in which the operative effect of non-verbal conduct depends upon the intent which accompanies it."\textsuperscript{14} Most of Professor Morgan's situations here admittedly involve hearsay. However, he states:

"The utterance may be circumstantial evidence of a state of mind which, in turn, is circumstantial evidence of the intent, as where a resident of X, while removing therefrom to Y, utters imprecations upon X and all its inhabitants, either reverently or blasphemously calling down upon them the condemnation of the Almighty. If domicile is in issue, the intent at the time of removal is an operative fact; the hostility of the declarant is circumstantial evidence of his intent to abandon X as his residence, and his utterance is circumstantial evidence of his hostility. Where the utterance is merely circumstantial evidence of the state of mind, it is not offered for the truth of the matter asserted and does not violate the rule against hearsay."\textsuperscript{15}

Professor Morgan goes on to state that the problem here is the same as that discussed in his class two.\textsuperscript{16} In discussing this latter class of cases, he says, "Utterances may constitute circumstantial evidence of the state of mind of the utterer, as, for example, where, to show his insanity, it is offered to prove that he uttered incoherent statements."

Judge Catterall makes much the same point when he illustrates the same kind of case by supposing a trial in which the defendant's sanity would be in issue and in which defendant's statement: "I am a poached egg" would be admitted into evidence. The Judge contends that this evidence would be circumstantial proof of the defendant's state of mind and that no hearsay would be involved.\textsuperscript{17}

The present writer has difficulty with this analysis. In the two concrete cases noted, the first by Professor Morgan and the second by Judge Catterall, the extrajudicial statements would be considered as assertions of feeling or belief and offered to prove that what was

\textsuperscript{13} Wigmore, Evidence §§1770-77 (3d ed. 1940); McCormick, Evidence § 228 at 463, 464 (1954).
\textsuperscript{14} Morgan, op. cit. supra note 3, at 233.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Catterall, op. cit. supra note 5, at 729.
asserted regarding mental state in the nature of feeling or belief was true. Mental state is an operative fact in each case, and the fact that, in Professor Morgan's case, mental state in the nature of an intention to abandon a locality is inferred from the declarant's statements does not remove his case from the hearsay category, since his inference is based upon mental condition in the nature of a feeling of antagonism which was established by a hearsay use of the declarant's statements. Such evidence, however, might well be receivable under the mental states exception to the hearsay rule.

The Virginia cases in which the res gestae phrase is treated as a guiding or controlling standard when no hearsay is involved do not always fit neatly into Professor Morgan's three classifications under discussion. Under the first classification, consider the relatively early decision in Ward v. White. The defendant was being sued for damages for shooting the plaintiff. At the trial by way of mitigation of damages the defendant sought to introduce evidence that on the preceding day the plaintiff had published libelous and insulting matter concerning him. The court held that such libelous and insulting matter amounted to provocation, which the jury was entitled to consider in determining damages. After referring to the res gestae rule a number of times, the court stated:

"How far these stinging insults mitigate the evil of the attack in question was a matter for the jury to determine, but there can be no doubt, there can be no denial! that the insulting words stood close to the act in question, in immediate causal relation thereto, and thus constituted part of the res gestae, and as such are admissible in evidence."

It would seem relatively obvious that this case deals with spoken language that produces legal consequences merely by virtue of the fact that it is spoken. The bare circumstance that words used by the plaintiff were libelous and insulting as to the defendant operates as provocation to reduce the damages resulting from the defendant's battery. Under this reasoning, nothing turns on the reliability of the plaintiff or the truthfulness of his utterance and no hearsay is involved. All that was needed, and was present, was an eyewitness to the fact that the matter was published. The res gestae formula serves only to distract and, possibly, confuse.

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29Ibid.
2866 Va. 212, 95 S.E. 1021 (1889).
21Id. at 218, 219, 9 S.E. at 1023.
22Ibid.

Under Professor Morgan's third classification, attention should be directed to the decision in *Pocohontas Fuel Co. v. Dillon*. The decision is valuable for illustrative purposes because it not only created confusion by resort to the res gestae phrase, but offered an opportunity to compound confusion by reference to the verbal act phrase. Fortunately the court refrained from express reference to the verbal act doctrine, a phrase more meaningful than res gestae only because it is couched in the "iron of English." In this case a controversy over title to land developed subsequent to the finding of an unrecorded deed in the clerk's office thirty-nine years after its date. Appellants argued in favor of admissibility in evidence of two affidavits of former owners of the land for the purpose of establishing proper delivery of the deed. The court stated that "declarations of one in possession of land, explanatory of such possession, as under what right or claim, are admissible to show his claim, but not to show title." The court added that "the declarations accompanying and characterizing the same are competent as part of the res gestae of the acts of possession," and by quoting from Greenleaf on Evidence approved the reasoning that rejects such declarations as hearsay. Here again, the very fact that language was spoken in a given set of circumstances had legal significance, and nothing turned upon the truthfulness of the declaration. No hearsay was involved and the court's use of the res gestae phrase served only to confuse the point. The evidence offered in the case was rejected, however, on the ground that the affidavits were not made when the affiants were in possession; and that, even if so made, they were, in this case, merely narratives of a past occurrence.

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21 161 Va. 301, 170 S.E. 616 (1933).
22 See Payne, op. cit. supra note 18, at 1035-36.
24 161 Va. at 312, 170 S.E. at 619.
25 "Again the occupation of land is, merely as a physical act, capable of various interpretations, and may be needed to be completed by words in order to have legal significance. 'What a man says when he does a thing, shows the nature of his act and is a part of the act; it determines its character and effect; tenancy is a continuance of acts in a certain relation to another, and declarations during the tenancy that he is a tenant... may be put as part of the res gestae, so far as it is necessary to learn the significance of his act, and assuming that his act of possession is material.'
26 "The words are not used testimonially; for example, where it is asked whether A's possession is adverse, i.e., under claim of ownership, his utterance, 'This land is mine, for I bought it of B' is not used as evidence that it is his land and that he did buy it of B, but merely as giving to his occupation an adverse complexion and significance. The applications of this principle are numerous." 161 Va. at 301, 170 S.E. at 619.
27 Id. at 312, 315, 170 S.E. at 620.
Also illustrative of Professor Morgan's third classification is the decision in *Reynolds v. Adams*. In that case the issue was the existence or nonexistence of a valid marriage. The evidence problem related to the admissibility of testimony concerning statements made by the reputed husband and wife in which they had said that they were married. The court adopted as its own an earlier statement that, "The presumption of marriage from cohabitation apparently matrimonial is one of the strongest presumptions known to the law." The court then stated:

"We are of the opinion that in this case the declarations of the reputed husband and wife concerning the *factum* of the marriage were made in good faith and not to serve an ulterior purpose . . . . And such declarations accompanied the cohabitation from the return of the parties home from their marriage trip, and . . . the cohabitation immediately following the alleged marriage was matrimonial, and such cohabitation was accompanied by the general repute of marriage as soon after the inception of the cohabitation as such repute could be reasonably expected to arise. And being made in good faith, such declarations furnish evidence of the most convincing character of the existence of a legal marriage, and having been made as a part of the *res gestae*, they were admissible in evidence for that purpose."

The court also referred to independent corroborative evidence of the reliability of these declarations.

If we have here what the court has described as matrimonial cohabitation then a presumption of marriage arises from general reputation in the community and declarations made by the parties in good faith (i.e., where the evidence tends to show good faith or, perhaps, where there is no evidence of bad faith).

On the hearsay point, the reasoning may proceed along either of two lines: (1) The declarations are hearsay (since they are offered to prove the truthfulness of the matter asserted therein) but the hearsay is corroborated by the factors listed by the court and is sufficiently reliable to be considered by the jury. (2) If the factors listed by the court as requisite are present, the mere making of the declarations of marriage creates a presumption of marriage without regard to the truth or falsity of the declarations as such. The mere making of the

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20Id. at 307, 99 S.E. at 699, citing Eldred v. Eldred, 97 Va. 606, 625, 34 S.E. 477, 484 (1899).
31Id. at 309, 310, 99 S.E. at 700.
32Id. at 310, 99 S.E. at 700.
33See the discussion of Eldred v. Eldred, id. at 308-09, 99 S.E. at 700.
declarations, without more, has legal consequences in the sense that conduct in the nature of the cohabitation involved becomes presumptively the result of marriage. Under this reasoning, no hearsay is involved. However, once the presumed fact is subject to attack, as was true in the case, the trier of fact will be concerned with the truth of the statement, since whatever presumption operates in the case is based on an inference of probability arising from experience or reason. In any event, the phrase res gestae is lacking in helpfulness. If it only indicates that the declarations must be made while the parties are living together, it would seem simpler to say so, and in English.

Also, in this context, note the case of Harrison v. Gardner Inv. Corp. The plaintiff, an intended purchaser of real property, brought an action to recover a $500 deposit paid to the defendant, a real estate broker, upon the purchase price of the property. The defendant wanted to introduce into evidence a written agreement between himself and plaintiff's agent which he contended permitted him to retain the deposit in the event that the plaintiff failed to perform under an agreement. On the question of admissibility, the court stated:

"The execution of this writing was one of the circumstances which attended the payment of this money into the hands of the defendant. Clearly, therefore, the writing was properly admissible in evidence as a part of the res gestae."  

Since the dispute in the case concerned the authority of the defendant to retain the $500, it is submitted that a written statement from the plaintiff, given or agreed to in apparent sincerity, which would authorize the defendant to retain the $500 as liquidated damages might as a matter of law create such authority. The language employed resolves the ambiguity involved in the act of paying over $500 and the statement simply shows the purpose for which the statement was made and the legal consequences flowing therefrom. Nothing turns on the truthfulness of the statement and no hearsay is involved. The res gestae phrase, which generally suggests some sort of an exception to or stretching of the hearsay rule, merely adds confusion to the problem.

Instances also exist in which the Virginia court has used the res gestae phrase to refer to eyewitness testimony regarding the facts of a case, where no hearsay problem is suggested, but where the facts testi-
fled to are closely connected in point of time with the material fact sought to be established, and, relevant perhaps, to show the existence of the material fact. Such a case is Clinton v. Commonwealth.\(^{39}\) The accused was convicted of first-degree murder for killing a police officer while resisting an unlawful arrest. His defense was that he killed in the heat of passion while so resisting. On appeal it was contended that the trial court improperly admitted evidence of the conduct of the accused after he had killed the deceased. This evidence was to the effect that as the accused ran from the car in which the killing occurred he shot at the driver of the car and also shot in the direction of a bystander. In considering this evidence, the court said:

"It is competent as part of the res gestae and it shows a purpose on his part to shoot anyone who might interfere with his escape.... Indeed we cannot imagine anything more intimately connected with the homicide than things done by the prisoner instantly in his attempt to escape."\(^{39}\)

Any hearsay argument in this case, based upon the suggestion that the conduct of the accused implied a mental state, borders on the fanciful. The court suggests such a line of reasoning both in its use of the word "competent" and in its use of the phrase "res gestae." The principal emphasis, however, seems to be on the close connection in point of time between the homicide and the effort to escape insofar as the res gestae phrase is concerned. The phrase is misleading if it suggests a serious hearsay problem. We can infer that the accused intended to shoot anyone that got in his way because he tried it, just as we might infer that a person is mentally confused if his eyes are glazed and his speech is incoherent. The more difficult problem in the case has to do with the question of relevance. It can be argued, for the defendant, that this conduct tends to prove that he was motivated by passionate outrage and anger, or it can be argued by the prosecution (who introduced the evidence) that the state of mind evidenced by his conduct refutes any argument that he killed in the heat of passion. Under either argument, his mental state can be presumed to have continued from the time of the homicide.\(^{40}\) The prosecution was assisted in the case by other evidence tending to prove that the accused did not kill in the heat of passion and by the inevitable bad impression created by the testimony as to this conduct of the accused subsequent to the homicide.\(^{41}\)

\(^{39}\)Id. at 1095, 172 S.E. at 276.  
Finally, in this area where the phrase res gestae may be used to characterize evidence which presents no hearsay problem, Virginia, in at least one case, has used the phrase primarily as a reason for permitting statements of fact in a criminal case which, seemingly, were both irrelevant and prejudicial, but which appeared to be difficult for the witness to avoid making without undue restraint in presenting his evidence. The case is *Compton v. Commonwealth*42 wherein the accused was prosecuted for breaking into a chicken house. Accused complained that the Commonwealth's witnesses were allowed to testify that he had shot the owner of the chicken house, the accused having already been tried and convicted of that offense. The court overruled the defendant, stating:

"This shooting occurred while the act of housebreaking was yet in progress and was so inseparably connected with it as to make the avoidance of all reference to it practically impossible. Witnesses undertaking to testify about the housebreaking voluntarily referred to the shooting.... The shooting was part of the *res gestae* and limited reference to it was admissible. It was part of the incident under investigation."

2. Cases In Which Hearsay Is Involved.

Again, this heading requires refinement. In his classification of utterances admissible as res gestae Professor Morgan refers to: "*Cases in which the utterance is made concerning a startling event by a declarant laboring under such a stress of nervous excitement, caused by that event, as to make such utterance spontaneous and unreflective.*"43

Professor Morgan's classification here is descriptive of the so-called excited utterance exception to the hearsay rule. The emergence of this exception in specific form is properly attributable to Wigmore.44 The special factor of spontaneity serves as the basis for the judicial judgment that statements resulting from the excitement produced by a startling event are particularly reliable. These circumstances are said to furnish adequate safeguards against the possibility that the statements are colored by reflection or fabrication.45 The exception applies whenever a startling event results in an excited utterance which relates to the immediate facts and is made before there has been time for re-

42 Va. 48, 55 S.E.2d 446 (1949).
43 Morgan, op. cit. supra note 3, at 278.
46Id. at 579, 580.
The statement may be made either by a bystander or a participant in the event; there is no requirement that the declarant be unavailable before his statement comes in; and, apparently, the declaration itself can serve as proof of the occurrence of the startling event. As the cases to be noted will show, the lapse of time between the startling occurrence and the declaration is of crucial importance, since this bears directly on the reliability factor of spontaneity.

Almost all of the Virginia cases which apply the res gestae rule in testing the admissibility of evidence could as well be decided on the excited utterance principle. This article does not purport to be an exhaustive catalogue of every such res gestae decision in Virginia. The cases to be described will be illustrative, with emphasis on decisions handed down since the publication of Judge Catterall’s very thorough article.

A typical res gestae case which would lend itself to treatment under the excited utterance exception to the hearsay rule is Huffman v. Commonwealth. This was a prosecution for murder in the first degree. The most significant issue for our purposes was whether there was sufficient evidence to establish the identity of the accused as the assailant. There were no eyewitnesses to the homicide. The prosecution relied in part upon testimony as to certain declarations made by the deceased to two witnesses who reached him a few minutes after he had been shot. The deceased had related the events leading up to the shooting and had described his assailant. Objection was made to these declarations on the ground that they were hearsay. The trial court held them to be a part of the res gestae and admitted them. The appellate court agreed, stating:

"Whether a statement is a part of the res gestae depends on the circumstances of each case, and there is no fixed rule by which it can be decided. Statements of the victim made a short time after he has been mortally wounded which obviously have not been concocted or premeditated charging the defendant with the act are a part of the res gestae. Whether or not a statement is a part of the res gestae rests within the sound judicial discretion and judgment of the trial court. Such discretion and judgment, of course, may be the subject of review; but in doubtful cases there ought to be and is a presumption in favor of the action of the court below.... We think the declarations of Mr. Riddle made to witnesses Via and Diehl were properly admitted in evidence as a
part of the *res gestae*. It is reasonably clear that they were not designedly made; that they were not fabricated; that Riddle, at the time they were made was still crying out in pain and agony from the mortal wound which he had just received and that they formed a part of the occurrence or transaction which they characterized.\textsuperscript{56}

The extensive quote serves to emphasize something of the elasticity of the court's approach and its reliance upon the assurance afforded by the spontaneous character of the statements.

In *Umberger v. Koop*\textsuperscript{51} there was an auto collision. A witness for the defendant saw the collision and a few minutes after the wreck heard the truck driver say: "I tried to keep from hitting. I done everything I could to keep her from hitting... She came to a full stop and I blinked my lights to signal I was going on through the intersection."

The court said:

"[T]he statements were a part of the *res gestae*, and hence were admissible as substantive evidence.... The admissibility of such verbal statements as a part of the *res gestae* rests on the conception that the circumstances of the occasion so excite and control the mind of the speaker that his statements are natural and spontaneous, therefore; sincere and trustworthy, and not the mere narration of past events."\textsuperscript{52}

Many of the Virginia cases in the category under discussion stress the importance of the time lapse between the startling event and the statement prompted by that event. A fairly dramatic decision on its facts and one emphasizing the time factor occurs in *Pepoon v. Commonwealth*.\textsuperscript{53} The defendant was convicted of the crime of sodomy per os on the person of a three year old boy. The Commonwealth introduced testimony of the child's mother that one night while bathing the child, upon touching the child's genitals, he related to her the acts of the accused. The Commonwealth's evidence tended to prove that the offense occurred about ten days prior to the child's

\textsuperscript{56}Id. at 681, 190 S.E. at 271. See also, Flannagan v. Provident Life & Acc. Ins. Co., 22 F.2d 136 (4th Cir. 1927).

\textsuperscript{51}Id. at 123, 72 S.E.2d 370 (1952).

\textsuperscript{52}Id. at 134, 72 S.E.2d at 377. With reference to the last phrase in the court's statement, see McCormick, Evidence § 272, at 581: "It is sometimes, under the lingering spell of the 'res gestae' metaphor, held that a declaration which is a 'mere narrative' of a past event, or one made in answer to a question, or one which is 'self-serving' in the sense of favoring the declarant's interest, is automatically excluded. The currently prevailing view, however, is that these are merely factors for consideration of the judge in deciding whether the declaration was spontaneous or contrived." See McReynolds v. Commonwealth, 177 Va. 933, 155 S.E.2d 70 (1941); Hagood v. Commonwealth, 157 Va. 918, 162 S.E. 10 (1932).

\textsuperscript{53}192 Va. 804, 66 S.E.2d 854 (1951).
There was no evidence that the child was other than nonchalant in his statement to his mother and his body bore no physical evidence of the occurrence. The defendant, however, confessed to the offense on three separate occasions: Once to the parents of the child, once to the police, and once to his employer. The appellate court reversed the conviction. The court applied the familiar rule that extrajudicial confessions standing alone and uncorroborated are insufficient to establish the corpus delicti. The only corroborating evidence was the testimony of the mother as to the statements made by the child. The court held that this evidence was not admissible as part of the res gestae, relying in large part on the time lapse involved. The court stated:

"Declarations admitted as res gestae constitute original evidence and are not only admitted as corroboration of a witness, but on the theory that they are verifiable accounts connected with the transaction. Where declarations of the injured party are relied upon as a part of the res gestae, it is essential that they must have been made recently after the injury, and before sufficient time has elapsed for the fabrication of a story ...."

In a case such as this, one natural concern bearing on the admissibility of the testimony would relate to the possibility that the statement of a very young child might be a fanciful fabrication. The court stated that "the statement was not made at such time and under such circumstances as would exclude the presumption that it was the result of the fanciful imagination of a three-year-old child."

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54 Id. at 806, 807, 66 S.E.2d at 856.
55 Id. at 808, 66 S.E. 2d at 856.
56 Ibid.

In cases discussing the alleged commission of some sexual offense involving a child the solution to the problem regarding the admissibility of the child's statements as part of the res gestae generally turns upon the question of whether or not the declarations are sufficiently close in time to the alleged offense. See L.R.A. 1915E 203. While the declarations need not be contemporaneous with the alleged offense, the decisions admitting statements made by the child-victim emphasize the fact that the statement was made shortly after the assault and while the child was still under the shock and excitement produced by the assault. Beausolich v. United States, 107 F.2d 292 (D.C. Cir. 1939); Keefe v. Arizona, 50 Ariz. 293, 72 F.2d 425 (1937); Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104 (1909); Kenney v. State, 79 S.W. 817 (Tex. Crim. App. 1903); State v. Coram, 116 W. Va. 492, 182 S.E. 83 (1935).

Note finally that the admissibility of declarations under the res gestae rule
Before tackling a final problem one further maverick decision should be noted. In *Thomas v. Commonwealth*⁵⁸ the defendant appealed a conviction of first-degree murder. One of the assignments of error related to the action of the trial court in admitting in evidence the statements of the deceased made immediately after being shot by the accused. Within two minutes of the shooting, while obviously in a grave condition, the deceased said to a witness, “Thelbert, I am dying. Come here, Thelbert, he has shot me.”⁵⁹ About fifteen minutes after the shooting, upon the arrival of a physician, the mortally wounded man said to him, “[T]here is no use taking me anywhere, this will be the last of me—he shot me just as I got out of the car, I never had a chance.” Almost the same statement was made a few moments later by the injured man to his wife when she arrived.⁶⁰ The court held that the several statements were admissible on two grounds: first, as dying declarations; and second, on the ground that they were part of the res gestae.⁶¹ On the latter point the court concluded that “statements of the victim made a short time after he has been mortally wounded which obviously have not been concocted or premeditated charging the defendant with the act are a part of the res gestae.”⁶²

This doctrine, of course, leaves the door open for the admission of many dying declarations under the res gestae rule and, indeed, given the requisite brief time lapse between the wound and the statement, this evidence would be admissible in a civil action. Here the reliance on the res gestae concept may well produce desirable results insofar as it nibbles away at the traditional, but arbitrary, restriction on the admissibility of dying declarations in criminal prosecutions for homicide.

3. *Cases In Which The Opinion Rule Is Involved.*

Is the opinion rule a qualification or restriction on evidence otherwise admissible as an excited utterance or as part of the res gestae? This question is squarely presented in the decision in the leading case of *Chappel v. White.*⁶³ Because of the importance of this question

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⁵⁸ Va. 501, 32 S.E.2d 711 (1945).
⁵⁹ Id. at 507, 32 S.E.2d at 714.
⁶⁰ Id. at 507-08, 32 S.E.2d at 714.
⁶¹ Id. at 508-09, 32 S.E.2d at 714.
⁶² Id. at 509, 32 S.E.2d at 714.
and also because the Virginia court attempts, for the first time, to achieve some substantial degree of specificity in spelling out the requisites of evidence admitted as part of the res gestae, extended reference to the language in the opinion is justified and perhaps necessary.

This was an action by a guest in an automobile, who had recovered a judgment in the trial court. On appeal the defendant assigned as error the admission of certain statements alleged to have been made by the eight-year-old daughter of the defendant. The version accepted by the court as the one to be tested under the res gestae rule was that after the accident, but before she was removed from the car, the child screamed and exclaimed, "Oh, Mamma, what is Daddy going to say? What is Daddy going to say? I was the whole cause of it.... If I hadn't told Mother to look down at my foot, it would not have happened." Another version of the child's statement contained the language, "If Mother hadn't been getting mud off my shoe, it would not have happened." This last statement was discarded under the rule of Massie v. Firmstone since the first statement was testified to by the plaintiff and the second by a witness for the plaintiff. The child, called as a witness by the plaintiff, denied making either statement, and the defendant testified that the child called her attention to some mud or dirt on her shoe before she reached the paved highway, but said nothing about mud on the shoe after the wreck. The court emphasized this sharp conflict in the testimony. The evidence also indicated that the defendant, the mother of the child, veered across a level, straight, three-lane highway which was not slick, without leaving any skid marks, and overturned in a ditch.

The court held that the child's statement before the trial was not admissible. The court stated:

"The purpose of permitting the introduction of this class of evidence, which is an exception to the hearsay rule, is to prove facts and not opinions. The res gestae is not the witness speaking but the transaction voicing itself. The spontaneity of the utterance is the guaranty of its trustworthiness in substitution of that provided by oath and cross examination."
"[T]he statement or declaration concerning which testimony is offered must, in order to make such evidence admissible, possess at least the following essential elements: (1) the statement or declaration must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made."

"The version of the child's statement as given by plaintiff, does not conform to (3), quoted above; that is, it is not 'a statement of fact' but is a 'mere expression of an opinion' of an immature, irresponsible child. The child's reference to her father shows that her mind had been projected beyond the immediate moment of the accident to the reaction of her father when he had been informed of the event. The expression, 'If I hadn't told Mother to look down at my foot, it would not have happened,' has no probative value and is not pertinent. The admission of such evidence in a border-line case constitutes reversible error."

Aside from our main concern, i.e., the qualification or restriction placed upon this evidence by the opinion rule, Chappel v. White provokes a number of inquiries. What does the court mean when it suggests that the evidence has no probative value? The court treated the child as a competent witness by allowing her to take the stand. Surely, the court is not suggesting that the evidence is not relevant. Indeed, the reliability and cogency of the child's statement is bolstered by the evidence of the peculiar manner in which the accident occurred, there being no ready explanation for the accident, on the facts presented, other than inattention on the part of the defendant-driver. This is easily explained if we accept the child's statement that her mother was looking down at her shoe at the time of the accident. Also, it seems doubtful that the court would characterize the evidence as lacking in probative value (a phrase normally connoting lack

70Quoting from Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939).
7182 Va. at 634, 29 S.E.2d at 862.
of relevance) because there is a conflict in the testimony of the witnesses who were present as to whether or not the disputed statement was made. The resolution of such a conflict is normally for the jury. The conflict may affect reliability, but not relevance, and here, too, we can discount the testimony of defendant’s witnesses who denied hearing the statement under the Virginia notion that the “positive” testimony in the case will carry greater weight than the “negative” testimony. A novel notion would indeed be involved if the court advanced the thesis that a conflict in testimony on a material or relevant fact destroyed or diminished the relevance of the testimony involved. The court also notes in this connection that the child’s reference to her father shows that her mind had been projected beyond the immediate moment of the accident to the reaction of her father when he should be informed of the event. But this fact would seem to be, at least arguably, a circumstance that would furnish additional assurance of the spontaneous character of the child’s statement. The reference to her father was a fearful one, not a reflective one, and, surely, neither the res gestae doctrine nor the excited utterance rule requires that the declarant’s mind be washed clear of every fearful or unpleasant consequence of a startling event before the declaration can be stamped with reliability on the basis of its spontaneous character. Such a requirement would be both new and more stringent than any requirement yet advanced as a condition to receiving this evidence. Then, too, why couldn’t the child’s statement that her mother was looking at her shoe at the time of the accident be received as a statement of fact, and a very cogent one indeed in view of the corroborating circumstances, without regard to the superfluous conclusion that the accident would not have happened otherwise?

As to the broader query concerning the impact of the opinion rule in this area, Professor McCormick concedes that most courts have limited the admissibility of this kind of evidence by an application of the opinion rule. Further, he notes that the problem arises most frequently in connection with situations where the speaker attempts to fix responsibility for an accident either on himself or another person. He comments on the relative uniformity of decisions affirming the application of the opinion rule in this type of case, presumably on the ground that such a declaration might be given undue weight by a jury. However, he adds that “the need for the knowledge

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73 McCormick, Evidence § 272, at 583 (1954).
74 Ibid. See also, Annot., 163 A.L.R. 15, 188 (1945).
or impression about the facts which such a statement conveys ordinarily outweighs this danger...." Professor McCormick's basic objection to the application of the opinion rule in this area is that the rule ignores the way people naturally talk. Thus there might be a basis for applying the rule in courtroom questioning, but as applied to the kind of speech likely to be found in extrajudicial utterances, which are frequently phrased in terms of opinions, the rule serves only to block off cogent and often exceedingly reliable information. Again, it may be argued that the opinion rule is calculated to force the witness, insofar as he is able to do so either on direct or cross-examination, to state only the facts that he has observed or to state as best he can the facts that support any opinion that he may offer. This is to enable the jury to make an intelligent appraisal of his testimony by evaluating the facts set out in such testimony. In this respect the opinion rule is akin in policy to the hearsay rule, with its faith in the process of cross-examination, as an effective probing device. It is simply too late for this, where the res gestae or excited utterance exception to the hearsay rule is involved, if the declarant is unavailable, either factually, or as a matter of practicality, as in Chappel v. White where the witness denied the statements attributed to her. We do not depend here on the availability of cross-examination as the basis for classifying res gestae evidence or excited utterances as reliable. Reliance is placed on the single factor of complete spontaneity assured by carefully defined circumstantial requirements, which furnishes evidence of the declarant's sincerity. In so doing, of necessity, there is always the obvious danger of inaccurate perception or faulty memory, just as the same risks are taken in the case of dying declarations. These risks generally increase as the circumstantial guaranty of sincerity grows stronger. Wigmore takes the view that when there has been an excited utterance, the opinion rule as such should not operate as a limitation on the admissibility of the declaration. In times past the Virginia court, reverting to the sound historical basis for the opinion rule, has suggested that whenever the opinion will be helpful it ought to be received. The state-
ment of the child in *Chappel v. White* would seem to be more than merely conjecture. She spoke, if at all, as an eyewitness and participant in the event described. It is difficult to see the policy underlying the cavalier treatment accorded the testimony.

**CONCLUSION**

What should be the future of the res gestae notion? Professor McCormick is sympathetic toward the old phrase. He suggests three specific benefits have resulted from its use over the years. First, the phrase has resulted in a practice whereby the witness is permitted to tell his story in a natural way, suggesting that “truth is a seamless web and the naturalness with which the details fit each other gives confirmation to the whole account.” Secondly, the phrase has aided in developing the theory that spontaneity is a special source of reliability—the bulk of the res gestae cases being characterized by declarations possessing this quality. Thirdly, the very vagueness of the term has permitted an expansion of the scope of admissibility. However, McCormick does concede:

“Perhaps the time has come now when this policy of widening admissibility will be even better served by striving for a clearer analysis of the different classes of evidence coming in under the phrase *res gestae* and of the justifying reasons for the admission of each class, as a basis for pointing out the need for further liberalization. If so, we could well jettison the ancient phrase, with due acknowledgement that it has well served its era in the evolution of the law.”

Professor Maguire cites at least one type of case in which the res gestae phrase has been utilized to admit evidence with a rational basis, which may well presage further liberalization. He notes that when one observer of an event comments about the event to another observer

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theory; it suffices if he had an opportunity of personal observation, and did get some impressions from the observation.' He notes that if there was actual personal observation of the pertinent facts, he may testify as to the impression which he then gained from his personal observation. Having shown the admissibility of such testimony, generally, in the course of an elaborate philosophical and lengthy discussion of this difficult question in all its aspects, he thus states the fundamental limit of the rule: ‘What the courts repudiate then is a mere guess, an exercise of the imagination, a suspicion, a conjecture, offered in the place of actual personal observation; it is from this point of view only that a belief or opinion or impression is not to be received.’” *Id.* at 352-53, 133 S.E. at 780.

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81Ibid.
82Ibid.
83Ibid.
84Ibid.
of the same event, the second observer may relate the comment in his testimony “for the purpose of proving what happened and how.” Here the second observer, who is testifying as a witness, has been in a position to verify the content of the first observer’s comment; he is in a position to appraise the accuracy of the comment; and consequently, he is subject to effective cross-examination with reference to the reliability of the comment. Another embryonic development in the res gestae cases in Virginia is the tentative notion that hearsay which is adequately corroborated by independent evidence is admissible. This notion may well be involved in a case like Reynolds v. Adams, where cohabitation as husband and wife plus a general reputation in the community for marriage will render admissible declarations of the man and woman to the effect that they are married and thereby create a presumption of marriage. Nor is the stress placed on corroboration as a basis for receiving hearsay evidence confined to cases involving the use of the res gestae notion. In Turner v. Burford Buick Corp., the Virginia court reiterated the rule that the “declarations of an agent cannot be received to prove agency until the fact of his agency has been otherwise established.” Such declarations made out of court are considered hearsay. However, the court said that “it is also the law in this state that when from extrinsic sources a prima facie case of agency is made out, the agent’s own declarations and admissions become admissible.” This would mean that whenever ownership of the car has been established, such evidence sufficiently corroborates the driver’s hearsay declarations of agency so to make those declarations admissible.

Spontaneity serves as a controlling basis for the admissibility of evidence as part of the res gestae. Spontaneity is, of course, a circumstantial guaranty of sincerity on the part of the declarant. The

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86 201 Va. 693, 112 S.E.2d 911 (1960).
87 Id. at 697, 112 S.E.2d at 914.
89 Turner v. Burford Buick Corp., supra note 92, at 697, 112 S.E. at 914.
90 Id. at 697-98. See also, United Constr. Workers v. Laburnum Constr. Corp., 194 Va. 872, 75 S.E.2d 694 (1953), aff’d, 347 U.S. 656 (1954). The plaintiff corporation sued three unions for intimidating workers so as to force abandonment of the work. The court allowed evidence of statements made by representatives of a union, not a defendant, to the effect that it was dangerous for Laburnum’s employees to return to work as tending “to corroborate the plaintiff’s other evidence of the tense situation which pervaded the neighborhood and had caused the Laburnum employees to refuse to return to work.” 194 Va. at 896, 75 S.E.2d at 710.
writer notes here, and has argued at length elsewhere, that the standard that many courts strive for in solving the problem of the admissibility of extrajudicial utterances is a standard of sincerity on the part of the declarant. Two facts might be stressed in this connection. First, the *Model Code of Evidence* and the *Uniform Rules of Evidence* both define a hearsay statement as an assertion, intended or presumed to be intended by the declarant, and introduced to prove the truthfulness of that assertion. The only factor called into question by this restriction in the definition of hearsay is the factor of sincerity, which is obviously treated here as sufficient assurance of reliability. Secondly, such a definition would eliminate the quibbling kind of analysis in which the res gestae phrase is used to justify the admissibility of statements when no hearsay is actually involved. In other words, the definitions referred to would be less confusing and simpler to apply than our current rules and, at the same time, afford a rational basis for admission.

Finally, it is submitted that the *Uniform Rules of Evidence* contain three provisions that would simplify considerably those instances in which hearsay is involved and evidence is admitted under the res gestae doctrine. The first is Rule 63(4)(c) which deals with the exceptions to the exclusion of hearsay testimony where the declarant is not available. It states:

"Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay and inadmissible except . . . if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action."

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92Payne, op. cit. supra note 77, at 1028-33.
95The comment on this rules states:

Clause (c) is new and represents a carefully considered middle ground between the liberal extreme of the A.L.I. Model Code of Evidence and the ultra conservative attitude opposing any liberalization in the exceptions to the rule against hearsay. In the tentative draft on hearsay presented at the 1951 meeting of the Conference an exception was included in the language of the 1938 recommendation of the American Bar Association, letting in hearsay statements of persons who are unavailable as witnesses because of death or insanity. A statute has existed in Massachusetts since 1898 recognizing death as the justifying factor. The committee after carefully reconsidering the problem has felt that there was no sound basis for recognizing necessity on account of death or insanity as distinguished from real unavailability for any
The second and third rules are Rule 63(4)(a) and Rule 63(4)(b) which state:

"Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay and inadmissible except... A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception..."