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A learned chief justice once remarked, "there are few problems in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestae*." [1] While this is true, it need not be so of necessity.

The term "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." [2]

There is perhaps no state which considers res gestae in as broad a sense as does Colorado. Professor Wigmore suggests that res gestae be confined to spontaneous declarations. Most other text writers admit the existence of verbal acts within the doctrine of res gestae, whereas, few writers recognize the third category, referred to here as contemporaneous acts, which Colorado adopts as part of the res gestae. The wisdom of this third category will not here be questioned, rather the sole issue to be considered will be the law of res gestae as actually applied in the Colorado courts.

The three segments to be considered then are contemporaneous acts, verbal acts, and spontaneous declarations. They will be considered in that order.

The category of contemporaneous acts, while not recognized by text writers, is easy of definition and comprehension. It is a doctrine of necessity. There is no basis under the hearsay rule for excluding testimony concerning these acts. The only objection to the admission of a contemporaneous act in evidence is that it may include an offense other than that for which the defendant is on trial. It is here that the doctrine of necessity applies. If the act which is in issue can be separated from an act about which testimony would be objectionable then, of course, this should be done, and the objectionable testimony should be excluded. When this separation is impossible, Colorado courts have consistently held evidence of these "secondary" acts to be admissible as a part of the res gestae. It would seem from the definition above that the courts may so do. In *Pearson v. People*,[3] the court admitted as part of the res gestae, evidence surrounding defendant's arrest, taking of arms from him, and the like.

In *Piela v. People*,[4] it appeared that, during an affray, defendant who was indicted for assaulting A with intent to murder, also assaulted B. The assault upon B was held to be a part of the res

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[1] Beasley, C. Jim, Hunter v. State, 40 N.J. L. 536.

[2] Black's Law Dictionary, 3rd ed., p. 1539.

[3] Pearson v. People, 69 Colo. 76, 168 P. 155 (1917).

[4] Piela v. People, 6 Colo. 343 (1882).

gestae, and the court said that the conviction under the indictment would not be set aside because the witness, in describing the affray, spoke of the assault upon B. In *Garcia v. People*,[5] evidence was admitted, as part of the res gestae, showing that the defendant had committed an assault upon another and while trying to escape, killed the deceased (for whose murder he was being tried) while resisting arrest. As can be seen by these cases, the question raised by the court when considering admissibility is whether the act, about which testimony is attempted to be introduced, is a part of the transaction in issue. While the wisdom of calling this a part of the res gestae may be questioned by many, it is well established in Colorado that such acts must be considered as within the res gestae.

Verbal acts are utterances which accompany some act or conduct to which it is desired to give a legal effect. When an act has intrinsically no definite legal significance, or is ambiguous, its legal purport or tenor may be ascertained by considering the words accompanying it. These utterances thus enter as a verbal act. The use of utterances as verbal acts has four limitations:[6] (a) The conduct to be characterized by these words must be material to the issue; (b) it must be equivocal in its nature; (c) the words must aid in giving legal significance to the conduct; and (d) the words must accompany the conduct.

A spontaneous exclamation may be defined as a statement or exclamation made immediately after some exciting occasion by a participant or spectator, asserting the circumstances of that occasion as it is observed by him. The admissibility of such an exclamation is based on the experience that, under certain external circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes control. The utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him.[7]

The confusion arises when the courts speak of res gestae as embodying but one logic, whereas in reality all of the above three segments mentioned have as a basis a different logical principle.

The logic behind the contemporaneous act is that if the court is to reach the truth of the matter asserted, it is sometimes necessary to testify to an act which is closely connected with the main act. This evidence concerning a contemporaneous act is admitted

[5] Garcia v. People, 59 Colo. 434, 149 P. 614 (1915).
[6] Wigmore Evidence, § 1772 (2d ed.).
[7] *Id.* at § 1747.

through the doctrine of necessity, not as substantive evidence, but as an act so closely connected with the main act that it is impossible to separate the two. These acts do not come under the hearsay rule as an exception because they are not hearsay evidence. In *Garcia v. People, supra,* an example is given in which the court stated that, "evidence that the defendant had been ejected from a hotel and stabbed the person who ejected him, was relevant as part of the res gestae on prosecution for killing the officer who attempted to arrest him." As shown by the court, these acts were so closely connected as to be impossible of separation.

As to verbal acts, there should be no objection to their admission because, as shown by the definition, they are not hearsay but are merely a verbal phrase with accompanies and gives a legal significance to the equivocal act. In the case of *Pickens v. Davis,*[8] the testatrix had made statements to the effect that when she cancelled her second will, the first will was not revived. It was held that these statements were verbal acts accompanying and explaining the equivocal act of revocation.[9]

Spontaneous declarations are true hearsay statements. They are introduced to prove the truth of the matter asserted. They are extra-judicial statements, not under oath, and with no opportunity to cross examine. Furthermore, the declarant is often not in court. Spontaneous declarations are admitted because the circumstances under which they are made indicate that they may be believed. The logic behind the admission of these statements is based on common sense. In the experience of men, there are events which are so shocking that an utterance spontaneously made while still under the influence of this event (and about this event) are to be given evidentiary value because of the likelihood of truth. These are proper exceptions to the hearsay rule.

Colorado does not clearly distinguish between these three segments of res gestae. For instance, in the case of *Martinez v. People,*[10] the court said, "res gestae may be defined as matter incidental to the main fact 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." This is typical of the Colorado construction of the rule. There is no allowance made for the difference in logic underlying the three segments mentioned. In the case of *Industrial Comm. v. Fotis,*[11] the court further states that "res gestae, while often spoken of as an exception to the hearsay rule, is generally not such in fact but ordinarily it relates to statements which because of their intimate relation to facts become a part of those

[8] Pickins v. Davis, 134 Mass. 257.

[9] See also for examples of verbal acts the following Colorado cases: Sharp v. McIntire, 23 Colo. 99, 46 P. 115 (1896); Wilcoxen v. Morgan, 2 Colo. 473 (1875); Wilson v. Birt, 77 Colo. 206, 235 P. 563 (1925).

[10] 55 Colo. 51, 132 P. 64 (1913).

[11] 112 Colo. 423, 149 P. 2d 657 (1944).

facts and are therefore admitted as such." Is the reference here to spontaneous declarations, verbal acts, or contemporaneous acts?

Further the supreme court, in the recent Colorado case of *Stahl v. Cooper*,[12] states: "Res gestae are events speaking for themselves, through the instinctive words or acts of participants, not the words or acts of participants when narrating the events, and what is done or said by participants under the immediate *spur* of a transaction becomes thus part of the transaction, because it is then the transaction that speaks." This could encompass either or both verbal acts and spontaneous declarations. The court further states, "A statement, if part of the res gestae, must be in the nature of an exclamation rather than an explanation, and must be spontaneous and instinctive rather than deliberate." This, while an excellent statement of a spontaneous declaration, is not definitive of a verbal act. If the courts were to follow the latter statement and apply it to verbal acts as part of the res gestae, this would necessarily limit the admission of verbal acts. Yet, in this same case, the supreme court stated, "The tendency is to broaden, rather than to restrict, the res gestae rule."

Colorado courts have taken the generally accepted two segments of res gestae and added a third which we have called "contemporaneous acts." These are all truly a part of the transaction. Spontaneous declarations are exceptions to the hearsay rule; verbal acts and contemporaneous acts are not within this rule. This is the only point of difficulty. It is necessary for the Colorado practitioner to keep constantly in mind the difference in logic underlying the admission of the three. The danger inherent in res gestae lies in trying to apply the same logic to all segments. This is, of course, impractical. Spontaneous declarations are admitted because the circumstances under which they are made point up the probability of their truth; verbal acts are admitted because they are not considered statements (and therefore cannot be hearsay), but as a part of the act which they explain; contemporaneous acts are not hearsay because they are not statements and are admitted (if objected to on other grounds) because it is impossible to testify to the main fact without talking about these acts also.

There is no reason why these three segments of res gestae should not exist side by side. With a thorough understanding of all three, the doctrine of res gestae can go on serving the ends of justice.

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[12] 117 Colo. 468, 190 P. 2d 891 (1948).