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The Present Sense Impression Exception to the Hearsay Rule: Federal Rule of Evidence 803(1)

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I. Introduction

In addition to affecting trial practice in the federal courts, the Federal Rules of Evidence will have great impact on state court litigation as courts and legislatures adopt rules patterned after Federal Rule of Evidence 803(1).[1] The federal recognition of the present sense impression as a distinct exception to the hearsay rule marks a significant step in modifying courtroom practice in a manner that has long been propounded by prominent legal writers.[2]

The exception for present sense impressions[3] is included in Rule 803 with more traditional hearsay exceptions, manifesting a philosophy that evidence with certain basic assurances of reliability should be admitted despite the absence of the usual safeguards of cross-examination and oath.[4] A declaration of a present sense impression is credible because it is a spontaneous expression of immediate sensual impressions, unaffected by retrospective thought.[5] In addition, the witness reporting the remark has often observed the event and can verify the statement.[6]

Although the exception has been supported by commentators since

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1. FED. R. EVID. 803(1).
Rule 803 - The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

2. *See* notes 32-37, 43 and accompanying text *infra*.

3. Present sense impressions often take the form of such statements as "Look at those fools go." Moreno v. Hawbaker, 157 Cal. App. 2d 627, 321 P.2d 538 (1958); "Driving like that he will land in hell." Everready Cab Co. v. Wilhite, 66 Ga. App. 851, 19 S.E.2d 343 (1942); "Look out. He has got a razor." People v. Rice, 109 Ill. App. 2d 391, 248 N.E.2d 745 (1969); "I believe that lady is going to try to beat that car across the road." Standard Coffee v. Carr, 171 Miss. 714, 157 So. 685 (1934); "Seems like there is a car being stripped down the street there." Anderson v. State, 454 S.W.2d 740 (Tex. Cr. App. 1970); or "My, Art, that car is coming fast!" Heg v. Mullen, 115 Wash. 252, 197 P. 51 (1921).

4. Comment, *Major Changes Under the Proposed Federal Rules of Evidence*, 37 TENN. L. REV. 556, 561 (1970) [hereinafter cited as *Major Changes*].

5. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 236 (1922) [hereinafter cited as Morgan, *Classification*]. See notes 63, 72-82 and accompanying text *infra*.

6. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 298 (2d ed. 1972) [hereinafter cited as MCCORMICK]; *Major Changes*, *supra* note 4, at 560-61. *See* notes 72-82 and accompanying text *infra*.

1881,[7] well-reasoned judicial discussion is rare[8] for two primary reasons. First, since unexciting events are unlikely to evoke comment, decisions concerning present sense impressions in unexciting circumstances are less numerous than decisions involving excited utterances.[9] Second, and more importantly, examinations of the trustworthiness of unexcited statements are rare because most courts admit spontaneous statements by citing the *res gestae* concept[10] without considering more specific justifications.[11]

Even among courts that admit spontaneous utterances, the vast majority follow Wigmore's view,[12] requiring the declarant to be under the influence of a startling occurrence in order for his statement to be admissible.[13] Several courts, in excluding present sense impressions, have expressed the opinion that to admit such statements would be to open the door to a flood of comments and opinions of questionable value in deciding issues of fact.[14] There is, however, strong justification for admitting spontaneous observations made in the absence of nervous excitement.[15]

This comment discusses the rationale and justifications supporting the recognition of this new, distinct exception to the hearsay rule. An examination of the historical treatment of statements now denominated "present sense impressions" demonstrates how other doctrines and concepts have operated to obscure the principles of this exception. The scope and requirements of Federal Rule of Evidence 803(1) are analyzed in light of the commentaries and cases that have led to its adoption.

II. The *Res Gestae* Doctrine

Although courts have admitted numerous statements that meet the criteria of Rule 803(1), most have done so by calling them part of the *res gestae,* without analyzing the underlying justifications for admission.[16] In

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7. See notes 32-37, 43 and accompanying text *infra.*

8. *See, e.g.*, Kelly v. Hanwick, 228 Ala. 336, 153 So. 269 (1934); Dameron v. Ansbro, 39 Cal. App. 289, 178 P. 874 (1918); Eveready Cab Co. v. Wilhite, 66 Ga. App. 815, 19 S.E.2d 343 (1942).

9. The excited utterance cases come under FED. R. EVID. 803(2). *See, e.g.*, People v. Alexander, 11 Ill. App. 3d 782, 298 N.E.2d 355 (1973); People v. Arnold, 41 App. Div. 2d 573, 339 N.Y.S.2d 583 (1973); Cody v. S.K.F. Indus., Inc., 447 Pa. 558, 291 A.2d 772 (1972).

10. The phrase *res gestae* means literally 'the thing done' and it is used in law as meaning the circumstances which are the automatic and undesigned incidents of the particular act in issue, and which are admissible in evidence when illustrative and explanatory of the act. The phrase is frequently applied to statements or explanations made in regard to an act in question by witnesses thereof.

Keefe v. State, 50 Ariz. 293, 297, 72 P.2d 425, 427 (1937) (citations omitted).

11. *See, e.g.*, Thompson v. State, 166 Ga. 512, 143 S.E. 896 (1928); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926); State v. McKinney, 13 N.C. App. 214, 184 S.E.2d 897 (1971); Hornschuch v. Southern Pac. Co., 101 Ore. 280, 203 P. 886 (1921); State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); Mathewson v. Olmstead, 126 Wash. 269, 218 P. 226 (1923); Heg v. Mullen, 115 Wash. 252, 197 P. 51 (1921).

12. 6 J. WIGMORE, EVIDENCE § 1750 (Chadbourn rev. 1976) [hereinafter cited as WIGMORE]. *See* notes 40-46 and accompanying text *infra.*

13. *See* note 9 *supra.*

14. *See, e.g.*, Louisville & N. Ry. v. Cox, 145 Ky. 716, 141 S.W. 59 (1911); Shadowski v. Pittsburgh Ry., 226 Pa. 537, 75 A. 730 (1910); Barnett v. Bull, 141 Wash. 139, 250 P. 955 (1926).

15. *See* note 34 and accompanying text *infra.*

16. *See* note 11 *supra.*

other cases present sense impressions were excluded because they did not fit within the current definition of the *res gestae* concept.[17]

The *res gestae* doctrine is much used as an exception to the hearsay rule for spontaneous utterances,[18] yet

> [t]he difficulty of formulating a description of the 'res gestae' which will serve for all cases, seems insurmountable. To make the attempt is something like trying to execute a portrait that shall enable the possessor to recognize every member of a very numerous family.[19]

The doctrine allows the admission of declarations that accompanied the principal litigated fact[20] and that could be viewed as created by, or springing from, the transaction itself.[21] These declarations are often described as "the facts of the principal transactions speaking through the mouth of the witness rather than the witness talking about the facts."[22] Statements of this type are admitted because they are considered to be a part of the act or event.[23] This rationale strictly limits the scope of the doctrine to contemporaneous statements made by a participant at the place of the occurrence.[24]

Several writers[25] have expressed a feeling of despair in trying to deal with the *res gestae* concept because many courts use it as a term of convenience to avoid determining less superficial reasons for admitting out-of-court statements.[26] The doctrine is also criticized on grounds that the evidentiary problems to which it is applied could be resolved by the application of some other well-established principle.[27] Its ambiguity

17. *See* Konidaris v. Burgess, 223 Ala. 512, 137 So. 303 (1931); Johnson v. Newell, 160 Conn. 269, 278 A.2d 776 (1971); Eveready Cab Co. v. Wilhite, 66 Ga. App. 815, 19 S.E.2d 343 (1942); Wrage v. King, 114 Kan. 539, 220 P. 259 (1923); Louisville & N. Ry. v. Cox, 145 Ky. 716, 141 S.W. 59 (1911); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967); Standard Coffee v. Carr, 171 Miss. 714, 157 So. 685 (1934); Swinson v. Nance, 219 N.C. 772, 15 S.E.2d 284 (1941); Shadowski v. Pittsburgh Ry., 226 Pa. 537, 75 A. 730 (1910); Gouin v. Ryder, 38 R.I. 31, 94 A. 670 (1915); Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967); Barnett v. Bull, 141 Wash. 139, 250 P. 955 (1926); Mercer Funeral Home v. Addison Bros. & Smith, 111 W. Va. 616, 163 S.E. 439 (1932). *See* notes 64-68 and accompanying text *infra*.

18. WIGMORE, *supra* note 12, § 1745; MCCORMICK, *supra* note 6, § 288.

19. Cox v. State, 64 Ga. 374, 410 (1879).

20. The principal litigated fact, or ultimate fact in issue, is sometimes described as the final or resulting fact reached by processes of logical reasoning from the detached or successive evidence, and which is fundamental and determinative of the whole case. BLACK'S LAW DICTIONARY 1692 (4th ed. 1951).

21. State v. McKinney, 13 N.C. App. 214, 184 S.E.2d 897 (1971); Pacific Mut. Life Ins. Co. of Cal. v. Schlakzug, 143 Tex. 264, 183 S.W.2d 709 (1944); Barnett v. Bull, 141 Wash. 139, 250 P. 955 (1926); WIGMORE, *supra* note 12, §§ 1745-46.

22. State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); *see* Comment, *Spontaneous Exclamations in the Absence of a Startling Event*, 46 COLUM. L .REV. 430 (1946) [hereinafter cited as Comment, *Spontaneous Exclamations*].

23. State v. Long, 186 S.C. 439, 195 S.E. 624 (1938).

24. Comment, *Spontaneous Exclamations*, *supra* note 22.

25. MCCORMICK, *supra* note 6, § 288; E. MORGAN, BASIC PROBLEMS OF EVIDENCE 328-29 (1962) [hereinafter cited as MORGAN]; WIGMORE, *supra* note 12, §§ 1745-46; Slough, *Spontaneous Statements and State of Mind*, 46 IOWA L. REV. 224 (1961); Thayer, *Bedingfield's Case-Declarations as a Part of the Res Gesta* (pts. 1-3), 14 AM. L. REV. 817, 15 AM. L. REV. 1, 71 (1880-81).

26. MCCORMICK, *supra* note 6, § 288; MORGAN, *supra* note 25, at 328-29; Slough, *supra* note 25, at 224; Thayer, *supra* note 25, 15 AM. L. REV. 1 (1881).

27. The *res gestae* doctrine covers four presently recognized exceptions to the hearsay rule: present sense impression, excited utterance, then existing mental, emotional or physical condition, and present bodily condition. Wabisky v. D.C. Transit System, 309 F.2d 317 (D.C.

invites confusion among the various concepts it embraces, resulting in uncertainty as to the limitations of each.[28] Even Wigmore was forced to admit that his attempt to analyze the several concepts implicit in the term "*res gestae*" did not reflect the law propounded by the courts.[29] The following words of Judge Learned Hand in *United States v. Matot*[30] are echoed by many authorities:

> [A]s for *res gestae*, it is a phrase which has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms.[31]

III. The Development of the Present Sense Impression Exception

The late Professor Thayer of Harvard Law School first proposed an exception to the hearsay rule[32] for

> declarations of fact which were very near in time to that which they tended to prove, fill out, or illustrate, being at the same time not narrative, but importing what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to those indications.[33]

Thayer felt that the contemporaneity of the out-of-court statement would as adequately guarantee trustworthiness[34] as does the spontaneity of excited utterances.[35] From his examination of the case law, Thayer deduced four conditions of admissibility for statements of present sense impression: (1) there must be a main event or condition that is material or relevant to the case; (2) the statement must be substantially contemporaneous with the main event or condition; (3) the statement must prove or elucidate the event; and (4) the statement must be made to a witness who testifies to it and can be cross-examined as to its accuracy.[36]

Cir. 1962); State v. Newman, 162 Mont. 450, 513 P.2d 258 (1973); Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974); MCCORMICK, *supra* note 6, § 288; Slough, *supra* note 25.

28. Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971); Illinois Cent. Ry. v. Lowery, 184 Ala. 443, 63 So. 952 (1913).

29. WIGMORE, *supra* note 12, § 1745.

30. 146 F.2d 197 (2d Cir. 1944).

31. United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944).

32. Thayer, *supra* note 25, at 15 AM. L. REV. 71, 107 (1881).

33. *Id.*

34. *See* notes 72-82 and accompanying text *infra*.

35. WIGMORE, *supra* note 12, §§ 1747, 1750. *See* note 45 and accompanying text *infra*. In 1928, Professor Robert M. Hutchins and Donald Slesinger of Yale Law School examined the psychological justification for the exception for spontaneous utterances. Their study indicated that calm observations presented an ideal exception to the hearsay rule providing greater probability of accuracy because of the absence of stress and excitement. The article noted the marked preference of the courts for excited utterances, but concluded that these were less trustworthy than unexcited statements. Though conceding that excitement does tend to still the reflective faculties and prevent statements colored by self interest, the authors pointed out that it also has the effect of rendering observation and judgment all but impossible. Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432 (1928).

36. Thayer, *supra* note 25, at 15 AM. L. REV. 1, 71 (1881).

Wigmore's analysis, while clarifying to some extent the concepts of *res gestae* and spontaneous utterances, unfortunately led to the restriction of the spontaneous utterance exception to *excited* utterances.[37] The disinclination of the courts to adopt the present sense impression exception may be attributed to Wigmore's influence.[38] Although he recognized an exception for spontaneous utterances, he insisted that only a startling event could guarantee trustworthiness.[39] For Thayer's prime requirement of contemporaneity,[40] Wigmore substituted the spontaneity of the exclamation produced by the shock or excitement of the declarant.[41] He discounted the importance of the circumstantial safeguards emphasized by Thayer and criticized his analysis.[42] Yet the importance placed by Wigmore upon the occurrence of an exciting event is highly suspect, since it results in the exclusion of statements less subject to the perceptual unreliability caused by stress.[43]

Both the American Law Institute Model Code of Evidence[44] and the Uniform Rules of Evidence[45] contain a specific present sense impression exception. The provision adopted in the Federal Rules is substantially the same as those contained in these previous codes. An examination of the history of the exception has shown that this is not a novel idea to legal scholars.[46]

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37. *See* WIGMORE, *supra* note 12, §§ 1745-64.

38. MCCORMICK, *supra* note 6, § 298; MORGAN, *supra* note 25, at 342; 4 J. WEINSTEIN, EVIDENCE § 803(1)[01] (1975) [hereinafter cited as WEINSTEIN]; Quick, *Hearsay, Excitement, Necessity and the Uniform Rules*, 6 WAYNE L. REV. 204 (1960).

39. WIGMORE, *supra* note 12, § 1756.

40. *See* notes 72-82 and accompanying text *infra*.

41. *See* WIGMORE, *supra* note 12, § 1756. The excited utterance need not be strictly contemporanious; it may be admissible so long as the controlling influence of the excitement continues.

42. "To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle. . . ." WIGMORE, *supra* note 12, § 1757 at 238.

43. MC CORMICK, *supra* note 6, § 298; Stewart, *Perception, Memory & Hearsay*, 1970 UTAH L. REV. 1.

Professor Edmund Morgan of Vanderbilt University School of Law is the leading modern advocate of the present sense impression exception. He has taken issue with Wigmore's requirement of an exciting event and deplores the apparent assumption of the courts that the acceptance of the Wigmore doctrine implies a rejection of Thayer's exception. *See* MORGAN, *supra* note 25; Morgan, *Classification, supra* note 5; Morgan, *Res Gestae*, 12 WASH. L. REV. 91 (1937).

44. Model Code of Evidence.

> Rule 512. Contemporaneous or Spontaneous Statements. Evidence of a hearsay statement is admissible if the judge finds that the hearsay statement was made (a) while the declarant was perceiving the event or condition which the statement narrates or describes or explains, or immediately thereafter.

MODEL CODE OF EVIDENCE rule 512(1) (1942).

45. Uniform Rules of Evidence

> Excited Utterances and Contemporaneous Statements. Rule 63. Evidence of a statement . . . offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (4) . . . a statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statements narrates, describes or explains.

UNIFORM RULE OF EVIDENCE 63(4)(a) (1953). The 1953 version of the UNIFORM RULES was adopted by Kansas, 4 KAN. STAT. ANN. § 60-460(d)(1), New Jersey, Order Supreme Court of N.J., June 6, 1967, and California, CAL. EVID. CODE ANN. § 1240 (1965). In 1974 the UNIFORM RULES were changed to conform as closely as possible to the FED. R. EVID. Hence, Rule 803(1) of the UNIFORM RULES OF EVIDENCE is now identical to the FED. R. EVID. 803(1).

46. *See* notes 32-43 and accompanying text, *supra*.

IV. The Scope of Rule 803(1)

A. *Availability of the Declarant*

The traditional hearsay rule is based upon the premise that cross-examination, testimony under oath, and observation of the demeanor of a witness enable the trier of fact to weigh the trustworthiness of statements made in court.[47] The Federal Rules adopted a general rule excluding hearsay,[48] with two broad exceptions. The first exception is found in Rule 803, which allows the admission of certain hearsay statements because there are adequate assurances of their accuracy that are not likely to be enhanced by the testimony of the declarant himself.[49] The second exception, found in Rule 804, bases admissibility on the necessity that arises when the declarant is unavailable.[50] The present sense impression exception is included in Rule 803, which does not require a showing of unavailability.[51] Previously, most courts that recognized the present sense impression exception required that the declarant be unavailable.[52] They would, therefore, have included it in Rule 804 as an exception to the hearsay rule justified by necessity. One recent commentary questions the accuracy of many assumptions concerning the reliability of perception and memory that have been applied to evaluate the accuracy of testimony and suggests that unavailability be made a condition precedent to the admission of present sense impressions.[53]

In many cases a reported statement was made by a bystander who was unidentified and, consequently, unavailable to testify. In *Hornschuch v. Southern Pacific Co.*,[54] for example, a train passenger testified to having heard an unidentified woman on the road shout to a motorist just before a collision. In cases in which the declarant is unavailable, the statement could often be found admissible under necessity principles. Sometimes, however, it is the declarant who testifies as to his or her own out-of-court statements. The inclusion of the present sense impression exception under Rule 804 would have operated to exclude these statements when the declarant was available for testimony, in spite of circumstantial guarantees of accuracy surrounding them.[55]

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47. 5 J. WIGMORE, EVIDENCE § 1420 (Chadbourn rev. 1974).
48. FED. R. EVID. 802.
49. *Major Changes, supra* note 4, at 560.
50. This broad exception would admit certain types of hearsay when the declarant is unavailable for any of a variety of reasons such as death, illness, lack of memory, or refusal to testify. FED. R. EVID. 804.
51. At least one writer, however, exhibits a feeling that this exception might have been more appropriately included in Rule 804. Stewart, *supra* note 43.
52. Swinson v. Nance, 219 N.C. 772, 15 S.E.2d 284 (1941); Shadowski v. Pittsburgh Ry., 226 Pa. 537, 75 A. 730 (1910); Jackson v. Utah Rapid Transit Co., 77 Utah 21, 290 P. 970 (1930).
53. Stewart, *supra* note 43.
54. 101 Ore. 280, 203 P. 886 (1921).
55. *See, e.g.*, Moreno v. Hawbaker, 157 Cal. App. 2d 627, 321 P.2d 538 (1958); Chicago City Ry. v. McDonough, 221 Ill. 69, 77 N.E. 577 (1906); Hastings v. Ross, 211 Kan. 732, 508 P.2d 514 (1973); People v. Gillard, 216 Mich. 461, 185 N.W. 734 (1921); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967); Terwillinger v. Long Island R.R., 152 App. Div. 168, 136 N.Y.S. 733 (1912); State v. McKinney, 13 N.C. App. 214, 184 S.E.2d 897 (1971);

B. *Use of Present Sense Impressions*

Under Rule 803(1), the declaration of a present sense impression is admitted as proof of the event described. A number of courts that previously admitted statements now classified as present sense impressions restricted them to circumstantial use.[56] This is demonstrated in cases that admit such statements to show that the attention of the witness was turned to the event.[57] An example is found in *Emens v. Lehigh Valley Railroad Co.*,[58] in which the issue was whether proper warning signals had been sounded as a train approached the crossing where an accident occurred. The exclamation of the witness' wife, "Why don't the train whistle?" was admitted, but only to show that the witness' attention had been called to this point. The statement could not be used to prove whether or not the whistle had sounded. Similarly, other courts have limited the use of statements of present sense impression to showing that the attention of a participant had been directed to his own danger,[59] or to allowing the witness to make his meaning clear to the jury.[60] It must be emphasized at this point that present sense impressions, generally admitted as a part of the *res gestae*, are not hearsay when used only circumstantially and therefore need no exception.[61] To be admissible as circumstantial evidence rather than proof of matters asserted, a statement need only meet the tests of relevancy and materiality.[62] Such attempts to limit the use of present sense impressions show the misapplication of older cases, which admitted them under the *res gestae* doctrine rather than under an independent exception to the hearsay rule.

C. *Requirement of Contemporaneity*

Throughout the discussion of justifications for the present sense impression exception, it has been stressed that contemporaneity is the chief safeguard of trustworthiness.[63] An examination of prior case law indicates, however, that there has been considerable disagreement as to the meaning of the term "contemporaneity." Courts have differed in

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Stanley v. Bowen Bros., 96 N.H. 467, 79 A.2d 1 (1951); Gouin v. Ryder, 38 R.I. 31, 94 A. 670 (1915); Jackson v. Utah Rapid Transport Co., 77 Utah 21, 290 P. 970 (1930); Mathewson v. Olmstead, 126 Wash. 269, 218 P. 226 (1923); Mercer Funeral Home v. Addison Bros. & Smith, 111 W. Va. 616, 163 S.E. 439 (1932).

56. *See* Emens v. Lehigh Valley Ry., 223 F. 810 (N.D.N.Y. 1915); Moreno v. Hawbaker, 157 Cal. App. 2d 627, 321 P.2d 538 (1958); Chicago City Ry. v. McDonough, 221 Ill. 69, 77 N.E. 577 (1906); Hastings v. Ross, 211 Kan. 732, 508 P.2d 514 (1973); People v. Gillard, 216 Mich. 461, 185 N.W. 734 (1921); Terwillinger v. Long Island R.R., 152 App. Div. 168, 136 N.Y.S. 733 (1912); Stanley v. Bowen Bros., 96 N.H. 467, 79 A.2d 1 (1951).

57. *See* Emens v. Lehigh Valley Ry., 233 F. 810 (N.D.N.Y. 1915); People v. Gillard, 216 Mich. 461, 185 N.W. 734 (1921); Terwillinger v. Long Island R.R., 152 App. Div. 168, 136 N.Y.S. 733 (1912); Stanley v. Bowen Bros., 96 N.H. 467, 79 A.2d 1 (1951).

58. 223 F. 810 (N.D.N.Y. 1915).

59. *See* Chicago City Ry. v. McDonough, 221 Ill. 69, 77 N.E. 577 (1906); Louisville & N. Ry. v. Cox, 145 Ky. 716, 141 S.W. 59 (1911); Stanley v. Bowen Bros., 96 N.H. 467, 79 A.2d 1 (1951).

60. *See* Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942).

61. MCCORMICK, *supra* note 6, §§ 288-89; WIGMORE, *supra* note 12, §§ 1745-46; Morgan, *Classification*, *supra* note 5, at 231.

62. Morgan, *Classification*, *supra* note 5, at 239.

63. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973). *See* notes 34-36 and accompanying text *supra*.

determining with which event or condition the statement must be contemporaneous.[64]

In instances in which the admissibility of a statement has turned on whether it was part of the *res gestae*, the class of acceptable statements has usually been limited to those that were exactly contemporaneous with the principal litigated fact.[65] These cases have held that indications of speed or other contributing factors were not part of the *res gestae* when there was no knowledge that the event in litigation would occur.[66] In this way, courts have excluded statements, now acceptable as present sense impressions, because they were made prior to the actual event.[67] This restriction resulted from the application of the *res gestae* concept that the statement must spring out of the event itself.[68]

When, however, admissibility is based upon circumstantial safeguards of accuracy, the result is to the contrary;[69] the utterance need be contemporaneous only with the factor or condition it reports, not with the ultimate fact in issue.[70] There is no valid reason to conclude that the trustworthiness of an observation is impaired because the ultimate accident or event could not be anticipated by the declarant at that moment. Rule 803(1) recognizes this and requires only contemporaneity with the event or condition described by the statement.[71]

The requirement that the statement be contemporaneous furnishes two important guarantees of reliability. The first of these is spontaneity.[72] When the statement or observation was made with little or no opportunity

64. *Compare* Konidaris v. Burgess, 223 Ala. 512, 137 So. 303 (1931); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967); *and* Gouin v. Ryder, 38 R.I. 31, 94 A. 670 (1915), *with* Sears, Roebuck & Co. v. Murphy, 186 F.2d 8 (6th Cir. 1951); Silver Seal Prods. Co. v. Owens, 523 P.2d 1091 (Okla. 1974); *and* State v. Long, 186 S.C. 439, 195 S.E. 624 (1938).

65. *See* Konidaris v. Burgess, 223 Ala. 512, 137 So. 303 (1931); Eveready Cab Co. v. Wilhite, 66 Ga. App. 815, 19 S.E.2d 343 (1942); Wrage v. King, 114 Kan. 539, 220 P. 259 (1923); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967); Gouin v. Ryder, 38 R.I. 31, 94 A. 670 (1915); Barnett v. Bull, 141 Wash. 139, 250 P. 955 (1926); Mercer Funeral Home v. Addison Bros. & Smith, 111 W. Va. 616, 163 S.E. 439 (1932).

66. *See* cases cited, note 65 *supra*.

67. Examples of such statements are found in Konidaris v. Burgess, 223 Ala. 512, 137 So. 303 (1931); Eveready Cab Co. v. Wilhite, 66 Ga. App. 815, 19 S.E.2d 343 (1942); Louisville & N. Ry. v. Cox, 145 Ky. 716, 141 S.W. 59 (1911); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967); Standard Coffee v. Carr, 171 Miss. 714, 157 So. 685 (1934); Shadowski v. Pittsburgh Ry., 226 Pa. 537, 75 A. 730 (1910); Gouin v. Ryder, 38 R.I. 31, 94 A. 670 (1915); Barnett v. Bull, 141 Wash. 139, 250 P. 955 (1926); Mercer Funeral Home v. Addison Bros. & Smith, 111 W. Va. 616, 163 S.E. 439 (1932). If redecided under 803(1), these decisions would probably be to the contrary.

68. *See* notes 21-24 and accompanying text *supra*.

69. *See* Picker X-ray Corp. v. Frerker, 405 F.2d 916 (8th Cir. 1969); Sears, Roebuck & Co. v. Murphy, 186 F.2d 8 (6th Cir. 1951); Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So. 2d 83 (1942); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926); Silver Seal Prods. Co. v. Owens, 523 P.2d 1091 (Okla. 1974); Commonwealth v. Coleman 458 Pa. 112, 326 A.2d 387 (1974); White Star Lines, Inc. v. Williams, 32 Tenn. App. 177, 222 S.W.2d 209 (1949); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); Marks v. I.M. Pearlstein & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943).

70. *See* cases cited, note 69 *supra*.

71. *See* note 1 and accompanying text *supra*.

72. Sears, Roebuck & Co. v. Murphy, 186 F.2d 8 (6th Cir. 1951); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926); Silver Seal Prods. Co. v. Owens, 523 P.2d 1091 (Okla. 1974); Marks v. I.M. Pearlstein & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943); State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); White Star Lines, Inc. v. Williams, 32 Tenn. App. 177, 222 S.W.2d 209 (1949). MCCORMICK, *supra* note 6, § 298; Morgan, *Classification*, *supra* note 5, at 236-37.

for reflection, it may be said that the statement was inspired by the event itself. Because it was, in a sense, more a product of reflex or instinct than of conscious thought, its reliability is based more on the trustworthiness of the statement than the veracity of the declarant.[73] For this reason it has been suggested that the testimony of a witness to whom a statement of present sense impression was made would be admissible even if the declarant were not qualified to testify for some reason.[74] Excited utterances have been admitted on this justification even though the declarant was a child, mentally ill, or a convicted felon,[75] but this idea has not yet been tested in the area of present sense impressions.

The second safeguard that results from the requirement of contemporaneity is the opportunity to cross-examine the reporting witness concerning the fact and content of the statement.[76] In the great majority of cases admitting unexcited contemporaneous declarations, the witness who heard the declaration also had substantial opportunity to observe the event or condition.[77] When the witness is not the declarant, the requirement of contemporaneity ensures that the statement was made in the presence of a person capable of testing its accuracy by personal observation of the event.[78] This opportunity for cross-examination provides assistance to the jury in its evaluation of the statement and protection against the danger that too much weight could be attributed to it.[79] When the witness and the declarant are the same person, as often occurs,[80] the witness may always be cross-examined as to the events that evoked the statement. Although courts have occasionally disregarded the requirement that the witness also perceive the event,[81] inadequate opportunity to cross-examine someone who witnessed both the event and the statement may well explain numerous cases in which statements of present sense impression have been excluded.[82]

It must be noted that the availability of a witness to both the statement and the event is a double-edged sword. The fact that the witness can testify to the same event or condition as did the declarant has sometimes been used to exclude the spontaneous utterance as cumulative.[83] The objection that

73. Slough, *supra* note 25; Comment, *Spontaneous Exclamations, supra* note 22.
74. Quick, *supra* note 38.
75. MCCORMICK, *supra* note 6, § 297.
76. MCCORMICK, *supra* note 6, § 298; MORGAN, *supra* note 25 at 341.
77. *E.g.*, Johnson v. Newell, 160 Conn. 269, 278 A.2d 776 (1971); Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So. 2d 83 (1942); Hastings v. Ross, 211 Kan. 732, 508 P.2d 514 (1973); Hornschuch v. Southern Pac. Co., 101 Ore. 280, 203 P. 886 (1921); Anderson v. State, 454 S.W.2d 740 (Tex. Cr. App. 1970); Claybrook v. Acreman, 373 S.W.2d 287 (Tex. Civ. App. 1963); Mathewson v. Olmstead, 126 Wash. 269, 218 P. 226 (1923).
78. Morgan, *Classification, supra* note 5, at 236.
79. *Id.* at 239.
80. *See* note 55 *supra.*
81. *See* Thompson v. State, 166 Ga. 512, 143 S.E. 896 (1928); State v. Cooper, 195 Iowa 258, 191 N.W. 891 (1923); Rouston v. Detroit United Ry., 151 Mich. 237, 115 N.W. 62 (1908).
82. Slough, *supra* note 25, at 252.
83. Swinson v. Nance, 219 N.C. 772, 15 S.E.2d 284 (1941); Shadowski v. Pittsburgh Ry., 226 Pa. 537, 75 A. 730 (1910); Jackson v. Utah Rapid Transit Co., 77 Utah 21, 290 P. 970 (1930).

evidence is cumulative often arises in fact situations such as that found in *Houston Oxygen Co., Inc. v. Davis*,[84] an automobile accident case. Mrs. Cooper, a witness, testified that one of the cars later involved in the accident had passed hers when she was four or five miles from the scene, and that she commented at the time, "They must have been drunk," and "we would find them somewhere on the road wrecked if they kept that rate of speed up."[85] The other passengers in Mrs. Cooper's car also testified as to the speed of the car and Mrs. Cooper's statement. Significantly, the *Davis* court admitted the statement, holding that it was not cumulative because the witness was alluding to an occurrence within her own knowledge in language calculated to make her meaning clearer to the jury than would expressions of opinion as to speed alone.[86] The court noted the considerable value of such statements both in adding weight and emphasis to the testimony of the witness and as a valuable and reliable way of proving the issue.[87]

Rule 803(1), like Rule 512(a) of the Model Code of Evidence,[88] includes the phrase "or immediately thereafter."[89] In this respect, Rule 803(1) and the Model Code provision follow the requirement of "substantial" contemporaneity enunciated by Thayer.[90] Even though contemporaneity is the decisive factor guaranteeing a lack of time for fabrication or failure of memory, Thayer believed that it would be impracticable to insist on exact contemporaneity.[91] The inclusion of this phrase goes beyond the stricter common-law holdings.[92]

A more conservative view was adopted in Uniform Rule 63(4)(a),[93] which would admit only statements made while the event was being perceived.[94] Morgan supports this view, asserting that unless strict contemporaneity is insisted upon, the guarantee of spontaneity is partially lacking and the likelihood that the witness will be able to testify as to personal perception of the same event is considerably weakened.[95]

The more liberal view reflected by Rule 803(1) is not, however, without safeguards. If there was a lapse of time between the event and the statement describing it, the trial court must exercise its discretion in

84. 139 Tex. 1, 161 S.W.2d 474 (1942).
85. *Id.* at 5, 161 S.W.2d at 476.
86. *Id.*
87. Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); Davis v. Younger Bros., 260 S.W.2d 637 (Tex. Civ. App. 1953); Comment, *Spontaneous Exclamations, supra* note 22.
88. MODEL CODE OF EVIDENCE rule 512(1) (1942).
89. *Compare* note 1 and accompanying text *supra with* notes 44, 45 and accompanying text *supra*.
90. Thayer, *supra* note 25.
91. *Id.*
92. *See, e.g.*, Sears, Roebuck & Co. v. Murphy, 186 F.2d 8 (6th Cir. 1951); Manuel v. American Employers Ins. Co., 212 So. 2d 527 (La. 1968); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926); Marks v. I.M. Pearlstein & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943); Pacific Mut. Life Ins. Co. v. Schlakzug, 143 Tex. 264, 183 S.W.2d 709 (1944).
93. UNIFORM RULE OF EVIDENCE 63(4)(a) (1953).
94. Quick, *supra* note 38. *See* notes 32 and 34 and accompanying text *supra*.
95. Morgan, *Classification, supra* note 5, at 236-37.

determining whether the declarant had an opportunity to form a purpose to misrepresent and whether the guarantees of trustworthiness are still present.[96] Most courts apply a more rigid standard of elapsed time for present sense impressions than for excited utterances, because in the latter case it might be found that a state of excitement had been prolonged by the circumstances.[97] If no evidence of the time elapsed is presented, the foundation for the present sense impression exception is not laid and the statement must be excluded.[98]

The overexpansion of the contemporaneity requirement would defeat the safeguards of the exception and result in questionable decisions; hence the meaning to be given to the phrase "or immediately thereafter" is a matter for sound judicial discretion.[99] The phrase should not be used to admit statements that do no fit within the rationale of the exception, but, since precise contemporaneity is not always possible, a slight time lapse should not result in the exclusion of valuable evidence.[100]

D. Perception

Another major requirement of the present sense exception is perception. Courts that have admitted present sense impressions are consistent in requiring the declarant to have perceived the event or condition described.[101] This perception requirement is no more than the basic requirement of firsthand knowledge or specific competency in qualifying a declarant to testify as to a comment on an event.[102] As long as perception is established, an observation need not be expressed orally to qualify as a present sense impression, as, for instance, when a bystander copies a license plate number during a robbery.[103] Unless perception is made clear, however, the statement must be excluded.[104]

When the declarant does not testify, the court's suspicion of the witness' testimony may lead it to find that perception was not established. There is no requirement that the declarant be identified,[105] but it is often

96. MCCORMICK, *supra* note 6, § 298; *Major Changes*, *supra* note 4, at 561; Morgan, *Classification*, *supra* note 5, at 237.

97. Comment, *Excited Utterances & Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969). *See* note 41 and accompanying text *supra*.

98. Mei v. Alterman Transport Lines, Inc., 159 Conn. 307, 268 A.2d 639 (1970); Manuel v. American Employers Ins. Co., 212 So. 2d 527 (La. 1968).

99. MCCORMICK, *supra* note 6, § 298; WEINSTEIN, *supra* note 38, ¶ 803(1)[01].

100. Picker X-ray Corp. v. Frerker, 405 F.2d 916 (8th Cir. 1969); Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So. 2d 83 (1942); MCCORMICK, *supra* note 6, § 298; WEINSTEIN, *supra* note 38, ¶ 803(1)[01]; THAYER, *supra* note 25.

101. *See* Kelly v. Hanwick, 228 Ala. 336, 153 So. 269 (1934); Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So. 2d 83 (1942); Thompson v. State, 166 Ga. 512, 143 S.E. 896 (1928); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942); Saint Louis, B. & M. Ry. v. Watkins, 245 S.W. 794 (Tex. Civ. App. 1922).

102. Comment, *Spontaneous Exclamations*, *supra* note 22.

103. State v. Smith, 285 So. 2d 240 (La. 1973).

104. Picker X-ray Corp. v. Frerker, 405 F.2d 916 (8th Cir. 1969); McClure v. Price, 300 F.2d 538 (4th Cir. 1962).

105. Evans, *Article Eight of the Federal Rules of Evidence*, 8 VAL. U.L. REV. 261, 277 (1974). *See* note 1 and accompanying text *supra*.

easier to establish the contact of an identified declarant with the event in question, from which contact perception may reasonably be inferred. If the witness is unable to identify the alleged declarant, the court may consider the danger of fabrication to have overcome any circumstantial guarantees of trustworthiness. The failure to establish perception underlies the rationale of courts' hesitancy to admit the spontaneous statements of unidentified bystanders.[106] Thus the admissibility of statements made by unidentified declarants may turn on the availability of other evidence corroborating the statement and describing the setting in which it was made.[107]

Many cases exclude spontaneous statements for lack of perception due to the requirement of the *res gestae* doctrine that the event perceived and described be the principal litigated fact.[108] As discussed earlier,[109] the present sense impression exception covers not only statements inspired by the main event in issue, but also those describing contributing factors and circumstantially related events or conditions.

The cases are divided on the issue whether actual sight is required to establish perception.[110] Some cases hold that one who hears but does not see cannot have a sufficient opportunity to observe, and that any statement as to the occurrence is an opinion or conclusion based on things not witnessed.[111] Although this viewpoint may well be justified in some cases, there are many conceivable situations in which aural perception would be sufficient to establish the occurrence of an event.[112] Visual observation is a factor to be considered in evaluating the validity of a statement, but an absolute requirement of visual perception would lead to the exclusion of valuable evidence.[113]

Rule 803(1) does not require that the declarant be a participant in the event.[114] Earlier cases, basing their rationale on the *res gestae* doctrine, excluded statements made by "mere onlookers."[115] It often happens,

106. The court in Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939), for example, excluded testimony of a witness about remarks he heard at the scene of an accident. The witness could not tell who the declarants were. In Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963), testimony relating the remarks of an unidentified woman concerning the speed of the defendant's automobile before the collision was excluded.

107. WEINSTEIN, *supra* note 38, ¶ 803(1)[01].

108. *See* Konidaris v. Burgess, 223 Ala. 512, 137 So. 303 (1931); Eveready Cab Co. v. Wilhite, 66 Ga. App. 815, 19 S.E.2d 343 (1942); State v. Cooper, 195 Iowa 258, 191 N.W. 891 (1923); Barnett v. Bull, 141 Wash. 139, 250 P. 955 (1926); notes 20, 22 and accompanying text *supra*.

109. *See* notes 65-71 and accompanying text *supra*.

110. *Compare* Johnson v. Newell, 160 Conn. 269 27 A.2d 776 (1971), *and* Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967), *with* Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974).

111. *See, e.g.*, Johnson v. Newell, 160 Conn. 269, 278 A.2d 776 (1971); Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967).

112. One such situation is suggested by Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967), in which an argument was overheard and commented upon over the telephone. Aural perception is also sufficient to establish the occurrence of a nearby struggle or of cars racing outside one's home, for instance.

113. Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974).

114. *See* note 1 and accompanying text *supra*.

115. *See* Louisville & N. Ry. v. Cox, 145 Ky. 716, 141 S.W. 59 (1911); Shadowski v. Pittsburgh Ry., 226 Pa. 537, 75 A. 730 (1910); Barnett v. Bull, 141 Wash. 139, 250 P. 955 (1926).

however, that the contemporary statements of a bystander are important evidence.[116] When this is the case, and the declaration is made under circumstances that provide guarantees of trustworthiness, there is no apparent reason to reject the statement simply because it was made by an observer rather than an actual participant.[117]

E. Subject Matter of the Statement

The subject matter of the communication of present sense impression is limited by Rule 803(1) to a description or explanation of the event or condition causing comment.[118] This restriction is consistent with prior case law.[119] The limitation is based upon the assumption that the safeguard of spontaneity extends no further in the absence of a startling event.[120] Unlike the exception for excited utterances,[121] the present sense impression exception does not extend to comments that are evoked by the event but describe events or conditions preceding it or collateral to it.[122] When such comments are offered, admissibility depends upon whether the declarant was under sufficient nervous stress to qualify his statement as an excited utterance under Rule 803(2).[123]

The word "narrates," which is found in both the Model Code[124] and Uniform Rules[125] versions of the exception, has been eliminated from the text of Rule 803(1).[126] This again illustrates a clear intention to exclude from the present sense impression exception narratives of past events or conditions evoked by an event or occurrence. A statement of this type is found in *Illinois Central Railway Co. v. Lowery*,[127] in which a witness testified that the defendant's servant exclaimed, "The damn thing was about wore out anyhow, and they would keep running it until they killed somebody." This statement did not describe the accident, but a condition that the declarant had noticed earlier; it thus did not meet the criteria for a present sense impression.[128] This limitation does not mean that the

116. *See, e.g.*, Picker X-ray Corp. v. Frerker, 405 F.2d 916 (8th Cir. 1969); Sears, Roebuck & Co. v. Murphy, 186 F.2d 8 (6th Cir. 1951); Kelly v. Hanwick, 228 Ala. 336, 153 So. 269 (1934); State v. Fletcher, 190 S.W. 317 (Mo. 1916); Hornschuch v. Southern Pac. Co., 101 Ore. 280, 203 P. 886 (1921); State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967); White Star Lines, Inc. v. Williams, 32 Tenn. App. 177, 222 S.W.2d 209 (1949); McCullom v. McClain, 227 S.W.2d 333 (Tex. Civ. App. 1949); Jackson v. Utah Rapid Transit Co., 77 Utah 21, 290 P. 970 (1930); Heg v. Mullen, 115 Wash. 252, 197 P. 51 (1921).

117. *See* cases cited, note 116 *supra*.

118. *Major Changes*, *supra* note 4, at 561.

119. *See, e.g.*, Illinois Cent. Ry. v. Lowery, 184 Ala. 443, 63 So. 952 (1913); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926); Silver Seal Prods. Co. v. Owens, 523 P.2d 1091 (Okla. 1974); Marks v. I.M. Pearlstein & Sons, 203 S.C. 318, 26 S.E.2d 835 (1943); State v. Long, 186 S.C. 439, 195 S.E. 624 (1938); White Star Lines, Inc. v. Williams, 32 Tenn. App. 177, 222 S.W.2d 209 (1949); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942).

120. *See* note 119 and accompanying text *supra*.

121. FED. R. EVID. 803(2).

122. MORGAN, *supra* note 25, at 343; WEINSTEIN, *supra* note 38, ¶ 803(1)[01].

123. MORGAN, *supra* note 25, at 343; WEINSTEIN, *supra* note 38, ¶ 803(1)[01].

124. *See* note 44 and accompanying text *supra*.

125. *See* note 45 and accompanying text *supra*.

126. *See* note 1 and accompanying text *supra*.

127. 184 Ala. 443, 63 So. 954 (1913).

128. Thayer, *supra* note 25, at 72-73.

statement must be in response to the principal event or transaction litigated.[129] A narrow interpretation could exclude evidence elucidating the event and aiding factfinders in assessing it. If the comment was made in reaction to one of the circumstances leading up to a final event or condition, it should be admitted under Rule 803(1).[130]

Courts that recognize the present sense impression have not used the opinion rule[131] to exclude present sense impressions, even though they very often announce opinions.[132] Most of these declarations could be considered within the established exception to the opinion rule for statements of collective facts.[133] The courts reason that the opinion aspect of present sense impressions does not create an undue risk of unreliability so long as the language is merely a shorthand form of expression rather than a conscious deduction.[134]

V. Conclusion

Rule 803(1) sets forth an exception to the hearsay rule which embraces statements made by a declarant during or immediately following the event or condition that occasioned it. The trustworthiness of these comments, made in reaction to unanticipated situations, derives from their spontaneity and the unlikelihood of fabrication.

This exception will undoubtedly overlap the excited utterance exception[135] to some degree, and in some cases either rule might apply to bring about the same result. Rule 803(1) will probably be used most often in conjunction with Rule 803(2) to admit statements made before the declarant could anticipate the litigated occurrence, and when the remarks would be otherwise inadmissible for lack of a startling event. Statements made after the event that would not meet the contemporaneity requirement of Rule 803(1) might still be admissible as excited utterances if a state of stress or excitement continues.

The formulation of an exception for present sense impressions is part of the trend toward permitting the finder of fact to weigh reliability in admitting certain types of hearsay. Although there are as yet virtually no federal cases applying the new exception, it has been endorsed by several courts.[136] It is evident that the exception, as adopted, is much broader than

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129. This was used to exclude statements under the *res gestae* doctrine. *See* notes 20-24, 64-68 and accompanying text *supra*.

130. WEINSTEIN, *supra* note 38, ¶ 803(1)[01].

131. Evidence of what the witness thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves, is generally not admissible. MCCORMICK, *supra* note 6, § 11.

132. Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481 (1946); Comment, *Excited Utterances & Present Sense Impressions as Exceptions to the Hearsay Rule in La.*, 29 LA. L. REV. 661 (1969).

133. MORGAN, *supra* note 25, at 343; Quick, *supra* note 38, at 204.

134. MCCORMICK, *supra* note 6, § 11.

135. FED. R. EVID. 803(2).

136. *See*, United States v. Chee, 422 F.2d 52 (9th Cir. 1970); Wabisky v. D.C. Transit System, Inc., 309 F.2d 317 (D.C. Cir. 1962).

any recognized by the present law of many states. Most state courts either limit admissibility to excited utterances or recognize no specific exception for spontaneous utterances.[137] Nevertheless, the present sense impression will now become a recognized exception to the hearsay rule in spite of its lack of judicial acknowledgement in the past. Some states have established the exception as a result of the Uniform Rules of Evidence[138] or through judicial decision.[139] Recent decisions in several other states have begun to recognize the exception.[140] It is likely that some states will follow the lead of the Florida legislature[141] by adopting evidence codes patterned after the Federal Rules.

The adoption of the present sense impression exception marks a crucial turning point, finally motivating courts to acknowledge and apply this long-considered means of searching for truth in courts of law. The excision of the inapplicable overtones imposed by the vague, inexact *res gestae* doctrine and of Wigmore's overly restrictive interpretation has led to the establishment of a rule more solidly based on a foundation of logic and clarity.

KATHRYN E. WOHLSEN

137. *See* Hughes, Horwitz, Koenig, Shields, Wolfe, *Comparison of the New Fed. R. Evid. and Rules of Evidence Applied in Massachusetts Courts*, 60 MASS. L.. 125 (1975); Comment, *Hearsay*, 27 ARK. L.J. 303 (1973); Comment, *Excited Utterances & Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969).

138. *See* note 45 *supra*.

139. 1 C. MCCORMICK & D. RAY, TEXAS LAW OF EVIDENCE § 916 (2d ed. 1956).

140. *See* State v. Newman, 162 Mont. 450, 513 P.2d 258 (1973); Silver Seal Prods. Co. v. Owens, 523 P.2d 1091 (Okla. 1974); Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974).

141. *See* Fla. H. R. 471 § 1 (1975); Note, *The Federal Rules of Evidence & Florida Evidence Rules Compared*, 3 FLA. ST. U. L. REV. 384 (1975).