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EVIDENCE—ADMISSIBILITY OF STATEMENTS BY AN ALLEGED AGENT INVOLVED IN AN ACCIDENT TO ESTABLISH AGENCY.

It is a well-recognized general rule that the fact of agency cannot be established by the extra-judicial statements, admissions, or declarations of the alleged agent,¹ although it is equally true that the agent is a competent witness to prove the agency, when it rests in parol.

Assuming that the agent does not testify however, or denies the fact of agency it frequently happens, in an action arising as the result of an accident, that the injured party will have available little or no proof that the other party involved in the accident was an agent of the defendant or was acting in that capacity. In such a situation a pre-trial statement by the one involved, regarding his employment by or agency for the defendant, if admissible, could be of great value in establishing the fact of agency.

In refusing to allow such statements, some courts consider it sufficient to declare that they are excluded by the hearsay rule. Professor Wigmore states that use of the alleged agent's hearsay assertions for the purpose of establishing the fact of agency would be begging the question⁴ and remarks that "This is never disputed, except by those counsel who have to receive elementary training at the hands of the Supreme Court."⁵ Nonetheless, there are occasions when, for one reason or another, a declaration made by one involved in an accident in relation to his employment by or agency for another person will be admitted in evidence to establish the agency.

By far the most frequent situation where such a statement is admitted is where it "was part of the *res gestae*."⁶ In such a case,

¹ MECHEM, LAW OF AGENCY (2d ed. 1914) sec. 285.

² *Montgomery Production Credit Ass'n. v. M. Hohenberg & Co.*, 31 Ala. App. 117, 12 So. 2d 865 (1943) *Rhodes v. Edward K. Tryon Co.*, 132 Fla. 880, 182 So. 301 (1938) *Key v. Thomas Lyons Co.*, 109 Kan. 281, 198 Pac. 928 (1921) *Munn v. Mid-Continent Motor Securities Co.*, 126 Okla. 241, 259 Pac. 249 (1927) MECHEM, LAW OF AGENCY (2d ed. 1914) sec. 291.

³ *Hackney v. Dudley* 216 Ala. 400, 113 So. 401 (1927) *Du Bois v. Powdrell*, 271 Mass. 394, 171 N.E. 474 (1930) *Dafoe v. Grantski*, 143 Neb. 344, 9 N.W. 2d 488 (1943).

⁴ WIGMORE, EVIDENCE (3d ed. 1940) sec. 1078.

Id. at sec. 1078, n. 5.

⁶ The phrase has been variously translated, defined, and applied. As used in this group of cases it apparently means any spontaneous exclamation, by a participant or witness of the accident. For other applications, see 1 JONES, EVIDENCE (4th ed. 1938) sec. 344, who defines the term as meaning "transactions" or "things done" and adds that "with reference to hearsay evidence it is rather loosely used to describe declarations, exclamations, acts or conduct

however, it is usually required that there be some other evidence to support the finding of agency. Typical of this type of decision is *Piedmont Operating Co. v. Cummings* in which the court states: "Where there is evidence from which the fact of agency may be inferred, the declarations of the agent as to facts tending to establish the agency when made as part of the *res gestae*, are relevant and admissible."⁷ The amount and type of the requisite "other evidence" indicates a wide diversity of opinion on the part of the courts.

In *Anning v. Rothschild*⁸ it was held that ownership of the car, while raising a presumption of agency, was not sufficient of itself to allow admission of a declaration by the driver. A Maryland court also recognized this presumption, but ownership, coupled with the fact that the driver often drove the same truck on company business and that he had on this occasion been told by a department manager (who may or may not have had the authority) to use the truck, plus of course an admission at the time of the accident by the driver, was held insufficient to avoid a directed verdict for the defendant.⁹

Contrasted with these are the cases of *Maynard v. Hall*¹⁰ and *Lowie v. Dixie Stores, Inc.*¹¹ where the only additional evidence was that the defendant in the one case, and the manager of the defendant in the other, had put up bond for the appearance at court of the driver of the car. This single act, which might have been the spontaneous gesture of a friend of the driver, or of a professional bondsman for that matter, was sufficient reason for a ruling that the driver's statement was properly admitted as part of the *res gestae*. In the latter case there was the additional factor that the declaration of the driver was made in response to a question put to him at the scene of the accident, a circumstance which caused the Michigan court to exclude a similar statement.¹²

The time interval often plays a large part in determining the admissibility of such a statement with those courts which employ the "res gestae" language. Here, too, the divergence of opinion is

of a participant in or witness of the principal transaction in suit, the statements or acts being such as tend to explain or illustrate the transaction which they accompany". *Sparks Bus Line, Inc. v. Spears*, 276 Ky 600, 604, 124 S.W 2d 1031, 1034 (1939) *Schroeder v. Rawlings*, 344 Mo. 630, — 127 S.W 2d 678, 681 (1939).

40 Ga. App. 397, 149 S.E. 814, 815 (1929) *Accord*, *Schlick v Berg*, 205 Minn. 465, 286 N.W 356 (1939), *Stover v. Mackie*, 170 Okla. 574, 41 P 2d 474 (1935)

⁷ 130 Wash 232, 226 Pac. 1013 (1924).

⁸ *Wells v. Hect & Co.*, 155 Md. 618, 142 Atl. 258 (1928).

¹⁰ 61 Ariz. 49, 143 P 2d 884 (1943).

¹¹ 172 S.C. 468, 174 S.E. 394 (1934).

¹² *Sheathelm v. Consumers Power Co.*, 280 Mich. 106, 273 N.W 410 (1937).

marked, for, though it is well recognized that the statement must be contemporaneous, there is no standard of application.¹³

The statements of the alleged agent have sometimes been admitted on grounds other than the traditional justification that they "form part of the *res gestae*." In *Du Bois v. Powdrell*¹⁴ a statement made by the minor driver of an automobile immediately after an accident to the effect that his mother had sent him to make a telephone call was admitted without objection being made. After pointing out this fact and acknowledging that such statements normally are inadmissible as admissions by the agent binding on the principal, without independent evidence of the authority of the alleged agent to make them and of evidence that they were brought home to the alleged principal, the court states that " it was entitled to its natural probative force as tending to show by a statement of the minor defendant, but not as an admission on the part of his mother, that he was driving the automobile on an errand for her when the plaintiff was injured."¹⁵ They are also admissible, of course, as self-contradictions of the alleged agent's testimony on the stand.¹⁶

When the statement is made to an insurance company or in compliance with a statute requiring a report by one involved in the accident, the report will not be admitted to prove the agency,¹⁷ unless the driver is acting as the agent of the principal in making the report.¹⁸ If the report was made, not by the agent, but by a police officer, for instance, who did not witness the accident, it is inadmissible as hearsay¹⁹

¹³ *Siebel v. Shapiro*, 58 Cal. App. 2d 509, 137 P 2d 56 (1943) (admitted—five minutes) *Renfro v. Central Coal & Coke Co.*, 233 Mo. App. 1219, 19 S.W 2d 766 (1929) (inadmissible— " whether 15 minutes or three hours was after the accident. ") *Barz v. Fleischman Yeast Co.*, 308 Mo. 288, 271 S.W 361 (1925) (admitted—30 minutes to one hour) *Moore v. Rosenmond*, 238 N.Y. 356, 144 N.E. 639 (1924) (extent of time not considered— " narrative of past event, no part of the accident itself, was pure hearsay ") *Snipes v. Augusta-Aiken Ry & Electric Corp.*, 151 S.C. 391, 149 S.E. 111 (1929) (first made immediately after the accident, and repeated " some time later when approached by the plaintiff in an effort to settle the cause"—" although not a part of the *res gestae* as to the immediate transaction, a part of the *res gestae* as to the general transaction in its entirety ")

¹⁴ 271 Mass. 394, 171 N.E. 474 (1930).

¹⁵ *Id.* at — 171 N.E. at 476.

¹⁶ *Craft v. Koonce*, 237 Ala. 552, 187 So. 730 (1939) *Otero v. Soto*, 34 Ariz. 87, 267 Pac. 947 (1928).

¹⁷ *Voegeli v. Waterbury Yellow Cab Co.*, 111 Conn. 407, 150 Atl. 303 (1930).

¹⁸ *Guberman v. Weiner*, 10 Cal. App. 2d 401, 51 P 2d 1141 (1935).

¹⁹ *Duffey v. Curtis*, 193 Minn. 358, 258 N.W 744 (1935) *Needle v. N.Y. Railways Corp.*, 227 App. Div. 276, 237 N.Y. Supp. 547 (1929) *Cf. Gibbons v. Perkins*, 132 Misc. 583, 230 N.Y. Supp. 273 (1928) (where a self-serving report was admitted).

Statements manifesting intent have been admitted to show that the agent was, at the time of the accident, acting within the scope of his employment. The Missouri court considered the state of mind of the agent to be a point in issue and, in view of a conflict as to whether he was, at the time, acting within the scope of his employment, admitted a statement made by the agent after the accident as to where he was going at the time. The court stated that the only way the intention could be proved " was by some outward manifestation by him of his intentions, by deed or word. Since there was no manifestation by deed the only evidence left was proof of his manifestation by word" and, quoting from *CORPUS JURIS SECUNDUM*, "Such evidence is admissible, not as a part of the *res gestae*. but as a fact relevant to a fact in issue."²⁰

A statement made by an employee in the presence of the manager of the company after being arrested in connection with the accident, that he had been directed to operate the vehicle by the manager was admitted in a late Georgia case²¹ on the dual ground that it was part of the *res gestae* and that it was made in the presence of the manager of the company despite the fact that the manager immediately denied having given such authority.

Although a declaration which is expressly authorized by the principal should be admissible, since this is clearly within the course of his employment, the question remains as to what should be the basis of admission in other situations. To depend solely on the evidentiary test for spontaneous exclamations is to ignore the fact of agency or the application of its rules. It is not enough to speak in terms of "*res gestae*" and, if this test be met, admit the declaration and hope it will be used by a jury in its proper function, be it evidence or agency. Nor is it wise merely to render lip service to the rule that the fact of agency must be shown in order to admit such declarations as a rule of agency. If used in this connection there should be recognized the requirement that this fact of agency *actually* be shown, and the declaration then be coupled with clear instructions regarding its proper purpose.

As to what that purpose is, Professor Wigmore sets forth a clear pronouncement:

"He who sets another person to do an act in his stead as *agent* is chargeable in substantive law by such acts as are done under that authority so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial

²⁰ *Mattan v Hoover Co.*, 350 Mo. 506, 166 S.W. 2d 557 (1942)

²¹ *American Fidelity & Casualty Co. v McWilliams*, 55 Ga. App. 658, 191 S.E. 191 (1937) Cf. *Dudley v. Preston Motor Co.*, 51 F. 2d 8 (C.C.A. 6th 1931) (where the company officer did not make such denial and the statement was held inconclusive.)

value to discredit the party's present claim as if stated by the party himself.

"The question therefore turns upon the scope of the authority. This question, frequently enough a difficult one, depends upon the doctrine of Agency applied to the circumstances of the case, and not upon any rule of Evidence."²²

It would appear, then, that there are two possibilities for allowing such statements and admissions by an agent to be introduced. (1) They may be admitted as an exception to the Hearsay Rule which, if correctly considered, will make the fact of agency immaterial, for agency is not then involved and the statement is admissible, not because made by an agent, but under the general rules of Evidence.²³ (2) They may be admitted as having been made by an agent acting within the scope of his employment; however, it is then necessary to establish clearly the fact of agency and that the person was, at the time of making the statement, acting within the course of his employment.²⁴ If these requirements be met the time and circumstances will present no difficulty. One of the clearest statements of this distinction is the dissenting opinion of Judge Cothran in *Snipes v. Augusta-Aiken Ry. & Electric Corp.* in which he said:

"There is quite a good deal of confusion of thought and lack of discrimination manifest in the treatment of the subject of the admissibility of declarations of an agent. The lack of discrimination and consequent confusion of thought is demonstrated by the failure to differentiate between the declarations of an agent which were part of the *res gestae* and those declarations which are made *in the course of his employment*, and while the matter in controversy was actually pending. The declarations of an agent, which are shown to have been a part of the *res gestae*, are admitted, not because he was an agent, but because they come within the class of excepted hearsay evidence which fulfills the requirements of the *res gestae* rule; the declarations of one not an agent would be received under the same conditions. The declarations of an agent made within the course of his employment and while the matter in controversy was pending, are admitted, not because they were mere [were?] made as part of the *res gestae*, but because they were made under the circumstances stated. They would be received weeks or months after the episode inquired into, provided that they were made under those circumstances. They may utterly fail of complying with the rule of *res gestae*, and still be admissible

²² 4 WIGMORE, EVIDENCE (3d ed. 1940) sec. 1078.

²³ RESTATEMENT, AGENCY sec. 289, comment d; 6 WIGMORE, EVIDENCE (3d ed. 1940) sec. 1756a.

²⁴ *Hackney v. Dudley*, 216 Ala. 400, 113 So. 401 (1927) RESTATEMENT, AGENCY sec. 288, comment b.

upon the entirely different foundation. It is misleading and incorrect, manifestly, to hold that, before the declarations of an agent can be received, they must be shown to have been both a part of the *res gestae* and within the course of his employment. They may have been either or both, and admissible for that reason."²⁵

It is, perhaps, unfortunate, that along with other uses of the phrase *res gestae* it has found such wide popularity in this sort of situation where it is used both as a rule of agency and of evidence. In the words of Professor Wigmore, " it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology."²⁶

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²⁵ 151 S.C. 391, —, 149 S.E. 111, 115 (1929).

²⁶ 6 WIGMORE, EVIDENCE (3d ed. 1940) sec. 1767.