THE ADMISSIBILITY OF DECLARATIONS AS PART OF THE RES GESTA.

Much of the confusion in the cases dealing with the admissibility of declarations as part of the res gesta arises from the different uses to which the phrase has been put by the courts. The term res gesta is used indifferently to denote various conceptions—among others:

1. Those occurrences or facts to which as a whole the law attaches legal consequences, and so, of course, open to investigation as a whole.¹

2. Similar to this, it is used to indicate that a series of occurrences are part of one transaction, all parts of which are actuated by the same motive or intent—so making any competent exhibition of intent governing one part, evidence that the same motive also actuated every other.

3. It is used to indicate the extent of the business or transaction about which two persons are legally identified

¹ There is also a loose use of the term denoting a fact undoubtedly relevant—a sort of higher relevancy—the distinction between kith and kin.
with one another, and so defining the limit of responsibility of the one for the acts and statements of the other.

4. It indicates—and this is perhaps the typical use of it—those attending circumstances of any fact whenever provable, which are necessary to properly understand it, which show its true nature, which are inseparable from it, without which a recital of the fact would be inadequate and misleading—proof of such concomitant circumstances being allowed though some of them if they stood alone would, as hearsay, be incapable of proof by the witness to such fact.²

It is as to this last conception as admitting declarations in this sense part of the res gesta that the cases are most in conflict.

On first glance it would appear to be an exception to the rules against hearsay. It is at least doubtful if it is so. The rule against the admission of hearsay testimony prevents the use of a statement of one not called as a witness as proof of the facts narrated therein.

Proof of words spoken or written is very often entirely consistent with the rule. That words are spoken, and what those words are, may be the very fact in issue, as in cases of slander or contract. It is the speaking of the words or the writing of them which affects the legal rights and liabilities of the parties to the litigation, irrespective of the truth of any facts which they may recite. So the fact that a statement has been made may equally be a relevant fact; as to establish knowledge of a fact already shown to exist. In neither of these cases can the statement be used to prove the fact therein recited, unless they fall within some recognized principle of exception to the rule against hearsay, or unless offered against the party making it, and if the fact which they recite is a necessary element of the case, the court will hold that the party bound to prove it has not met the burden imposed on him, if this be his only evidence. Of course once in, it is difficult, in fact impossible, to prevent it from influ-

²There is, as will be seen, a use of the term to denote narrative statements admissible in some jurisdictions because made under the immediate impression of the fact which they recite, and so far from any suspicion of fabrication—this last is a pure exception of hearsay. This is distinct from the last conception, but the distinction does not appear to have been noted by the courts who have introduced this use.
AS PART OF THE RES GESTA.

...encing the jury. This is an incidental and unavoidable evil, which since it cannot be cured must be endured.  

The chief characteristics of the various exceptions to hearsay are two: The necessity of providing against a failure of direct proof which is inherent in the type of question presented or the kind of fact to be proved.

2. A probability of truthfulness arising out of the circumstances under which the statement is made, which supplies the lack of the sanction of the oath and the at present much more effective guarantee of accuracy, the test by cross-examination.

As to the first. Of course the mere impossibility of proof of an essential fact otherwise than by hearsay in any particular case is not sufficient; to so hold would be to admit hearsay whenever important. Nor is it enough to exclude hearsay properly admissible under any recognized exception that other and direct evidence of the facts exists.

The necessity is one general to some broad class of question or inherent in the proof of some type of fact. It is only the most urgent necessity which will cause the courts to admit such an exception and in no other branch of the law is its conservatism more apparent; its inertia more difficult to overcome.

The law of evidence is full of such instances; the mere possibility of misuse will not render evidence proper for any purpose inadmissible, as where evidence of a previous crime may be proved to show motive, though no doubt the jury can scarcely fail to be prejudiced against the accused thereby.

Roddy v. Com., 184 Pa. 274.

Pedigree is an instance of the first, a question hardly ever capable of direct proof. The thousand and one details of business, readily forgotten, in fact almost incapable of distinct recognition, usually entered in some permanent form as in a book or memorandum, and then put out of mind, is an instance of the latter.

In both cases, having excluded any object for fabrication by showing that they are made ante lite motam, the probable truth is established because in the first case they are statements by a member of the family, and so relate to a matter within the declarant's own knowledge, and one as to which he may be expected to speak truthfully; and in the second, because they are either against the pecuniary or proprietary interest of the declarant or because they are entered in pursuance of a duty to others which requires an accurate record of such facts, and so the declaration becomes admissible.
However, it is doubtful if any contemporaneous statement of an existing fact is to be regarded as hearsay. Still less obnoxious to the reasons for the exclusion of such testimony, are declarations offered not as proof but in explanation of existing facts.

A statement accompanying an admissible fact is not from its mere coincidence in time therewith *ipso facto* admissible, it is admitted if and because it qualifies and explains—in short shows the true quality of the act it accompanies. It is the fact as so explained which is in reality the evidence admitted. That the statement may, besides explaining its accompanying fact, also be probative of and so influence the jury in regard to some other matter is purely incidental. If it does not explain the principal fact it cannot be admitted, no matter how closely in point of time it accompany it and no matter how vital the fact which it states. It is admitted not as or because proof of the facts recited therein, but as a contemporaneous statement showing the quality of the act it accompanies. Historically, it is submitted that declarations explanatory of a relevant fact, were not originally admitted as exceptions to hearsay but as a natural part of the story of a competent witness at a time when the competency of a witness was the sole test of the admissibility of his story, long before his testimony was subject to scrutiny piecemeal.

The admission of a witness to testify at all, was itself exceptional. As a rule the jury knew in a general way of the occurrence. It was only where the witness had that special knowledge of a fact which comes only from having seen or heard it, that he was allowed to testify to it, in order to add to the general gossip of the community his special knowledge so acquired—in short, his position was analogous to that of an expert who brings to the assistance of the jury his scientific knowledge to aid and not to control them in forming their opinions upon matters as to which the ordinary man, and so the jury, unaided is unable to form an accurate judgment. The early witness, in a word, was an expert in the facts—his testimony did not supersede

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*Subject of course to this, that he could not be allowed to ramble on about matters as to which he was not called as witness.*
nor control the jury’s finding, they could still find upon their general knowledge as neighbors in the very teeth of the witness’s story. Then, too, the witness was often only called in corroboration of the story told by the counsel for the parties who indulged in long narrative statements of the facts constituting his client’s cause, this too often called “evidence”; and often the witness would be merely present and referred to as ready to corroborate the story of counsel. But once a witness competent as to a fact he could tell all he knew of the fact. There was no way of objecting to any part of his story which related legitimately to the fact and was part of his knowledge thereof. Thus it is laid down in *Style’s Practical Register* (1670), 173:

“A person that may be admitted as a witness at a trial may give words in evidence to the jury which were spoken to him by another person who by the rules of the court might not be admitted as a witness at the trial. Mich. 22 Car. 1646, B. R.” “It is lawful,” says the editor, “for one that is admitted as a witness to give anything in evidence which may concern the matter in question.”

It would be impossible, in the space of this article, to trace the change, whereby the propriety of a means of proof has, from being a question primarily of the competency of the witness, come to the modern conception that the test is the logical relevancy of his story and its possible infringement in whole or in any part upon some definite fixed rule of exclusion.

In no branch of the law has the conservatism of the courts been more apparent than in the law of evidence. The courts have preserved usages long after the conditions from which they arose disappeared, and have often in forgetfulness of its origin had recourse to reasons for its continuance, which would be far from convincing for its original adoption were the question new.

When the rule against hearsay, with its exception, was taking form, the courts found the witness testifying as a matter of established practice to the whole of the transaction both what was done and what was said, and it was to justify the continuance and not to introduce the practice that the court held such evidence admissible as *pars rei gestae*.
To properly understand their reasoning in support of its admissibility as such, it must be remembered that it had been admitted as a matter of course long before the term *res gesta* was used, and long before it was thought necessary to explain its admissibility by any reasons whatever. In fact every change which has been made has been restrictive. The court having greater power over the witness has used it to compel him to restrict his story to those things which were not only being said and done during the continuance of the fact as to which he was witness, but were also necessary to its proper comprehension for the purposes of the trial.

Similarly are statements of an existing mental or bodily condition to be regarded as exceptions to hearsay or are they themselves original evidence of such condition?

Such bodily or mental conditions may be proved by contemporaneous oral or written declarations, because they are the natural exhibitions of existing conditions and as such original evidence thereof. "They are as direct evidence of the fact as his own testimony that he had such intention would be were he alive. After his death there can hardly be any other way of proving it, and while he is still alive his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander’s recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation. The letters were competent, not as narratives of facts communicated by the writer to others, but only to show his then existing intention." Gray, J., *Hilmon v. Ins. Co.*, 145 U. S. p. 295.

"The usual expression of such feelings (bodily and mental) are original and competent evidence. They are the natural reflexes of what might be impossible to show by other means. Such declarations are regarded as verbal "acts and as competent as any other testimony." Swayne, J., *Ins. Co. v. Moseley*, 8 Wall. p. 404.

In *Trefethen v. Com.*, 157 Mass. 180, it is said that the declarant was dead and could not, therefore, be called to testify directly, and that there existed no reason for fabrica-
tion. There was no expression of opinion as to the effect upon the admissibility of this evidence had these elements been lacking. Their presence was stated as showing that in the case in hand there could exist no objection on the ground that more direct evidence was withheld, or that the source of proof was untrustworthy.

If the evidence were admitted as an exception to hearsay both of these elements would normally be prerequisites to its admission. If, on the contrary, the statements were original evidence as the natural exhibition of such feelings, then the absence of such elements would only affect the weight of the evidence, but could not exclude it.

In *Elmer v. Fessenden*, 151 Mass. 359, statements of workmen to show their knowledge of dangerous condition created in a business by defendant, and that they left the plaintiff's employment on account thereof, were admitted, though no doubt some or most of the workmen could have been produced in court.

In *Hilmon v. Ins. Co.*, 145 U. S. 285, though in fact the declarant was dead, Mr. Justice Gray expressly said that even the recollection of the party as to his pre-existing state of mind was less likely to be accurate than a letter exhibiting it as a present existing condition. And in cases of physical injuries the statements of the sufferer indicating pain, whether made to a layman or physician are customarily admitted though the injured person himself testifies in court. In addition, as is pointed out in *Hilmon v. Ins. Co.*, the expression of such a feeling by action, as by a grimace or gesture is but a statement of it by the party feeling it. True it is a statement in a popular sense verified by action, but if a statement be not admissible standing alone, it does not become so because the declarant manifests his good faith by acting upon it. Nor can such action be admitted where it but amounts to indirect, though perhaps more forcible, assertion of the facts contained in the statement.

How far the absence of motive for fabrication may be important presents, perhaps, a different question. In both

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The admissibility of declarations

Trefethan v. Com. and Hilmon v. Ins. Co., the statements were made under circumstances negating any idea of motive therefor. In the first, this is expressly alluded to as excluding any possibility of objection to the evidence—in the latter it is statements made in the absence of such motive, which is spoken of as more valuable than the subsequent testimony of the declarant. Properly speaking, this should be of importance only as inducing the jury to attach no importance to statements not so made—and Gray’s remarks, in reality refer to the weight rather than admissibility of such statements and yet it is quite possible that there may be in the court sufficient discretion over the admissibility of evidence to reject not merely such statements, but any acts done as well where the circumstances show plainly that they were spoken or done merely to manufacture evidence to serve the declarant or actor. If the court has this power, and certainly for the ends of justice, and to prevent the jury being misled by prejudice, there seems every reason to allow them it—there seems no adequate logical reason for distinguishing between statements and acts, especially where they are offered to exhibit mental or bodily feelings.

A limp, an expression of pain, is indeed only an expression, a symbol of the bodily condition—perhaps more trustworthy—perhaps less easily assumed, but still readily capable of fabrication. Such statements usually accompany some noticeable physical condition, itself a proper mode of proving the illness, and so would also be admissible as explanatory of it and pars rei gestae thereof, but many ailments do exist which afford no external symptoms perceptible to a layman, often not even to a physician; in such cases it seems impossible that any sound distinction should be drawn between statements in regard thereto and statements in regard to intention and similar mental conditions; where the ailment usually exhibits itself in some patent physical effect, it may be proper to exclude the statement, unless corroborated by the presence of some such symptom, just as a statement of intention might be excluded if made under circumstances showing some motive for fabrication. The court would exercise their prerogative of excluding

from the jury evidence which they think harmful, but where no such corroboration is possible from the nature of the illness the absence of it does not affect the bona fides of the statement, in the absence of any other good reason for false speaking.

"A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words spoken or written. The nature of the fact is the same, and the evidence of its proper tokens is equally competent to prove it whether expressed by aspect or conduct, voice, or pen." *Hillmon v. Ins. Co.*

Upon this principle are admitted declarations of testators as to their testamentary intent, made before the will was drawn, to show undue influence; also, as in *Sugden v. St. Leonards*, L. R. i P. D. 154, to show the contents of a lost will proven to have existed; the inference being that a will if made would embody the testator's previously existing testamentary intent: but not declarations by the testator after the execution of the will, as to what he had done, such are at best but narrative of past intention already fulfilled by execution. Mellish, J., *Sugden v. St. Leonards*, *Woodward v. Gouldstone*, L. R. ii A. C. 469.

Such statements must, then, not be narratives of a past state of mind or body, but they are admitted if and because they are contemporaneous exhibitions of an existing condition, not because they are *pars rei gestae*; necessary to explain a fact itself relevant. If the condition of mind or body is by itself an independent relevant fact, they need not accompany any act, but "where the intention is only important as qualifying an act, its connection with that act must be shown." Gray, C. J., *Hillmon v. Co.*

This is capable of misapprehension. If it be taken to mean that the expression of it must be contemporaneous with the action—that it must be a statement made while acting, showing the object of such action, it would unduly restrict the admission of such testimony. What is meant is that the evidence must show that the intention, motive, knowledge, or whatever the state of mind may be, existed at the time of the action. If the motive be transitory, as sudden anger or fear, it must be exhibited as existing very
THE ADMISSIBILITY OF DECLARATIONS

near to if not exactly at the time of action. If the intention is fixed, or the mental or bodily condition permanent, the time of its exhibition may be farther removed. The question presented is this: in view of the nature of the mental or bodily condition, is it a fair inference that it continued from the time of its exhibition until the time of action? Here the term \textit{res gesta} is often employed to indicate the time limits during which the condition may be taken to continue the same— the limit during which the condition of the person is open to investigation to show the true quality of his acts.\footnote{The second meaning stated at the beginning of this article.}

The same use of the term of \textit{res gesta} is found in the bankruptcy cases in England, which have led to such confusion, and which have formed the main reliance of those who have sought for an extension of the rule of \textit{res gesta} to embrace everything said by a party to a transaction long after the fact to which it relates is over.

An act of bankruptcy, an act done with intent to delay creditors, was a fact necessary to be proved in every case to show the assignee's right to sue. One form was absenteeing the realm. "The motive of the party in departing the realm constitutes an act of bankruptcy."\footnote{Park, J., in Rawson v. Haigh, 1824, 9 J. B. Moore, 217. Also 2 Bing. 99.}

So in \textit{Rawson v. Haigh},\footnote{2 Bing. 99; 9 J. B. Moore, 217.} letters sent while abroad which showed such motive, were held to be admissible. Park, J., denied that such declarations must accompany the act whose quality is to be determined. "The court is to judge from the circumstances of the particular case. We need not say that declarations made a month or even a shorter period after the act was completed might be admitted; but here there are connecting circumstances, and the letters may be considered as written during the continuance of the act complained of."\footnote{In 2 Bing., this passage is quoted as follows: "We need not go to the length of saying that a declaration made a month after the fact would be of itself admissible, but if as in the present case, there are connecting circumstances, it may even at that time form part of the whole \textit{res gestae}."}
"The letters must be taken as connected with the bankrupt's state of mind at the time when they were written "and admissible for that purpose" (i.e., to show such state of mind then existing) "as well as to show the intent of his "departure."

Much subsequent confusion would have been avoided had he, instead of saying "as well as to show the intent," said and shows the intent of his departure because written during the continuance of the act complained of, while the mental state continued the same.

Best, C. J., said: "The going abroad was of itself an equivocal act and requiring explanation, and if so we must endeavor to discover the motive with which it was accompanied, and this is generally, if not always, effected by declaration of the party himself; declarations or letters written at any subsequent time, however distant, cannot be admitted; they must be made or written at the time or during the continuance of the act or urgency of the circumstances under which they were elicited or sent. Here the act of bankruptcy was a continuous act from the time of leaving the country for France and was confirmed and completed by remaining there, and as the letters were written during the stay in that country, they may be considered as forming part of one continuing and the same act." It is to be expressly noted that the letters were not offered to prove any past act done by the bankrupt, but to prove the motive actuating an act already proved.

In Baily v. Bateman, 5 T. R. 512, 1794, the earliest case of the sort, it was said: What an alleged bankrupt "said at "the time in explanation of his act may be received in evi- "dence. Whatever he says before his bankruptcy is evi- "dence explanatory of the act done by him. Here, he ab- "sented himself from home under suspicious circumstances "for which his reasons were asked and without doubt it was "competent to inquire of the witness to whom he com- "municated them what those reasons were."

23 Lees v. Martin, 1 Rob. 210, 1832, Parke, B., acc.: "The statement "must be made while absenting himself or immediately on his return "to be admitted as part of res gesta." It must exhibit an existing pur- pose, which is the same throughout, the whole being one continuous act.
The statement was made immediately on his return home. The absence from home was one inseparable whole, the setting out, the remaining away, and the return, which completed it; all pervaded by the same motive.

One sentence in the opinion opens an instructive field for speculation—the statement that any statement made before bankruptcy is evidence explanatory of the act done by him.

So in Robson v. Kemp, 4 Esp. 233, 1802, Lord Ellenborough said: "If the declarations of the bankrupt have been before the act, they may show with what intention it was done, and it would be evidence. But declarations and conversations taking place subsequent to the commission of the act of bankruptcy are not admissible."

If this means that a statement of an intention to defraud creditors not accompanying any act may be shown to prove such intention as an existing mental condition, and, such intention being shown to exist, that any subsequent equivocal act of a sort appropriate to carry such intent into effect should be referred thereto, but that a statement of a past motive for a completed act is a mere narrative statement of such a state of mind, and so inadmissible to establish it as affecting the quality or nature of the act, it states the effect of the case of Sugden v. St. Leonards as qualified and explained in Woodward v. Gouldstone.

In both Rawson v. Haigh and Bateman v. Baily, the journey was one continuous whole—the start, the stay and the return, all referable to the same motive. There was no new journey ascribable to new motives, the same purpose which prompted its inception must also have caused its continuance, and the abandonment of it must have led to its close.

In the attempt to bring together under some common principle the cases in which the term res gesta has been used to indicate diverse ideas, these cases have been made to stand for the principle that to include a statement as the contemporaneous qualifying context of some provable fact, it is but necessary to show that the fact was part of a continuous transaction still going on when the statement was made. The fact, as it were, is to be elongated and carried
over to include a later statement reciting it and all because the two form part of one consecutive whole. This is sometimes expressed as follows, that the inquiry is not to be directed to ascertain after what lapse of time an admissible statement may follow the fact, but whether the fact cannot be stretched out by means of this principle of continuous transaction to reach and include the statement.

The fallacy lies in this: in the bankruptcy cases the statements are not admitted because accompanying, through the connection of a continuous transaction, the fact of leaving home or because in any such sense they are pars rei gestae of it; they are admitted because they show a motive, an intent, the proved existence of which during any part of the transaction is evidence of its existence during all other parts thereof, because the whole is but one transaction, actuated by the same intent. The whole journey is res gesta to this extent, that the mental condition of the actor at every stage is the same and so is open to investigation to prove his intent at any particular point thereof which may be in issue.

Where knowledge of a fact is necessary to be proved, generally its exhibition must precede the point of time in issue, for knowledge may be suddenly acquired after the event. Whether bodily condition may be exhibited after the time in controversy depends in its nature whether a slow growth, or the result of sudden accident.

In matrimonial causes, the state of affections during a long period is under investigation, to show their nature, whether proper or improper at the precise time in question, evidence may be given of any expression of them by word or act within a wide range of time.

The case of Cattison v. Cattison, 22 Pa. 275, is very similar to the bankruptcy cases: a woman appears at midnight at a neighbor's door; to explain her presence at that hour so dressed, she says she has fled from her husband's cruelty; this is admissible not because, the whole flight being one continuous transaction, the statement is thus drawn to and made contemporaneous with the cruelty—not because while flying the continuity of events was unbroken,

and thus no chance for concoction was presented,¹⁵ for, had she wandered the entire night and then in the morning asked for succor, her reasons for her position could still be given in evidence; but because the flight was so far one transaction that the same fear, the same motive must be taken to exist at all parts of it, and its proof at one time prove its existence at every other point of time during the continuance of such transaction. It was admissible because it explained her presence at the neighbor's, it was important because it accused her husband of cruelty.

This is practically the same principle on which, in cases of fraud in the purchase of sale of property, evidence of other frauds of a similar character committed by the same parties at or near the same time are admitted; because, as was said in Lincoln v. Clafin, 7 Wall. 132, "the inference "is reasonable that they proceed from the same motive."¹⁶

Field, J., p. 138. They, in fact, all form part of one greater fraudulent scheme.

True, the evidence admitted was of acts done, but the acts were only admissible because they tend to show a fraudulent purpose at the time of their commission, and so through the identity of motive throughout, go to prove the fraudulent nature of the sale in issue.

A quite distinct use of the term is that expressing the extent of a business about which two or more are legally identified.¹⁷

The cases in which this use occurs are those of agency, either actual or constructive, as that which exists between the members of a band of conspirators, whereby each is the agent of all in doing whatever is appropriate to the furtherance of the common illicit purpose. It is sometimes said that the acts of all the conspirators throughout are the res gesta. What all do is the act and so the crime of each, and when each is tried, it is for the acts of all; it is in this sense that the whole conspiracy is open to investigation as the res gesta, though but one conspirator is on trial.

This is not peculiar to conspiracy; it pervades the whole

¹⁵ The test in Com. v. Wernitz, infra.
¹⁶ See also Meyer v. People, 80 N. Y. 264.
¹⁷ The third meaning stated at the beginning of the article.
law of agency, of master and servant—in fact, the conspiracy raises the agency, or perhaps more accurately it, like agency, or the relation of master and servant, creates such a legal identity and responsibility as to all acts done or words spoken in furtherance thereof, as does agency for similar things, within the proper limits of authority, or the position of servant for what is said and done in the course of employment.

Under this conception of res gesta, an act is admissible or inadmissible on the same terms exactly as a statement, the sole test for either is whether it is appropriate to further the common object, not whether made during the pendency of the conspiracy; it is not an identity as to all acts during the time limits of the conspiracy—only as to such as are appropriate to effect its object.

So in agency, the test is the limit of the agent’s power; so also in cases of master and servant, it is the range of the servant’s duties which determines.

As a rule, in conspiracy both words and acts are necessary to success. In agency, the agent is generally empowered to speak as well as act, sometimes to act only. Servants are generally employed to act, not to talk, though sometimes their position may require both.

The question so far treated is the power of the conspirator, agent or servant to speak for the co-conspirator, principal or master, to bind him directly by his speech unaccompanied by any act, that identity which makes the admission of the one the admission of the other.

In addition, many statements are admissible, not because they fall within the scope of the agent’s powers, but because they accompany and explain acts which the agent is empowered to do. They are admitted not to bind the principal directly, but to show the character of the act, which so explained binds the principal.

As was well said by Chief Justice Tilghman in Magill v. Kaufman, 4 S. & R. 321, 1818: “An agent is authorized to act, therefore his acts, explained by his declarations during the time of action, are obligatory upon his principal; but he has no authority to make confessions after he has acted, and therefore his principal is not bound by his confessions.”
The latter part of this taken as a statement of the law of agency generally is too narrow; he may have authority to make confessions, or perhaps more accurately explanations, of what he has, as agent, done; this depends on the nature of the business entrusted to him, on what, in this sense, is the *res gesta*. So in *Morse v. Connecticut River R. R.*, 6 Gray, 450, the statements of a baggage-master and station-master accounting for the loss of a trunk were held admissible though no part of the *res gesta* of the loss, because it was "the duty of these agents to deliver the "'baggage and account for the same if missing."

Such a duty is exceptional, however, and, as a rule, statements of agents must either be in furtherance and not explanation of the master's business, or they must accompany acts themselves within the scope of the agent's or servant's employment, in which case they are admitted simply as part of the *res gesta* of such acts. In those courts where the term *res gesta* is used also as indicating those acts of the agent for which, as a whole, the principal is responsible, the business about which the two are identified, both forms of statement—those directly binding the principal and those which do so indirectly only by showing the true quality of the act which, so explained, binds him—will often be admitted as part of the *res gesta*; thus confusing under one head statements admissible whenever made with those only admissible when contemporaneous with some act done.

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18 Under the fourth use of this term indicating those facts and statements forming an inseparable part of the main fact, and necessary to a proper understanding of it, and subject to all the requirements thereof.

19 Take this case for instance,—an anarchistic conspiracy,—the following evidence offered: (1) a confession made to a policeman during the pendency of the conspiracy, of steps already taken; (2) a similar statement at the same time made for the purpose of convincing a possible recruit of the success of the project, and so of securing his services; (3) a boast as to the intentions of the conspirator; (4) a similar statement of intention, but made while throwing a bomb.

The first would be inadmissible, it having no tendency to further the common object. The second admissible, because appropriate for that purpose. *U. S. v. Gooding*, 12 Wheat. 460. These depending on the fact that all things appropriate to carry out the common object, make up the overt act for which all are legally responsible. In this
What, then, are the principles which determine the admissibility of such contemporaneous statements? Two views with some slight variants have been held.

1. That only those statements which in point of time accompany an act actually in progress and which are necessary to explain its true nature are admissible as part of the *res gesta.*

2. That any statement narrative of a fact made so immediately after it that there is no chance for concoction or error in memory is admissible as part of the *res gesta,* and that where a condition is in evidence, not merely evidence explaining its nature, but also narrating a very recent cause therefor, is admissible.

In Bedingfield's case, a trial for murder, 14 Cox, C. C. 341, Lord Cockburn, C. J., after consultation with Field and Manisty, JJs., rejected evidence of statements of the victim, made not more than two minutes after the occurrence and while the blood was gushing from her cut throat, and while seeking aid to stanch her wound. The statement was this: “See what Bedingfield has done to me.” “It is not so admissible” (as *pars rei gestae*). said he, “for it is not part of anything done or something said while something was being done. but something said after something done. It was not as if, while being in the room and

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20. This appears to be a recognition of the old established practice which allowed, because it could not prevent, a witness to testify to the whole of a fact; everything which, while a witness of such fact, he perceived in any way, by sight or hearing, but which excluded anything occurring after the fact was over, for at that moment he ceased to be a competent witness and had no standing to speak in evidence at all. This view is supported by at least two English cases and substantially by the Supreme Courts of New York and Massachusetts and probably at present by the Supreme Court of the United States.

21. This view is supported by two Nisi Prius cases in England, by the Supreme Courts of Pennsylvania and New Jersey and probably by the majority of the American State Courts, and for a time at least by the Supreme Court of the United States.
while the act was being done, she had said something which was heard.” Here the statement was made “after it was all over, whatever it was, and after the act had been completed.” Under this view a statement narrative of a past fact could not be admitted as *pars rei gestae* of that fact, no matter how soon after made—only statements which both accompanied and gave color to a fact could be so admitted.22

In *Agassiz v. Tramway Co.*, 21 Weekly Rep. 199, Mr. Baron Bramwell says: “If the question had been 'Did you hear the conductor say anything?' her answer being, 'Yes, I did,' and neither had been allowed, I would say that the court was right; the question was put with a view to getting hearsay evidence from a man that might render persons liable whom he had no right to bind.” The remark was made just as the plaintiff had disentangled herself from the wreck of the tramcar.23 “It is impossible to admit the remark as part of the *res gesta*—it was in no sense one of the surrounding circumstances; the *res* were all *gestae* by the time the remark was made, and the plaintiff’s cause of action was quite complete without any such words, which indeed for all they had to do with the accident might as well have been spoken when the car had been taken back to the stable.”

The statements then must be made while the act is being done, they must relate to it and tend to explain it.

In New York the leading case is *Waldele v. R. R.*, 95

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22 And so Pitt Taylor gives as his fourth rule as to admissibility of declaration as part of the *res gesta* the following: “That an act cannot be varied, qualified or explained by a declaration which amounts to no more than a mere negative of a past transaction, nor by an isolated conversation, nor by an isolated act done, at a later period.”

However, a statement which tended to explain the true nature of the fact it accompanied, if such explanation was necessary to a proper understanding of the fact for the purposes of proof in the case in hand, would not be inadmissible because narrative of some other prior event. If the fact were unequivocal, if it needed no explanation, if its probative effect were not altered by the explanation afforded by contemporaneous statements, such statements would of course not be admitted. (See also note at the end of this article.)

N. Y. 274, in which the earlier cases are collected and commented upon. The first is *Luby v. R. R.*, where the conductor of the car immediately after the accident, while getting off the car and out of the crowd that surrounded him, was asked why he had not stopped the car, and answered that the brake was out of order. The case was reversed on appeal because these declarations were admitted, the court saying: "The statements were no part of the driver's act for which the defendants were sued. It was not made at the time of the act so as to give it quality and character. The alleged wrong was complete and the driver when he made the statement was only endeavoring to account for what he had done." "To be admissible they must constitute the fact to be proved and must not be the mere admission of some other fact." Comstock, J.

In *Whitaker v. Eighth Ave. R. R.*, 51 N. Y. 295, an action for injury caused by the willful act of defendant's driver in running into plaintiff and throwing him into an excavation, it was held on appeal to be error to admit evidence that immediately after the car had passed, the driver had cursed plaintiff and said "Let him fall in and be killed," because, being made after the car had passed and the injury done, it was no part of the *res gesta*. In *People v. Davis*, 56 N. Y. 95, an indictment for abortion, the woman was dead and it having been shown that she had gone away with the defendant in a buggy, a statement made on her return as to what the doctor had done and said to her in the interim was on appeal held inadmissible, Grover, J., saying: "The *res gesta* was at the doctor's office in another town, and it is clear that its narration was no part of that thing. Anything said accompanying the performance of an act explanatory thereof, or showing its purpose or intention, when material is competent as part of the act.

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24 In *Hamilton v. R. R.*, 51 N. Y. 100. Also cited abusive remarks made by a conductor while refunding an extra fare paid by the plaintiff at the time of his wrongful ejection some hours before, was held incompetent to prove the *quo animo* of the ejection. The ill will of the conductor might readily have arisen since the ejection, in fact it probably grew out of the plaintiff's conduct then and afterward.

25 If it is to show its intention undoubtedly it need not be precisely contemporaneous with the act, it is enough if it be made while the
But when the declarations offered are merely narratives of past occurrences they are incompetent."

In *Casey v. R. R.*, 78 N. Y. 518, a child had been run over by a car, the acts and statements of the engineer while extricating the body of the child from the wheels were held admissible as part of the *res gesta*. The two New York cases cited in favor of admission of the testimony in the Waldele case were *Swift v. Ins. Co.*, 63 N. Y. 186, and *Snicker v. People*, 88 N. Y. 192. In the first, the insured, to explain his evident bad health, had said he was suffering from scrofula. Shortly after he stated to the company's medical examiner that he was not aware of any disease. Medical testimony showed that he had died of chronic scrofula. His first declaration was held competent to prove that the representation by which the insurance was procured was false to the knowledge of the insured. This was admitted not as part of the *res gesta* of the examination, but as a statement showing knowledge of a fact proven to exist; when such knowledge is material, any statement made so near before the time of examination as to exclude the possibility that the knowledge had been forgotten was admissible; if made after, the knowledge might have been acquired subsequent to the examination and not have existed at that time.

In *Snicker v. People* it was held that what was done and said by a third party was sufficiently near in point of time to a certain command of the prisoner to the prosecutrix and had sufficient relation to it to be part of the *res gestae*, and might reasonably be inferred to be part of a common scheme to subject the prosecutrix to violence. That case was simply this, that upon the whole of the evidence, including the proximity in time, there was sufficient *prima facie* evidence of an illegal combination between the prisoner and the third person above, to subject the girl to

intention may be presumed to continue unchanged. See *supra*. And it is to this probably that his remarks in *Mosely v. Ins. Co.*, "that length of time between the act and its subsequent narration is not material," were directed.

* The headline is stated too broadly.

* It is probably not necessary that the statement should accompany any external symptoms of ill health. See *supra*, p. 195.
violence, to make the acts and statements of each admissible against the other as acts or statements in furtherance of the common object. As Earl, J., in the principal case says, these cases have no bearing on the present cases, in fact their only resemblance is that the term res gesta is used throughout.

Having thus reviewed and distinguished the earlier cases, he finds no difficulty in holding that where the action is for injuries negligently inflicted, "the res gesta was not the fact of the injury nor of the collision, these facts were apparent and undisputed." "The point of the inquiry was how he came to be struck. The manner of the accident was the res gesta and these declarations made after (in this case half an hour after) the accident had happened, after the train had passed from sight and the whole transaction was terminated, were no part of that res gesta,\textsuperscript{28} had no connection with it and were purely narrative. It has been well said the res gesta must be a res gesta that has something to do with the case and then the declaration must have something to do with that res gesta." In this case the declarations, he says, are "not made under circumstances that they are in any way confirmed by the res gesta,\textsuperscript{29} and they had no relation to what was then present or had just gone by."\textsuperscript{30} He then says: "Suppose the intestate had been found with a mortal wound freshly inflicted and he had charged that an individual, naming him, had thirty minutes before inflicted it. Would such evidence be admissible? Clearly not." Yet in the case of Mosely v. Ins., a similar statement was admitted and there was nothing to fix the time of the injury, if any, at any period less distant.

The court rejects the argument that there being a strong probability of their truth\textsuperscript{31} they should be admitted. The same may be said of many statements not under oath, which,

\textsuperscript{28} The idea of res gesta here is the occurrence as exhibited in its true light by surrounding acts and statements, the principal fact with its concomitant circumstances.

\textsuperscript{29} Here is a different idea; the res gesta is here the principal fact alone, or at best with its physical accompaniments.

\textsuperscript{30} This seems to mean, the statement is admissible though made at the moment the principal fact ended, else it conflicts with the earlier case cited with approbation.

\textsuperscript{31} Woodward v. Gouldstone, L. R. 11 A. C. 359, accord.
though made under circumstances entitling them to implicit confidence, do not answer the requirements of the law. "Declarations which are received as part of the res gesta are to some extent a departure from the general rule. And when they are so separated from the act they are alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to derive credit therefrom, they are no better than any other unsworn statements, depending entirely on the credit of the party making them."

The statements are not competent to explain the condition of the intestate when found. There was no question as to his condition; it was not to explain his condition, but to show what had caused it, that the statement was offered. "Such a statement if so admissible could not be excluded, no matter how far distant," so long as the results of the cause still existed.

In Massachusetts the court in Com. v. Pike, 3 Cush. 181, 1849, a statement of the victim, some little time after the assault sufficient to summon a watchman, but while she was lying in the place where she was injured, bleeding profusely, was admitted, the court, Dewey, J., saying: "The time was so recent after the accident as to justify the admission of the declaration as part of the res gestae." "Much must be left to the discretion of the presiding judge." This last phrase has become of great importance, having been embodied in the editions of Greenleaf on Evidence subsequent to it,32 and so has served to extend to the court a power wholly unrestrained by any governing rules to admit such narrative statements of recent events it may deem of service to the elucidation of the case.

The later cases in Massachusetts have, however, imposed a series of principles and tests by which the exercise of the court’s discretion is to be controlled and which would have excluded the declaration in Com. v. McPike. In Com.

32 In the edition of 1848, all the cases relative to res gesta are those which deal with statements explanatory of the intention or motive governing the act in question or with the subject of conspiracy, partnership and agency, and statements narrative of past occurrences are said to be inadmissible, § 110. The test constantly reiterated is that they be contemporaneous with the fact.
v. Hackett, 2 Allen, 136, a witness testified that at the moment of the affray he heard deceased cry out, "I'm stabbed," reaching him within twenty seconds he heard him say:33 "I'm stabbed. I'm gone. Dan Hackett has stabbed me." This statement was admitted only because "uttered in the presence of a person who was present when the blow was struck, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declarations or exclamations of the deceased may be fairly deemed a part of the same sentence as that which followed instantly after the stab. It was not an abstract narrative statement of a past occurrence depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact and receiving no credit or significance from the surrounding circumstances."

In Lund v. Tynsborough, 9 Cush. 36, it is said: "There must be a main or principal transaction and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporaneous with it and derive some degree of credit from it." And "a declaration having force by itself as an abstract statement detached from any particular fact in question, is not admissible in evidence, because it depends on the credit of the person making it and, therefore, is hearsay." This is quite sufficient to exclude any narrative statement no matter how soon after the event it is made; it depends on the credit of the party making it, although the short space of time may add to such credit by removing the chance of concoction.

In Massachusetts, it is worthy of remark, the term res gesta has never been used to indicate that similarity of circumstances which proves the continued existence of the same state of mind or body, at the time in dispute and at the date of the declaration exhibiting it. The question is said to be, in Bradford v. Com., 126 Mass. 42, whether a previous act (or similarly a declaration) indicates an existing purpose which from known rules of human conduct may be fairly presumed to continue over and control the doing of the act in question, it is admissible?

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33 This was not in response apparently to any question as to the cause of his condition, a reply to which would have been of course a narrative thereof.
The case of *Mosely v. Insurance Co.*, 8 Wall. 397, supports the second view, that even narrative statements of a past cause of a present condition made almost contemporaneously with the occurrence which it narrates are admissible. Clifford and Nelson, JJ., dissenting. As authority that declarations to be part of the *res gesta* need not be contemporaneous with the main fact the bankruptcy case of *Rawson v. Haigh*, and especially Park, J.'s statement therein, were relied upon. As has been seen, the bankruptcy cases deal with a different question and a different conception of *res gesta* from the one in hand. The point in issue in Mosely's case was whether the insured had died from the results of illness or accident. His wife testified that during the night he had left his bed between twelve and one o'clock. His son testified that about twelve he had found his father in the shop lying with head on the counter and had asked him what was the matter and that he replied that he had fallen down stairs. This answer was held properly "competent to prove the fall" as part of the *res gesta*. "Here," said Swayne, J., "the principal fact is the bodily injury. The *res gestae* are the statements of its cause made almost contemporaneously with its occurrence and those relating to the consequences made while the latter subsisted and were in progress." They are "the declarations which show the reality of its (the sickness) existence and its extent and character." Two things must concur: the consequences of the occurrence must still be in progress, and the statement must be almost contemporaneous with the cause thereof which it recites.

Do such declarations tend to show the extent and character of the consequences, in this case the illness, in any true sense, as they form part of the surrounding circumstances necessary to its proper understanding?

True they account for its existence, but it is only in the rarest cases that a knowledge of the cause can aid in a true

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84 See *supra*, for discussion of this case, pp. 196-197.
85 Professor Thayer objects very forcibly in this article on Bedingfield's case, *Am. Law Rev.*, Vols. 14 and 15, that there is no adequate proof of the time of the fall if it occurred and therefore no means of ascertaining how long after the statement was made.
perception of the nature of the consequence. A broken leg is a broken leg, whether caused by a trolley accident or a fall from a tree, and while sometimes it may help the diagnosis to know whether it is caused by one of the two, knowledge of how the fall or accident occurred, whether by the victim’s carelessness or that of the motorman, can be of absolutely no aid to either physician or juryman in ascertaining the present character of the injury. Such knowledge may gratify our curiosity, but it does not increase our knowledge of the nature of the injury. The court is careful to restrict statements narrating the cause of an existing condition to those almost contemporaneous with its occurrence. The declarations would seem rather to have been admitted as part of the res gesta of the cause of the illness than of the illness itself, because in fact almost contemporaneous with the origin of it. And the case is authority for the rule that where a statement is made shortly after a fact it narrates and while its consequences are in progress it is admissible as part of the res gesta.

The importance attached to the cases of Thompson v. Trevanian and King v. Foster, supports this view of the case. In Thompson v. Trevanian, Skin. 402, 1693, a nisi prius case, Lord Holt, in an action by the husband on behalf of his wife for injuries to her, allowed what the wife said immediately after the hurt and before she had time to devise or contrive anything for her own advantage to be given in evidence. The facts are not stated, it does not appear how great was the lapse of time, or to whom the declaration was made. What Lord Holt was mainly interested in showing was that while the wife was incompetent on the trial as interested, her statement made immediately after was not open to such objection, because no matter how great might be her interest and desire to misrepresent the facts to her advantage, she had had no opportunity to do so. It is apparently to the objection that the wife was an interested

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22 Lord Ellenborough in course of argument in Aveson v. Kinnaid, 6 East, 193, says, “as part of the res gesta.”
23 Compare his language with the extract from Style’s Register, written only twenty-three years before. Cited. Supra, p. 191.
party that the court's attention was directed. If Lord Holt meant to hold that any statement made by a party to the act or anyone having special means of knowledge if made under circumstances which preclude the possibility of fabrication, it is apparent his ruling has not been followed by English judges. If such a broad general principle had existed, there would have been no necessity for the formulation of those rules, rigidly enforced as they are, of exceptions to hearsay, which form so large a part of the law of evidence. Practically all evidence admitted thereunder would have come in under this broad general principle, together with much that has always been excluded. Jessel, M. R., did indeed attempt to lay down a much more restricted general rule of exception to hearsay in Sugden v. St. Leonards, L. R. i P. D. 154, but it was not accepted by his brother justices in that case and was expressly rejected in Woodward v. Gouldstone, L. R. xi App. Cases, 469. R. v. Foster, 6 C. & P. 325, was a criminal case, also at nisi prius. A witness who had not seen the accident, but who hearing the victim groan had gone to his aid, was allowed to testify to what he said in reply to an inquiry as to what was the matter. Gurney, B., said: "What deceased said at the instant as to the cause of the accident is clearly admissible." Park, J., said: "It is the best possible testimony that under the circumstances can be adduced to show what it was which knocked the deceased down."

Here appears Sir George Jessel's idea that where it is difficult to obtain other evidence, a hearsay statement made under circumstances doing away with the probability of concoction ipso facto becomes admissible. Whatever may have been the tendency of the courts at the time R. v. Foster was decided, it has been seen this idea has been thoroughly exploded as part of the English law. And these being the only reasons advanced for the admission after the

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*His test was as follows: (1) The case must be one in which it is difficult to obtain other evidence; (2) The declarant must be disinterested; (3) The declaration must be before dispute or litigation, so that it is made without bias; (4) The declarant must have peculiar means of knowledge. It may be well to remember that Jessel was primarily an equity judge where there is no jury to be misled.*
AS PART OF THE RES GESTA.

completion of a fact of a narrative statement of it, it would appear that such evidence would now be held inadmissible and that Baron Bramwell's statement in Agassiz v. Co. may be taken to state the modern English rule. In fact, in O'Brien v. R. R., 119 U. S. 99, the Supreme Court of the United States, though against a strong dissent, have held that a statement of a conductor as to the speed of his train made from ten to thirty minutes after the accident and while the wreckage was still strewn about was inadmissible. "It was," says Harlan, J., "a mere narration of a past occurrence:" a mere assertion of a matter not then pending and as to which the engineer's authority had been fully exerted. It is not to be deemed part of the res gestae, because of the brief period intervening between the accident and the declaration. The occurrence had ended when the declaration was made and the engineer was not in the act of doing anything which could possibly affect it. Field dissenting Fuller, C. J., Miller and Blatchford, JJ., concurring with him, said that evidence of declarations are admissible as part of the res gestae though not strictly contemporaneous with the main transaction, "When made under the immediate influence of the principal transaction and so connected with it as to characterize or explain it." Such an accident "would lead to great excitement among the passengers, and the character and cause of the accident would be the subject of explanation for a considerable time." This case places the majority of the court in full accordance with the strict English rule and marks the end of the influence of Thompson v. Trevanion and Rex v. Foster in the Federal courts.

These two cases, however, largely through the sanction given them in Mosely v. Ins. Co., have had a great influence upon the decisions in the state courts of the United States. They are followed to their logical conclusion in the case of Com. v. Werntz, 161 Pa. 591.

The court, Mitchell, J., says: "Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same transaction." He quotes with approval the test laid down in the American and English Encyclopedia of Law, 102, that declarations "if made under such circumstances as raise the reasonable
presumption that they are the spontaneous utterances of thought created or springing out of the transaction itself and so soon thereafter as to exclude the presumption that they are the result of premeditation or design, are admissible as part of the res gestae."

"The intervals of time (between the fact and statement) do not appear with exactness," he goes on, "nor are they material, for it is apparent they were not great and that the continuity of events was not broken."

This phrase has been seized on as the touchstone of admissibility, but to properly understand it, it must be read in the light of the above quotation from the Encyclopedia, and this sentence which follows it: "The declarations were made by the party best informed and most interested, and were made at a time and place and to a person and under circumstances which effectually exclude the presumption that they were the result of premeditation and design."

The continuity of events is one which prevents the possibility of concoction. It is not the mere sequence of cause and effect that must remain unbroken, it is not enough that the effect of the occurrence is plainly apparent. The continuity of events must remain in the sense that the overpowering influence of the principal fact must still continue. There must be no cooling space, no chance to concoct if the will to do so existed. The principal fact is still continued upon the mental retina of the declarant as an existing fact and there is thus little or no risk of that inaccuracy which comes from the re-creation of a past fact by a conscious effort of memory. This would appear to

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39 In addition Mitchell quoted a sentence from Wharton's Evidence, sec. 259, whose only effect is to double the existing "convenient obscurity" of the term and which adds nothing of value to the above quotation. "The sole distinguishing feature (of the res gestae) is that they should be the necessary incidents of the litigated act necessary in this sense that they are the immediate preparations for or emanations of such act and are not produced by the calculated policy of the actors."

40 In Fulcher v. State, 28 Tex. App. 471, a murder case, the victim was shot in the throat. Fifteen minutes after the shooting the witness gave him brandy and camphor to clear his throat of the blood which had previously prevented him from speaking, and fifteen
be the meaning of an unbroken continuity of events, of the statement that it is a matter for the court to determine from the particular facts before it whether the whole is one continuous transaction. Such a rule of admissibility of statements as *pars rei gestae* is a pure exception to hearsay.

These statements are not necessary to the proper understanding of the fact they accompany. They are purely narrative of a past event, which, it is true, may and probably has caused the condition existing when they are made. The probability of accuracy, the practical impossibility of concoction and the great advantage of allowing proof of practically contemporaneous statements, these are the considerations which lead the courts to waive the usual guarantees of oath and cross-examination.

In *Com. v. Werntz*, three statements, all to the same effect, were made, one at practically the very time of the assault and while still in the election booth where it occurred, the second while being removed to an adjacent drug shop (both admitted without objection), and the third (excluded by the court below) made in the shop while the wounds were being dressed. The witness had heard all three, he had heard the scuffle, had helped in the removal and was himself dressing the wounds. The continuity mentioned was that onward rush of events which prevented a clear retrospect of the occurrence and which continued the impression of the fact upon the mind of the victim.
The change of place alone was not enough to break the continuity, the spell or influence. Change of place is like lapse of time an element, and it is for the court to say whether either or both are sufficient to free the mind from the overpowering impression of the occurrence. Change of scene often breaks the impression, as see the two cases of Ogden v. R. R., 23 W. N. C. 191, and Lyons v. R R., 129 Pa. 113, and the fact that the statement is made on the spot and in the presence of the physical after-effects of the accident is always an element for the court's consideration.

In Com. v. Wernts as has been seen, first, the witness, who heard the statement, was within hearing of the affray and probably heard it, and so in a sense was a witness as to both the fact and the declaration and second, the declarant was a party to the affair.

Is either or both of these essential? As to the first, in Van Horn v. Com., 188 Pa. 143, similar statements were admitted, the boy who had heard them not having perceived anything other than the wounded condition of the woman when she made them to indicate that a crime had been committed or the time of its commission. The wounds spoke for themselves, the statement was not necessary to explain their nature and so to show her physical condition. It was a narrative statement of the past cause of a perfectly apparent condition. This is a logical result of the reasons set forth in Com. v. Wernts for admitting such statements. They are admitted not as necessary to the proper understanding and therefore an inseparable part of the fact, which the witness having perceived is narrating to the jury, but because the declarant had no opportunity for mistake or concoction and her statement was, therefore, presumptively true, and if true, was undoubtedly of great value. Of course there must be some evidence both of the principal fact and of the time when it occurred, in order that the statement may be seen to be made under its unbroken influence, but as in Van Horn v. Com., 188 Pa. 143, this may be proved by circumstantial evidence. The presence of those very sequelae which continue its impression if it exist may prove also its existence and the time when it occurred.

As to the second of these elements, must the declarant
be a party to the principal act; must he act or be acted upon? There is no sound restriction to such declarants in the reasons given, but as the admission of such evidence is an exception to the rule against hearsay and an extension, in fact a departure separate in principle, from the previous rules admitting statements as pars rei gestae, it would be unsafe to say that the courts would carry it beyond the cases already decided, all cases where the declarant was a party. An extension still further to admit any narrative of any fact proven to exist by whomsoever made if made so immediately after the occurrence as to remove any chance of error or mala fides would, however, be the logical result of the principal case. In fact the chance of concoction is less; a party may have an interest to invent an account exculpating himself or rendering others liable, which can exist only in the most exceptional of bystanders. There is no particular sanctity in the statements of parties to acts. If offered in evidence against the party making such statement, he cannot object to it; while not strictly evidence of the fact, he can ask for no better evidence; it may be said to be a substitute for proof by evidence to which the party who has made the statement is estopped from objecting. Be this as it may, this extension of the principle of the admissibility of evidence as pars rei gestae to embrace narrative statements made under circumstances proving their bona fides, has not in any way superseded or destroyed the original conception. A witness to a fact may still testify not merely to the bare fact itself, but to all that context which gives it its true color, both what was done and what was said at the time of the act by the actors and by all who were present, so far as such acts or statements tend to explain or qualify the principal fact. A witness is still a witness, not to the bare physical happening, but to the fact as it existed, as explained by the circumstances under which it took place. So, statements made even by bystanders during the occurrence are admissible if they tend to show its true character.

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42 Not to the action before the court but to the act.
43 It may be that a less duration of time or change of plan would be sufficient to remove the impression from the mind of a stranger than from that of a party.
THE ADMISSIBILITY OF DECLARATIONS

as a necessary part of the witness' story. This is of course subject to this qualification, that mere statements of opinion cannot be shown, no matter how closely they accompany a relevant fact. It is still the jury's exclusive function to form opinions as to the effect of facts, in those rare cases where opinion is admitted in evidence it is only as an aid to the jury's function; they are entitled to cross-examination, not merely as to facts on which it is based, but on the soundness of the process by which it is arrived at from those facts, that they may judge, not merely upon the adequacy of its foundations, but also as to its value as a guide to them in their deliberations. And it may be here remarked that in the great number of cases the remarks and often the acts of bystanders if carefully examined will be found to be but expressions of opinion as to the effect of the facts.

Thus there appear to be two distinct conceptions and uses of the term res gesta.

I. INDICATING THE ENTIRETY OF A TRANSACTION, often continuing over a space of time.

(a.) The extent of the matter in issue, or under investigation, every part of which during its continuance is the very matter to be proved, the length of time between the circumstances of it being unimportant if all form part of it.

(b.) A series of acts part of one transaction in the sense that they either presumably proceed from the same motive or intent or are done while the same bodily condition may be fairly supposed to continue unchanged, so that any exhibition of such mental or physical condition during the pendency of such transaction is proof of the same condition at every stage of it.

In this class of cases if the bodily or mental condition of a person at a particular time is relevant, an exhibition of it to be admissible need not occur at or even near such time, so long as the conditions so far remain the same that the mental or bodily condition may be fairly presumed to remain the same throughout.

(c.) A business in the furtherance of which two or more persons are legally identified, as in a combination to effect a common purpose either legal or illegal. There everything done or said by each is legally the act of all if done or said
not merely during the pendency of the combination, but in furtherance of the common object. There is not an identification during a certain space of time, but from the inception of the scheme until its completion in all things necessary to effect the common object. A statement need not be made at any particular time during the carrying into effect of the conspiracy. If the common object be abandoned or accomplished no further act can be in furtherance thereof, and so nothing said or done thereafter can be part of the business about which all are identified with one another. In none of these need the statement be contemporaneous, actually or practically, with the principal fact which it is offered to prove.

II. The term is used to indicate those concomitant circumstances or context of a fact in issue or relevant fact which are necessary to understand its true nature. Here every one of those circumstances is admissible (acts or declarations) if necessary to understand the fact aright and if they accompany the fact. The coincidence of time is here of the utmost importance, though there is a difference of opinion as to how far the coincidence must be exact and how far an unbroken sequence of events the continuance of the immediate influence of the fact may supply its absence.

Certain requirements are essential everywhere:

1. There must be a principal fact, itself relevant, already proven to exist; such fact, like any other fact, may be proved either by direct or circumstantial evidence.

2. The statement must relate to and tend to show the true nature of such principal fact. It must not be a statement of some other fact unnecessary to the proper understanding of the principal fact.

4 So a statement may be admissible as pars rei gestae of a statement or of an act. So both acts and statements inadmissible to show sanity of one to whom they were done or adversed, are competent to explain the acts done or statements made by such person in response thereto. *Wright v. Tatham.*

45 In those jurisdictions admitting declarations after the act is over but while the immediate results are existing, the declaration explains the existence of the resulting condition by narrating its cause; it proves rather than explains the cause itself, but even there it must describe or explain either the cause or the resulting condition.
3. The declarations must accompany the fact which they are offered to explain. The difficulty is as to what is a sufficiently close accompaniment. All cases agree, on the one hand, that if the statement is exactly contemporaneous with the fact it is admissible. Equally all agree that when the whole occurrence is past, when all the immediate results have ceased, when its pressing influence is over and the whole has by all concerned been relegated to the memory as a past event, capable of deliberate contemplation, then a narrative statement of it is clearly not admissible as part of its res gesta, even though the fact is still working out through the laws of cause and effect its final legal result and is in such sense incomplete. It is in that large class of cases comprised between these two extremes that a difference of opinion is found.

One group holds that a practically exact coincidence of time is required, that the declaration must accompany and elucidate some relevant act actually going on. An act is not continued in this sense by the presence of the immediate results of the act. When the causal act has itself ceased, a narration of it does not become admissible because it tends to account for the existing results thereof. The declarations by themselves are not admitted as independent evidence; the fact as explained by them is the evidence which goes to the jury. It is as part of the fact that they

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4 An act accompanying a fact, if necessary to understand it, is admissible as par res gestae. If it does not accompany it it is still, if it tend to explain it, relevant. There is no act which is narrative of a past fact, it may be probative of its existence or quality, but can scarcely recite it in any other sense. An act whenever done if it prove or explain a relevant matter is relevant, or as Pitt Taylor says, the expression is perhaps unfortunate, is part of the res gesta.

5 If a wrong, this means that its injurious tendencies have neither been diverted by an independent agent nor yet exhausted their destructive power.

6 And itself lending credit to them.

7 The fact itself must be one whose true nature is not apparent without such explanation. The surrounding circumstances must not only explain, the explanation must add something to the fact which it did not possess before. The explanation must change the probative value of the fact. If the declarations are of no value for this purpose, they do not become admissible because they recite some other fact, even though it be itself of the utmost importance.
are admitted, *pars rei gestae*, and not as an exception to the rule against hearsay.

The other group of cases holds that any statement though narrative of a past occurrence is admissible if made while the immediate results of such occurrence are still apparent and so soon after as to be made under the overpowering influence of it and so practically without an opportunity for concoction. These are generally admitted as part of the *res gesta* of the occurrence, sometimes as part of the *res gesta* of the resulting conditions.

This is an exception to hearsay. The statements are not admitted as explaining the nature of the fact, but as a narrative proving its existence. Its probative value rests on the credit of the declarant, the proximity of the fact, the practical impossibility of concoction, the probable accuracy of statement as to a fact only just past, the effects of which are still apparent; these guarantee the credit upon which, however, still rests the value of the evidence. This coupled with the constant difficulty in proving such facts by other means supplies the reasons for the exception to hearsay. The adequacy of these reasons has been denied in England.

That this latter view adds a new exception to hearsay, there seems no doubt.

The advisability of this relaxation is a question of the policy of the court. Weighty arguments can be offered on both sides. Against it may be urged that it is by no means certain that a statement in the heat of the occurrence is either accurate or impartial. That it is at best extremely difficult to say when the time is so short or rush of events so overpowering that concoction becomes impossible. That usually the declarations emanate from the party most interested to exculpate himself or to fix the blame on another. That the first impulse of a party is to excuse himself if not to accuse others. That there is no danger of a failure of other evidence in any large general class of cases, though occasionally there may be such failure in individual cases.

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51 Mosely v. Ins. Co., 8 Wall. 397.
52 Woodward v. Gouldstone, L. R. 11 A. C. 369, per Lord Herschell.
In short, that the declarations, while sometimes of service, are very likely to be misleading. That there is no such necessity for their admission, no such probability of accuracy and good faith to make it advisable to relax in their favor existing rules, and that the advocates for their inclusion have at least failed to meet their burden of proving affirmatively any sufficient reason for altering the established practice. On the other hand it may be well said that the rule against hearsay, on the whole, shuts out too much evidence that is commonly recognized as sufficient to govern men in their most important affairs, and which would in the trial of legal causes be both reliable and of the utmost utility, that it is preserved largely because much hearsay, probably the bulk of it, being unreliable and misleading, could not be excluded save by a general rule or purely at the caprice of the courts. This being so, whenever any sort of declarations can be grouped into a class capable of definite ascertainmament, and such declarations are found to be in general both accurate and truthful and of great use in the elucidation of questions otherwise difficult of adequate proof, it is the policy of the law not to turn its back on a means of proof generally trustworthy, because occasionally there may be a danger of the jury being misled. If the circumstances are such as to clearly discredit the statement the court may exclude; in other cases the jury can be so directed that no more than proper weight will be given it. The danger is that when the declaration is important, the court may be led to stretch the rule so as to include it, and that the courts will end by admitting any narrative which they consider necessary for the proper understanding of the case by the jury and which they believe from the circumstances under which it is made to be probably accurate and trustworthy.

Francis H. Bohlen.

53 The argument that such alteration should be left to the legislature seems untenable. The admission of evidence is a matter of procedure which the courts should be and are competent to regulate, and almost all relaxations of strict rules of evidence as to hearsay have heretofore been introduced by the courts without legislative aid.

54 As in Fulcher v. State, note 40, supra, p. 214.
NOTE.

In his pamphlet answering the criticism of Mr. Pitt Taylor on Bedingfield's case, Lord Cockburn states that anything said by the victim while the criminal act was in progress either actually or constructively would be admissible. What does he mean by constructive? Does he mean that although the assailant had desisted from his attempt the victim still believed he was endeavoring to carry it into effect? Pitt Taylor ridicules the idea that this could in any way affect the admissibility of the evidence, or that his lordship could have so used the term, but in the first place, if her assailant was still pursuing her statements during her flight would accompany and explain the object of her flight, her flight would still surely be a fact both relevant and equivocal, requiring explanation, and her statements would explain and show its true nature. In fact the criminal act as a transaction, is made up of the assailant's action to accomplish and the victim's to avoid the injury. No story of the crime is complete which does not embrace both. The whole is the matter under investigation. Her flight in this sense is part of the criminal transaction and any statements accompanying it are admissible to explain it. Can then it matter if her flight is needless, that the assailant without her knowledge has abandoned his purpose or has been by some injury to himself been rendered incapable of effecting it? Is not the flight, if flight, from what is believed to be a present danger, is still in a true sense a part of the transaction?

If the danger is known to be over there can be no flight, the whole act is completed. What is done is done in consequence of the completed attempt. It may be the result of the whole transaction, but is no part of it. That she is seeking aid for her wounds is a fact needing no explanation other than her wounded condition. That she is flying needs the explanation for her fear. The one act as perceived by the witness requires no explanation, the other does. Her statement does not explain her reason for seeking medical aid, her wounds are sufficient for that, it is a purely narrative statement of a condition apparent without need of explanation.