ADMISSION BY CONSPIRATOR*

EMILIANO R. NAVARRO †

§1. *The Basic Law.*—The basic law on this subject is now embodied in §12, Rule 123 of the Rules of Court.[1] This is a clarification of the poorly drafted section 298 (b) of the Code of Civil Procedure, now repealed, which required reception of the following:

> "6. After proof of a conspiracy, the act or declaration of a conspirator relating to the conspiracy."

The above quoted provision did not say with what evidence the conspiracy should be proved nor did it fix the time when the act or declaration should have been made. Thus the case developed and the present Rules restated.

§2. *Theory of Admission.*—The vicarious admission of a conspirator is received against the others on the basis of privity of obligation established by the substantive law. The act of a conspirator becomes the act of all and, thus, becomes a joint obligation.[1] The admissibility is, therefore, based upon the familiar principle of agency. Learned Hand states the theory as follows:

> "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all." [2]

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† LL.B. (University of the Philippines) LL.M. (Michigan); Practicing lawyer and professor of law on the faculties of the College of Law and the Graduate School, University of the Philippines, Philippine Law School, and Arellano University.

1 "*Admission by conspirator.* — The act or declaration of a conspirator relating to the conspiracy and during its existence, may be given in evidence against the co-conspirator after the conspiracy is shown by evidence other than such act or declaration."

1 Art. 17, Revised Penal Code. "So the acts or declarations of a conspirator are sometimes admissible as evidence against his co-conspirators, the acts or declarations of each of the conspirators being regarded as the acts or declarations of all." United States v. De la Cruz, 12 Phil. 87, 91 (1908). *See* also Gardiner v. Magsalin, 73 Phil. 114, 115, 116 (1941); Morgan, THE RATIONALE OF *Vicarious Admisions*, 42 H.L.R. 461,464 (1949); 4 WIGMORE ON EVIDENCE, §§1077, 1078 (1940).

Mr. Levie, who said Wigmore "differs" and attributes to him the theory that admissibility rests on the ground that the declaration is "unusually trustworthy", must have committed sheer error. HEARSAY AND CONSPIRACY, 52 MICH. L. REV. 1159, 1163 (1954), citing §1080a of Wigmore, but failing to notice §§1077 and 1079.

2 Van Riper v. United States, 13 F 2d 961, 967 (2d Cir. 1926).

Very clearly, then, the admission of the vicarious act or declaration of a conspirator cannot be made to rest upon the simple fact that the party sought to be charged is joined as a co-defendant of the declarant.[3] A great body of cases [4] illustrates this rule of which the following is representative:

UNITED STATES v. EMPEINADO, 9 Phil. 613, 616 (1908)

> "It was further shown at the trial that the said Regino de Gracia had been tried in a separate action for his participation in the crime; that the complaint in that action charged him with having induced Ciriaco Empeinado and others to assassinate Bernardina Pacris in consideration of a promise of reward; and that the said Regino de Gracia confessed his guilt as charged, and was sentenced to life imprisonment. This evidence was wholly inadmissible; where a conspiracy between two or more persons for the accomplishment of the same criminal design has been established, the declarations made by one of them during the pendency of the unlawful enterprise, and in furtherance of its objects, are receivable in evidence against one or all of them; but the confession of one conspirator, made after the conspiracy has come to an end, whether by success or failure, is not admissible in evidence against any but himself (U.S. v. Hartwell, 3 Clif., [Circ. Rep.], U.S., 221; Logan vs. U.S., 144 U.S., 263; Brown vs. U.S., 150 U.S., 93; Sparf vs. U.S., 156 U.S., 156 U.S., 51.) The admission of this evidence, however, was not reversible error, because after excluding it from the record there remains sufficient evidence to establish the guilt of the accused beyond a reasonable doubt, and the substantial rights of the accused were not, therefore, prejudiced by its admission."

These cases involved confessions after arrest when, obviously, the conspiracy had ended. The prosecution, however, sought to bind both the declarant and the co-defendant with the former's confession. The agency having terminated, the confession can be admitted only against the declarant, but not against the co-defendant, against

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[3] WIGMORE ON EVIDENCE, *supra*, §1076, pp. 115-117.

[4] United States v. Castillo, 2 Phil. 17, 18-19 (1903); United States v. Lim, 4 Phil. 440, 441 (1905); United States v. Candelaria, 4 Phil. 543, 544 (1905); United States v. Paete, 6 Phil. 105, 106 (1906); United States v. Macalalad, 9 Phil. 1, 5 (1907); United States v. Estabillo, 9 Phil. 668, 674-675 (1908); United States v. Galanco, 11 Phil. 575, 576-577 (1908); United States v. De la Cruz, *supra*, at pp. 91-92; United States v. Raymundo, 14 Phil. 440, 443 (1909); United States v. Cassion, 28 Phil. 285, 289 (1914); United States v. Vega, 43 Phil. 41, 42-43 (1922), United States v. Tabucho, 46 Phil. 28, 39-40 (1924); People v. Manalo, 46 Phil. 572, 577 (1924); People v. Durante, 47 Phil. 654, 658-659 (1925); People v. Orenciada, 47 Phil. 970, 975-976 (1924); People v. Badilla, 48 Phil. 718, 725-727 (1926); People v. Ranario, 49 Phil. 220, 224 (1926); People v. Bande, 50 Phil. 37, 41 (1927); People v. Nakpil, 52 Phil. 985, 989-990 (1926); People v. Francisco, 57 Phil. 418, 420 (1932); People v. Avelino de Linao, 58 Phil. 116, 134-135 (1933); People v. Gallemos, 61 Phil. 884, 892 (1935); People v. Ramos, 62 Phil. 339, 344 (1935); People v. Buan, 64 Phil. 296, 298 (1937); People v. Ferry, 66 Phil. 310, 322 (1938); People v. Raiz, G.R. No. L-4565, May 20, 1953; People v. Lumahang, G.R. No. L-6537, May 7, 1954; People v. Yatco, 51 O.G. No. 12, 6187, 6188-6190 (1955). See also People v. Morales, C.A., 44 O.G. No. 12, 4989, 4992 (1947); People v. Obejera, C.A. 50 O.G. No. 2, 669, 674 (1953).

whom the confession would be hearsay. And our Courts have acted accordingly.[5]

Certain exceptions have, however, been evolved by judicial decisions by which a vicarious declaration of a conspirator, after the termination of the conspiracy, may bind the co-defendant. It is apparent that the conditions of section 12, Rule 123, of the Rules of Court, not being met, the declaration is received despite this legal provision.

One instance is where the declaration has been adopted and here the rule is the same as in other cases of adopted admissions. The following case is a lucid example.

PEOPLE v. ORENCIADA, 47 Phil. 975-976 (1924)

> "But the most damaging circumstance against Cenita is found in the Exhibits 2 and 3 which are letters written by Cenita and directed to Simeon. In this connection it appears that, while the two prisoners were detained in separate cells, Cenita was permitted to have writing material with which he wrote two short letters (Exhibits 2 and 3) in ink upon a small piece of paper. These letters were addressed to Simeon and appear to have been written for the purpose of closing Simeon's mouth and preventing him from making further harmful admissions. Among other things the writer advises Simeon that he must begin to deny everything in order that the lawyer who would defend them might have something to build upon. The author of the letters refers to the confession that had been made by Simeon at the preliminary hearing, and without calling in question the truthfulness of said confession, he says that it must be denied by Simeon at the trial. The authorship of these two letters is proved beyond all question; and a policeman in fact saw Cenita pass one of them into the cell where Simeon was confined. It may be added that Simeon upon receiving these two letters delivered them promptly to the municipal president.
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> It is well established in this jurisdiction that a confession made by one of two or more accused persons, without the intervention of the others, is competent only against the declarant. (U.S. vs. Castillo, 2 Phil., 17; U.S. vs. Paete, 6 Phil., 105; People vs. Tabuche, 45 Phil., 28) In conformity with this doctrine, the confession of Simeon Orenciada would not be competent as against Cenita, but the application of the rule is modified in the present instance by the letters to which we have referred (Exhibits 2 and 3). These show a full appreciation on the part of Cenita of the character of said confession, and they contain ad-

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[5] United States v. Castillo, *supra;* United States v. Candelaria, *supra;* United States v. Paete, *supra;* United States v. Macalalad, *supra;* United States, v. Vega, *supra;* United States v. Tabuche, *supra;* People v. Durante, *supra;* People v. Orenciada, *supra;* People v. Bande, *supra;* People v. Nakpil, *supra;* People v. Avelino de Linao, *supra;* People v. Gallemos, *supra;* People v. Buan, *supra.*

Occasionally, however, the Supreme Court fails to grasp this simple fact. In People v. Yatco, *supra,* note 4, the Court conceded for the purpose of the holding that §12, Rule 123, of the Rules of Court could apply. In view of the clarity and simplicity of the rule of law, there could be no room for even such a concession; it would at best becloud what was clear.

missions which clearly involve the author in its legal effects. It is therefore, legitimate for the court in estimating the proof in this case to consider the confession of Simeon Orenciada, in connection with these letters, as evidence against Cenita. We may add that, in the light of these letters and other items of proof already mentioned, it is impossible to doubt that Cenita prevailed upon Simeon Orenciada to kill Maximo Mora, as alleged in the complaint." [6]

Again, a confession in the presence of a co-defendant implicating him who did not remonstrate will bind him.[6a]

A second exception is that of identical confessions. Where extrajudicial confessions had been made by several persons charged with a conspiracy and there could have been no collusion with reference to the several confessions, the fact that the statements are in all material respects identical is confirmatory of the testimony of an accomplice.[7] Here, it is said that the declaration of one is not received directly against the other. It is the extrinsic fact of the declarations being identical that is considered as a corroboration of the testimony of the accomplice.[8] Such a refinement of distinction is probably impossible to grasp by a trial court and it is improbable that a real difference is perceivable.[9] And here, too it is an easy step to rule that it is the "evidence of appellant's culpability," not necessarily the testimony of an accomplice, that is corroborated. And the doctrine seems to be tending towards including the fact of identical confessions corroborating each other.[10] This, indeed, is a new twist not contemplated in the rule initially formulated.

A third exception is that of an act or declaration of a co-conspirator received without objection by the co-defendants.[11] Here, the rule is no different from the familiar one that hearsay evidence becomes admissible by failure to object on time. Objection should be made specifically on this ground: an objection on other grounds will not suffice.[11a]

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[6] *Cf.* United States v. Estabillo, 9 Phil. 668, 674-675 (1908); People v. Ranario, 49 Phil. 220, 224 (1926); People v. Obejera, C.A., 50 O.G. No. 2, 669, 674 (1953).

[6a] §8, Rule 123, Rules of Court; People v. Atienza; 47 O.G. No. 12 (Supp.) 200, 204-205 (1950).

[7] People v. Badilla, 48 Phil. 718, 725-727 (1926); People v. Piamonte, G.R. No. L-5775, Jan. 28, 1954.

[8] MORAN, COMMENTS ON THE RULES OF COURT 110-111 (1952).

[9] People v. Prudente, C.A., 45 O.G. No. 12, 5587, 5591 (1949). *See* also People v. Sedon, C.A. 46 O.G. No. 6, 2644-2647 (1948).

[10] People v. Napiza, 44 O.G. No. 10, 3879, 3881-3882 (1947).

[11] United States v. Galanco, *supra*, note 4, at pp. 576-577; Diaz v. United States., 223 U.S. 442; Poeple v. Atenza, 47 O.G. No. 12 (Supp.) 200, 205 (1950).

[11a] People v. Bernadez, 42 O.G. No. 6, 2260, 2264-2265 (1947), where the objections were that the statement was not a confession and that it was extorted by means of force; but the statement was found to be a voluntary confession.

A fourth exception is that of corroboration by other evidence. A co-conspirator's extrajudicial confession, ordinarily inadmissible against his co-defendants, becomes admissible against them because corroborated by other evidence of record. It was clearly formulated in the following case, although another preceded it.[12]

UNITED STATES v. PEREZ, 32 Phil. 163, 171-173 (1915)

After the order of arrest had been issued for Severino Perez, Abdon de Leon, Faustino Manago and Julio de los Santos, and prior to the filing of the complaint against them in this cause, these four men, armed with *talibones* and a revolver, were seen in the *sitio* of Sapangbalot, in some mangrove swamps between the pueblos of Hermosa and Orani, Province of Bataan, on August 19, 1913, by Valeriano Calma, a secret service agent of the Constabulary, and a corporal of the same organization who had gone there in search of them, but as they resisted and fired a shot at the officers attempting to arrest them these members of the Constabulary fired at Severino Perez and his three companions, seriously wounding Julio de los Santos and Abdon de Leon; Julio de los Santos died in the hospital as a result of his wound and De Leon was removed to the municipality of Hermosa. From these two men and from the others, Faustino Mañago and Severino Perez who succeeded in escaping, the said officers then seized two revolvers, a *talibon* and a dagger which were turned over to the captain of the Constabulary of the said Province of Bataan. Subsequently Severino Perez was also arrested by a Constabulary detachment and before the end of August, 1913, the other defendant Faustino Mañago gave himself up to the chief of police of the pueblo of Hagonoy and was therefore arrested in that municipality.

"Lieutenant Cristobal Cerquella of the Constabulary in the Province of Bulacan was presented as a witness by the prosecution and testified that on August 24, 1913, Faustino Mañago, while held in detention in the municipal building of Hagonoy, voluntarily stated that in company with Severino Perez, Abdon de Leon, one De los Santos and Lorenzo Reyes he went to the house of one Damaso Valencia; that he, Mañago, and Lorenzo Reyes remained in the banca and the others continued on their way to the said house; that afterwards when Damaso Valencia was near the house beside the river and not expecting any danger Abdon de Leon struck him a cutting blow and then Severino Perez shot him once; that Faustino Mañago made the said statement voluntarily, without the witness having exercised any force upon him, as Cerquella was in the said municipality for the purpose of conducting the proper investigation; and that there were then present, if he remembered rightly, the chief of police, a member of the Constabulary, and another man.

"The municipal president of Hagonoy, Francisco Sebastias, also testified that, while Faustino Mañago was a prisoner in the municipal building of the said pueblo, this defendant told him that in the assault made in the *sitio* of Lawa, of the municipality of Lubao, he was in the company of Severino Perez and others, but that he did not enter the house on the night of the crime, but remained on guard below. The said municipal president further testified that Mañago made this statement to him freely and voluntarily on an occasion when the chief of police was present.

[12] United States v. Burias, 13 Phil. 118, 125 (1909).

"Finally, Eustasio Martin, a municipal policeman of the same pueblo of Hagonoy, testified that he had an opportunity to talk with Faustino Mañago in the said municipal building on August 24th, as this defendant had given himself up to the chief of police as one of the robbers, and that, when witness then asked him about the assault upon Damaso Valencia's house and told him that for some time past they had been looking for him, Mañago freely and voluntarily told witness that Severino Perez, Abdon de Leon, Julio de los Santos and Lorenzo Reyes were his companions in the assault. Mañago not only made this statement to this witness, but also to the municipal president, on being interrogated by the latter.

The foregoing testimony clearly shows the direct and positive participation of each one of the three defendants, Severino Perez, Abdon de Leon and Faustino Mañago, in the commission of the act as referred to at the beginning of this decision, and the mode and manner in which these three men, together with Julio de los Santos, now deceased, cooperated in the performance of those acts. The truth of the incriminating statements of Miguela Sibug, Damaso Valencia's widow, in connection with each one of the said three defendants, is proved by those made by the other witness for the prosecution, Lorenzo Reyes, and by the confession, although extrajudicial, made by Faustino Mañago himself in the municipality of Hagonoy to the lieutenant of the Constabulary, Cristobal Cerquella, and to the municipal president and a policeman of the said pueblo; and this confession is worthy of credence and is admissible against him, as it is likewise credible and admissible against his co-defendants, Abdon de Leon and Severino Perez, his accusation of their participation in the crime, inasmuch as the confession is corroborated both by the testimony of Miguela Sibug herself and by that of Lorenzo Reyes and confirmed by the other evidence related thereto and found in the record." [13]

The rule thus formulated does not seem to have been followed elsewhere but tribute is given to its wisdom.[14] A little reflection would, however, make clear that it would wipe away all the safeguards

[13] The principle was mentioned but not applied in People v. Buan, 64 Phil. 296, 298 (1937) because there was no corroboration by other evidence. In refusing to apply the rule, the Court cited cases which were not in point instead of invoking United States v. Perez, *supra*. The cited cases were those of co-conspirators testifying on the stand and whose credibility was sustained because corroborated by other evidence. The point we are discussing is altogether different for it is merely the extrajudicial declaration of a co-conspirator that is involved.

A like misapprehension is found in 4 WIGMORE ON EVIDENCE, §1076, note 12, p. 117, citing People v. Bautista, 49 Phil. 389 (1926). The "universally held" doctrine announced in the Bautista case is that a co-conspirator's testimony on the stand is admissible if corroborated by other evidence. This has no relation to the vicarious extrajudicial declaration we are discussing.

For an intelligent apprehension and application of the rule, see People v. Jose, C.A., 51 O.G. No. 9, 4573, 4580-4581 (1955).

[14] Under a misapprehension already mentioned in note 11, *supra*, Wigmore says of People v. Bautista: Where the opinion, without citing authority, makes the extraordinary statement that 'the Courts have universally held that such declaration and confessions (of co-defendants) are admissible when corroborated by other indisputable proof"; this would have been a rather wise rule if adopted in the first place; but when did a court adopt it? and what becomes of the long line of prior rulings by this Court?" 4 WIGMORE ON EVIDENCE, *supra*, note 13. If United States v. Perez were substituted for People v. Bautista, the comment of Wigmore would be correct.

established by the traditional requirements of section 12, Rule 123. of the Rules of Court. Few are the cases imaginable where the vicarious confession will find no corroboration from the mass of the prosecution evidence. And to emasculate the rule by saying that the other evidence should be sufficient for conviction, without the confession,[15] is practically the annul it or to establish no rule at all. It is equivalent to saying that the Supreme Court, in U.S. v. Perez, did not mean what it said. It is precisely where the other evidence is not sufficient that the rule finds potential application.[16]

§3. *Requisites for Admission Under §12.*—The law requires three requisites for the admission of a conspirator's extrajudicial act or declaration against his co-defendant: (1) the conspiracy must first be proved by evidence other than such act or declaration; (2) the act or declaration must relate to the conspiracy; and (3) it must have been made during the existence of the conspiracy. These are the traditional requirements of Anglo-American law.[1] In the absence of one of these requisites the extrajudicial act or declaration of a conspirator will be received only against him but not against his co-defendant. The principle is applicable to both civil and criminal cases.[2]

§4. *Proof of Conspiracy.*—Before proof of the extrajudicial act or declaration of a co-conspirator may be offered, the conspiracy must first be proved by evidence other than the act or declaration. The requirement of independent proof is based upon the same reason as that relating to agency or partnership. Admitting the act or declaration as proof of conspiracy would "be merely begging the very question,[1] or to enable hearsay to "lift itself by its own bootstraps to the level of competent evidence."[2] This is required not only by the Rules of Court but also by cases heretofore decided.[3]

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[15] This is the interpretation given by Moran to United States v. Perez. 3 COMMENTS ON THE RULES OF COURT, *supra*, at 111.

[16] *See* People v. Jose, *supra*, note 13, where it was not found useful because the other evidence was sufficient.

[1] Levie, Hearsay and Conspiracy," 52 MICH. L. R. 1159, 1167 (1954); 2 JONES ON EVIDENCE, §943 (1926); 4 WIGMORE ON EVIDENCE, §1079 (1940); Burrows' PHIPSON ON EVIDENCE, 98-99 (1952).

[2] United States v. Raymundo, 14 Phil. 416, 440 (1909). For specific application to a civil case, *see* Montoya v. Crisostomo, C.A., 44 O.G. No. 11, 4382 (1947).

[1] 4 WIGMORE ON EVIDENCE, §1078 123-124 (1940.

[2] Glasses v. United States, 315 U.S. 60, 75, 62 S.Ct. 457 (1942). *See* also State v. Benson, 234 N.C. 263, 66 S.E. (2d) 893 (1951).

[3] United States v. Macalalad, 9 Phil. 1, 5 (1907); United States v. de la Cruz, 12 Phil. 87, 92 (1908); United States v. Raymundo, 14 Phil. 416, 440-443 (1909); United States v. Cassion, 28 Phil. 285, 289 (1914); United States v. Vega, 43 Phil. 41, 42-43 (1922). *See* also People v. Morales, C.A., 44 O.G. No. 12, 4989, 4992,(1947).

Accordingly, when no proof of conspiracy is established, the extrajudicial act or declaration of one binds himself alone.[3a]

The order of proof is, however, within the control of the trial court. In its discretion, proof of the extrajudicial act or declaration may be received subject to proof of the conspiracy at the later stages.[4] The proof of conspiracy failing or being omitted, the evidence already received of the act or declaration shall be stricken from the record or received only against the declarant.

There is, of course, nothing to prevent the co-conspirator from testifying upon the stand for the prosecution to prove the conspiracy. Here the testimony being given in court, under oath and subject to cross-examination, is no longer hearsay. Obviously, the requirement of independent proof of conspiracy applicable to extrajudicial acts and declarations, does not apply in this case. And the testimony so given in open court is admissible against the co-defendant.[5] It has, however, been ruled that when he testifies for the defense his extrajudicial declaration becomes competent for impeachment.[6] It is implied that the declarations merely discredits the witness but gains no evidential value as against the defendant.

The independent proof of conspiracy is sufficient if it creates a *prima facie* case, something more than grave suspicion.[7] Some courts are content with "slight" proof.[8] This is no doubt the case because conspiracies are hatched in secrecy and none but circumstantial evidence is usually available.[9] So in *People v. Valdellon*,[10] a case of qualified theft, sufficient proof of conspiracy consisted in the witness seeing the alleged conspirators several times in the house of one of them where he was boarding, that on one occasion he saw two of them burning checks and one counting large quantities of currency until very late in the evening, that he saw them

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[3a] People vs. Samano, 43 O.G. No. 6, 2043, 2045 (1946); People v. Morales, C.A., 44 O.G. No. 12, 4989, 4992 (1947); Montoya v. Crisostomo, C.A., 44 O.G. No. 11, 4382, 4393 (1947).

[4] WIGMORE ON EVIDENCE, *supra*, §1079, 131. *See* also Intl. Bank. Corp. v. Martinez, 10 Phil. 242, 248 (1908), where the order of proof was relaxed by the trial court "upon the promise of the defendants to prove later the conspiracy."

[5] United States v. Burias, 13 Phil. 118, 125 (1909); People v. Nakpil, 52 Phil. 985, 989-990 (1923); People v. Mabassa, 65 Phil. 568, 572-573 (1938); Gardiner v. Magsalin, 73 Phil. 114, 115-116 (1941); People v. Timbang, 74 Phil. 295, 298-299 (1943); People v. Tundia, G.R. No. L-2576, May 25, 1951; People v. Dacanay, 49 O.G. No. 3, 919 (1953); People v. del Rosario, C.A., 46 O.G. No. 9, 4332, 4336 (1948).

[6] People v. Manalo, 46 Phil. 572, 577 (1924).

[7] People v. Valdellon, 46 Phil. 245, 251 (1924), where the Court used the phrase "prima facie". *See* also Levie, *Hearsay and Conspiracy*, 52 MICH, L. R. 1159, 1176 (1954).

[8] Burns v. State, 72 Okla. Cr. 432 117 P. 2d 155 (1941).

[9] The cases are numerous, but see for illustration People v. Romualdez, 57 Phil. 148, 184 (1932).

[10] *Supra*, note 7.

the next morning ride in a car carrying all the money with them, and that he was asked by one to mail letters addressed to another of the group. But mere friendship,[11] or that the declarant was boarding in the defendant's house,[12] or that the alleged conspirators ran away together from the scene of the crime [13] were held insufficient. It has likewise been held that complicity is not proved by the mere finding in defendant's truck of articles available in stores and not shown to have been part of the lost charged in the case.[14]

§5. *In Furtherance of the Conspiracy.*—The Rules of Court, like the Code of Civil Procedure, admits acts or declarations "relating to the conspiracy." The phrasing is almost identical with the American Law Institute Code of Evidence which requires that the hearsay declaration be "relevant to the plan or its subject matter."[1] It has been contended that the latter provision abolished the old requirement that the act or declaration be in "furtherance" of the conspiracy.[2] Whatever be the effect of this phrasing upon American law, there seems no doubt that our Supreme Court never intended to give the phrase "relating to the conspiracy" a meaning other than "in furtherance of the conspiracy." It will be recalled that this is in keeping with the orthodox rule which applies the principles of agency to conspiracy. Consequently, the act or declaration of a conspirator is admissible against another only if "in furtherance of the conspiracy." [3] So, the Supreme Court, referring to the Code of Civil Procedure, used "in aid or execution of the conspiracy," [4] "in pursuance of the ends for which it was formed," [5] "pursuant to a conspiracy" [6] "in furtherance of its objects" [7]—all of these phrases reiterating the orthodox rule.

So in the trial of Thomas Hardy for high treason letters written by co-conspirator during the existence of the conspiracy, discussing its details and having no tendency to further it, were rejected while similar letters written in furtherance of it were admitted.[8] A similar letter, enjoining precautions and provisions for eventual

[11] Howe v. State, 186 Ind. 139, 115 N.E. 81 (1917); People v. Linde, 131 Cal. App. 12, 20 P. 2d 704 (1933).
[12] United States v. Nibbelink, 66 F.2d 178 (6th Cir. 1933).
[13] McIntosh v. Commonwealth, 272 Ky. 159, 113 S.W. 2d 1144 (1938).
[14] United States v. Cassion, 28 Phil. 285, 289 (1914).
[1] Rule 508 (b).
[2] Levie, *Hearsay and Conspiracy*, 52 MICH. L. R. 1159, 1169 (1954); Morgan, *The Rationale of Vicarious Admissions*, 42 H.L.R. 461, 465, note 8 (1929).
[3] State v. Poder, 154 Iowa, 686, 135 N.W. 421 (1912).
[4] United States v. Raymundo, 14 Phil. 416, 440 (1909).
[5] United States v. De la Cruz, 12 Phil. 87, 91 (1908).
[6] People v. Durante, 47 Phil. 654, 659 (1925).
[7] United States v. Empeinado, 9 Phil. 613, 616 (1908).
[8] Trial of Thomas Hardy, 24 How. St. Tr. 200, 451-453, 473-477 (1794).

discovery, was admitted in *People v. Valdellon*.[9] Similarly, the act of a conspirator in getting a weapon from the witness and saying that he and his co-defendants would use it in killing a man may be considered in furtherance of the conspiracy.[10] Thus, the New York Court of Appeals said: "But to make the declaration competent it must have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gestae* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others."[11]

If the conspiracy was effected by the acts of a mob or other riotous assembly or seditious society, the leaders are held responsible for the action of the mob. The acts and declarations of any and all persons in the mob become vicarious admissions of the defendants.[12]

Consequently, declarations concerning past transactions when the conspiracy has ended, as are confessions after arrest, can have no tendency to foster it and should, therefore, be rejected.[13]

The cases, however, emphasizing the continuance or duration of the conspiracy and losing sight of the effect and purpose of the declaration have admitted declarations relating to the conspiracy that can have no possible tendency to further it. "But in numerous instances," says Morgan, "the report makes it clear that the words could not possibly have been uttered to further the common design. The conspirator was indulging in idle or ill-advised talk which constituted the best method imaginable for wrecking the conspiracy."[14] We are not aware that this has been authorized in any reported Philippine case, although the hypothetical case given in *Gardiner v. Magsalin* comes pretty nearly close to it. Ad-

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[9] 46 Phil. 245, 250-251 (1924), citing C.J., to the effect that a letter directing destruction of stolen property was in furtherance of the unlawful enterprise.

[10] A hypothetical example given by the Court in Gardiner v. Magsalin, 73 Phil. 114, 115-116 (1941).

[11] People v. Davis, 56 N.Y. 95, 103 (1874).

[12] Art. 139, Revised Penal Code. *See* the Communist cases for sedition. People v. Evangelista, 57 Phil. 354 (1932); People v. Capadocia, 57 Phil. 364 (1932); People v. Evangelista, 57 Phil. 372 (1932); People v. Evangelista, 57 Phil. 375 (1932). In the third case the Court said: "That the said utterances were really inciting the people to revolt, is shown by the fact that the man, not only shouted a protest against the officers of the law, but did actually advance against them, and the latter had to use force in order to enforce the law." At p. 374.

[13] *See* cases in §2, note 4, *supra*. The following doctrine was approved: "...the admissions of one conspirator by way of narrative of past facts are not admissible...." People v. Durante, *supra*, note 6, at p. 659. But see United States v. Vehicular Parking, 52 F. Supp. 751 (D.C. Del. 1943), where, in an anti-trust prosecution, narrative of past facts may be in furtherance of the conspiracy.

[14] Supra, note 2, at p. 465. *See* also Morgan and Maguire, CASES AND MATERIALS ON EVIDENCES 565 (1951).

mitting evidence of this character is practically establishing a new exception to the hearsay rule quite apart from the section of the Rules we are discussing.[15] Apparently resigned in the face of overwhelming authority, a writer could do no more than to suggest that "the proper practice would be to admit declarations made during the pendency of a conspiracy *unless the declaration is self-serving.* A conspirator's hearsay declaration exculpating himself at the expense of others is too prejudicial in proportion to its probable truth." [16] This suggestion seems identical, phrased in a different language, with Morgan's that the agency basis be abandoned because not sufficiently capable of explaining court decisions. He proposes that the basis be that of declaration against interest. "It would hasten," says Morgan, "the accomplishment of the end for which the courts appear to be striving in the conspiracy cases, for even where a conspirator's utterances are without the scope of his authority as a representative of his fellows, they are usually against his penal interest." [17] The suggestion, apparently is proper in a jurisdiction where evidence rules evolve independently of statutes supplying the rationale. It is not apt for a jurisdiction like the Philippines where the statute and Rules of Court have already supplied the basis and none is expected of the courts but intelligent application to particular cases.

§6. *During the Existence of the Conspiracy.*—Acts and declarations of a conspirator before the conspiracy is hatched or after its termination are inadmissible against the others.[1] Before the conspiracy, they are but predictions of matters that have not taken definite shape.[2] After the conspiracy, they are narratives of past facts that may have been inspired by a desire to shift blame and responsibility or by spite, fear, malice or a desire to please both the prosecution and the court. It is clear, at any rate, that the agency rationale cannot apply to a situation before the agency is created or after it is dissolved.

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[15] *Id.*, at p. 466.

[16] Levie, *supra*, note 2, at p. 1172. The Supreme Court so held, excluding self-serving statements: "Only those confessions and incriminations made by a coprincipal or accomplice who absolutely denies the charge and the facts alleged by the prosecution, and to excuse himself attributes to another person the execution of the crime should be rejected." United States v. Burias, 13 Phil. 118, 125 (1909). The confession was, however, received against the others because corroborated by the evidence of record. The practice of co-conspirator to exculpate themselves and to tag the blame upon others is by no means uncommon. People v. Obenia, G.R. Nos. L-4218 and 4219, May 19, 1952.

[17] *Supra*, note 2, at p. 481.

[1] People v. Durante, 47 Phil. 654, 658-659 (1925); United States v. Empeinado, 9 Phil. 613, 616 (1908); United States v. Raymundo, 14 Phil. 416, 440-441 (1909); United States v. de la Cruz, 12 Phil. 87, 91 (1908).

[2] *See* People v. Valdellon, 46 Phil. 245, 251 (1924), citing C.J., where a letter dated before the conspiracy is admitted because shown to be a mistake and written actually after the conspiracy.

Here, again, it will be noticed that no act or declaration can foster or be relevant to anything not yet or no longer existing. A writer, consequently, concluded that the present requirement makes furtherance superflous.[3] This is, obviously, a hasty conclusion. If a choice were to be made, we would rather say that furtherance renders the present requirement superflous. For it is obvious that furtherance would require pendency of the conspiracy, but not all acts and declarations during its pendency may foster it.

Confessions are generally inadmissible against any but the declarants because the conspiracies were ended.[4] It has already been noticed that their admission rests on grounds other than the present rule. The conspiracy may terminate also by resignation,[5] apprehension [6] or prosecution [7] or by success or failure.[8]

The conspiracy once being shown to exist the conspirators have the burden to show it had ended.[9] Acts and declarations during its existence are admissible against those that joined after they were made on the theory of approval of prior action.[10] But, obviously, the acts and declarations of one not yet a member of an existing conspiracy cannot bind the others after he has joined.

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[3] Levie, *Hearsay and Conspiracy*, 52 MICH, L. R. 1159, 1173 (1954).

[4] United States v. De la Cruz, *supra*, note 1 at p. 92, shows a good grasp of the point: "The declaration under consideration was made after the transaction to which it referred was at an end...." *See* also cases cited in §2, note 4, supra.

[5] Too easy in the Philippines.

[6] Graham v. United States, 15 F 2d 740 (8th Cir. 1926).

[7] Ling v. United States, 30 F. 2d 342 (8th Cir. 1929).

[8] People v. Durante, *supra*, note 1.

[9] United States v. Pugliese, 153 F. 2d 497 (2d Cir. 1945).

[10] United States v. U.S. Gypsum, 333 U.S. 364, 68 S.Ct. 525 (1948).