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MORE ON RES GESTAE

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In the July issue of *Dicta* 1952 appeared an article entitled "Res Gestae in Colorado".¹ In this article res gestae was classified into three categories. They were "spontaneous declarations",² "verbal acts",³ and "contemporaneous acts". It was the latter category which excited some comment and as a consequence is worthy of further exploration.

Once again it is not the object of the writer to criticize the Supreme Court of Colorado, but rather merely to inform the practitioner and student that this classification of res gestae does exist and to attempt a clarification of the logic involved.

A partial exposition of the proposition that res gestae in Colorado involves a third element, which is a contemporaneous act, is found in an article by Max Melville⁴ in *Dicta*, July 1952. Mr. Melville, however, confines the use of contemporaneous acts to sex cases and in this he is not borne out by the cases.

This category of res gestae is, it is true, seemingly confined to criminal cases. The logic behind this seems to be more that these are the only situations in which there would be an objection to this type of evidence, rather than that the court has any desire to restrict it. The objection made is that these contemporaneous acts are sometimes offenses themselves and knowledge by the jury of their commission might unduly prejudice them against the defendant in this trial. In most instances this is true. Knowledge by the jury of some act, an offense in itself, committed while committing the offense with which the defendant is charged, would prejudice the jury. Evidence of this act would best be kept out. Why then, is it allowed? The answer to this is fairly simple. Because, under certain circumstances, it would be impossible for a witness to testify in regard to the act with which the defendant is charged without at least a mention of a contemporaneous act.

Take as an example the *Garcia* case.⁵ The defendant was on trial for first degree murder. He had committed an assault upon a person and when an arrest had been attempted had killed the person arresting him. A witness attempting to relate the events to the jury would find his story distorted and only a half truth if not allowed to mention the assault which led to the arrest attempt. It is conceivable, in a similar situation, if this evidence

* Written while a student at University of Denver College of Law.

¹ *Dicta*, July, 1952, "Res Gestae in Colorado" by Arthur Burke and Arthur Frazin.

² Which was admitted to be a part of the res gestae.

³ Which, while criticized as such, are generally admitted to be a part of the res gestae.

⁴ *Dicta*, supra, p. 249, "Evidence as to Similar Offenses, Acts, or Transactions in Criminal Cases" by Max Melville.

⁵ *Garcia v. People*, 59 Colo. 434, 149 P. 614 (1915).

were excluded, for a jury furnished with only an half truth, to conceive of the arresting officer as committing an assault on the defendant.

It is through practical necessity then that courts in their search for the truth should admit such evidence.

Res gestae has been defined as "things done; transactions; essential circumstances surrounding the subject. The circumstances, facts and declarations which grow out of the main fact are contemporaneous with it and serve to illustrate its character."⁶

Contemporaneous acts certainly fit this definition. Take once again the *Garcia case*.⁷ The contemporaneous act of assaulting the other person certainly grows out of the murder. That is, an explanation for the officer's attempt to arrest Garcia is contained in the explanation of the assault. The assault was contemporaneous with the murder. It had immediately preceded it. And it served to illustrate its character. This is, a jury may have been led to believe that the killing had an entirely different character without knowledge of the assault and ensuing arrest attempt. It is to be seen that a contemporaneous act fits the definition of res gestae.

There are many who, admitting the necessity of admitting this evidence and the proposition that spontaneous acts fit the definition of res gestae, nevertheless maintain that it should be isolated to save courts the possibility of confusion. They feel that lumping spontaneous declarations, verbal acts, and contemporaneous acts into one rule of evidence and calling it res gestae creates confusion. It is not the terming of all three as res gestae which creates the confusion; it is the failure to distinguish the logic underlying each.⁸

This restriction of the res gestae rule has found no sympathy in Colorado courts. As was said in *Stahl v. Cooper*,⁹ "The tendency is to broaden, rather than restrict, the res gestae rule."

Colorado has made broad use of the spontaneous acts in res gestae to help ascertain the facts of a case. There is only one requirement, besides those generally accepted in res gestae, and that is that the contemporaneous act be so interwoven with the main act as to be a part of it. That is, that it would be impossible to give a clear, honest opinion of what had happened without at least allusion to the contemporaneous act.

In 1913 the Colorado Supreme Court defined res gestae in such a way as to include contemporaneous acts. "Res gestae may be defined as matter incidental to the main facts and explanatory thereof, including acts and words so closely connected therewith as to constitute a part of it; the circumstances, facts, and declarations, which spring out of the main fact, are contemporaneous with it, and serve to illustrate its character."¹⁰

⁶ Black's Law Dictionary, 3rd ed., p. 1539.

⁷ *Garcia v. People*, supra.

⁸ See *Dicta*, "Res Gestae in Colorado", supra.

⁹ *Stahl v. Cooper*, 117 Colo. 468, 190 P. 2d 891 (1948).

¹⁰ *Martinez v. People*, 55 Colo. 5, 132 P. 64 (1913).

It is strictly a doctrine of necessity. If there is any way the evidence desired can come in with this obviously prejudicial evidence being excluded, this will be done. When, however, the ends of justice cannot be met without it, the evidence will be admitted.

A few cases will better serve to illustrate the character of a contemporaneous act.

In *Piela v. People*¹¹ the defendant who was tried for assault upon A had at the same time assaulted B. The court held evidence of the assault on B as a part of the *res gestae* and admissible. As can be seen, this evidence meets all the requirements enumerated in *Martinez v. People, supra*. It also meets the requirement that the evidence of the assault upon B, which is not the subject of the trial, is so interwoven with the assault upon A that a witness could not describe the affray without a mention of it. Such a result is not only logical but is justifiable. It would be unconscionable to fail in conviction in such a case merely because a witness mentioned the assault upon B when describing the assault upon A. This is, of course, the point upon which the entire question turns—is it possible to introduce the evidence of the assault in question without alluding to the other assault? In this case it was not and the evidence was properly admitted and labeled *res gestae*.

This case is also an example of the court going beyond the realm of sex cases as mentioned by Mr. Melville in his article *supra*. The assault involved was not of a sexual nature.

Garcia v. People, supra, is another example of the court admitting evidence of a contemporaneous act in a case not involving a sex offense. It too was labeled *res gestae*. “. . . evidence that the defendant had committed an assault upon another and killed the deceased while resisting arrest, was competent as a part of the *res gestae*.” The court may have erred in commenting upon the competency because what should be questioned is the materiality or relevancy, but nevertheless, the meaning is clear and the court had once again declared a contemporaneous act as a part of the *res gestae*.

It seems in some cases that the evidence admitted as *res gestae* might more properly be admitted as showing a scheme or design. Such a case is *Granato v. People*¹² in which there was an admission of evidence that defendant, who was prosecuted for statutory rape, aided his companion, who allegedly raped another girl, in removing her from the automobile. This case more properly seems to show design or scheme, but there is a thread running through this case and all contemporaneous acts cases which is not necessarily present in those in which a scheme or design is proved. That thread is the element of the necessity of admitting this evidence to allow the proper evidence for a conviction of a guilty party.

Another case of this type is the case of *Pearson v. People*¹³

¹¹ *Piela v. People*, 6 Colo. 343 (1882).

¹² *Granato v. People*, 97 Colo. 303, 49 2d 431 (1935).

¹³ *Pearson v. People*, 69 Colo. 76, 168 P. 655 (1917).

in which it was held that the court properly admitted as part of the *res gestae*, evidence of circumstances surrounding the defendant's arrest, taking of arms from him, etc. It is not contended here that the Colorado court has never been wrong in admitting evidence as a contemporaneous act and part of the *res gestae*. If the court has erred this would seem to be the case. This depends on the circumstances of the case and, as in this case, it might appear that perhaps the court erred in holding this to be a part of the *res gestae*. If, however, it appears that the arrest and the offense are closely connected, in point of time under the circumstances, then the arrest might actually be contemporaneous with the act for which the defendant is indicted.

The thread running through all contemporaneous acts cases is the thread of necessity. The necessity for admitting evidence of another act or occurrence in order to receive evidence of the main act. This is borne out quite clearly in *Sarno v. People*.¹⁴ In this case evidence was admitted of different acts of the same kind constituting several offenses and it was held that no error was committed where it appeared that the acts were all a part of a single transaction.

There is no reason for excluding evidence of this sort. But there is one fact which must be kept in mind, which is that the rule of necessity should govern such admissions. If the evidence desired can be admitted without admitting statements concerning contemporaneous acts this should be done. Where it is impossible to separate the different acts then the evidence must come in.

An adequate safeguard against the prejudicial effects of the admission can be obtained in the court's instructions to the jury wherein he may warn them of the singleness of purpose of the admission of this evidence.

Res gestae then, as seen in Colorado, is composed of three categories. Undoubtedly spontaneous declarations and verbal acts are still the most important of these three, but contemporaneous acts should be recognized and accorded its place as a part of the Colorado law on evidence. Such recognition, along with an understanding of the principles involved, will aid the attorney in the preparation of his case and the court in its determination of these questions of evidence.

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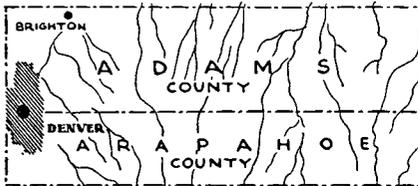
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¹⁴ *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924).

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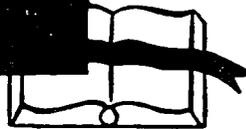
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