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**AGENCY: ADMISSIBILITY AGAINST THE PRINCIPAL
OF STATEMENTS MADE AGAINST HIS INTEREST
BY THE AGENT.**

When an agent makes statements against the interest of his principal while executing his agency authority, there are at least two independent grounds upon which the statements may be admitted in a subsequent suit against his principal by a third party. For such statements to be admitted against the principal on the ground that it was an agent making them, it must be shown that such agent was hired actually for the purpose of making statements of this kind.¹ If this be established, the time, place and circumstances under which they were made are not otherwise important.² On the other hand, if the statement be admitted solely under an appropriate rule of evidence (as a spontaneous exclamation, an operative fact, etc.); then the fact that they were made by an agent is irrelevant to their admissibility.³

The above two strictly independent bases for admission of statements against interest are now so confused that the courts, including the Montana Court,⁴ fail in a large number of cases

¹Pan-American Petroleum Co. et al. v. United States (1926) C. C. A. 9th, 9 F. (2d) 761 at p. 769; Rosenberger v. H. E. Wilcox Motor Co. (1920) 145 Minn. 408, 177 N. W. 625; Lacheck v. Duluth-Superior Transit Co. (1937) 199 Minn. 519, 273 N. W. at p. 369; Chantry v. Pettit Motor Co., Miller v. Same (1930) 156 S. C. 1, 152 S. E. 753 at p. 757 (dissenting opinion); City of Chicago v. Greer (1870) 9 Wall. 726, 19 L. Ed. 769; C. B. & Q. R. R. Co. v. Coleman et al. (1857) 18 Ill. 298, 68 Am. Dec. 544; Xenia Bank v. Stewart et al. (1885) 114 U. S. 224, 5 S. Ct. 845, 29 L. Ed. 101; Price v. American Agri. Chem. Co. (1934) 173 S. C. 518, 176 S. E. 352. (Some of these cases state the *res gestae* rule; they all include the correct statement of the agency principle involved.); RESTATEMENT, AGENCY, (1933) Vol. 2, §288, p. 647; TIFFANY ON AGENCY, (2d ed. 1924) §106, p. 290: ". . . the statement of a servant or agent is admissible as an admission, if it is made when he is engaged in some authorized transaction, and it is within the scope of his authority in that transaction to make the statement."

²Rosenberger v. H. E. Wilcox Motor Co. (1920) 145 Minn. 408, 177 N. W. 625; Snipes v. Augusta-Aiken Ry. & Electric Corporation et al. (1929) 151 S. C. 391, 149 S. E. 111, p. 115 (dissenting opinion by Cothran J.); RESTATEMENT, AGENCY, (1933) Vol. 2, §288, p. 650 (Comment c); VI WIGMORE ON EVIDENCE (3d ed. 1940) §1756, p. 162, §1769, p. 184; Professor James Bradley Thayer (1881) AM. LAW REV. XV, 80, quoted by VI WIGMORE ON EVIDENCE, (3d ed. 1940) p. 184.

³Burns v. Smith (1898) 21 Mont. 251, 53 P. 742, 69 Am. St. Rep. 653; Roberts et al. v. Port Blakely Mill Co. (1902) 30 Wash. 25, 70 P. 111; Lambert v. LaConner Trading and Transportation Co. (1902) 30 Wash. 346, 70 P. 960; Forester v. Southern Pacific Co. (1913) 36 Nev. 247, 134 P. 753, 48 L. R. A. (N. S.) 1; VI WIGMORE ON EVIDENCE (3d ed. 1940) §§1745 *et seq.*, p. 131; RESTATEMENT, AGENCY, Vol. 2, §289, (Comment d), p. 653.

⁴Ryan v. Gilmer (1877) 2 Mont. 517, 25 Am. Rep. 744, and cases cited in footnote 10, *infra*.

involving this question to recognize the distinction. They err in considering the problem solely from the standpoint of the supposed evidence rule as expressed in the old, much abused, so-called *res gestae* doctrine. These courts, and numerous authorities,⁵ seem to assume that the *res gestae* doctrine as traditionally stated forms a single basis upon which to establish the admissibility of statements as a rule of agency, on the one hand, or a rule of evidence, on the other. The objection to *res gestae*,

⁵One of the most striking aspects of this confusion is that the publicists have so uncritically perpetuated it. Wigmore thinks that Greenleaf may have been principally responsible for the extreme looseness in the use of the term *res gestae*, which has since plagued both the law of evidence and of agency, citing "1842, Professor Simon Greenleaf, Evidence, §108" in support of that conclusion. VI WIGMORE ON EVIDENCE, (3d ed. 1940) p. 167. The entire problem is keyed in the encyclopedias and digests almost exclusively under "Evidence". To make matters worse, both the encyclopedias and some authorities on evidence assume that "admissions" by an agent may be discussed indiscriminately along with other statements, representations, and declarations of an agent—and subject to the same general rules, apparently. Indeed, in JONES ON EVIDENCE (1st ed. 1896) §§256 and 257 it appears that the word "admissions" is used as a generic term to cover all of such verbal acts by an agent. So we find the question of the "power" of an agent to give a warranty given as an example of an "admission" or "declaration" by an agent. This grouping is continued in the second edition. A more grievous error from the standpoint of the substantive law of Agency hardly can be imagined. The power of an agent to charge his principal in tort is broader in some respects than to charge him strictly in contract. Since some of such statements may amount to deceitful representations, while others will not, clearly they are subject to substantially different rules as to when the principal will be liable. Corpus Juris considers the question of "admissions" principally under the topic of Evidence. 22 C. J., Evidence §440, ff. Although 22 C. J. contains a statement which seems to recognize the dual character of the problem herein involved, (*id.* §443) there is little suggestion of the distinct character of the problem in 2. C. J., Agency, §541 ff., where representations, declarations and admissions of an agent are discussed together. Though 3 C. J. S., Agency, §236 ff. declares that tort elements may be present as to some declarations while not as to others, it makes little effort to formulate a precise body of rules indicating the scope of an agent's power to charge his principal for strict admissions. While Am. Jur. emphasises that, for an agent's admissions to bind his principal they must be within the scope of the former's authority, it says nothing to indicate *how* that is determined until it contributes the following: "In some cases the admissibility of the statement of an agent against his principal has been predicated upon the theory that such statement constituted a part of the *res gestae* of a transaction in which the agent engaged in behalf of the principal . . . his declarations are binding if made at any time before the transaction is terminated." It throws no further light on the subject. 20 AM. JUR., Evidence, §596, p. 505. Cf. RESTATEMENT OF AGENCY, (1933) §§63 (1), (2), Vol. 1, p. 150 (Authority to Warrant or Represent); *id.* §162, Vol. 1, p. 397 (Unauthorized Representations); *id.* §256 *et seq.*, Vol. 1, p. 571 (Misrepresentations); *id.* §284 *et seq.*, Vol. 2, p. 637 (Admissibility in Evidence of Statements of Agents). Note the detail with which different kinds of statements are treated.

when used as a yardstick for any purpose in the law, is cogently stated by Professor Wigmore:

“The phrase ‘res gestae’ has long been not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity 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. No rule of Evidence can be created or applied by the mere muttering of a shibboleth.”⁶

Exactly the same criticism, with even greater force, may be made of its use in the Law of Agency.

It appears that the first Montana case⁷ considering statements by an agent as admissions⁸ against his principal's interest realized that the essential agency question was whether, in fact, the principal had authorized his agent to make such statements. However, the history of the present Montana law governing such admissions begins with *Ryan v. Gilmer*.⁹ This case and several following¹⁰ are excellent examples of what Wigmore had in mind when he said:

“. . . judges sometimes have discussed the two principles (evidence and agency) in their application to personal injuries, as if they were but one principle. That there are two distinct and unrelated principles involved must be apparent; . . .”¹¹

⁶VI WIGMORE ON EVIDENCE (3d ed. 1940) §1767, p. 182.

⁷*Herbert v. King* (1872) 1 Mont. 475.

⁸The “admissions” herein considered are statements which one party to a suit charges were made by the other party prior thereto, which will prejudice the latter's case if admitted—generally by contradicting testimony given at the trial by the latter. Whether it be deemed an exception to the Hearsay Evidence rule, as a form of “statement against interest”, or not subject thereto in the first place, is not important for our purpose. Hence the very interesting argument between Professors Morgan and Wigmore on that point need not concern us. See: Professor Edmund M. Morgan, *The Rationale of Vicious Admissions*, 42 HARV. L. REV. (1929) p. 461; IV WIGMORE ON EVIDENCE (3d ed. 1940) §1080a.

⁹(1877) 2 Mont. 517, 25 Am. Rep. 744.

¹⁰*Joseph et al. v. Mady Clothing Co.* (1893) 13 Mont. 195, 33 P. 1; *Missoula Mercantile Co. v. O'Donnell* (1900) 24 Mont. 65, 60 P. 594, reh. den. 24 Mont. 65, 60 P. 991; *Hogan v. Kelly* (1903) 29 Mont. 485, 75 P. 81; *Poindexter & Orr Livestock Company v. Oregon Shortline Railroad Company* (1905) 33 Mont. 338, 83 P. 886.

¹¹IV WIGMORE ON EVIDENCE (3d ed. 1940) §1078, p. 121. See also Thayer's article cited in footnote 2, *supra*.

The first Montana case fully to recognize the fact that two separate sets of principles were involved was *Callahan v. Chicago B. & Q. R. Co.*¹² Herein the court on appeal admitted almost identical statements made by the conductor and roadmaster thirty or forty minutes after the accident to the effect that the parting of the train was caused by defective coupling, a worn lock-block. In the lower court, this evidence was excluded on the ground that the declarations were not a part of the *res gestae*, and were therefore incompetent. Mr. Chief Justice Brantly, delivering the opinion of the court on appeal, recognizing that these statements could not be admitted under the strict *res gestae* rule (if you please) of evidence, as they were made a half hour or more after the accident, said:

“But we think the evidence competent upon another theory, *viz.*, as admissions by the agents of the defendant within the scope of their employment while engaged in the discharge of their duties. . . . It is a well-settled rule that when an agent is vested with authority to perform any act for his principal, his words—his verbal acts—while engaged in that business, are a part of the *res gestae* of that business. They are therefore the words and acts of the principal and may be proved against him. . . . If, however, the appointed work has been completed, any statement made by the agent with reference to it is, under all the authorities . . . a mere narrative of a past transaction and is not admissible under the *res gestae* rule. It is, as to the principal, mere hearsay.’”

Chief Justice Brantly finally concluded that the statements were not so remote from the principal's business as to be a mere narrative of past events under his own rule. Thus he seems deliberately to have raised a new criterion or basis for measuring the scope of an agent's authority to bind his principal in a par-

¹²(1913) 47 Mont. 401, 133 P. 687, 47 L. R. A. (N. S.) 587. The same Justice decided the principal case and the Poindexter case (footnote 10, *supra*). In the latter, the Court seemed to recognize two possible grounds for admitting the statements of the section boss, but failed to formulate a fully developed rule of agency indicating when the agent actually has authority to so charge his principal. The Callahan case also cites Hogan v. Kelly, *supra*, note 10, and Ryan v. Gilmer, *supra*, note 9, as authority for its ruling.

¹³Callahan v. Chicago B. & Q. R. Co. (1913) 47 Mont. 412, 413, 133 P. 690, 47 L. R. A. (N. S.) 590, 591. It should be observed that even the Callahan case and all others which state the rule in this manner fail to separate completely the substantive agency question from the law of evidence. The assumption that the agent never has power to make a statement as to a past transaction shows the continuing influence of the law of evidence and the vague *res gestae* doctrine.

ticular respect, using the old evidentiary term of *res gestae* as a foundation for delimiting that authority.¹⁴

The upshot of the rule stated in the *Callahan* case, for determining when an agent has the power to make his principal responsible for the former's statements amounting to admissions, is that the agent shall be deemed to have such power to make any statements he takes a notion to, concerning his principal's business—if he makes them while engaged in that business. That is, if such statements are part of the *res gestae* of the transaction that the agent is properly engaged in, that fact alone incorporates into the agent's authority the power to make such statements binding on the principal. If, however, they are not "part of such *res gestae*", it will be outside of the agent's authority to make them. This, however, is precisely what we are told is *not* the law by the Restatement:

"(1). Authority to do an act or conduct a transaction does not of itself include authority to make statements concerning the act or transaction."¹⁵

Thus it becomes clear that our *res gestae* rule, in the agency field, is a two-edged fallacy. It serves to admit some statements that should be excluded, while excluding others that should be admitted. This fact can be shown by the following case: A customer complained to the foreman of a warehouse that water had leaked through the roof onto his stored goods and had damaged them. The foreman replied that he had told his employer about the condition of the roof; also, that other customers had registered the same complaint with him. In a subsequent suit¹⁶ for the injury to the goods, the customer plaintiff sought to admit both of the statements by the foreman. The only real agency question was whether, according to some of the recognized criteria,¹⁷ the employer may be found to have authorized the fore-

¹⁴JONES ON EVIDENCE, (2d ed. 1926), see footnote 23, *infra*.

¹⁵RESTATEMENT, AGENCY, Vol. 2, §288, p. 647.

¹⁶Hansen et al. v. Oregon-Washington R. & Nav. Co. (1920) 97 Or. 190, 188 P. 963, reh. den. 97 Or. 190, 191 P. 655.

¹⁷For a case which, if interpreted literally, might be said to formulate an even more vague rule for measuring the extent of an agent's power to charge his principal for the former's slander (and presumably torts generally), see *Keller v. Safeway Stores, Inc. et al.* (1940) 111 Mont. 28, 108 P. (2d) 605, commented on by Albert Angstman in the current MONTANA LAW REVIEW, p. 75. We are told by Wigmore that there have been various spurious enlargements of the phrase *res gestae*, among which is "part of the transaction". VI WIGMORE ON EVIDENCE (3d ed. 1940) §1757, p. 166. If, to charge a principal with the agent's tort, it is only necessary to find that it was an "incident of the employment", how does that differ from "part of the transaction", "an incident of the *res gestae*" (*Earlywine v. C. I. T. Corporation* (1940) 110 Mont. 295, 101 P. (2d) 59, Headnote 2), "part of the

man to make either or both statements, i.e., did he have an express authority, or were such statements reasonably necessary or incidental to his express authority; or was there a course of conduct, or a custom, showing such authority. Under this approach, the agent probably would be found to have no authority to charge his principal with either statement—but he *might* have authority to make *both* statements. Yet the Court admitted the first statement because “part of the *res gestae*”, and excluded the latter one because a “mere narrative of a past event”. Again,¹⁸ where, after examining the bank’s books, the then bank president represented to the holder of certain certificates of deposit that the money represented by the certificates was received by the bank when the certificates were issued, the representation was held not admissible in a subsequent suit against the bank, the Court relying in considerable part at least upon the proposition that it was a mere narrative of a past event by one not participating in the original transaction. The Court didn’t even ask whether one of the primary duties of the president might be to perform just such acts. On the other hand, in a suit to recover the subscription price for stock purchased, a well considered Minnesota case¹⁹ ruled admissible against the company an admission of its president as to the value of the stock when sold (the statement having been made months after the stock sale), as being incidental to his powers to negotiate an adjustment.

The cases²⁰ immediately following the *Callahan* case in Montana do not state clearly that they recognize the presence of the two distinct problems involved. In *Raish v. Orchard Canal Co.*²¹ the Court admitted statements by the president of the defendant corporation, made while in the active discharge of his official duties, and at the time of the occurrence to which they related, adopting the principle laid down in the *Callahan* case. However, *Exchange State Bank of Glendive v. Occident Elevator*

res gestae”? The Keller case suggests that its rule is even more vague than the *res gestae* rule governing admissions in that it says that the “acts” out of which the tort arose need not have been performed on behalf of the principal. The Callahan case insists on that much before the agent’s admissions charge the principal. As suggested in the comment on the Keller case, however, it is extremely unlikely that the Court intended to lay down any such rule in that case.

¹⁸First National Bank of Sweetwater v. Rust et al. (1919) C. C. A. 5th, 168 C. C. A. 241, 257 F. 29.

¹⁹Rosenberger v. H. E. Wilcox Motor Co. (1920) 145 Minn. 408, 177 N. W. 625.

²⁰Fowlie v. Cruse (1916) 52 Mont. 222, 157 P. 958; Raish v. Orchard Canal Co. (1923) 67 Mont. 140, 218 P. 655.

²¹(1923) 67 Mont. 140, 218 P. 655.

*Company*²² does seem to recognize the agency problem apart from the evidence question, quoting verbatim the language of the Court in the *Callahan* case as its authority.

The extent to which the Court in *Rossberg v. Montgomery Ward & Co.*²³ has recognized the confusion which exists by reason of the engrafting of the so-called *res gestae* rule upon the agency doctrine is not clear. In this suit to recover damages for an alleged injury caused by falling in the defendant's store because of an oily substance on the floor, the plaintiff sought to introduce statements made twenty days later by the manager to the effect that there was no excuse for the presence of the substance on the floor, and that it had been there long enough to have been removed. In rejecting this evidence, Mr. Justice Arnold, writing the majority opinion, said:

"It is elemental that admissions or declarations of the officers or agents of private corporations are not admissible unless they are made while acting within the scope of their authority as a part of the *res gestae* relating to the present transaction. . . . The statements claimed to have been made by the defendant . . . are not *res gestae*, having been made about three weeks after the accident; neither do they tend to prove negligence as to the defendant company, as they were not made by the agent while accompanying an act which he was authorized to do. They were, at most, mere exclamations or conclusions on the part of the agent, and not binding."²⁴

²²(1933) 95 Mont. 78, 24 P. (2d) 126, 90 A. L. R. 740. The Court is very careful to establish that the agent was, in general, trying to carry out the principal's business when he made the admissions. However, having established this, it seems to assume that any statements made in connection therewith charge the principal, as suggested by the *Callahan* case.

²³(1939) 110 Mont. 154, 99 P. (2d) 979.

²⁴*Id.* at p. 163 and p. 164. In citing approvingly JONES ON EVIDENCE, the case cites "JONES ON EVIDENCE, 2d ed., par. 268", which is an erroneous citation. In the first edition, Sections 256-7 are the relevant sections, and in the second edition Section 944 ff. is pertinent. The extent of the confusion prevalent in treating of this problem is revealed in JONES ON EVIDENCE (2d ed. 1926) §944. Apparently conscious of the distinct agency question, he there attempts to state a rule for measuring the agent's authority, similar to that laid down in the *Callahan* case: ". . . whatever is said by an agent, either in making a contract for his principal, or at the time and accompanying the performance of any act within the scope of his authority, having relation to, and connected with, and in the course of, the particular transaction . . . is, in legal effect, said by his principal and admissible in evidence against such principal. But, . . . it is well established that parties are not chargeable with the declarations of their agents, unless . . . made during the transaction of business by the agent for the principal, and in relation to such business and within the scope of the agency; in other words, unless they may be deemed a part of the *res gestae* . . ." The

The Court includes a quotation from *Corpus Juris*²⁵ which seems to recognize the distinct agency question, but it is not clear to what extent the decision itself recognized the question of whether or not the agent had authority to make the statements as an independent basis for their admission.²⁶

In *Earlywine v. C. I. T. Corporation*,²⁷ decided during the same term of court as the *Rosberg* case and by the same Justice, a curious condition obtains. In order to charge the defendant for damage to the plaintiff's car, the latter sought to introduce statements by the defendant's cashier to the effect that the defendant had already taken out new insurance on the plaintiff's car. The relevant headnote seems to say that the statement was admissible as an admission because part of the *res gestae*: ". . . held not objectionable as having been made outside the scope of the cashier's authority, it rather having been an incident of the *res gestae*. . ." However, this does not correspond to the actual ruling of the Court on this point:

"The statement . . . would not be sufficient, standing alone, to bind the defendant as the representation of an agent authorized to make such a statement. . ."²⁸

unfortunate result of assuming that "representations", "declarations", and "admissions" could all be discussed under one rule is indicated here.

²⁵Rosberg v. Montgomery Ward & Co. (1939) 110 Mont. at pp. 163 and 164, 99 P. (2d) at p. 982 quoting extensively from 22 C. J. *Evidence* p. 379, §443 (4) *Narrative Statements*, 22 C. J. p. 386, §460 (d) *Agents of Private Corporations* (1) In General. See footnote 5, *supra*.

²⁶The dissent takes the view that the manager's statements should have been admitted under certain rules of evidence rather than as a binding admission by an agent. Though beyond the scope of this comment, there seems to be substantial supporting authority. VI WIGMORE ON EVIDENCE (3d ed. 1940) §§1766 ff., p. 177 (Utterances material to the case as a part of the issue, or as circumstantial evidence of negligence); RESTATEMENT OF AGENCY, Vol. 2, §284, p. 637 (Operative and Relevant Statements); 22 C. J. 382 (note 55e), cited in this opinion.

²⁷(1940) 110 Mont. 295, 101 P. (2d) 59. It was unnecessary for the Court to consider extensively the cashier's authority to make such an admission against her principal, since it found that the latter was chargeable with several acts, including the accepting of the insurance premium and leading the plaintiff reasonably to believe that his car was covered. However, the principal case relied on for the conclusion that her statement, standing alone, would not bind her principal, forces the suggestion that such conclusion simply is a reiteration of the Callahan case. The principal case cited (*Ashley v. Safeway Stores, Inc.* (1935) 100 Mont. 312, 47 P. (2d) 53) quotes JONES ON EVIDENCE (2d ed. 1926) §946 extensively. The extremely vague way in which *res gestae* is used in the *Earlywine* case, demonstrates its unreliable character even in limiting the scope of the transaction in connection with which an agent's statements must be made to charge the principal, under the Callahan rule.

²⁸*Earlywine v. C. I. T. Corporation* (1940) 110 Mont. 298, 101 P. (2d) 60.

Treating the latter quotation from the text as controlling, even then the case helps us little in interpreting the *Rossberg* case, or in clarifying the law as to admissions in Montana, because the Court does not suggest why the statement would not be so admissible. It admits the statement on other grounds.

It should be realized that statements which are spontaneous exclamations must automatically be admitted under principles of evidence, though statements not admissible under evidence rules should not be excluded automatically if there is agency involved. The authority of the agent to make such statements, not merely to do the act in connection with which the statements are made, should be inquired into to determine whether or not they are admissible against the principal's interest under rules of agency law. The term *res gestae* should be wholly repudiated as a principle of agency.

It is submitted that both the legal basis for, and the authority upon which the *Callahan* rule is predicated are so questionable that the Montana Supreme Court would be justified in re-examining the entire question of an agent's admissions against his principal.

—Bill Hirst.

BILLS AND NOTES: NEGOTIABILITY OF BILLS AND NOTES SECURED BY COLLATERAL AGREEMENTS

Uncertainty and confusion exist in Montana with respect to the negotiability of instruments, otherwise negotiable, which are secured by collateral agreements.¹ The extent of the confusion can best be determined by comparing the Montana decisions upon the subject with the rules formulated by the weight of authority in other states. Clarity in presentation of those rules demands a classification of the fact situations with regard to the form of the instruments involved as follows: (1) Instruments containing no reference to the collateral agreement. (2) Instruments containing a mere reference to

¹The word "secured" as used in this discussion extends not only to those situations where a collateral agreement is given as security for payment of a bill or note, but to the cases where the collateral agreement is the consideration for which the instrument is given or the transaction giving rise to it.

No attempt is made herein to analyze the cases involving the right of a transferee of a bill or note secured by a collateral agreement to claim as a holder in due course where the agreement shows on its face an infirmity in the bill or note or a defect in the title of the person negotiating it.