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## ADMISSIBILITY OF DECLARATIONS OF CORPORATE AGENTS

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Men have always performed acts through others which they might well have performed for themselves. The rights and liabilities of the various parties involved in such transactions have given rise to the law of Agency. The agent is circumscribed by certain well recognized limitations. He may have general powers conferred upon him to enable him to do anything which his principal might do. He may act only by special authority, under which he may speak when, and only when speech is a part of the act which he is commissioned to perform.<sup>1</sup>

Sometimes words are spoken which are not authorized and which have therefore no direct relation to the subject-matter of the agency, and are germane to the acts authorized only indirectly. To establish the rights and liabilities of the parties involved in such transactions, these spoken words are often of vital importance. Here the law of Agency comes into contact with the law of Evidence. In the light of the rules of both branches of the law, when may the spoken words of the agent be admitted to establish the liability of the principal to third parties?

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<sup>1</sup> See *Fairlie v. Hastings*, 10 Ves. Jr. 123 (1804). Cf. 1 GREENLEAF, EVIDENCE (16th ed. 1899) § 184 c.

When the agent whose words are sought to be introduced in evidence is one who acts for a corporation, the question is still further complicated. Here the legal theory of corporations intrudes itself to render undesirable many results which would ensue from the application of the law of Agency and the rules of Evidence. Since courts have confused the theories underlying the law of Agency with those of the law of Evidence, it is not surprising, when Corporation law overlaps Agency, to find them confounding both Agency and Corporation law with rules of Evidence. To present a concrete problem: at 5 P. M., *A* is injured in a factory. At 5.03 P. M., *B*, general manager, on being informed of the accident, makes to his clerk, *C*, certain statements damaging to the interests of the defendant corporation. At 5.30 P. M., *X*, a reporter, asks *D*, president of the board, the cause of the accident. *D* refers *X* to *B*, the general manager. At 5.45 P. M., after working hours, *B* is interviewed on the street car by *X* and repeats the words previously spoken to *C*. At 8 P. M., at his club, *B* reiterates the words to *E*, *F*, and *G*, three distinterested persons. *C* dies before the trial, *X* leaves the jurisdiction, but *B* is retained as general manager. From this set of facts arise issues which involve nice questions of Agency and Corporation law, as well as rules of Evidence, and questions upon the answer to which may largely depend *A*'s right to recover damages.

Anciently, and more especially in the sixteenth century, it seems that substantially all words spoken by one person to a third party were admissible in a matter under adjudication.<sup>2</sup> All admissions and declarations of agents were competent. Following this there came a reversal of practice whereby substantially all declarations and admissions of agents to third persons were excluded as mere hearsay.<sup>3</sup> Obviously neither practice could be satisfactory. Neither wholesale admissibility nor total exclusion was adequate to meet the requirements of the judicial process nor the dictates of common sense. Little by little the doors were

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<sup>2</sup> See WIGMORE, *CASES ON EVIDENCE* (2d ed. 1913) 547.

<sup>3</sup> See 2 WIGMORE, *EVIDENCE* (2d ed. 1923) 585, § 1078, n. 1. Cf. Lord Kenyon in *Maesters v. Abram*, 1 Esp. 375 (1795). Cf. also Sir William Grant in *Fairlie v. Hastings*, *supra* note 1.

again opened to admit certain statements of agents to third persons. This was brought about under the doctrine of *exceptions* to the hearsay rule. Declarations were admissible under this new device, *first*, when they were shown to have been authorized; *second*, when consent had been given in advance, as by contract; *third*, when they were a part of the *res gestæ*.

Under the first theory, that of authorization, there may have been general authority or special authority. In either case the authority must be shown before the declarations are admissible.<sup>5</sup> It may be express or implied from the facts and circumstances of the case, but the agent's own statements that he has been authorized are not admissible.<sup>6</sup> The existence of the relationship of agency is a question of fact for the jury. So also, it would seem, as to the character of the agency and its extent to include the declarations sought to be admitted. The questions involved, it is seen, are primarily those of the substantive law of Agency, rather than rules of Evidence.<sup>7</sup>

The admission of declarations, consent to which was founded in contract, was permitted in an early English case where a deputy sheriff gave a bond to his chief, the sheriff, to save him harmless in the event of his misconduct.<sup>8</sup> The deputy committed an illegal act in the course of his official duty. The deputy made certain admissions to third parties and the question arose whether the admissions were competent to bind the sheriff. It was held that they were. The sheriff had required and accepted the bond, thereby charging himself with whatever his deputy might do.

<sup>4</sup>For the sake of analysis, it seems best to have regard for these three types of admissions of agents, although the first two classes may seem to be substantially the same, as opposed to the third, which arises in connection with tort liability.

<sup>5</sup>The fact of agency must be proved first. *Livingston M'fg. Co. v. Rizzi*, 86 Vt. 419, 85 Atl. 912 (1913). See 2 WIGMORE, *supra* note 3 at 587. But see *Central Penn. Tel. etc. Co. v. Thompson*, 112 Pa. 118, 3 Atl. 439 (1886). *Cf.* *Buist v. Guice*, 96 Ala. 255, 11 So. 280 (1892); *Campbell v. Sherman*, 49 Mich. 534, 14 N. W. 484 (1883).

<sup>6</sup>*Union Trust Co. v. Robinson*, 70 Fed. 420 (C. C. A. 8th, 1897); *Howe Machine Co. v. Clark*, 15 Kan. 492 (1875). See also *Irwin v. Buckaloe*, 12 S. & R. 35 (Pa. 1824). The agent may testify directly, of course, as to his agency. See 2 WIGMORE, *supra* note 3 at 588.

<sup>7</sup>*Cf.* 2 WIGMORE, *supra* note 3 at 585.

<sup>8</sup>*Yabsley v. Doble*, 1 Ld. Raym. 191 (1697).

The court was looking at the effect of its decision. "For though the sheriff is suable," it was said, "yet the under-sheriff gives him a bond to save him harmless, and therefore it will all fall upon him. And therefore his confession is good, because in effect it charges himself."

In *Snowball v. Goodricke*,<sup>9</sup> Alderson, J., excluded declarations made by a deputy for no apparent reason other than that the deputy had gone out of office. The inference is that the declarations would have been admitted had the deputy still been in the sheriff's employ. It is not easy to reconcile the reasoning here with that in *Yabsley v. Doble*, for the bond was still effective, albeit the deputy was out of office. It is clear, however, that the declarations of the under-sheriff are not admissible on the grounds of his being the general officer of the sheriff.<sup>10</sup>

Perhaps the most outstanding exception involved in this problem is the doctrine of *res gestæ*. Were the words uttered a part of the thing done? If they were near enough in point of time so that they might be regarded as spontaneous, rather than the result of deliberation and contrivance, they might be admitted as competent and relevant. If not, they must be excluded as incompetent and as hearsay. Here was a doctrine which constituted one of the earliest exceptions to the hearsay rule.

Now to what extent do these grounds for the admissibility of such declarations apply to corporations? It has been held that on principle there should be no difference in the application of the rules between corporations and individuals. A principal is such whether an individual or a corporation.<sup>11</sup> On the other hand, because of the artificial nature of the corporation, it may be argued that the same degree of rigidity in application to corporations ignores some of the fundamental assumptions of corporation law. The doctrine indicated above as consent by contract may well be applied to the one as to the other. The nature of the corporate entity together with its anomalous relation to

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<sup>9</sup> 4 Bar. & Ad., 541 (1833).

<sup>10</sup> See a good note on this matter in 1 GREENLEAF, *op. cit. supra* note 1, § 180, n. 5.

<sup>11</sup> See, for example, *McEntire v. Levi Cotton Mills Co.*, 132 N. C. 598, 44 S. E. 109 (1903).

the business world makes the *res gestæ* doctrine difficult of application, and many curious and interesting results have followed.

The task of determining whether words spoken were a part of the *res gestæ* is never an easy one, whether the doctrine apply to individuals or to corporations. One difficulty arises from the constant query: when, in point of time, must the statement be made to be *res gestæ*? Here the courts have been, and are, hopelessly divided. Some hold to what is known as the strict rule that declarations must have been contemporaneous with the thing done, so that they become "verbal acts," intimately connected with the physical acts, thus insuring that the declarant have no opportunity to deliberate and to concoct a statement advantageous to himself, disadvantageous to the adverse party. Other courts, and apparently the minority, hold to what may be described, for want of a better term, the "sphere of influence" theory. By this is meant that declarations made after the event, which are so close in point of time that they "may be deemed" to have been uttered while the declarant was under the excitement and influence of the thing done, so that they are, in effect, equivalent to spontaneous statements, are as likely to be true and reliable as though they were contemporaneous with the acts. The reason for the exclusion failing, of course, the rule fails, and such declarations are admitted. While the strict application of the rule may be made in the majority of cases, the more liberal theory which extends the scope of the doctrine to include declarations made when they can be fairly adjudged to be within the sphere of influence of the acts done, seems more satisfactory, both in reason and in the satisfactory nature of the results reached.<sup>12</sup>

In enforcing the rule strictly, the fallacies of the courts' reasoning are aptly illustrated by the fictions devised to bolster up the decisions. Many courts are unwilling to rest the decision upon the grounds that the declarations were too remote, in point of time, to be a part of the *res gestæ*. They are more content to urge that the *reason* that the statements are not a part of the *res gestæ* is because they are narrative, and thus, untrust-

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<sup>12</sup> See 3 WIGMORE, *supra* note 3, § 1750.

worthy.<sup>13</sup> All verbal acts are, of course, narrative, unless they are made before the act, when they might serve to prove the intention or state of mind of the speaker in his subsequent act; or at the exact instant of the act, when they are literally "spontaneous." An explosion of gunpowder takes place, or a collision of vehicles occurs, causing a woman to scream. This, perhaps, is *res gestæ*, but even here the exclamation occurs after the act or event, and is consequently narrative. The real question which courts so frequently fail to answer is whether or not the statements are made under such circumstances as would make it reasonable to rely upon them.

To become proper evidence, the statements need only be close enough in point of time, under all the circumstances of the case, to leave insufficient opportunity for contrivance. If, in view of all the circumstances, the words used are in logical sequence and so connected with the act or events that neither is intelligible without the other, there is every reason for admitting them both. "It depends," said Mr. Justice Swayne in a Supreme Court case, "upon the circumstances as well as the expressions used. In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the verbal fact would not infrequently have the same effect as to strike out the controlling member of a sentence, or the controlling sentence from its context . . . The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine."<sup>14</sup>

<sup>13</sup> Cf. *Fairlie v. Hastings*, *supra* note 1; *Packet Co. v. Clough*, 20 Wall. 528 (1874).

<sup>14</sup> See *Insurance Co. v. Mosley*, 8 Wall. 397, 408 (1869). A few typical examples of the *res gestæ* application follow. Majority rule: *Boyd v. West Chicago St. Ry.*, 112 Ill. App. 50 (1904), a conductor fell from a street car. The motorman ran the car a block or so, then back to the place where the conductor fell. In the meantime, the latter regained his feet. The answer of the conductor to the motorman's question as to how he happened to fall was excluded, although but a minute or two had elapsed. It was said to be narrative and hence hearsay. In *Bedingfield's Case*, 14 Cox. C. C. 341 (1879), a woman with her throat cut came running from a house and made certain statements as to who had done the act and as to how it was done. In ten minutes she died.

It would seem that since a corporation can be dealt with only through its agents, the application of the *res gestæ* doctrine should be further extended with respect to corporations.<sup>15</sup> After all, corporations differ from individuals in law.<sup>16</sup> The law has created the legal personality of the corporation for the sake of convenience in certain phases of its activities. It should not overlook the fiction in others. In every case, however, the attitude of the court will determine whether the rule of *res gestæ* shall be applied strictly, or whether the principles underlying that rule shall render its application more liberal, and perhaps, more realistic.

To return to the problem, what disposition must be made of *B*'s declarations as a part of the *res gestæ*, were *C* alive to give them? This would, as has been pointed out, be dependent upon which of the two applications of the *res gestæ* doctrine the court adopted. If it were partial to the strict rule, three minutes removed would be fatal for the statements would be too far removed, in point of time, from the accident to permit the statements to be admitted.<sup>17</sup> If, on the other hand, the court leaned

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Her declarations were not admitted as dying declarations nor as coming within the *res gestæ* doctrine, although the statements had been made within the space of a minute from the time when the crime had been admitted. In *Parker v. State*, 136 Ind. 284, 35 N. E. 1105 (1893), a druggist had been shot. His wife, who had been in the store but a few minutes before, was not permitted to testify to statements made by her husband within a minute from the time when he was shot. In *Brauer v. New York City etc. R. R.*, 131 App. Div. 682, 116 N. Y. Supp. 59 (1909), the remark of a motorman that "he bothered me all the way across the bridge" was excluded as hearsay, although made within five seconds of the time of the accident.

Illustrations of the broader "sphere of influence" application: *Railroad v. McLane*, 11 D. C. App. 220 (1897), where statements of a boy injured by a street car were admitted although made about ten minutes after the accident, but while he was still lying on the track. In *Krogg v. Atlantic & West Point R. R.*, 77 Ga. 202 (1886), the statement of a general manager of a railroad made fourteen hours after the accident was admissible as *res gestæ*. In *Walters v. International R. R.*, 58 Wash. 293, 108 Pac. 593 (1910), the statements of a conductor were admitted two hours after the accident, and after he had run a mile from the spot where the accident occurred. They were *res gestæ*. In *Malecek v. Tower Grove R. R.*, 57 Mo. 17 (1874), statements made three days after the event were regarded as *res gestæ*, and admitted as such. In *Morse v. Conn. R. R.*, 6 Gray 450 (Mass. 1856), the "continuing act" doctrine was grafted on to *res gestæ*, to make admissible statements uttered the morning after the disappearance of certain baggage from the railroad's custody.

<sup>15</sup> See 2 THOMPSON, CORPORATIONS (2d ed. 1909) § 1622.

<sup>16</sup> Cf. the non-applicability to corporations of the privileges and immunities clause of the Fourteenth Amendment to the Federal Constitution.

<sup>17</sup> Cf. *Alabama Great Southern R. R. v. Hawk*, 72 Ala. 112 (1882).

toward the sphere of influence notion, the statements would not necessarily be excluded as being made too long after the event.<sup>18</sup>

But *C* is dead, and the *res gestæ* question is, therefore, eliminated. *X* is not available as a witness, and his testimony cannot be procured. Perhaps his testimony is not admissible if he were present, as *D*, the president of the board, may not have had authority, either general or special, to refer *X* to *B*. There only remains the statements of *B* to *E*, *F*, and *G*, the three indifferent persons. The statements to these three were made in a casual manner while *B* was not engaged in the performance of a duty connected with his relationship to the corporation. Upon the ordinary construction of rules of Evidence, under these circumstances *B*'s statements are inadmissible, not having been made within the course of his duty<sup>19</sup> and the declarant having no authority to make them.<sup>20</sup>

In view of this situation, the question is pertinent whether the well recognized rules of Evidence are adequate to produce sound or desirable results, and, if not, does legal theory have available any other doctrine whereby more satisfactory results can be attained. It is at this stage that the overlapping of Corporation law is significant. A great deal of confusion in this type of case, it is submitted, results from the failure to apply the rules of the different branches of the law which are involved. Some courts seem inclined to hold that declarations of managing agents are controlled exclusively by rules of Evidence. Others lean toward the doctrines of Agency, while still others regard the situation as completely within the realm of Corporation law. It seems obvious, however, that no one of these views is productive of proper results. Corporation law should apply to such phases of the question as lie peculiarly within the province of the legal theory of corporations. The relation of the corporation,

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<sup>18</sup> Cf. *Morse v. Conn. etc. R. R.*, *Malecek v. Tower Grove R. R.*, both *supra* note 14.

<sup>19</sup> *Central Electric Co. v. Sprague Co.*, 120 Fed. 925 (C. C. A. 7th, 1902); *Blanchard-Carlisle Co. v. Garretson*, 43 Ind. App. 303, 87 N. E. 151 (1909); *McMillan v. Carson Hill etc. Co.*, 12 Phila. 404 (1878); *Tyng v. Constant-Loraine Inv. Co.*, 47 Utah 330, 154 Pac. 767 (1916).

<sup>20</sup> *Brackett v. Commonwealth*, 223 Mass. 119, 111 N. E. 1036 (1916); *Haney-Campbell Co. v. Preston Creamery*, 119 Iowa 188, 93 N. W. 297 (1903).

as a legal personality, to its agents and the legal status of the latter are included within this province. How, then, is that relationship described and delimited, and what effect does it have upon the present problem of admissibility of the declarations of general corporate agents?

Salmond, in his work on *Jurisprudence*, suggests that "it is held that the law will not only impute to the corporation all acts which its representatives are lawfully authorized to do, but all acts which they do *in or about* the business so authorized."<sup>21</sup> This phrase *in or about* is freighted with great significance. In our problem we have a piece of machinery used in the business of the corporation. The officers directed or permitted this use. The machinery is defective and known to be so. By a positive order or act the managing agent, with knowledge of the defects and the consequent danger, caused the continuance in use of this machine, or by a negative act suffers its continued use. The "corporation," of course, knows nothing of this positive order or negative suffrance. Yet, by orthodox corporation law, the corporation should be bound by the doctrine of imputed knowledge, and therefore imputed assent to the use of the crane. The substantive law, determining tort liability, is clear. Now, when the accident occurs, the manager makes a statement tending to prove this knowledge on his part, and hence on the part of the corporation. The accident occurred "in and about" the business which he, the managing agent, is authorized to control. The tort committed renders the corporation liable; why then does not the declaration thus made bind the corporation? If the casual instrument was used in the business, why should not the declaration of the managing agent of that business concerning the casual instrument be admitted in evidence? Why does this not involve questions of substantive law of as vital importance as those which fix the corporation's liability for the tort in the first instance?<sup>22</sup>

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<sup>21</sup> JURISPRUDENCE (7th ed. 1924) 347. See *State v. Armour*, 173 Mo. 356, 73 S. W. 645, 650 (1903).

<sup>22</sup> If the general question depends upon the doctrine of Agency and not upon any rule of Evidence, this particular phase of the question depends upon the law of Corporations and not upon any rule of Evidence.

The information from one who is in a position to know the cause of the accident, such as the managing agent of the corporation, should be admitted, it seems, first, providing it was divulged "in or about" the business; and provided, second, that it has the color of circumstantial genuineness.<sup>23</sup> But, it is objected, the law assumes that such testimony is unreliable because, at best, it is hearsay. If this contention be conceded, under the circumstances of this case, we have the defendant corporation in the embarrassing position of repudiating the statements of its spokesman and insisting that, although the managing agent made the oath to verify the pleadings in the present action, and now directs the defence during the prosecution of the trial, still his statements shortly after learning of the accident are so untrustworthy and unreliable that they cannot be admitted in evidence.

Morawetz, in his work on *Corporations*, has observed as follows:

"The doctrine in respect of the relations of principal and agent, and master and servant, as applicable to the acts and contracts of corporations, are well established. It is essential to an act or contract which binds the corporation that it be done, or entered into, or authorized by the corporation entity itself, as represented by the governing board of stockholders."

"It is well recognized in the law that corporations, in carrying out corporate functions, may, and of necessity do create vice principals who, in respect of the departments of corporate business intrusted to their control and general management, partake of the corporate entity, and their acts and contracts, in execution of the functions they represent, are of the same effect and import as if done and entered into, or directly authorized, by a vote of the governing board of stockholders. Such a person in reference to the public, is more than a mere agent acting under orders of a superior. He is *pro hac vice* a principal. He stands for, and represents within the sphere of his authority the corporate entity itself."<sup>24</sup>

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<sup>23</sup> See 2 WEARTON, EVIDENCE (3d ed. 1888) § 1177.

<sup>24</sup> *Op. cit.* (2d ed. 1886) § 725.

Corporate law, creating corporate entities, contemplates managing officers who shall act and speak for the corporation. Out of the very nature of the corporate person this is the only way in which it can act and speak. Having no eyes, no ears nor hands, it sees, hears and acts only in law, and in law through natural persons. The law creates the entity as a legal person, permits or compels it to take a name, empowers it to enter the world of business and industry, and insists that it name some individual or individuals as officers who shall speak for it and act in its stead. This situation is, it is obvious, peculiar to corporate law.

Now that other person or persons, the officer or officers named in the charter or required by the state to be named in the by-laws, is no mere agent, in the ordinary sense. Consequently, the ordinary rules of Agency should not apply to determine his relationship to the corporation and the binding effect of his declarations upon the corporation. He is, indeed the corporation's *alter ego*, its second self.<sup>25</sup> It is true, of course, that the corporation can, and frequently does, act through agents, in the accepted meaning of that term. But in every act done by or in behalf of the corporation, the latter may be present by *alter ego* or "other self," or the act may be done by representation and the corporation be present in the same way, through an agent. If by the former method, the act is done by the corporation *per se*; if by the latter, it is done *per alium*. There is a difference, and the difference is that in the one case the corporation acts directly; in the latter case, indirectly.

This doctrine is familiar in the substantive law of Corporations, and is forcibly enunciated in a recent New Jersey case in the following language:

"Take for instance when a corporation makes a deed, the corporation grantor must make an acknowledgment before a notary public the same as any other grantor. How will it be done? By the proper officer of the corporation. His act is not the act of himself but the act of the corporation. He is not an agent for the corporation. He is the

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<sup>25</sup> Cf. the language of McCardie, J., in *Said v. Butt*, [1920] 3 K. B. 497.

corporation. The former would be *per alium*. The latter is *per se*. This distinction is fundamental. One goes to the law of principal and agent. The other to corporation law." <sup>26</sup>

Is this not a realistic way of regarding corporations? It imputes to them the attributes of legal personality, yet abandons the notion that they are ideal, intangible beings by treating them as organizations of men, created for certain purposes, but with officers, required by law, through whose acts the corporation itself acts, the things done being regarded as proceeding directly and immediately from the corporation.<sup>27</sup> In a Canadian case it was said that "when an officer of a corporation makes an affidavit, he does not act as an agent. He exercises the corporate powers in the only way in which they can be exercised at all. He acts in chief and not by delegation."<sup>28</sup>

Thus, a New York court, considering the sufficiency of an affidavit, said:

"It (the affidavit) is made by the general and managing agent . . . It would be indefensible to preclude a corporation from the benefits of this act of Congress by insisting on an affidavit from itself which cannot be made, or by denying its petition because none was made by it. It may be made by any person acting under the authority of the corporation, and possessed of the needed knowledge or information to make it . . . This affiant swears that he is the managing agent . . . This is proof, *pro hac vice*, that he had the means of knowing the material facts stated in the petition."<sup>29</sup>

Many further illustrations of this theory may be recalled. It is thus, through individuals, acting, not *for*, but *as* the corporation, that they may commit all manner of torts such as assault

<sup>26</sup> See *American Soda Fountain Co. v. Stolgenbach*, 75 N. J. L. 721, 68 Atl. 1078 (1908).

<sup>27</sup> *Cf.* the cases in which the law removes the "corporate mask" or "pierces the corporate veil."

<sup>28</sup> *Bank v. McDougel*, 15 U. C. C. P. 475 (Canada, 1865).

<sup>29</sup> *Shaft v. Phoenix Ins. Co.*, 67 N. Y. 544, 549 (1876). *Cf.* the language used in *Bank v. Hutchinson etc.*, 87 N. C. 36, 37 (1882).

and battery,<sup>30</sup> malicious prosecution,<sup>31</sup> false imprisonment,<sup>32</sup> libel,<sup>33</sup> slander,<sup>34</sup> and some offenses for which they may be indicted. It was never thought that a corporate vote was necessary to bind a corporation for such wrongs, especially within the past hundred years. As well might be said that a corporate vote were necessary to give express authority to every contract made by the managing agent, although the ordinary doctrine of Agency would take care of many contracts.

This same distinction between acts of the corporation when done for the corporation by the managing agent, and when consummated through the managing agent by the corporation, is recognized by the Supreme Court of the United States. The question of intent seems to figure in the opinion. The Court has said:

“Any damages sustained by the plaintiff as a result of the acts of the agents of the defendant corporation in the scope of their agency is allowed, but punitive damages is for punishment for intentional wrongdoing. The defendant must be shown to have participated or ratified the wrongdoing. This participation can be done by the general managing officers or by the board by official acts.”<sup>35</sup>

But the same objection is raised to this theory, which is grounded exclusively upon legal doctrines peculiar to the law of Corporations, as is raised in the case of declarations of ordinary agents acting for a principal. There is no authority to do the acts nor to make the declarations pertaining to those acts. The fallacy is obvious. It is due to an effort to apply Agency law to a problem of Corporation law. In the latter, the question of authority is involved only to determine the general field within which the acts and declarations of the managing agent constitute acts and declarations of the corporation itself. This matter once determined, authority to perform the particular act is not necessary, or, in other words, it is imputed from his position as man-

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<sup>30</sup> *Passenger R. R. v. Young*, 21 Ohio 518 (1871).

<sup>31</sup> *Goodspeed v. Bank*, 22 Conn. 531 (1853).

<sup>32</sup> *Conklin v. Consolidated R. R.*, 196 Mass. 302, 82 N. E. 23 (1907).

<sup>33</sup> *South etc. Alabama R. R. v. Chapell*, 61 Ala. 527 (1878).

<sup>34</sup> *Empire Cream Separator Co. v. DeLaval etc. Supply Co.*, 75 N. J. L. 207, 67 Atl. 711 (1907).

<sup>35</sup> *Lake Shore etc. Ry. v. Prentice*, 147 U. S. 101 (1893).

aging agent.<sup>36</sup> It is only consistent with the legal theory of Corporations that the same reasoning be applied to declarations of such general officers made under the same circumstances.

It is another objection frequently raised to the admissibility of such declarations that they were not made in the line of, or during the period of the duty of, the declarant. But the same objection could as readily be made to his tortious acts, for it is hardly to be presumed that the commission of torts or of negligent acts is contemplated as being within the agent's duty.<sup>37</sup> It is difficult to understand just what is intended by this objection with reference to declarations of general corporate officers such as managing agents. Sometimes it means that the admissions were made out of time, that is, that they were not made while the manager was on duty,<sup>38</sup> or that they were not made with reference to or at the time of the particular transaction.<sup>39</sup> But one is tempted to inquire whether a managing agent is ever "off duty." In the event of emergency or of sudden and unforeseen peril and danger to the factory or to corporation property, the general manager finds his duties as onerous and as definite as though he were sitting at his desk in the middle of the day. Not only are his duties, under the circumstances, clear and unmistakable, but his authority is just as explicit and just as certain. It is refreshing to observe that a few courts have taken a realistic view of the "off duty" question.

In a Georgia case,<sup>40</sup> the general manager of a railroad com-

<sup>36</sup> Cf. *Citizens Gas & Electric Co. v. Black*, 95 Ohio St. 42, 115 N. E. 495 (1916).

<sup>37</sup> Cf. the language of Warrington, L. J., in *Jefferson v. Derbyshire Farmers Ltd.*, [1921] 2 K. B. 281.

<sup>38</sup> Cf. *Huntingdon etc. R. R. v. Decker*, 82 Pa. 119 (1876), confining admissions of agents to the "time of the particular transaction" and declaring that "the declarations of officers of a corporation rest upon the same principle as apply to other agents." Cf. also *Ricketts v. Birmingham St. Ry.*, 85 Ala. 600, 5 So. 353 (1889).

<sup>39</sup> *Bank of Brocton v. Brocton Fruit Juice Co.*, 208 N. Y. 492, 102 N. E. 591 (1913), involving declarations made by the president of a bank. This decision reversed the Appellate Division, which had held that the declarations were admissible. "In my opinion," said the court, "the evidence was clearly competent, and it is sufficient to say that Hall (the defendant), at the time he made the statements which are in evidence, was an officer, to wit, president, of the plaintiff."

<sup>40</sup> *Krogg v. Atlantic & West Point R. R.*, 77 Ga. 202 (1886).

pany had left his office and gone "off duty." Instead of being at his home or club, however, he was in bed in a car, presumably a Pullman, sound asleep. He was just as much off duty, it must be remarked, as though he were at his home, at the theatre, or at his club. The conductor entered the coach, awakened him and informed him of the wreck of another train at a certain place many miles away. "I told the roadmaster," exclaimed the general manager, "that the track was too high at that curve." Now the facts are not clear whether the managing agent was, at the time, on a journey in the interest of the company or whether he was engaged in a purely private enterprise. It is only reasonable to believe, therefore, that it was immaterial to the court. The declaration was admitted on the ground that it was in the line of duty and within the scope of the officer's employment, and the reason assigned was that it was his duty and his business to know the condition of the road, whether technically on duty or not. The court seems to proceed on the assumption that the managing officer is never off duty with respect to affairs of corporate business which he has under his control and management. If this premise be a valid one, it completely disposes of the objection so frequently interposed that declarations are not made while the declarer was acting within the line of his duty, or at the exact time that the act to which the declaration pertains took place.

Proceeding now upon the legal theory as to the nature of corporations, as determined and adopted in Corporation law, and regarding the "line of duty" and "scope of employment" question in a way consistent with that theory, it follows that such declarations as we are concerned with in our specific problem may find a ready avenue of admission through the application of ordinary and orthodox rules of evidence. The words of the manager to his friends at the club, being the words of the corporation itself, are but the simple admissions of a party, against his own interest, and are admissible as such. They are available as competent evidence against the corporation only, which, of course, is not true of declarations which are a part of the *res gestæ*. Thus the chief reason employed in the strict application of the *res gestæ* doctrine, time for contrivance, is not invoked against such declarations.

A principal himself can always bind himself by his acts and by his declarations, both in season and out of season, with respect to his own legal affairs. It follows, if the foregoing reasoning is accurate, that a corporate principal is able to do the same thing with respect to the acts and declarations made by the managing agent "in or about" the business which the law created the corporate principal to conduct. This means that the managing agent can bind the corporation within the limits of the business of the corporation. Anything said by him relative to that business is within the scope of his authority and in the line of his duty, for in respect to such business, he is the corporation. In other words, the line of his duty is determined by the law which creates the corporation, not by the number of hours per day which he ordinarily serves the corporation. Obviously he, as the corporation's "second self," could not act and make declarations about acts which were wholly outside the authorized business which the corporation was empowered to transact. But under these circumstances, not only the general manager, but the board as well, is impotent to make declarations binding upon the corporation, for such statements, as the acts to which they pertain, are *ultra vires*, and thus beyond the legal power of the corporation to make.<sup>41</sup>

In an Oregon case,<sup>42</sup> both a corporation and its president were made defendants in a suit for slander. The plaintiff had been accused of theft from the company's store. The president, who was also general manager of the store, a corporation, had made the slanderous remarks complained of. Declarations of the president were sought to be introduced in evidence. Their admission was objected to as hearsay. The court ruled that they were admissible as declarations against interest.<sup>43</sup> The corporation defendant failed to ask for instructions limiting the operation of the rule to the president, personally, and the case must be

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<sup>41</sup> *National Home Building etc., Assn. v. Bank*, 181 Ill. 35, 54 N. E. 619 (1899). But *cf.* the rule as to torts. See *Hussey v. King*, 98 N. C. 34, 3 S. E. 923 (1887).

<sup>42</sup> *Bingham v. Lipman, Wolfe & Co.*, 40 Ore. 363, 369, 67 Pac. 98 (1901).

<sup>43</sup> The court refers to these admissions as "declarations against interest," but treats them, apparently, as "admissions," or as primary evidence.

regarded as applying the principle to corporations as well. Just how much weight is to be attached to this decision, in view of the joinder of parties defendant, may be problematical, but in *Southern R. R. Co. v. Howell*,<sup>44</sup> the application of the rule of declarations against interest cannot be denied. The superintendent of the defendant company had written a letter to a party in adverse interest, saying: "It is my understanding that we own 50 feet on each side of the main track." At the trial of the issue, it was objected that the introduction of this letter violated rules of evidence. The court overruled the objection, holding it within the officer's authority and being in the nature of an admission against interest. In another case, an admission in writing by the secretary and general manager of a corporation that certain sums were due the plaintiff for services rendered, was received in evidence as an admission against interest. It was a declaration of the general manager with respect to the business of the corporation, and consequently it was the declaration of the corporation itself.<sup>45</sup>

From these cases there is some indication that the courts at times recognize the fact that a corporation can make no admission against interest unless the same falls from the lips of an *alter ego*, acting and speaking "in or about" the business which the corporation is empowered by law to conduct, and which the *alter ego* is empowered to control.

Fixed rules of evidence are the result of a growth of the law extending through centuries and are, no doubt, justified by the stability given to the legal system and the judicial process. This stability is necessary to the effective functioning of our judicial machinery. On the other hand, as society progresses and as business is carried on by corporations in increasing volume, there seems to be a demand for the relaxing of hard and rigid rules, especially where the reason for the rule has partially or wholly failed. This demand can be met by a sound judicial discretion in giving careful consideration to the rules in the light of orthodox corporation law and theory, controlled by the facts and circumstances of each individual case as it arises. There can be no

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<sup>44</sup> 79 S. C. 281, 60 S. E. 677 (1908).

<sup>45</sup> *Smith v. Sinbad Development Co.*, 11 Cal. App. 253, 104 Pac. 706 (1909).

objection to the use made of the rules of evidence which the common law has developed. It is the abuse of these rules that produces the unsatisfactory results. When the legal theory of corporations is completely ignored, and the reasons for rules of evidence overlooked for the purpose of applying the rule itself, literally, it seems justifiable to conclude that the rules have been abused. Rules misapplied are perhaps worse than no rules at all, for they cramp the discretion of the court and defeat the very purpose of their origin. Similarly, legal theory misinterpreted and misdirected is bound to produce results both unsatisfactory in effect and unsound in logic.

In this connection, it has been said by an eminent judge:

"It is because I believe that the reason back of most of these rules is sound that I feel that they should not be abandoned but should be applied whenever the reason does not fail. When the reason does fail then there should be a way to at least relax the rigor of the rule."

"In the development of our system of evidence there are three courses possible: our present system may be continued and the rules become even more definite and rigid; the rules may be abolished and all evidence of a probative force received, as in arbitrations or hearings by certain administrative boards; or a field for the exercise of judicial discretion may be created where it can be demonstrated that rigid application of the rules is unreasonable."<sup>46</sup>

In our problem of the admission of declarations of managing agents of corporations, the last course suggested above is the only one to relieve the trouble encountered with respect to the *res gestæ* rule. It is necessary to have regard for the reasonableness of the rule as applied to the circumstances of the particular case, in order, frankly, to achieve a desirable result and one not inconsistent with the reason underlying the rule itself. In the application of the "scope of authority" and "line of duty" doctrines, it is submitted that a true regard for the legal theory underlying the substantive law of Corporations will solve many difficulties. This, together with more extended use of the admissions against interest rule, it is believed, will avoid many of the absurd results of the hearsay rule.

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<sup>46</sup> Lehman, *Technical Rules of Evidence*, (1926) 26 COL. L. REV. 509.