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MONTANA'S RULE ON RES GESTAE

John S. Warren

INTRODUCTION

To be admissible, it is a general rule that all evidence must be both relevant and competent. Hearsay evidence¹ is excluded because it is thought to be untrustworthy and, therefore, incompetent. The main justifications for suspicion of hearsay evidence have been: (1) the out-of-court assenter was not under oath; (2) the jury is unable to observe the out-of-court assenter's demeanor; (3) the witness may have somehow misunderstood the out-of-court assenter's statement; and (4) the opposing party has no opportunity to cross-examine the out-of-court assenter. Logically, should the offered hearsay testimony be inherently trustworthy, and should the justifications just enumerated suggest no reason for excluding the offered evidence, then relevant hearsay evidence should be admissible.

Predictively, no sooner was the rule against hearsay evidence established, but exceptions sprouted up. One such exception has been known as *res gestae*, or "things done."² It is commonly thought of as being a set of connected acts which, when taken as a whole, comprise a complete transaction forming the subject of litigation. Since the *res gestae* rule's creation, courts have often carelessly bandied it about, sometimes applying it correctly as an exception to the exclusionary hearsay rule, and othertimes using it wrongly as a standard of relevance. To an extent, the literal meaning of the phrase "*res gestae*" is responsible for its misuse; hence, the rule has been criticized as "a convenient substitute for analysis,"³ and as "not only entirely useless, but even positively harmful."⁴

In an attempt to clarify the hazy definition of *res gestae*, many jurisdictions have sought to analyze it by subdividing according to its many chimerical characteristics. Spontaneous declarations, verbal acts, expressions of a state of mind, expressions of physical condition, irrelevant facts which are inseparable from relevant ones, words constituting circumstantial evidence, and words involved in the pleadings are the most often encountered subdivisions. The Montana supreme court has

¹McCormick offers the best definition of hearsay evidence: "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court assenter." C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE, § 246 (2d ed. 1972).

²The earliest reference Professor Wigmore found to "*res gestae*" was in *The Ship Money Case*, 3 How. St. Tr. 988 (1637). J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE, § 1767, n. 1 (3d ed. 1923). However, the *res gestae* exception to the hearsay rule has been firmly established only since the mid-1800's. *Id.* § 1768.

³Spencer, *Res Gestae in Oregon*, 11 OR. L. REV. 254, 254 (1932).

⁴WIGMORE, *supra* note 2 at § 1767.

not pursued this course. While often borrowing terminology from the lexicon developed by those jurisdictions which subdivide the *res gestae* rule, the Montana court has persisted in the use of the general phrase, *res gestae*, to express the concept of the litigated transaction. The object of this comment is to explore the application of Montana's *res gestae* rule by comparing it with the general rule of other jurisdictions.

THE MONTANA RULE

SPONTANEOUS DECLARATIONS

Spontaneous declarations are classic exceptions to the hearsay rule and are easily described by a useful definition. Spontaneous declarations are out-of-court statements, offered to prove the meaning contained therein, which are substantially contemporaneous with the litigated event, and which are originally inspired or caused by the excitement and influence of the event before the declarant has had time to reflect, contemplate, and possibly fabricate or prevaricate.⁵ The basis of this exception is the obvious trustworthiness of such declarations. Not only do they have the advantage of not being distorted by the passage of time, for they are made at the time of the event, but such declarations are easily accepted as true because they are reports of what the declarant has seen or heard. They are made as though the declarant's mind is but a conduit through which the observed event is converted into the spoken word. No element of intentional untruth has time, theoretically, to be injected by the declarant. For example: While in the midst of a bank robbery in which the bank teller has just been shot, a bystander immediately declares to the killer: "You have just murdered that man in cold blood!" The statement is admissible whether offered through the testimony of the declarant or through the testimony of any other witness who heard the declaration. Although, if offered to prove malice, it is hearsay, courts believe this kind of hearsay is competent and trustworthy because the declarant simply has had no time to make up his own opinion or to lie.

Possibly because it is easiest of application and lends itself best to analysis, the spontaneous declaration portion of the *res gestae* rule has been most frequently used by the Montana court. Many cases⁶ have presented ideal factual situations for its application. They involve statements made during a time period commencing with the litigated act⁷ and terminating about thirty minutes afterwards.⁸ The court has

⁵See, McCORMICK, *supra* note 1 at §§ 289 and 297; B. JONES, THE LAW OF EVIDENCE, § 10:1 (6th ed. 1972).

⁶Tanner v. Smith, 97 Mont. 229, 33 P.2d 547 (1934); Sellers v. Montana-Dakota Power Co., 99 Mont. 39, 41 P.2d 44 (1935); Sullivan v. Metropolitan Life Insurance Co., 96 Mont. 254, 29 P.2d 1046 (1933); Koppang v. Sevier, 106 Mont. 79, 75 P.2d 790 (1937); Blevins v. Weaver Construction Co., 150 Mont. 158, 432 P.2d 378 (1967); State v. Medicine Bull, 152 Mont. 34, 445 P.2d 916 (1968).

⁷Tanner v. Smith, *supra* note 6.

⁸State v. Medicine Bull, *supra* note 6.

been careful to point out, however, that the lapse of time after the litigated act is not as important as whether the declarant was excited by the event and compelled by its influence to speak spontaneously about it without probability of fabrication.⁹ By way of contrast, the court has refused to apply the exception where the lapse of time after the event has been inordinately long,¹⁰ and where the statement, although apparently made sufficiently contemporaneously with the event, was made by a person not speaking under its influence and excitement.¹¹ In still other cases the court has noted the offered hearsay statements were not sufficiently connected with the litigated transaction so as to come within the notion of "things done."¹² Like other courts, the Montana court has at times carelessly applied the rule. In several cases it has neglected either to mention the time lapse between the event and the offered hearsay statement, or to analyze the offered testimony to determine if its inherent trustworthiness is so great that it should be admissible.¹³ It should also be noted that discretion may be exercised in permitting what would otherwise be admissible spontaneous declarations. In at least one case the court has allowed the rather delicate and inflammatory nature of the accusation (buggery of a young boy) to tell against admission of a hearsay statement made soon after the event, the court constricting the *res gestae* so as to prevent the statement from being part of the litigated transaction.¹⁴

The best formulation of the spontaneous declaration part of the *res gestae* exception the Montana court has given to date is found in *Callahan v. Chicago, Burlington & Quincy Railroad Company*:¹⁵

[The] general rule is that the declarations must be substantially contemporaneous with the litigated transaction and be the instinctive, spontaneous utterances of the mind while under the active, immediate influence of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations.

VERBAL ACTS

Verbal acts, although thought of as part of the *res gestae*, are not logically an exception to the hearsay rule, for they are not even hearsay.

⁹*Sullivan v. Metropolitan Life Insurance Co.*, *supra* note 6.

¹⁰*Rosberg v. Montgomery Ward & Co.*, 110 Mont. 154, 99 P.2d 979 (1939), where a statement made twenty days after the litigated act was held not part of the *res gestae*; and *Cook v. Rigney*, 113 Mont. 198, 126 P.2d 325 (1942), where the court held that a statement made three months after the litigated act but made sixteen years before the commencement of litigation was not part of the *res gestae*.

¹¹*Poindexter & Orr Live Stock Company v. Oregon Short Line Railroad Company*, 33 Mont. 338, 83 P. 886 (1905).

¹²*Wilson v. Davis*, 110 Mont. 356, 103 P.2d 149 (1940); *State v. Fairburn*, 135 Mont. 449, 340 P.2d 157 (1959).

¹³*Hulse v. Northern Pacific Railway Co.*, 47 Mont. 59, 130 P. 415 (1913); *State v. Le Duc*, 89 Mont. 545, 300 P. 919 (1931).

¹⁴*State v. Shambo*, 133 Mont. 305, 322 P.2d 657 (1958).

¹⁵*Callahan v. Chicago, Burlington & Quincy Railroad Company*, 47 Mont. 401, 133 P.

A verbal act is a statement or communicative gesture accompanying and explaining an otherwise ambiguous act.¹⁶ It is different from a spontaneous declaration in that (1) the former accompanies and explains an otherwise ambiguous act while the latter immediately follows and is a reaction to an act not necessarily ambiguous; (2) a verbal act is always made by the actor whereas a spontaneous declaration may be made by a bystander; and (3) a verbal act is not offered to prove the contents of the statement but rather to allow the substantive law to attach certain consequences to the statement, whereas the spontaneous declaration is offered to prove the truth of the contents of the declaration.¹⁷ An example is apposite: Smith hands his watch to Jones saying, "This is a gift." The act of handing Jones a watch without the attendant statement is ambiguous, for Smith may have intended to establish a bailment, a loan, or a gift; the accompanying statement, however, explains the act. The statement was made by the actor, Smith; had a bystander made the statement, the act need not have been a gift, for all the statement would then show is that the bystander assumed the act to be a gift. Lastly, in the eyes of the law it would not matter one whit if the statement were untrue, i.e., that Smith was lying, for the law would attach certain consequences to this outward manifestation of intent regardless of Smith's real intent. Hence, the statement is a verbal act.

Whereas the spontaneous declaration subdivision of the *res gestae* rule boasts a plethora of Montana case law, the verbal act subdivision has the distinction of having had no correct application and little development by the Montana supreme court. Several cases have given the court the opportunity to discuss the verbal act doctrine, but the court decided them under the spontaneous declaration idea instead.¹⁸

¹⁶See, WIGMORE, *supra* note 2 at § 1772.

¹⁷See, Catterall, *Res Gestae in Virginia*, 21 VA. L. REV. 725, 737-738 (1935).

¹⁸*Wilson v. Davis*, *supra* note 12; *Platts v. Platts*, 134 Mont. 474, 334 P.2d 722 (1958). There are, however, two verbal act cases in which the evidentiary question was correctly decided even though the right rule was not applied. In *Territory of Montana v. Campbell*, 9 Mont. 16, 22 P. 121 (1889), the defendant was convicted of assault. A dispute having arisen with a neighbor over the construction of a boundary fence, the defendant and his hired hands confronted the neighbor. After a short and evidently fruitless parley, the defendant shouted, "Fire boys!" and shot the neighbor in the knee. This statement is clearly a verbal act: it is not a spontaneous reaction to the neighbor's shooting; it was a deliberate statement by the actor indicating that his operation of his rifle was not accidental; and it was not offered to prove he ordered his hired hands to fire. For these reasons, the court should have ruled the statement admissible as a verbal act and relevant, noting that it was not hearsay, and therefore needing no application of the *res gestae* exception to the hearsay rule. In the second, *Petition of Peterson*, 155 Mont. 239, 467 P.2d 281 (1970), Peterson and his partner had the bad luck to be caught by a witness red-handed in the act of burgling a barn. While the partner did the dirty work, Peterson maintained a watch outside. When the witness happened upon him and questioned him about his presence, all Peterson could do was lie obviously and unintelligently. At Peterson's trial the prosecution offered his responses to the witness's questions when he caught Peterson red-handed. The court cited *Campbell* at length and ruled the responses were part of the *res gestae*. Again, these responses were really in the nature of verbal acts; they were made by the actor deliberately at the time of the act in order

Other cases have been decided as though they were verbal act cases when in reality they were not.¹⁹

STATE OF MIND

The state of mind subdivision, like the spontaneous declaration, is a true exception to the hearsay rule; but unlike a spontaneous declaration, a hearsay statement indicating state of mind is not always admitted because of its inherent trustworthiness. Rather, this is an instance where the law of evidence has given way to the law of necessity. Because it is often necessary to prove an intent or motive element of an act, and because even today's advanced sciences cannot divine a person's intent or motive at any given time, it is necessary to accept either conduct or personal statements to prove intent or motive. Nevertheless, to come within the state of mind portion of the *res gestae* exception to the hearsay rule, a statement indicating state of mind must be made substantially contemporaneously with the litigated act, and it must tend to show the actor's motivating state of mind at the time of the litigated act. The landmark case in this area of the law is *Mutual Life Insurance Co. v. Hillmon*,²⁰ which held that declarations of a state of mind tending to show a plan or intent to do an act, which is in the future with regard to the declaration, are admissible as part of the *res gestae*. This holding was limited in a later decision only to "declarations casting light on the future" as distinguished from "declarations of memory, pointing backwards to the past."²¹ For example, a day before a man is shot, the killer states, "If I don't get him first, he's going to kill me." Although it is an out-of-court statement offered to prove the truth of the matter asserted therein, the statement is admissible to establish a defense, for it satisfies the two criteria set out above for the state of mind, *res gestae* exception to the hearsay rule.

The state of mind portion of the *res gestae* exception has had a haphazard application in Montana. The court is to be commended for its clear and cogent application of the exception in *Ross v. Industrial Accident Board*²² where it noted, in a decision whose logic is similar to that of the *Hillmon* case, the facts indicated the disputed hearsay declarations cast light on an intent to do a future act. However, in another state of mind case²³ the court gave no explanation of its use of the

to make it ambiguous, and they were offered to show Peterson was lying when he made them. Again, the court should have ruled these statements were verbal acts and not hearsay; therefore, they were admissible because they were relevant; no discussion of *res gestae* was necessary.

¹⁹*Callahan v. Chicago, Burlington & Quincy Railroad Co.*, *supra* note 15; *Raish v. Orchard Canal Co.*, 67 Mont. 140, 218 P. 655 (1923); *Exchange State Bank v. Occident Elevator Co.*, 95 Mont. 78, 24 P.2d 126 (1933).

²⁰*Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1891).

²¹*Shepard v. U.S.*, 290 U.S. 105, 106 (1933).

²²*Ross v. Industrial Accident Board*, 106 Mont. 486, 80 P.2d 362 (1938).

²³*Shepherd v. U.S.*, 290 U.S. 105, 106 (1933).

res gestae exception. Even more objectionable has been the court's approval of the state of mind exception as a rule of relevance for determining whether evidence of other crimes—thus purportedly showing motive or intent—is admissible.²⁴ A recent case²⁵ gives cause to hope for the logical application of this exception in Montana. There the court refused offered state of mind hearsay testimony and looked beyond the surface of the exception in search for the inherent trustworthiness of the offered hearsay. After having done so, the court stated:

There is nothing in the circumstances surrounding the making of the statement . . . which indicates that the defendant did not have time to reflect, plan, and if it suited his purposes, prevaricate.²⁶

This last quotation reflects a caveat all students of evidence should note. Most exceptions to the hearsay rule have been accorded their status because their factual situations contain some factor which insures their truthfulness. Naturally, when a factual situation is presented which lends itself to the application of a hearsay exception, but which does not contain the guarantees of trustworthiness typical of situations the exception was designed to cover, then the exception should not be applied, and the declaration should be rejected as pernicious hearsay.

EXPRESSIONS OF PHYSICAL CONDITION

Expressions of physical condition are also true exceptions to the hearsay rule. These are usually expressions of pain or suffering contemporaneous with physical discomfort. Because the expression may be viewed as being forced or driven out of the declarant by the pain or suffering and not as a product of thought or design, it is generally believed such expressions are inherently trustworthy in the same way as are spontaneous declarations.²⁷ Unlike spontaneous declarations, however, expressions of a physical condition showing pain or suffering need not be substantially contemporaneous with the litigated act; such expressions need only reflect the physical feelings present at the time of the declaration.²⁸ For example, where Tom's arm required amputation after a traffic accident, but weeks later he complained of great lancinating pain coming apparently from the missing appendage, such complaints would be admissible. They are definitely hearsay, but because they are motivated by the pain and suffering and not by thought, design, or reflection, they are trustworthy. Also, note the complaints followed the litigated act, the traffic accident, by several weeks. This is one area of the *res gestae* exception where the notion of "things done" can be stretched considerably beyond the litigated act.

²⁴State v. Schlaps, 78 Mont. 560, 254 P. 858 (1972); State v. Russell, 93 Mont. 334, 18 P.2d 611 (1933).

²⁵State v. Fairburn, 135 Mont. 449, 340 P.2d 157 (1959).

²⁶*Id.* at 162.

²⁷JONES, *supra* note 5 at § 10:6.

It cannot be said authoritatively that the Montana supreme court has accepted the expressions of physical condition subdivision of the *res gestae* exception, for the one case presenting an ideal opportunity for so ruling failed to mention the phrase "*res gestae*" or even "trans-action."²⁹ In that case the court called testimony relating the plaintiff's moaning and similar expressions of physical pain "original evidence"³⁰ and ruled it admissible. Although this seems to be the only case on this point in Montana law, it should be indicative of this jurisdiction's acceptance of the expressions of physical condition subdivision of the *res gestae* exception.³¹

IRRELEVANT FACTS INSEPARABLE FROM RELEVANT ONES

Another subdivision of the *res gestae* exception may be described as admissible facts which, though irrelevant, are inseparable from the relevant facts. Obviously, this so called subdivision of the *res gestae* exception has nothing to do with the hearsay rule; rather it is an exception to the relevance requirement of the general rule of admissibility. Like the state of mind exception, its justification lies in its necessity. Were it not for this exception it would often be impossible for a party to present his case in a logical manner or prove its necessary elements because the irrelevant facts are so inseparably intertwined with the relevant ones as to defy their severance. For example: The defendant kills three persons during the same murderous spree at the same location, but he is tried for each crime separately. During his trial for the first slaying, the clothing of his other victims is introduced, so that by comparing angles of fire indicated by the bullet holes, it is possible from all three bodies to calculate the position of the murderer at the time of the shooting. Even though the clothing of the other two victims is evidence of other crimes, evidence normally excluded as irrelevant, the clothing is admissible because of its necessary position in the presentation of the proof.³²

Rather than noting that the hearsay rule was not involved—therefore requiring no *res gestae* exception—the Montana court has applied this part of the *res gestae* exception as a standard of relevance. These cases involve admission of evidence of other crimes.³³ In two, the prosecutions' cases could not have been presented in a clear and chronological manner if the admittedly irrelevant evidence of other crimes had

²⁹Burles v. Oregon Short Line Railroad Co., 49 Mont. 129, 140 P. 513 (1914).

³⁰*Id.* at 515.

³¹Although not decided by the Montana supreme court, *Northern Pacific Railroad Co. v. Urlin*, 15 S.Ct. 840 (1894), a case arising out of Montana, stretched the idea of *res gestae* to include statements of aches and pains made by the plaintiff during periodic examinations, some of which were up to two years after the litigated act.

³²This example is drawn from the books. See, *State v. Porter*, 32 Or. 135, 49 P. 964 (1897).

³³*State v. Schlaps*, *supra* note 24; *State v. Russell*, *supra* note 24; *State v. Broadwater*, 75 Mont. 350, 248 P. 587 (1926).

not also been presented to the jury.³⁴ The irrelevant evidence was a necessary part to recounting the defendants' crimes. In the other case, however, the court correctly recognized refusal of the offered testimony in no way detracted from the story of the accused's offense; on the contrary, its admission might have unjustly prejudiced the jury.³⁵

WORDS CONSTITUTING CIRCUMSTANTIAL EVIDENCE

Words constituting circumstantial evidence have also been admitted under the rubric of *res gestae*. In the usual situation, this subdivision of the hearsay exception is invoked unnecessarily for the evidence sought to be admitted is not hearsay. For example, in proceedings to declare a person insane, it would be error to exclude as hearsay testimony that the allegedly insane person often proclaimed himself to be king of the United States. Such testimony is relevant in insanity proceedings and certainly would not be admitted to prove that the allegedly insane person was in truth King of the United States; rather it is circumstantial evidence tending to show he is insane. However, there are instances when circumstantial evidence comes cloaked in hearsay. For example: Mary contests the manner in which an administrator is prepared to distribute an intestate decedent's property. She claims to be the decedent's wife; the administrator claims the decedent was never married. Mary seeks to introduce testimony that the deceased on several public occasions referred to her as "Mrs." and that he often boasted she was the mother of his children. Such declarations are circumstantial evidence of a marriage, but they are also hearsay because they are offered to prove the assertions they carry. There is no apparent reason why such statements should be admissible under the *res gestae* exception. All other exceptions have some kind of rationale behind them usually explaining why they are inherently trustworthy. This one does not.³⁶

Perhaps of all the legitimate subdivisional exceptions to the hearsay rule embodied by the phrase *res gestae*, the one including words constituting circumstantial evidence has been the one least analyzed and most casually applied by the Montana court. It never recognizes, or at least never states, it is admitting hearsay evidence under the *res gestae* exception for the circumstantial, evidentiary value it may have. Nonetheless, the Montana court has allowed circumstantial hearsay evidence where the declarations shed light on a couple's marital status,³⁷ where comments made by on-lookers during the execution of a contract suggested one of the contracting parties was taking unfair advantage

³⁴State v. Schlaps, *supra* note 24; State v. Russell, *supra* note 24.

³⁵State v. Broadwater, *supra* note 33.

³⁶It must be noted, however, at least one court in an attempt to insure trustworthiness has required that such declarations be made in good faith. See, Reynold v. Adams, 125 Va. 295, 99 S.E. 695 (1919).

³⁷Welch v. All Persons, 85 Mont. 114, 273 P. 110 (1929).

of the other,³⁸ and where the offered hearsay statements indicated the relationships between contracting parties.³⁹ Possibly seeking to insure the trustworthiness of circumstantial hearsay evidence, a step jurisdictions following the general rule have not taken, the Montana supreme court has required a contemporaneity between the litigated act and the offered circumstantial hearsay evidence.⁴⁰ When not present, the court has refused the offered hearsay.

WORDS INVOLVED IN THE PLEADINGS

The last occasionally mentioned subdivision of the *res gestae* exception is that which encompasses the words involved in the pleadings. Usually, this area should not involve an exception to the hearsay rule, for the words are not introduced to prove the truth of the meaning they convey. A classic example is the case where the plaintiff has alleged libel and slander by the defendant, and he seeks to prove his allegations by introducing testimony of the torts. Obviously, this evidence is not hearsay. It is introduced only to show the torts were committed; the plaintiff certainly does not wish to prove the alleged libel and slander are true, for if he did he would thereby prove the defendant's defense.

It is to the Montana supreme court's credit that it has never used this subdivision citing the *res gestae* exception to the hearsay rule. The one Montana case illustrative of this principle is *Jones v. Shannon*.⁴¹ There, the pleadings alleged mental distress, and the words which allegedly contributed to the distress the court called "part of the whole occurrence."⁴²

THE TRANSACTION ASPECT

As applied by the courts of most jurisdictions, the *res gestae* exception to the hearsay rule is two-fold: (1) it attempts to delineate a set of acts relevant to the litigated act by defining a completed transaction, of which the litigated act is a part; and (2) if the evidence is hearsay, it provides an exception to that rule of exclusion generally based on the evidence's inherent trustworthiness. Although not a pure exception to the hearsay rule, the Montana court has adhered to the rule in this form. However, there is yet another important characteristic developed by the Supreme Court of Montana: the transaction aspect. It is illustrated by the following cases.

³⁸*Stagg v. Stagg*, 96 Mont. 573, 32 P.2d 856 (1934).

³⁹*Burns v. Smith*, 21 Mont. 251, 53 P. 742 (1898). See also, *Northern Pacific Railway Co. v. Kempton*, 138 F. 992, 995 (9th Cir. 1905), where a federal court applying Montana's law decided an employee's statements suggesting his employer's liability were admissible as part of the *res gestae*.

⁴⁰*State v. Fairburn*, *supra* note 25.

⁴¹*Jones v. Shannon*, 55 Mont. 225, 175 P. 832 (1918).

⁴²*Id.*, at 886.

Welch v. All Persons:⁴³ This case involved a dispute among the children of Hiram Rhodes, the plaintiffs contending they were the only legitimate progeny, and the defendants asserting their legitimacy. The plaintiffs sought to show the defendants were products of an illicit union by introducing hearsay evidence of certain statements made by the defendants' mother to the federal government asserting she had never married Hiram Rhodes. The defendants alleged Rhodes and their mother had been married for twenty-six years. The court held that the *res gestae*, or the transaction in dispute, was the entire twenty-six years of the alleged marriage; hence, any statements made during more than a quarter of a century were admissible as part of the *res gestae* if they shed light on the litigation.

Burns v. Smith:⁴⁴ In this case the plaintiff was suing to enforce a contract made for her benefit between her mother and the deceased. Its terms were that the mother would give up the plaintiff to the deceased's care and custody to be raised by him as his daughter in exchange for which the deceased promised to leave the plaintiff a daughter's share of his estate. The contract was made eleven years before the deceased's death. The court held that the transaction or "the *res gestae* extended over the entire time . . . [from] when the contract is alleged to have been made, to the death of the deceased."⁴⁵ Explaining, the court noted:

The conduct of the parties towards each other during that entire time is part of the transaction, and whatever either party did or said during that time which sheds light upon the matter, and aids in disclosing the relations the parties sustained, and understood that they sustained, towards each other, must be considered as part of the *res gestae*.⁴⁶

Exchange State Bank v. Occident Elevator Co.:⁴⁷ This case involved the delivery of grain to an elevator company which paid for the grain by check. The elevator company later discovered the grain was subject to a prior valid security interest. Its agent, one Anderson, unsuccessfully attempted to notify the company's bank to stop payment on the check; he even stated to several individuals he had attempted to stop payment on the check. When the plaintiff, by introducing the agent's hearsay statements relating his attempt to stop payment on the check, sought to disprove the elevator company's defense, one of a *bona fide* purchaser for value without notice, the court noted that the statements were part of the *res gestae*.

These cases indicate the Montana court has chosen to broadly define the transaction aspect of the *res gestae* exception to the hearsay rule.

⁴³Welch v. All Persons, *supra* note 37.

⁴⁴Burns v. Smith, *supra* note 39.

⁴⁵*Id.* at 748.

⁴⁶*Id.*

⁴⁷Exchange State Bank v. Occident Elevator Company, *supra* note 19.

Rather than identify a marriage ceremony, the execution of a contract, or the business deal of delivery and payment as the "things done," the court has chosen the duration of the alleged marriage, the relationship between the contracting parties from execution of the contract until its completed performance, and the events and statements flowing out of a business transaction. The expansiveness of the court's interpretation in these cases, however, must be contrasted with its occasional constrictions of the scope of the exception: a conversation held by witnesses to the disputed execution of a will immediately after witnessing but out of the presence of the testatrix was disallowed as not part of the *res gestae*.⁴⁸

To a great extent it would seem the manner in which counsel are able to define the transaction in dispute determines whether hearsay evidence will be admissible as a part of the *res gestae*. If counsel must litigate a dispute arising out of a sudden and unexpected act, and if the facts force a reliance on the spontaneous declaration idea, the apparent maximum time duration after the litigated act during which a statement can qualify under this exception is probably thirty minutes.⁴⁹ On the other hand, if the facts permit the *res gestae* to be framed in terms other than a sudden and unexpected act, the court appears more willing to extend the limits of the transaction. The duration of a marriage,⁵⁰ the relationship sustained between contracting parties,⁵¹ and even a deceased's state of mind⁵² have been held to be parts of the *res gestae* of their respective cases. This application of the doctrine is well beyond its ordinary concepts even as broadly applied in the *Occident Elevator* case. Hence, it would seem the Montana lawyer may be able to secure admission of what might otherwise be impermissible hearsay, if he composes his pleadings with the transaction aspect of the Montana *res gestae* rule in mind.

THE EFFECT OF STATUTES

There remains but one further area to discuss in relation to the *res gestae* rule. This is the effect statutes have had on its development in Montana. The Revised Codes of Montana 1947 (hereinafter R.C.M. 1947) set out three statutes which involve the idea of *res gestae*, or "transaction" as it is therein named.⁵³ Section 93-401-7, R.C.M. 1947,

⁴⁸In re Williams' Estate, 50 Mont. 142, 145 P. 957 (1915).

⁴⁹See, Callahan v. Chicago, Burlington & Quincy Railroad Co., *supra* note 15; State v. Medicine Bull, *supra* note 6; Sullivan v. Metropolitan Life Insurance Co., *supra* note 6.

⁵⁰Welch v. All Persons, *supra* note 37.

⁵¹Burns v. Smith, *supra* note 39.

⁵²Ross v. Industrial Accident Board, *supra* note 22.

⁵³These three are R.C.M. 1947, §§ 93-401-7 (*Declarations which are a part of the transaction. Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction.*); 93-401-11 (*When part of the transaction, evidence, as part of the transaction, is admissible. When part of an act, declaration,*

appears to be used most often in the cases as a make-weight factor whenever the court is deciding whether a statement is part of the *res gestae*;⁵⁴ indeed, this is to be expected, for §93-401-7 is but a statutory declaration of the *res gestae* rule. Of more particular interest to the practicing lawyer is §93-401-11, R.C.M. 1947, popularly known as the "opening the door" doctrine. Its most startling use has been to admit hearsay statements similar to those the court in the same case ruled inadmissible as not part of the *res gestae*;⁵⁵ the court's rationale was that since one party had been allowed to introduce part of a hearsay conversation, the other party had the right under §93-401-11 to introduce the remainder of it. The same section has been used to justify the admission of the entire record of a former proceeding where the opposition had previously introduced parts thereof.⁵⁶ It also permitted one version of a conversation where other versions had already been admitted by the opposition.⁵⁷ However, the use of §93-401-11 is not unlimited: the additional evidence must be on the same subject as that introduced by the opposition.⁵⁸ The opening-the-door doctrine has also been used (although §93-401-11 was not mentioned) to admit parts of correspondence⁵⁹ and city ordinances where the opposition had previously introduced portions thereof.⁶⁰

A CRITIQUE

Montana's present rule on *res gestae* is the product of two main forces. The first was codification in 1877 of what is presently §93-401-7, R.C.M. 1947.⁶¹ The second has been the Montana supreme court's refusal to subdivide the rule for analytical purposes. Both forces have worked to preserve Montana's *res gestae* exception in much the same condition as it existed in many jurisdictions during the mid-1800's.

This nineteenth-century exception to the hearsay rule has generated much dissatisfaction. The commentators do not like it.⁶² The trend in

conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.); and 93-401-27(7). The last mentioned section is but a repetition of the first, so henceforth no further mention of it will be made in this comment.

⁵⁴See, *Burns v. Smith*, *supra* note 39; *Callahan v. Chicago, Burlington & Quincy Railroad Co.*, *supra* note 15; *Ross v. Industrial Accident Board*, *supra* note 22; and *State v. Schlaps*, *supra* note 24.

⁵⁵*Hulse v. Northern Pacific Railway Co.*, *supra* note 13.

⁵⁶*Lehman & Co. v. Munger*, 86 Mont. 553, 284 P. 769 (1930).

⁵⁷*McGonigle v. Prudential Insurance Co.*, 100 Mont. 203, 46 P.2d 687 (1935); *Rasmusen v. Lee & Company, Inc.*, 104 Mont. 278, 66 P.2d 119 (1937).

⁵⁸*State v. Collett*, 118 Mont. 473, 167 P.2d 534 (1946).

⁵⁹*Northwestern Electric Equipment Co. v. Leighton*, 66 Mont. 529, 213 P. 1094 (1923).

⁶⁰*Varn v. Butte Electric Railway Co.*, 77 Mont. 124, 249 P. 1070 (1926).

⁶¹See the legislative history following R.C.M. 1947, § 93-401-7.

⁶²*E.g.*, WIGMORE, *supra* note 4; MCCORMICK, *supra* note 1 at § 288; J. Thayer, 15 AM. L. REV. 5, 81 (1881), quoted in WIGMORE, *supra* note 2 at § 1767.

many jurisdictions to subdivide has been an attempt to escape the exception's pitfalls. And California, whose Code of Civil Procedure provided the source for §93-401-7, R.C.M. 1947,⁶³ has repealed its statutory *res gestae* exception and superseded it with sections which speak to spontaneous declarations and contemporaneous statements.⁶⁴ As illustrated by this comment, Montana's exception does not escape the area of general dissatisfaction.

The problem with *res gestae* is that courts can apply it as a standard of relevance as well as an exception to the hearsay rule. Certainly, Montana's exception as it appears in §93-401-7, R.C.M. 1947, has encountered this problem.⁶⁵ Furthermore, in many situations where *res gestae* is revoked it is used to decide an evidentiary question where another rule of evidence better suited to the facts should have been applied.⁶⁶ Lastly, it is vague and imprecise.⁶⁷

Because this misapplication of the exception is so widespread, one cannot condemn a particular court for its misuse; rather, any critic should recognize that the fault lies with the *res gestae* exception itself. A different formulation is needed to express the hearsay exception *res gestae* was supposed to cover. Since the hearsay rule speaks to competence, any hearsay exception should speak to the inherent trustworthiness of the offered hearsay evidence. Hence, a better name might be the trustworthy statement exception to the hearsay rule. This trustworthy statement exception should contemplate only spontaneous declarations, expressions of a state of mind, expressions of physical condition, and words constituting circumstantial evidence. As a further ingredient, the ex-

⁶³See, the legislative history following R.C.M. 1947, § 93-401-7.

⁶⁴STAT. & AMEND. TO THE CODES OF CALIF., 1965, Ch. 299, §§ 1240, 1241, currently reproduced in WEST'S ANNO. CALIF. CODES, Evidence, § 1240, 1241, respectively:

§ 1240: "Spontaneous statement. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant, and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

§ 1241: "Contemporaneous statement. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Is offered to explain, qualify or make understandable conduct of the declarant; and

(b) Was made while the declarant was engaged in such conduct."

⁶⁵E.g., in *State v. McCracken*, 93 Mont. 269, 18 P.2d 302 (1933), the defendant was charged with horse stealing. During the trial testimony was introduced to show the defendant had attempted to conceal the stolen horses by driving them down a remote country lane. The court called testimony of the horses' route "part of the *res gestae*." *Id.* at 303. The *res gestae* doctrine was invoked in this case where there was no question of hearsay testimony; it was applied strictly as a standard of relevance.

⁶⁶E.g., in *Raish v. Orchard Canal Co.*, 67 Mont. 140, 218 P. 655 (1923), the plaintiff alleged the defendant's negligent maintenance of his headgate caused injury to the plaintiff's lands. As evidence of the defendant's negligence, the plaintiff offered hearsay statements made on an inspection tour shortly before the injury occurred by one of the defendant's corporate directors. The court said the statements were not part of the *res gestae*. It should not have mentioned *res gestae*, for the admissions against interest exception to the hearsay rule more properly fit the facts.

ception should include the transaction aspect as identified by the Supreme Court of Montana. At least such an exception would not inadvertently lend itself to application as a standard of relevance; moreover, it would not be a great departure from established Montana law.

CONCLUSION

Although *res gestae* should only be applied as an exception to the exclusionary hearsay rule, many jurisdictions have used it as a standard of relevance. The Montana supreme court recognizes the *res gestae* exception as generally applied and misapplied, but it has chosen not to specifically subdivide it as have other jurisdictions and the commentators. However, it has used the language of the subdivisions and applied much of their rationale. It should be noted also that the Montana court has shown no reluctance to define the scope of the transaction broadly so as to include hearsay testimony which might otherwise be excluded under usual applications of the *res gestae* exception. To take advantage of the transaction aspect, however, counsel must be careful to frame the issues in the pleadings so as to make the transaction in dispute encompass the needed hearsay statements. Even when the transaction cannot be defined so broadly as to include desired hearsay testimony, it still may be admissible under § 93-401-11 if the opposing party previously introduces portions thereof. As a check on the admission of hearsay evidence, under the *res gestae* exception, admissibility is within sound legal discretion of the trial court.⁶⁸

⁶⁸See, *Koppang v. Sevier*, *supra* note 6; *Blevins v. Weaver Construction Co.*, *supra* note 6; *Gundersen v. Brewster*, 154 Mont. 405, 466 P.2d 589 (1970).