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Evidence – Res Gestae – SPONTANEOUS DECLARATION AS EXCEPTION TO THE HEARSAY RULE-PRIMA FACE CASE MADE OUT / CONFLICT OF LAWS-DOMESTIC RELATIONS-WIFE'S DIVORCE ACTION NOT BARRED BY HUSBAND'S SISTER STATE DIVORCE DECREE WHERE HUSBAND FALSELY STATED WIFE 'S ADDRESS TO OBTAIN PUBLICATION ORDER

NOTES

EVIDENCE—RES GESTAE—SPONTANEOUS DECLARATION AS EXCEPTION TO THE HEARSAY RULE—PRIMA FACIE CASE MADE OUT.—In a consolidated action for personal injuries and wrongful death, the Court of Appeals in a recent decision[1] modified the Appellate Division's dismissal of a complaint[2] and held that a prima facie case had been made out by the plaintiffs. In sending the case back for a retrial, the Court indicated that the case presented a "classic example" of res gestae evidence.

Ward La France Truck Corporation agreed to supply the defendant Despatch Company a used tractor and trailor, reconditioned by Ward and attested to by Ward's secretary as being in perfect condition for a trial run, with the understanding that Despatch would buy it if it was found satisfactory.

Trimboli, a truck driver for Despatch, who was to make the trial run from New York City to Plattsburgh, invited the plaintiff Swensson to accompany him. On the return trip, the following day, while the truck was moving at the speed of about forty-five miles per hour and was on a slight incline, Trimboli attempted to apply both the air brakes and emergency brakes, but without result. He told Miss Swensson, within the ten to twenty seconds that elapsed between his first unsuccessful attempt to brake the truck and the accident, that the regular brakes "didn't work," and that the air for the foot brakes was "gone". The truck oveturned, killing the driver and severely injuring Miss Swensson.

Ward's mechanic testified that he had repaired the truck; that he had put it through a test run of forty miles before delivering it to Despatch; and that both brakes were then in good working condition. Expert testimony was offered on behalf of the plaintiff Trimboli to the effect that if the air brakes were in good working order the truck would have stopped within fifteen to twenty feet; that it is not good practice to put a truck on the road without examining the brake drum, and that such examination is impossible without removing the drum. A witness for Ward, a mechanic in its employ, although conceding that he had not removed the drum, asserted that such practice is unnecessary when a truck has been driven as little as 18,000 miles, as had this one. An eye witness testified that the truck had been driven faultlessly until it went down the incline. At the trial defendant Ward objected to the admission of plaintiff Trimboli's statement that "the air was gone," on the ground of hearsay, but the statement was admitted.

Upon all the evidence, the jury returned a verdict for both plaintiffs, based upon defendant Ward's negligence in inspection and repair, but exonerated Despatch.

The Appellate Division, by a divided court, although accepting all the evidence, reversed the lower court and dismissed the complaint on the grounds that there was insufficient evidence, as a matter of law, to establish a prima facie case. The court indicated that, were it not dismissing, it would have granted a new trial, as the verdict was contrary to the weight of credible evidence.

The Court of Appeals had to decide two questions: one, whether the driver's statement that the air was "gone" should be excluded on the ground of hearsay; and two, if such evidence were admissible, as both the trial court and the Appellate Division had held, whether a prima facie case had been made out by the plaintiff.

In the instant case, the most telling evidence against the defendant was the remark of the deceased driver immediately preceding the accident that the air was "gone".

[1] Swensson v. New York, Albany Despatch Company, 309 N. Y. 497 (1956).
[2] 285 App. Div. 1078, 139 N. Y. 2d 711 (2d Dep't 1955).

One of the exceptions to the hearsay evidence rule is a declaration which is part of the res gestae. The res gestae declaration is one born of a situation which presents a startling occurrence sufficient to produce so spontaneous a verbal or behavior reaction as to preclude the fabrication which would render it inadmissible.[3]

The facts generally deemed significant in determining whether a statement may be considered a spontaneous declaration are: interval of time between the statement and occurrence; form of statement; whether it was elicited in response to a question; physical and mental condition of the declarant; and its relevance to the main transaction.[4]

In *People* v. *Curtis*,[5] the defendant, who was convicted of hit-and-run driving, sought to exclude the testimony of an eyewitness who had been awakened by the crash to see a car drive away and the victim crawling to the sidewalk, moaning, "Oh my God, get me a doctor!" The statement was shown to have been made within a few moments of the crash. It was admitted as part of the res gestae.

However, a contrary result was reached in *Handel* v. *New York Rapid Transit Company*,[6] where the deceased, who had been caught in a subway door, was dragged for five blocks. Within two or three minutes, he was found by a witness, who heard plaintiff say, "Save me—Help me—Why did that conductor close the door on me?"

While the lapse of time may be an indication of a non-spontaneous declaration, the courts will sometimes distinguish in their opinions between the mere lapse of time and the opportunity to fabricate, which is at the root of the res gestae standard.

Thus, in *Scheir* v. *Quirin*,[7] the plaintiff, who had been severely scalded when the plank upon which he had been standing slipped and he fell into a vat of boiling alcohol, ran a distance of about seventy feet while in intense pain, and screamed, "Oh George, I am scalded, the plank slipped and throwed me in". The intense pain suffered by the plaintiff from the time of the accident to the statement, even though it was a matter of two or more minutes, was held to preclude any other than an impulsive or instinctive statement, and it was admitted as part of the res gestae.

As to a statement being elicited by a query rather than one initiated by the declarant, again the decisions seem to be non-uniform. In one instance, the deceased took four or five steps after being stabbed, and in response to the witness who asked him, "What happened?" he said, "Del Vermo stabbed me." This declaration was admitted as part of the res gestae.[8] Yet the ruling in *Greener* v. *Electric Company*[9] excluded a statement of the plaintiff, who had fallen from a ladder which had buckled under his weight. As he lay there, a fellow workman asked him what had happened and the plaintiff answered, "My feet is broken, the ladder bent over". The opinion indicated that a distinction must be made between spontaneous answers to questions, and answers which take the form of a narrative and are not spontaneous.[10]

These illustrations indicate that what may constitute a spontaneous declaration varies markedly with the facts and circumstances of each individual case, and its admissibility rests very largely with the discretion of the trial judge.[11] In many jurisdictions there is a marked tendency to extend rather than to narrow the scope

[3] 20 AM. JUR., *Evidence* § 662 (1936).
[4] See Note, 10 BROOKLYN L. REV. 282 (1941).
[5] 225 N. Y. 519, 122 N. E. 623 (1913).
[6] 277 N. Y. 548, 13 N. E. 2d 468 (1937).
[7] 177 N. Y. 568, 69 N. E. 1130 (1902).
[8] People v. Del Vermo, 192 N. Y. 470, 85 N. E. 690 (1908).
[9] 209 N. Y. 135, 102 N. E. 527 (1913).
[10] *Id.* at 138, 102 N. E. 527, 529.
[11] 32 C. J. S. *Evidence* § 403 (1942).

of the doctrine;[12] whereas in New York, the later cases seem to indicate a strict attitude towards its use.[13]

In the instant case, where the statement was simultaneous with the accident, the Court of Appeals allowed the statement to remain as part of the res gestae. Such evidence being admissible, the court held that a prima facie case had been made out,[14] and indicated that despite evidence showing that the brakes had been operating efficiently prior to the accident, it could not say that by "no rational process" could the jury have based a finding in favor of the plaintiffs on the basis of the evidence presented.

In admitting the statement, the Court of Appeals declared the statement an almost "classic example" of res gestae, made in the course of and within ten seconds of the event itself. Its admission by the court probably did not liberalize the strict New York rule as to hearsay, but rather indicates the extreme spontaneity and relevance necessary for a statement to fall within the spontaneous declaration exception.

CONFLICT OF LAWS—DOMESTIC RELATIONS—WIFE'S DIVORCE ACTION NOT BARRED BY HUSBAND'S SISTER STATE DIVORCE DECREE WHERE HUSBAND FALSELY STATED WIFE'S ADDRESS TO OBTAIN PUBLICATION ORDER.—The Appellate Division, Third Department, in unanimously affirming a judgment of divorce, has held that the defendant spouse could not set up as a bar the prior divorce he had obtained in Pennsylvania. In what appears to be a case of factual novel impression in New York, the court held the foreign decree void because the husband in obtaining it had deliberately falsified the wife's address in obtaining an order of service by publication.[1]

The parties were married in 1947, in Binghamton, New York, where they lived together as man and wife until 1952, at which time they separated, the wife remaining in New York and the husband moving to Hallstead, Pennsylvania. In 1953, the husband instituted divorce proceedings in Pennsylvania, alleging that the wife had deserted him, and had been absent from their habitation since 1951. He further alleged that his wife's last known address was Snake Creek, RD # 1 Hallstead, and that her present whereabouts were unknown to him. Undisputed evidence showed that the wife had never lived in Pennsylvania, that her husband knew her New York address, and in fact had been sending alimony checks in a pending New York action to her there.

The necessary papers were sent to the wife at the address given by her husband, and were returned marked "unclaimed and unknown". Service by publication was authorized and notice of the action was published in two Scranton newspapers. A divorce was granted to the husband, who remarried shortly thereafter.

The wife, learning of the divorce some time later, instituted an action for divorce in New York, the husband pleading in defense his prior decree in Pennsylvania. In the New York Supreme Court, judgment was for plaintiff wife, granting the divorce.

In affirming the judgment, the Appellate Division held that "defendant's fraud vitiated the service of process which was attempted to be made in accordance with the false information supplied by him. The Pennsylvania Court therefore never obtained jurisdiction over the plaintiff and the judgment of the Pennsylvania Court may be collaterally attacked in this state."

[12] *Ibid.*

[13] RICHARDSON, EVIDENCE § 263 (8th ed. 1955).

[14] See Sagorsky v. Malyon, 307 N. Y. 584, 123 N. E. 2d 79 (1954).

[1] Hoyt v. Hoyt, 286 App. Div. 580, 146 N. Y. S. 2d (3d Dep't 1955).

The United States Constitution provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".[2] Early judicial decisions held this article applicable to final judgments of courts of record.[3] Later cases effected a modification of this doctrine by holding its observance not mandatory where the court rendering judgment lacked jurisdiction.[4]

Simple in its statement, this concept has ever been complex in its application to the sui generis actions of separation and divorce. As long as the American courts adhered to the common law doctrine that a married woman was not sui juris, and could therefore have no domicile separate from that of her husband,[5] there was no problem: the court either had jurisdiction over both husband and wife, or neither. However, it was held in the early Rhode Island case of *Ditson* v. *Ditson*[6] that a wife abandoned in New York could move to Rhode Island and give the Rhode Island court jurisdiction over a divorce action instituted by her. This case is significant because it is apparently the first one in which the state's interest in the marriage was treated as a res within the state. Fourteen years later, in *Cheever* v. *Wilson*,[7] the Supreme Court of the United States adopted this view, that either spouse could acquire a domicile separate from the other for the purpose of divorce jurisdiction. This was shortly to become the doctrine applied almost uniformly throughout the United States.[8]

The courts of New York, however, tempered their acceptance of this doctrine by adhering to a firm policy of non-recognition of foreign divorces where the decree-granting state did not acquire in personam jurisdiction over the defendant spouse. This was the holding in an 1879 bigamy prosecution,[9] although the New York court in that case expressly conceded that the foreign divorce was effective in the foreign jurisdiction as to the status of the plaintiff. This remained the law of New York[10] until the Supreme Court of the United States, reversing the New York Court of Appeals in *Atherton* v. *Atherton*,[11] held that New York had to recognize a divorce obtained by the husband in the matrimonial domicile, even though there was no in personam jurisdiction over the wife. The force of this holding was somewhat modified several years later by the Supreme Court in *Haddock* v. *Haddock*,[12] another New York case, in which it was held that New York did not have to give recognition to a divorce granted by a state which was not the matrimonial domicile, where there was no in personam jurisdiction over both parties. As much as was possible within the limits laid down in the *Haddock* case, however, New York retained its flexible recognition policy until the rule became more or less settled by the two cases of *Williams* v. *North Carolina*.[13]

[2] U. S. CONST. art. 4, § 1, cl. 1.

[3] Shumway v. Stillman, 6 Wend. 447, 2 Am. Lead. Cas. 778 (N. Y. 1829); Wheeler v. Raymond, 8 Cow. 311 (U. S. 1830); Strauss v. Strauss, 122 App. Div. 729, 107 N. Y. Supp. 842 (1st Dep't 1907); Pierce v. Bristol, 130 Misc. 188, 223 N. Y. Supp. 678 (Sup. Ct. Steuben Co. 1927).

[4] For a collection of these cases, see People v. Townsend, 133 Misc. 543, 233 N. Y. Supp. 632 (Sup. Ct. Wash. Co. 1929).

[5] STUMBERG, CONFLICT OF LAWS 40 (2d ed. Brooklyn 1951).

[6] 4 R. I. 87 (1856).

[7] 9 Wall. 108, 19 L. Ed. 604 (U. S. 1870).

[8] See Williamson v. Osenton, 232 U. S. 619, 34 S. Ct. 442, 58 L. Ed. 758 (1913).

[9] Peole v. Baker, 76 N. Y. 78 (1879).

[10] *Cf.* De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996 (1890).

[11] 155 N. Y. 129, 49 N. E. 933 (1898), *rev'd* 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794 (1901).

[12] 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867 (1906).

[13] 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942); 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945).

In the first *Williams* case, which expressly overruled the *Haddock* case, the Supreme Court reversed a state conviction for bigamy of two persons who had left their spouses and obtained simultaneous Nevada divorces after service on the North Carolina spouses by publication. This amounted to a holding that the guilty spouse, as well as the innocent, might leave and take the matrimonial domicile with him for purposes of divorce jurisdiction. In the second *Williams* case, the bigamy conviction was affirmed by the Supreme Court after the prosecution had proven to the satisfaction of the state court that there had been no good faith domicile acquired in Nevada, a jurisdictional fact which the Supreme Court held to be triable *de novo*.

As a result of the *Williams* cases, New York had to modify still further its nonrecognition policies, but it retained the right to determine *de novo* the jurisdictional facts in ex parte matrimonial actions. Prior to the *Williams* cases, the lower New York courts had collaterally impeached foreign divorce decrees where jurisdiction of the foreign court had been invoked by fraud. Thus, in *Oblander* v. *Oblander*,[14] it was held that New York could inquire into the jurisdiction of the divorcing state, notwithstanding the full faith and credit clause, and could refuse to recognize a Nevada decree obtained after the plaintiff husband induced his illiterate wife to sign a paper which turned out to be a notice of appearance in the action.

Also, in *Kozba* v. *Kozba*,[15] an action brought by the wife for separate maintenance, it was held no defense to the husband that he had obtained an Ohio divorce, where it was proven that the husband had falsely told the Ohio court that he did not know the whereabouts of his wife. In *Dean* v. *Dean*,[16] it was similarly held that the plaintiff's fraud on the Pennsylvania court removed any prima facie obligation on the New York court to give the decree full faith and credit.

The general rule applicable to all judgments in rem obtained after service by publication is that, inasmuch as the court has jurisdiction over the subject matter (and this is especially true today in matrimonial actions after the *Williams* cases), an irregularity in the service by publication is not necessarily fatal to the judgment.[17] However, where the service, as in the instant case, is so colored by deliberate, blatant fraud, the court, in exercising its right to try the jurisdictional facts *de novo*, will find a lack of jurisdiction in the foreign court, and will refuse to give any effect to the decree.

Although the decision in the *Hoyt* case announces no new principles of law, it presented a fact situation which had apparently never been ruled upon, precisely, in New York. This decision, applying existing principles of law, reaffirms the right of the courts of one state to inquire broadly into the jurisdictional bases of a sister state's judgment, despite the constitutional mandate that such decrees be given prima facie validity.

[14] 179 Misc. 459, 39 N. Y. S. 2d 139 (Dom. Rel. Ct. N. Y. 1943).
[15] 160 Misc. 56, 289 N. Y. Supp. 632 (Dom. Rel. Ct. N. Y. 1936).
[16] 213 App. Div. 360, 126 Misc. 797 (4th Dep't 1925).
[17] 159 A. L. R. 569 N (1945).