ness.[26] Rarely is the privilege denied to belong to the witness spouse.[27] And rarely also is it denied to belong to the party spouse.[28]

Though to assume from the present state of the cases that the Ohio courts will construe this general incompetency to testify against one's spouse to be a privilege may seem somewhat radical, the definite trend throughout the country is certainly in this direction. In line with this, the most acceptable means of clarifying the irresolution resulting from the clumsily worded statute is by legislative enactment specifically providing that anti-marital testimony is privileged.

R. G. T.

EVIDENCE — RES GESTAE — HEARSAY RULE — SPONTANEOUS EXCLAMATIONS

Res Gestae is the "lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos . . . the conflict and the chaos will not cease until the various conceptions concealed beneath the ample wings of the *res gestae* are released from a coverture as alien to most of them as the nest from which the mis-laid cuckoo first surveys the world."[1] The use of the term *res gestae* and its application to the field of evidence by Lord Ellenborough in 1805 was more or less of an historical accident.[2] It has come down since 1805 through custom or habit and is used as a reason for permitting many varieties of subject matter to be placed in evidence. It is one of the most ubiquitous phrases in the law[3] and is perhaps used most frequently in the law of evidence. This note is limited to an analysis of the use of *res gestae* in that field.

[26] *Ward* v. *Dickson*, 96 Ia. 708, 65 N.W. 997 (1896); *People* v. *Gordon*, 100 Mich. 518, 520, 59 N.W. 322 (1894); *Lihs* v. *Lihs*, 44 Neb. 143, 62 N.W. 457 (1895).

[27] *Turner* v. *State*, 60 Miss. 351 (1882) (assault and battery on the wife, the wife compellable to testify, though unwilling, the husband not having a privilege).

[28] *State* v. *Geer*, 48 Kan. 752, 754, 30 Pac. 236 (1892) (the wife may consent, though not compellable, to testify against husband); *Com.* v. *Baronian*, 235 Mass. 364, 126 N. E. 833 (1920); *Com.* v. *Barker*, 185 Mass. 324, 70 N.E. 203 (1904).

[1] Stone, *Res Gestae Reagitata* (1939) 55 Law Q. Rev. 66.

[2] The first use of the plural term, *res gestae*, by a judge is believed to be in the opinion given by Lord Ellenborough in *Aveson* v. *Kinnaird*, 6 East 188, 193-194 (1805), wherein he referred to *Thompson* v. *Trevanion*, *Skinner* 402 (1694), as holding admissible "as part of the *res gestae*" certain statements made by an injured person immediately after an assault. As a matter of fact, there was no reference made to any such term as *res gestae* in Lord Holt's opinion in *Thompson* v. *Trevanion*. Prior to 1805 the singular form *res gesta* had been used several times in judicial reports. See Thayer, *Bedingfield's Case*, 15 Am. L. Rev. 5, 81, for a history of the terms *res gesta* and *res gestae*.

[3] See 3 WIGMORE, EVIDENCE (2d ed. 1923) secs. 1768-1769. To establish liability for acts of agent: 2 MECHEM on AGENCY, (2d ed. 1914) secs. 1781-1785 and secs. 1793-1799; *Thomas* v. *Hargrave*, Wright's Rep. (Ohio, 1834) 595. To establish liability for acts of co-conspirator: *Clawson* v. *State*, 14 Ohio St. 234 (1863), *Hutchinson* v. *State*, 8 Ohio C.C. (N.S.) 313, 18 Ohio C.D. 595 (1906).

Undoubtedly, *res gestae* served a useful purpose in those times of the past when so much relevant evidence was barred by rules rendering incompetent, as witnesses, the parties to the action. Its utility may have continued up to relatively recent times in admitting certain statements otherwise excluded by the hearsay rule. Calling these statements *res gestae* did not change their hearsay character but seemed to aid the courts in admitting them. With the formulation and recognition of many exceptions to the hearsay rule, which cover adequately and clearly the hiatus, the doctrine of *res gestae*, embodying hearsay statements, would seem to be entirely useless. Lack of utility, however, is not the strongest objection which has been made to the use of the phrase *res gestae*. Not only is it utterly useless, but it is in fact harmful. By reason of its vagueness and ambiguity it invites the confusion, by both bench and bar, of the rules of evidence which have developed and which should be held to have supplanted this former "handy-andy." Is not this confusion inevitably concomitant with the use of this term *res gestae?* As one writer suggests,[4] it is much like an attempt to group men, horses, cats and tables under a single designation—"belegged creatures"—because they all have legs. Any feature that could be said to be common to all the conceptions customarily included under *res gestae* would be as lacking in significance as the legs that men, horses, cats and tables have in common.

Text writers on evidence have condemned in strong language the present use and preservation of *res gestae*. Professor Wigmore, in his monumental work on evidence,[5] states: "It should never be mentioned. No rule of evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rules of evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision." Professor Thayer's criticism is less scathing.[6] "Lawyers and judges seem to have caught at the term *res gestae*,—a phrase . . . which was a foreign term, a little vague in its application, and yet in some applications of it precise,—they

[4] Note 1, *supra*.

[5] WIGMORE, note 3, *supra*, sec. 1767, p. 775. In section 1768, Professor Wigmore proceeds to classify the concepts embodied in *res gestae* in which classification he lists as one group "Verbal Acts." Professor Edmund Morgan criticizes this term: ". . . the phrase 'verbal act' . . ., as commonly used, is less vague than *res gestae* only because it is couched in English, instead of Latin." Morgan, *A Suggested Classification of Utterances Admissible As Res Gestae* (1922) 31 Yale L.J. 229, at 235. Morgan's condemnation of the courts' resort to *res gestae* is vigorous: "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as *res gestae*."

[6] THAYER, LEGAL ESSAYS (1908) 207, at 244.

seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the 'limbo' of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one,—some things belonged there, others might, for purposes of present convenience, be put there."

Many judges have expressed a feeling akin to despair when they have sought to define *res gestae* as an aid in applying it to a situation confronting them.[7] Only a few, however, have sought to extirpate the doctrine or even to avoid its use.[8] The general result is that *res gestae* is undefined but nevertheless applied in many and divers situations.

The phrase *res gestae* as currently used comprehends both hearsay and non-hearsay evidence.[9] Although it is essential to recognize that both types of evidence exist under the guise of *res gestae*, a more detailed analysis is necessary in order to resolve much of the confusion attending the use of the phrase. Professor Morgan[10] has suggested that the cases involving *res gestae* may be classified under seven heads.[11]

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[7] In *Cox* v. *State of Georgia*, 64 Ga. 375 (1879), Judge Bleckley admitted: "The difficulty of formulating a description of the *res gestae* which will serve for all cases, seems insurmountable. To make the attempt is something like trying to execute a portrait that shall enable the possessor to recognize every member of a very numerous family. Eschewing anything so impracticable, and letting the present case sit for its own individual likeness, . . ." [the Court proceeded to apply the *res gestae* rule]. In *Craig's Case*, 30 Tex. Cr. App. 619, 621, 18 S.W. 297 (1892), Judge Hurt said: "Just when the fact or statement is or is not a part of the *res gestae* is one of the most difficult questions to solve known to the writer." Why do not the courts denounce the phrase, now that it has not only lost its usefulness (which was the original reason for its use) but has in fact become a source of difficulty and confusion? In *State* v. *Lasecki*, 90 Ohio St. 10, 106 N.E. 660 (1914), Judge Wanamaker, in reversing the Court of Appeals, on an evidentiary issue involving *res gestae*, apologized: "We feel, however, that it is but just to say that the judgment of the Court of Appeals in this case finds abundant warrant in the former decisions of this court in analogous cases."

[8] Mr. Justice Holmes, it has been said, refused to resort to the use of *res gestae*. "When counsel was attempting to introduce certain hearsay, Holmes, J., presiding, said: 'No, the hearsay rule has been a good deal nibbled round the edges, but nobody has taken quite such a bite out of it as that. And I think I won't set the example.' 'Not as part of the *res gestae?*' asked the counsel. Holmes, J., replied: 'The man who uses that phrase has lost temporarily all power of analyzing ideas. For my part, I prefer to give articulate reasons for my decisions'." *Ex relatione* Samuel Williston as recorded in an unpublished journal of James Bradley Thayer (1895), quoted in Morgan, *Some Suggestions for Defining and Classifying Hearsay* (1938) 86 U. of Pa. L. Rev. 258, at 266 fn. But *cf.* opinion in *Beck* v. *Dye*, —Wash.—, 92 P. (2d) 1113 (1939), in which the court concluded: "the term *res gestae* is not a mere shibboleth by an indiscriminate use of which every unsworn statement made during a particular transaction is to be admitted, but it is a doctrine which recognizes that, under certain circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event."

[9] WIGMORE, note 3, *supra*.

[10] Professor of Law, Harvard University.

[11] Morgan, *A Suggested Classification Of Utterances Admissible As Res Gestae* (1922) 31 Yale L. J. 229; Morgan, *Res Gestae* (1937) 12 Wash. L. Rev. 91.

1. Utterances as Operative Facts

The first, and probably the clearest, class is that in which the words or statements constitute an operative fact.[12] For example, in an action alleging slander, where the question is whether the defendant uttered such words, the fact and content of the utterances are material in and of themselves. This is clearly not a hearsay use. The same is true in the proof of an oral contract. The words themselves are the operative facts.

2. Utterances Not the Essential Facts but Material to the Issue

In the second class the words are not the essential facts but may be important as a part of the issue. For example, it may be essential to notice of injury by municipal negligence, in a damage action against a municipality; or in bankruptcy, the answer "not at home," given by a servant to a creditor inquiring at the house of the debtor, may under the substantive law constitute a refusal or denial to his creditors and thus amount to an act of bankruptcy. These words are offered regardless of their truth and, consequently, are not hearsay.

3. Utterances Giving Operative Effect to and Accompanying Ambiguous Acts

A third group of cases using the *res gestae* phrase embodies those in which the legal significance of an act (non-verbal) depends upon words accompanying it.[13] Here the act of itself is ambiguous when established in evidence. The words spoken by the actor contemporaneously with the act resolve the ambiguity. The statement may be, and frequently is, an operative fact. A hands over to B a book. This act, in the absence of words, might indicate a sale, a bailment, a gift or the return of a loan. The words uttered by A at the time of the transfer may eliminate all of these possibilities but one. So the statement is relevant, material and, not being hearsay, is admissible.

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[12] An operative fact is one which, by itself or in connection with others, operates to create legal relations between the parties.

[13] [14] The requirement of contemporaneity in these two groups is often applied to utterances which are, in reality, spontaneous exclamations (class seven, *infra*). The use of the phrase *res gestae* has been largely responsible for the confusion of these completely separate doctrines. The outstanding example is *Bedingfield's Case* (1879) 14 Cox C. C. 34, in which Cockburn, C. J., failed to distinguish between hearsay exclamations admissible under an exception to the hearsay rule (group seven) and statements admissible as verbal parts of facts in issue (classes three and four). He applied the contemporaneity requirement, properly applicable only to the latter, to an utterance which fell under the former class where no such requirement exists.

In *Railroad Co.* v. *Kovatch*, 120 Ohio St. 532, 166 N.E. 682 (1929), the court used Wigmore's criteria of competent spontaneous exclamations to determine whether a scream was "part of the *res gestae*" and so would seem to infer that the *res gestae* rule is synonymous with the "Spontaneous Exclamations" exception. At pages 537-538, however, the court used language tending to show that the contemporaneity of the scream was considered.

4. Utterances as Evidence of Intent — where intent accompanying an act is an operative fact

Under a fourth heading may be placed cases in which the legal significance of an act depends upon the intent which accompanies it.[14] Here again the act of itself is ambiguous. The intent of the actor at the time of the act is an operative fact. If the utterances are not offered for their truth, they fall into the second class; otherwise, they fall into the next class.

5. Utterances as Declarations of Mental Condition

The fifth group of cases embraces those in which the utterance is a declaration of a presently existing mental condition.[15] Since the utterance is offered for its truth, it is clearly hearsay, but is now generally held admissible as an exception to the hearsay rule. The doctrine of *res gestae* is no longer needed as a means of admitting such statements of mental condition. The clearest case is one where the mental state or intent is an operative fact. Cases, like the famous *Hillman* case,[16] in which the mental state is only sought to be established as a fact from which to reason that the utterer carried out such intent either prior to or subsequent to the utterance, present a more difficult problem. The problem is suggested here only for purposes of contrast and no attempt is made in this note to discuss the many possibilities of this "mental condition" exception to the hearsay rule.

6. Utterances Accompanying an Independently Admissible Act

The sixth class consists of a large group of cases in which the utterance is contemporaneous with an act (non-verbal), independently material and admissible, relating to that act and throwing some light upon it.

7. Spontaneous Exclamations

Cases in which the term *res gestae*, as used, is synonymous with the widely accepted "Spontaneous Exclamations" exception to the hearsay rule, comprise the seventh group.[17] Professor Wigmore has been instru-

[15] This includes declarations of present pain which comprise a separate and generally recognized exception to the hearsay rule; see note 19, *infra*.

[16] *Mutual Life Ins. Co.* v. *Hillman*, 145 U.S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706 (1892).

[17] See 3 WIGMORE, EVIDENCE (2d ed. 1923) sec. 1749, where the author states: "Under certain external circumstances of physical shock a state of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. . . . Since this utterance is made under the immediate and controlled domination of the senses, and during the brief period when considerations of self-interest could not have been fully brought to bear by reasoned reflections, the utterances may be taken to be particularly trustworthy."

mental in the adoption of this exception and he lists as the requirements: (1) there must be some shock startling enough to produce nervous excitement and to render the utterance spontaneous and unreflecting; (2) the utterance must be made before time to contrive and misrepresent; (3) the utterance must relate to the circumstances of the occurrence. Wigmore urges that these requirements guarantee trustworthiness. It is submitted that, while a statement made by a person under nervous excitement may offer more guarantees of honesty, it is very apt to be inaccurate and, therefore, unreliable.[18] Professor Morgan suggests that the utterances appearing in class six should be recognized as an exception to the hearsay rule. He feels that the requirement of contemporaneity is a more satisfactory guarantee of trustworthiness than is spontaneity. Wigmore's theory, on the other hand, makes contemporaneousness important only as evidence of spontaneousness.

In these seven classes, there are instances of both hearsay and non-hearsay evidence. There is no hearsay in the first three groups. In the fifth, sixth and seventh classes, the hearsay rule is applicable, but the utterances may be admitted as coming within an exception to the rule. The fourth class involves both hearsay and non-hearsay evidence, depending upon the use to which the utterance is put. It is evident that no one phrase can be used which will be descriptive of all the foregoing classes. It is not surprising that courts often lose their way in the mazes of *res gestae*. It is surprising that they continue to follow such a circuitous and devious path. Would it not be more desirable for the courts to determine the exact reason for the competency of these utterances? If they are admissible it must be because they are not hearsay, or being hearsay, they come within an exception to the hearsay rule. The use of the phrase *res gestae* cannot make otherwise incompetent evidence admissible.

In a recent Ohio case, *Bake* v. *Indus. Comm.*,[19] the court invoked what, in Ohio, has been called the *res gestae* rule—which rule the court states is "an exception to the elementary rule of evidence excluding hearsay." The statement sought to be introduced in evidence in this action to obtain Workmen's Compensation was one made by the deceased to the testifying witness that, during the day, he (deceased) "had hurt himself lifting a crate of head lettuce . . . in the kitchen of the Oxford College." *Held:* the statement was not admissible because not "part of the *res gestae*."

[18] See Hutchins and Slesinger, *Some Observations On The Law of Evidence* (1928) 28 Col. L. Rev. 432, where the writers speak of psychological tests which have been made tending to show that shock and nervous excitement impair the powers of perception. Their conclusion is that "psychologically speaking, hearsay is inadmissible, especially (not except) if it be a spontaneous exclamation.

[19] 135 Ohio St. 627, 22 N.E. (2d) 130, 15 Ohio Op. 7 (1939).

The statement was hearsay since it was offered for its truth—that is, to prove that the deceased hurt himself lifting a crate of lettuce because he said he did.[20] If it is to be admitted it must be because it comes within an exception to the hearsay rule. It does not come under class seven, *supra,* because there was no startling event and the statement was not spontaneous. Class six is not applicable because the statement did not accompany an independently material act. The "mental condition" exception (class five) cannot apply because (1) it is not a statement of present pain or suffering and (2) it relates to the cause of the injury.[21] The obvious conclusion is that the statement is not admissible.

The same result was reached in *Dugan* v. *Indus. Comm.*,[22] in respect to a statement of the employee that "he had slipped and fallen." This statement was made to his physician at least two hours after the fall. Again, the hearsay statement failed to comply with the criteria of any exception to the hearsay rule and was, therefore, incompetent.[23]

In both cases the *res gestae* rule was said to require, not strict contemporaneity, but rather that the statement be "in the nature of an exclamation," the competency of which "depends primarily upon having been spontaneous or impulsive and not a narrative of a past event."

While spontaneity is important in some of these situations, it seems obvious that no one thing can be essential for all the heterogeneous mass included in the term *res gestae.* The competency of an utterance can best be determined by first deciding whether it is or is not hearsay, and if hearsay, whether it comes under any recognized exception to the hearsay rule.

R. H. S.

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[20] 3 WIGMORE, note 17, *supra,* sec. 1746. At page 737 it is stated: "The hearsay rule . . . forbids the use of an assertion, made out of court, as testimony of the truth of the fact asserted. . . . Whenever, therefore, an utterance is used as testimony that the fact asserted in it did occur as asserted, that is, on the credit of the speaker as a credible person, it is being used testimonially, and is within the prohibition of the hearsay rule."

[21] The general statement of the exception is that declarations are admissible in evidence when they relate to present pain and suffering, that is, pain existing at the time the declarations are made; but the statements are not competent if they relate to the cause of the pain or suffering. *Lake Shore & Mich. Southern R. R. Co.* v. *Yokes,* 12 Ohio C. C. 499, 5 Ohio C. D. 599 (1895); *Indus. Comm.* v. *Strassel,* 11 Ohio App. 234, 30 Ohio C. A. 460 (1919). But *contra* as to statements relating to the cause of the pain made to a physician within a short time after the cause: *Hartley* v. *Model Dairy Products Co.,* 25 Ohio L. Abs. 146 (1937); *Baker* v. *Indus. Comm.,* 44 Ohio App. 539, 186 N.E. 10 (1933); *Dabbert* v. *Travelers Ins. Co.,* 2 Cin. Super. Ct. 98 (1871).

Wigmore justified the exclusion from the exception of declarations relating to the cause of the pain: "Statements of external circumstances causing the injury, namely the events leading up to it, the immediate occasion of it, or the nature of the injury, do not satisfy the Necessity principle, because they do not relate to an internal state, and thus other evidence is presumably available; moreover they have not the usual Guarantee of Trustworthiness because they are not naturally called forth by the present pain or suffering." 3 WIGMORE, EVIDENCE (2d ed. 1923) sec. 1722.

[22] 135 Ohio St. 652, 22 N.E. (2d) 132, 15 Ohio Op. 17 (1939).

[23] See note 21, *supra.* The statement was not within the "mental condition" exception because it was a statement of the cause of the injury; also, it was a statement as to a past fact and not a present one.