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EVIDENCE - HEARSAY RULE - USE OF "RES GESTAE"

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EVIDENCE — HEARSAY RULE — USE OF "RES GESTAE" — In an action on a life policy which acknowledged receipt of the first premium, the insurer-defendant claimed that no premium payment was made and that delivery was only to allow inspection and comparison with a specimen copy of the policy already in the hands of insured's wife. The district court admitted testimony by the insured's wife, the beneficiary and plaintiff in the action, to the effect that when the insured turned the policy over to her he said it was hers and paid for. The Circuit Court of Appeals for the Fifth Circuit sustained the ruling and, on motion for rehearing, adhered to its original decision, stating that what the insured said about payment was properly admitted as res gestae of his possession of the policy. *Yarbrough v. Prudential Ins. Co. of America*, (C. C. A. 5th, 1939) 100 F. (2d) 547.[1]

Although roundly criticized with striking unanimity by authorities in the

[1] For former opinion, see Yarbrough v. Prudential Ins. Co. of America, (C. C. A. 5th, 1939) 99 F. (2d) 874.

field of evidence,[2] the phrase "res gestae" continues to appear with a high degree of frequency in the decisions. The theory of the majority of the court in the principal case was that the words of the declarant-insured were not offered for their testimonial value and thus were not within the sanctions of the hearsay rule. This position appears vulnerable for two reasons. In the first place, it is questionable whether the utterance relative to payment had any relevancy except to evidence the truth of the matter asserted.[3] As the dissenting judge pointed out, the act of handing the policy to the wife was not in issue, and an utterance forming the verbal part of an act is admissible only if the physical part of the act is itself material to the issue.[4] It is difficult to see how such a transfer throws any light on the nature of insured's possession. Even if that were granted, however, it does not follow that his act of dominion is circumstantial evidence of payment.[5] It is quite possible that at the time insured was only intending to pay the premium. The indubitable tendency of such testimony to be prejudicial should be considered seriously, especially in view of the doubtful probative value of the acts of dominion.[6] In the second place, if it were conceded that the hearsay rule is not applicable to the utterance in question, its admission was still inadvisable. It has been held that where a statement is offered for a non-testimonial purpose, it will nevertheless be excluded if it coincides with the issue in the case.[7] The issue in the principal case was whether or not the insured had paid the premium, and his statement to his wife regarding payment would inevitably be considered by a jury for its testimonial value. The case appears to be but another illustration of the legerdemain often practiced by courts under the cloak of "res gestae" in order to evade the hearsay rule. Since the declarant here was unavailable and the plaintiff had no other means of controverting the testimony of the insurer's agents as to non-payment, it is

[2] The classic treatment of the phrase and its history is THAYER, LEGAL ESSAYS, "Bedingfield's Case—Declarations as a Part of the Res Gesta," 207-304 (1908). This essay was first published in 14 AM. L. REV. 817 (1880) and 15 AM. L. REV. 1, 71 (1881). Also see, 3 WIGMORE, EVIDENCE, 2d ed., § 1767 (1923); and Morgan, "A Suggested Classification of Utterances Admissible as Res Gestae," 31 YALE L. J. 229 (1922). The phrase itself defies definition. One court has said that definitions of it are "as numerous as prescriptions for the cure of rheumatism and generally about as useful." Estate of Gleason, 164 Cal. 756 at 762, 130 P. 872 (1913). For attempted classifications on rational grounds of decisions invoking the doctrine, see 3 WIGMORE, EVIDENCE, 2d ed., §§ 1714-1792 (1923). A recent concise treatment is Morgan, "Res Gestae," 12 WASH. L. REV. 91 (1937).

[3] The court reasoned that the act of turning over the policy was ambiguous and the insured's statement made at the time explained that act, which, as so clarified, tended to establish it as an act of ownership; this in turn being circumstantial evidence of payment by the insured.

[4] 3 WIGMORE, EVIDENCE, 2d ed., § 1772 (1923).

[5] 1 WIGMORE, EVIDENCE, 2d ed., § 38 et seq. (1923).

[6] 1 WIGMORE, EVIDENCE, 2d ed., §§ 29a, 42 (1923). The author points out that strictly relevant testimony is often excluded on principles of policy, e.g., to prevent unfair surprise or undue prejudice.

[7] Carpenter v. Carpenter, 46 R. I. 433, 128 A. 223 (1925), noted 34 YALE L. J. 911 (1925). The non-testimonial utterance in this case was offered to fix the time and place of the execution of a will.

arguable that the utterance should be admissible as the best evidence available to the plaintiff.[8] The province of the courts to establish so broad an exception to an established legal principle as the hearsay rule is open to serious doubt.[9] And if that is the objective, it should be grounded on definite and rational reasons rather than under the guise of the meaningless res gestae doctrine.[10]

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[8] MORGAN, THE LAW OF EVIDENCE (1927). The committee recommended a statute which would make any unavailability a basis for admission of hearsay evidence. The Massachusetts statute of 1898 and the reactions thereto of members of the Massachusetts bar are found at pp. 39-49.

[9] An illuminating discussion of the propriety of reform by judicial legislation, written by the late Justice Holmes, can be found in Stack v. New York, N. H. & H. R. R., 177 Mass. 155 at 158, 58 N. E. 686 (1900). See also, CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921).

[10] As one authority has said in referring to a possible destruction of the hearsay rule through use of the res gestae doctrine: "That may be a consummation devoutly to be wished, but it should be accomplished by more forthright methods." Morgan, "Res Gestae," 12 WASH. L. REV. 91 at 111 (1937).