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# Theoretical Bases of Admitting Agents Declarations Made After the Event as Evidence Against His Principal in Personal Injury Actions

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**THEORETICAL BASES OF ADMITTING AGENT'S DECLARATIONS MADE AFTER THE EVENT AS EVIDENCE AGAINST HIS PRINCIPAL IN PERSONAL INJURY ACTIONS**

In the event that an action is brought against a principal for personal injuries or wrongful death it is often necessary to determine whether a declaration by his agent who was involved in the allegedly tortious occurrence, made after termination of the event, is admissible in evidence against the principal. This presents a perplexing problem in view of the existing decisions. It is perhaps true that with regard to no other question are the judicial solutions and the reasons offered therefor more unsatisfactory in principle. While it may be apparent to one who peruses the cases that much of the obscurity in the reasoning of the courts is due to their indiscriminate use of the phrase *res gestae*, there is also, the writer believes, a real misunderstanding concerning what principles can serve as reasonable grounds for the admission of such evidence. It is the purpose of this note to explain three distinct principles which have been referred to in cases determining the admissibility of this type of evidence; to show that only one of these can reasonably be said to justify its reception in cases of the kind here considered; and to demonstrate that this one applicable principle has been overlooked by some courts in reaching a decision. The principle referred to is that which justifies the admission of spontaneous exclamations.

The following facts, although hypothetical, are useful to illustrate the type of situation out of which the instant problem arises. "A" who is employed by "P" as a truck driver, while driving upon "P's" business, strikes a pedestrian inflicting serious injuries. Immediately after the impact he jumps from the truck and with the help of a bystander carries the injured man to a house abutting the street. On the way to the house the bystander remarks, "You must have been blind if you didn't see this man." In response "A" says, "I guess I just wasn't watching the road." Thereafter the injured man institutes an action for personal injuries against "P" predicated on the alleged negligence of his driver. He seeks at the trial to introduce the above declaration of "A" by means of the testimony of the bystander to prove that "A" was not careful in the respect indicated by his statement. "P" objects to the admission of the declaration on the ground that it constitutes mere hearsay.

In order to rule intelligently upon the objection of "P" it is necessary that the court examine the principles upon which the Hearsay Rule rests. It may be said with reasonable precision that the rule excludes declarations offered for the purpose of proving the truth of the facts asserted therein,<sup>1</sup> when such declarations were

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<sup>1</sup> 6 WIGMORE, EVIDENCE sec. 1766 (3d ed. 1940).

not made under circumstances which impart to them a judicially recognized circumstantial probability of trustworthiness, and when offered in evidence in a manner which precludes opportunity to the party against whom they are offered to cross-examine the declarant.<sup>3</sup> It appears that the real basis of the rule is to be found in the conviction of courts that it is unfair to the party against whom such statements are offered and unproductive of justice to admit them without the safeguard of cross-examination unless the circumstances under which the statements were made warrant a probability of trustworthiness sufficient, in the opinion of the courts, to justify dispensing with that safeguard. The rule does not rest upon doubt as to the truth of the witness' testimony, as he is under oath and subject to cross-examination, but upon misgivings regarding the accuracy and veracity of the declarant who is not before the court. It is important to notice that the rule does not exclude all declarations "heard said," but operates only on those offered to prove the truth of the assertions therein, *e.g.*, those offered for their testimonial value.<sup>4</sup> This attitude toward untested statements offered for their truth seems sound in view of the frequency with which inaccuracies and falsehoods are exposed upon cross-examination by skillful lawyers.

How then does the Hearsay Rule relate to the hypothetical case *supra*? It is obvious that the declaration sought to be introduced by the plaintiff is hearsay inasmuch as it was heard said. It is equally apparent that the declaration is offered for no purpose other than to prove the truth of the assertion contained therein, *e.g.*, that "A" failed to look where he was going. In addition it appears that declarant, "A," does not testify in court to the facts stated, but that his declaration is offered in evidence by another who heard it. Except for the principle which will now be explained it would appear the statement should be rejected as objectionable hearsay.

#### PRINCIPLE ADMITTING SPONTANEOUS EXCLAMATIONS

Declarations of the sort known as spontaneous exclamations or declarations are admitted in evidence although they constitute hearsay and although they are generally offered as evidence of the truth of the facts asserted therein. This is because the courts have found in the circumstances of their utterance a probability of trustworthiness. Wigmore lists the following as requisites of a spontaneous exclamation: "(1) A startling occasion (2) A statement made before time to fabricate (3) Relating to the circumstances of the occur-

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<sup>3</sup> WIGMORE, EVIDENCE sec. 1422 (3d ed. 1940).

United States v. Macomb, 26 Fed. Cas. 1132, No. 15702 (C.C.D. Ill. 1851), 5 WIGMORE, EVIDENCE sec. 1362 (3d ed. 1940).

<sup>4</sup> Terry v. United States, 51 F. 2d 49 (C.C.A. 4th 1931), 6 WIGMORE, EVIDENCE sec. 1766 (3d ed. 1940).

<sup>5</sup> 6 WIGMORE, EVIDENCE sec. 1766 (3d ed. 1940).

rence."<sup>6</sup> The theory upon which spontaneous exclamations are admitted is not complicated. It is thought that a statement made by one who was at the scene of an exciting occurrence, spontaneously and under the influence of the occasion, before the mind has had opportunity to become sufficiently detached to reflect or to falsify is likely to be true. Thus there is a probability of trustworthiness, the product of the circumstances under which the statement was made. It has been said that the facts must speak through the person, not the person about the facts. Many circumstances must often be considered in order to determine whether a statement is, in fact, spontaneous. Courts usually consider the amount of intervening time between the occurrence and the making of the statement of importance as bearing on the question of spontaneity.<sup>7</sup> Whether the declarant was himself injured and suffering when he spoke is another circumstance which might reasonably be noticed.<sup>8</sup> The fact that the declarant was at the time of speaking, and at all time prior thereto after the occurrence, laboring under great responsibility has influenced one court to hold admissible his declaration made two hours after the occurrence.<sup>9</sup> In another case the declaration of one made eight days after the occurrence was admitted as spontaneous because prior to the utterance thereof the declarant had remained unconscious.<sup>11</sup> Time, it appears, is but one consideration. Usually spontaneous declarations are made by a participant in the occurrence, but they have been received when made by bystanders.<sup>12</sup> If spontaneity is the test it should make no difference by whom the spontaneous declaration is uttered. In deciding whether a given declaration is spontaneous it has generally been said that the trial judge should be accorded much discretion.<sup>13</sup>

In reference to the hypothetical case *supra* the principle governing the admission of spontaneous declarations would appear clearly applicable. Nevertheless, in some cases involving very similar circumstances, the courts have apparently neglected this principle entirely, attempting to decide on admissibility by applying one or the other of two dissimilar principles which, it will hereafter appear, could not reasonably be found to supply a ground for admissibility,

<sup>6</sup> 6 *Id.* sec. 1750.

*Cromeenes v. San Pedro L.A. & S.L.R. Co.*, 37 Utah 475, —, 109 Pac. 10, 15 (1910).

<sup>7</sup> *McKELVEY*, EVIDENCE sec. 278 (5th ed. 1944).

<sup>8</sup> *Rothrock v. City of Cedar Rapids*, 128 Iowa 252, 103 N.W. 475 (1905).

<sup>9</sup> *Walters v. Spokane International Ry. Co.*, 58 Wash. 293, 108 Pac. 593 (1910).

<sup>11</sup> *Britton v. Washington Water Power Co.*, 59 Wash. 440, 110 Pac. 20 (1910).

<sup>12</sup> *Armborst v. Cincinnati Traction Co.*, 25 F. 2d 240 (C.C.A. 6th 1928), *New York, C. & St. L. R. Co. v. Kovatch*, 120 Ohio St. 532, 166 N.E. 682 (1929).

<sup>13</sup> *Walters v. Spokane International Ry. Co.*, 58 Wash. 293, 108 Pac. 593 (1910) *McKELVEY*, EVIDENCE sec. 279 (5th ed. 1944).

nor grounds, in themselves, for rejection of the evidence. The courts have apparently decided these cases upon the principles admitting verbal acts<sup>14</sup> and vicarious admissions.<sup>15</sup> It is believed that these principles should not ordinarily be decisive in such cases.

#### PRINCIPLE ADMITTING VERBAL ACTS

The concept of the verbal act cannot be cast immediately aside in a note concerned with the admissibility of agents' declarations made after the occurrence and sought to be introduced against the principal in personal injury actions. Although clearly the verbal act doctrine is not likely to be applicable under such circumstances, and certainly cannot be applicable under the facts of the hypothetical case *supra*, its unwarranted influence can be discovered in some of the cases. It is typical of verbal acts that the making of the statements is an act which has in itself legal significance in the case without regard to the truth of the facts asserted in the statement.<sup>16</sup> In other words, the truth of the statement is immaterial, and the statement is not offered in evidence to prove the truth of the facts stated, but for some other purpose. The statement is relevant regardless of its truth. Such utterances are classified by Wigmore as follows: "(1) words the utterance of which is a fact forming part of the issue (*e.g.*, words of a contract or a slander) (2) words uttered at the time of doing a material equivocal act, and forming part of the total conduct which determines the legal significance of the act (*e.g.*, words of ownership-claim accompanying the occupation of land) (3) words used circumstantially as indirect evidence (*e.g.*, words of notification as evidence that the person notified received knowledge)."<sup>17</sup>

It will be seen that statements of this sort are not objectionable within the Hearsay Rule stated *supra* because they are not offered for their truth; their truth does not matter. In an action for slander a necessary element of proof is that the allegedly slanderous words were spoken. Before any question of the truth or falsity of the facts asserted by the words can arise it must be shown that they were uttered. How could this be proved except by one who heard them? If title to land by adverse possession is claimed, a statement by the occupant while in possession that he owns the land, whether this be true or false, is relevant to show that he claimed the ownership and thus held adversely to the claimed rights of another. Whenever knowledge is a fact to be proved the fact that words of notice were spoken to one alleged to have had knowledge is indirect evidence tending to establish that he was aware of the matter concerning

<sup>14</sup> *Norris v Interurban St. Ry. Co.*, 90 N.Y.S. 460 (1904).

<sup>15</sup> *Morse v Consolidated Ry. Co.*, 81 Conn. 395, 71 Atl. 553 (1908).

<sup>16</sup> 6 WIGMORE, EVIDENCE sec. 1772 (3d ed. 1940)

<sup>17</sup> 6 *Id.* sec. 1746.

which the words were spoken. In each case the words are important regardless of their truth; they are independently relevant.

In order that a statement can be properly admitted as a verbal act the following have been considered requisites: " (1) There must be a *main* or *principal act*, relevant under the issue, the significance of which needs to be made definite; (2) the words must genuinely elucidate or *give character* to this act; (3) the words must be by the *actor himself*, not by another person; and (4) the words must be *precisely contemporaneous* with the act."<sup>18</sup>

It is because the situations with which this note is concerned, like the hypothetical case *supra*, involve statements offered for their truth and for no other purpose, and because the statements were made after the act, not contemporaneously with it, that the verbal act concept cannot properly be regarded as a ground for removing such statements from the prohibition imposed by the Hearsay Rule. Having seen that the statement in the hypothetical case cannot qualify as a verbal act, it may be queried whether it might be admissible under another theory that of the vicarious admission.

#### PRINCIPLE ADMITTING VICARIOUS ADMISSIONS

McKelvey defines evidential admissions as follows:

"The evidential admission is the statement by a party (at some previous time) of a fact inconsistent with a fact attempted to be established by him at the time of trial; a statement which, when brought into the case, comes in as a piece of evidence, direct or circumstantial, testified to by a third party from which the court and jury may draw an inference as to the truth of the fact in issue."<sup>19</sup>

It may be said that admissions of parties are always receivable.<sup>20</sup> One theory treats admissions as outside the scope of objectionable hearsay on the ground that a party having made a statement which by chance operates against his interest at the time of trial cannot object to its reception as evidence, for the reason that he has no standing in common sense or law to complain that he has had no opportunity to cross-examine himself.<sup>21</sup> A contention to that effect offered by the declarant himself would seem ridiculous. Another is predicated upon the "against interest" or "estoppel" elements which are thought to furnish a probability of trustworthiness in that one would not be expected to make statements against his own interest unless they are true.<sup>22</sup> However this may be, it is not a question within the scope of this note.

<sup>18</sup> 6 *Id.* sec. 1752.

<sup>19</sup> MCKELVEY, EVIDENCE sec. 83 (5th ed. 1944).

<sup>20</sup> 4 WIGMORE, EVIDENCE sec. 1048 (3d ed. 1940)

<sup>21</sup> *Ibid.*

<sup>22</sup> MCKELVEY, EVIDENCE sec. 89 (5th ed. 1944).

In order that a declaration can be properly called an admission it must have been, in contemplation of law, that of a party to the suit.<sup>23</sup> It will hereafter appear that the statement need not, in fact, be made by a party under certain circumstances it may be made by the party's agent in which case the law will attribute the statement to the party so that it constitutes his own admission. Here a principle of substantive law of Agency is superimposed upon a principle of the adjective law of Evidence to create what is known as a vicarious admission. By authorizing his agent to perform certain acts the law says that the principal has authorized any statements which are naturally and usually associated with the doing of such acts. Mechem lists the following requirements which must be met before the statement of an agent will be deemed in law that of his principal:

- (1) That the making of the statements or admissions of the class of those in question can fairly be regarded as incident to the act authorized to be done. If there was no occasion to say anything of the sort in question, there can be no foundation for their admissibility
- (2) They must be made by an agent authorized to act with reference to the subject matter.
- (3) The statements, representations or admissions must have some inherent and rational relation to the subject matter of his agency
- (4) And the statements, representations or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance or so soon after as to be in reality a part of the transaction.<sup>24</sup>

It is also said in substance that the statement must have been made by the agent while acting within the scope of his employment, regarding some act within the scope of his authority, which was incomplete at the time.<sup>25</sup> That a statement which is a narrative, in that it relates to some act already completed and past, is not to be regarded as the admission of the principal is substantiated by the decisions.<sup>26</sup> The authority of an agent to make statements may be express or it may be implied as a usual and natural concomitant of the authorized act to which it relates.<sup>27</sup> When authority is found the statement becomes that of the principal, and because it is so regarded, it becomes an admission which is receivable under the ordinary rules of evidence relating to admissions.

It seems apparent that a statement like that in the hypothetical case *supra* could not reasonably be held to constitute a vicarious ad-

<sup>23</sup> *Laidlaw v Sage*, 2 App. Div. 375, 37 N.Y.S. 770 (1896).

<sup>24</sup> 2 MECHEM, A TREATISE ON THE LAW OF AGENCY sec. 1783 (2d ed. 1914)

<sup>25</sup> *Franklin Bank v Penn. D. & M. Steam Navigation Co.*, 11 G. & J. (Md.) 28, 33, 33 Am. Dec. 687 (1839)

<sup>26</sup> *Morse v Consolidated Ry Co.*, 81 Conn. 395, 71 Atl. 553 (1908) *Marsh v. South Carolina Railroad Co.*, 56 Ga. 274 (1875).

<sup>27</sup> 2 MECHEM, A TREATISE ON THE LAW OF AGENCY sec. 1348 (2d ed. 1914).

mission for at least two reasons. The act to which it relates, the driving of the truck, or perhaps the collision, with the plaintiff, had terminated when the statement was made. And it cannot be said that the statement was a usual or natural concomitant of any act the agent was authorized to perform. In brief, it might be said the statement was completely unnecessary to performance of any duty within the scope of the agent's authority.

Having examined the principles upon which spontaneous exclamations, verbal acts, and vicarious admissions of agents are admissible in evidence one finds that only the first type can be said to furnish a proper ground for admitting a statement made under circumstances similar to those in the hypothetical case aforesaid. The spontaneous exclamation principle would seem, in the final analysis, to be that upon which the issue of admissibility should be decided. Unfortunately the cases do not always show recognition of this principle.

In *Morse v. Consolidated Ry. Co.*,<sup>29</sup> an action for wrongful death, statements made by a motorman two or three minutes after the decedent had been taken from beneath his street car were held inadmissible. The court without discussing spontaneity said that the agent was not authorized to make admissions after the event had passed, and that the statements were inadmissible as constituting a narrative. Thus the court talked exclusively in terms of the vicarious admission principle. Again, in *Pittsburgh, Cincinnati and St. Louis Railroad Co. v. Theobald*,<sup>30</sup> the court discussed the case in terms of the agency principle. The facts were that after the plaintiff was injured in falling from a streetcar someone asked the brakeman why he had not pushed the plaintiff harder to which the brakeman replied that he would have if the plaintiff hadn't "caught to something." The court holding the statement inadmissible said, "Neither the declaration nor admissions of an agent, made after the event to which they refer has transpired, can be received as evidence to bind the principal unless they are so immediately connected therewith as to become a part of the *res gestae*." Not only does this court talk in terms of vicarious admission, but it offers an alternative ground for possible admissibility, that is, the declarations might be admissible if they had been found to be a part of the *res gestae*. *Res gestae* has been used to connote spontaneous exclamations,<sup>30</sup> verbal acts,<sup>31</sup> and the time during which the agent has authority to make vicarious admissions.<sup>32</sup> Since the court offered *res gestae* as an alternative to the vicarious admission principle as a possible ground for admitting

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<sup>29</sup> 81 Conn. 395, 71 Atl. 553 (1908)

<sup>30</sup> 51 Ind. 246 (1875)

<sup>31</sup> *Leahy v. Cass Ave. & F. G. Ry. Co.*, 97 Mo. 172, 10 S.W. 58 (1888)

<sup>32</sup> *Cooper v. The State*, 63 Ala. 80 (1879).

<sup>33</sup> *Vicksburg & Meridian Railroad Co. v. O'Brien*, 119 U.S. 90, 7 Sup. Ct. 118, 30 L. Ed. 299 (1886)

the statements which it rejected, and said nothing about spontaneity, it might be assumed it referred to the verbal act principle which has already been discarded in this note as inapplicable where the statement is offered to prove the truth of the facts asserted therein, or where the act and the statement elucidating it are not contemporaneous. But the important consideration is that the court did not recognize the spontaneity principle. Does this not indicate a failure to recognize the third side of an essentially trilateral problem with the result that the only real possibility for admitting the evidence is ignored?

In sharp contrast to the foregoing cases is that styled *Walters v. Spokane International Ry. Co.*<sup>33</sup> where the spontaneity principle was recognized and utilized to admit the evidence in a rather extreme case. There a train had been derailed, fatally injuring the engineer and brakeman, so that the conductor became responsible for the care of the injured men and all other matters pertaining to the train. Immediately after the wreck he ran one mile to a telephone to notify the railroad company. He then walked back to the train and the dying crewmen. He was followed by the occupant of the farmhouse at which he had placed the telephone call, this man arriving at the train approximately two hours after the wreck took place. It was then that the conductor stated to him that the wreck had been caused by a bad rail and that the track was defective. The court ruled that the lower court did not err in admitting the statements as spontaneous declarations although two hours had elapsed between the wreck and the utterances, apparently resting its decision on two grounds: (1) the trial judge has much discretion in determining whether a statement is spontaneously uttered, and (2) the great responsibility under which the conductor labored at the time might be considered a circumstance indicating that his mind was not in a condition to reflect or fabricate. While it is quite possible to differ with the decision on the merits, the case definitely demonstrates that the court recognized the applicability of the spontaneous exclamation principle and used it. Other cases involving agents' statements made after the fact show that the spontaneous exclamation principle is a recognized ground for admissibility<sup>34</sup>

Whether the courts which do not utilize spontaneity as a test in cases involving declarations of agents fail to do so because of lack of precedent in that class of cases, or because they feel that the principle cannot justly be applied to agency cases, or because the idea has not come to mind, the writer does not know. But in view of the fact that spontaneous exclamations have been received from mere

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<sup>33</sup> 58 Wash. 293, 108 Pac. 593 (1910)

<sup>34</sup> *Bessierre v. Alabama City, G. & A. Ry. Co.*, 179 Ala. 317, 60 So. 82 (1912) *Cincinnati, L. & A. Electric St. R. Co. v. Stahle*, 37 Ind. App. 539, 76 N.E. 551 (1905) *Powe v. Pittsburgh R. Co.*, 303 Pa. 533, 154 Atl. 795 (1931).

bystanders,<sup>35</sup> and from children;<sup>36</sup> there appears to be no good reason why those of agents should be excepted. A principal should have no better protection from unfavorable evidence than any other party that he should, has never been contended. But the ground upon which statements of the sort here considered have sometimes been admitted, that is, that they are a part of the *res gestae*, and the accompanying comments which make no mention of spontaneity, would seem to indicate that some courts either confuse the spontaneous declaration with the verbal act which is a statement not offered for its truth, or else they do not know upon what rational basis they admit the evidence.

In conclusion, it is submitted that declarations by agents made after the event and offered to prove the truth of the assertions contained therein should not be rejected by the courts without regard to the possibility that they were perhaps spontaneous declarations, admissible for that reason. It is further submitted that to replace the term *res gestae* with an equivalent explanation in English would be to eliminate much uncertainty in the law.

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<sup>35</sup> *Armborst v Cincinnati Traction Co.*, 25 F 2d 240 (C.A.A. 6th 1928)

<sup>36</sup> *New York, C. & St. L. R. Co. v. Kovatch*, 120 Ohio St. 532, 166 N.E. 682 (1929).