The Hearsay Rule and Its Exceptions
IN THE LAW OF PUERTO RICO

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"The fact is, then, that the law governing hearsay today is a conglomeration of inconsistencies developed as a result of conflicting theories. Refinements and qualifications within the exceptions only add to its irrationality." This conclusion of the American Law Institute as to the common law in general applies with even greater force to the law of Puerto Rico where special circumstances have added confusion to the irrationalities of the common law, from which the Puerto Rican law of evidence has been taken. The infusion of many elements of the Anglo-American law into the Roman law, which has prevailed in the Island during four centuries, has brought uncertainty into many departments of the Puerto Rican law. Whether this infiltration will serve as a progressive influence or whether it will remain as a disturbing element, it is very difficult to forecast. But the manifestations of this major problem can be easily observed everywhere and we shall try to discover their operation in our particular subject. Although the substance of the law of evidence has been entirely adopted from the common law, yet, in the application of its principles, the civil technique of drawing analogies from the statute is seen in conflict with the common law technique of drawing analogies from judicial decisions and deciding cases according to the traditional rules established by the courts.

The scope of admissibility of evidence is greatly narrowed by the hearsay principles which, as evolved in the common law, are far from following the dictates of reason. In the law of Puerto Rico, complicated by the special circumstances which I have suggested,

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1 Model Code of Evidence (Am. L. Inst. 1942) 223.

2 There is another special circumstance which calls for attention. The fact that there is no jury trial in civil cases in Puerto Rico is an argument in favor of the liberal application of the rules of hearsay. The Supreme Court has repeatedly expressed that opinion. Belber v. Calvo (1910) 16 P.R.R. 342; Webb v. The Porto Rico Am. Tob. Co. (1910) 16 P.R.R. 378; People v. Rosado (1910) 16 P.R.R. 412; People v. Silva (1911) 17 P.R.R. 577; People v. Velez (1911) 17 P.R.R. 977; People v. Beltran (1912) 18 P.R.R. 908; People v. Diaz (1915) 22 P.R.R. 177; People v. Julia et al (1917) 25 P.R.R. 262. However, we shall see how this wise attitude has been many times forgotten.
It is our purpose to determine: a) how the scope of admissibility is affected by the hearsay rule and its exceptions; b) what defects the hearsay rules embody, as criticized by reason and compared with the most recent Anglo-American doctrines; c) what probability we can find in the decisions for an improvement of the present state of the law by the judicial organs.

I

THE HEARSAY RULE

A. Definition of Hearsay

There is conflict among the leading authorities as to whether the hearsay rule is a product of the jury system or of the adversary theory of litigation. It is not worthwhile to devote too much attention to ascertain whether the rule was born as a result of one or the other. If the controversy is one as to which of these two factors has been the determining force in the shaping of the present rules as to hearsay, it seems difficult to argue that one theory is right to the exclusion of the other. It is more accurate to recognize that both have had a great deal of influence in the development of the present-day law on that subject. And, what is more important, if

3 "The hearsay rule, like the rest of the law of evidence, has been said to be the child of the jury system. As to much of the law of evidence the entire lack of influence of the jury can be clearly demonstrated; as to the hearsay rule also the statement, unless qualified, will not bear close investigation. It would more nearly approximate the truth to say that the hearsay rule is the child of the adversary system, and that the jury is a foster parent foisted upon it by the judges and the textwriters of the 19th century." MODEL CODE OF EVIDENCE, op. cit. supra note 1, at 217. Professor Morgan sustains that same point of view: "The essays of the great Thayer, the rationalizations of the judges beginning in the third or fourth decade of the 19th century and the acceptance of these by Wigmore have combined to make orthodox the fallacy that the exclusionary rules of evidence, and particularly, the hearsay rule, are products of the jury system. The truth is that they are products of the adversary system; in almost all jurisdictions they are enforced only at the behest of the adversary; and today, as in the earliest cases, lack of oath and lack of opportunity for cross examination are the reasons advanced for the exclusion of hearsay." Ibid. at 36. For the opposite view see 5 WIGMORE, EVIDENCE (3d ed. 1940) §1364.

4 The American Law Institute recognizes the influence which the jury system has had on the hearsay rule, when it says that "the jury is a foster parent foisted upon it by the judges and textwriters of the 19th century." Supra note 3. Professor Morgan also recognizes the influence of the jury system: "The clash between the considerations looking to the protection of the jury and those flowing from the adversary concept nowhere causes more inconsistency than in the cases involving the hearsay rule and its exceptions." Morgan, HEARSAY AND NON-HEARSAY (1935) 48 HARV. L. REV. 1138.
the future is considered, the protection of both the trier and the adversary should be taken into account for the formulation of a correct theory of hearsay.

In the admissibility of hearsay, courts should be governed by two realities: a) that hearsay evidence has not been subjected to the tests of accuracy and veracity and so is of inferior value to the testimony of witnesses to whom those tests have been applied; b) that, on the other hand, it is not worthless and should be considered in law suits as it is in everyday life. The balance between these conflicting principles must be found in the particular case with a tendency to admit hearsay evidence so long as its probative value outweighs its dangers. In the determination of that balance both the adversary theory and the jury system weigh in favor of the restriction of admissibility. It seems desirable to protect the adversary and at the same time not to be too optimistic as to the capacity of jurors to evaluate evidence. But these factors must not be overestimated, in order to make possible the admissibility of much hearsay evidence of great probative value that will help the trier of fact, judge or jury, in the discovery of the truth. The ideal device with reference to which hearsay evidence can be tested, in order to determine whether its dangers are less than its probative value and whether the trier of fact can fairly evaluate it without prejudice to the adversary, is cross-examination.

Many reasons have been advanced by judges and text-writers as the bases for the exclusion of hearsay: the lack of oath; the dangers of error in its transmission; its inherent weakness; the lack of personal knowledge by the witness of the fact declared; the lack of presence of the declarant in a court of justice; the lack of confrontation of the declarant by the person against whom the evidence is

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6The American Law Institute after arriving at the conclusion that the hearsay rule is not the child of the jury system but of the adversary theory and while it enlarges to an unprecedented extent the admissibility of hearsay, takes good account of the jury system by providing in Rule 303 that the judge may reject evidence if its probative value is outweighed by the risks of undue prejudice, undue surprise and confusion of the issues and by giving power to the judge under Rule 8 to comment on the weight of the evidence and the credibility of witnesses. MODEL CODE OF EVIDENCE, supra note 1, Rule 303. See Morgan, Foreword, ibid. at 49. Of course, the question of how much the jury system should be considered in the formulation of a hearsay theory depends on one's opinion as to the capacity of jurors.

6It is true that behind all this lies the main fact that our litigation has an adversary character which greatly limits the possibilities of discovering the truth but even within those limitations much can be done to make law approach sensibility.
offered; the inability of the jury to fairly evaluate hearsay. The leading authorities now reject all these reasons and there is agreement that the lack of opportunity for cross-examination is the real basis for exclusion. It cannot be doubted, however, that all these reasons have actually influenced the formation of the law of hearsay, which cannot be explained, as it is today, solely in terms of cross-examination. This reinforces the proposition that the present law of hearsay is a "conglomeration of inconsistencies," for the explanation of which a single theory is not enough. It is a product of conflicting theories, of the weight of precedents, of historical accidents and of the particular circumstances of each case. But while cross-examination alone cannot explain the law as it is, it can serve as the backbone for a rational theory of the hearsay rule and its exceptions. It is undoubtedly an ideal device for the discovery of truth, and for the protection of the adversary and the jurors, in an effort to admit as much hearsay as is consistent with those purposes. Such a rational theory of hearsay applied as a critique to the law of Puerto Rico will enable us to understand it better, to discover its defects and to ascertain its tendencies.

If lack of opportunity for cross-examination is the reason for
exclusion, Professor Morgan's definition of hearsay seems to me the most logical:

"Any conduct of a person, verbal or non-verbal, offered for a purpose which requires the trier to treat that person as a witness to the extent of relying upon his perception, recollection, narration or veracity is hearsay unless that conduct is subject to cross-examination at the trial or hearing at which it is so offered." 11

According to this definition it is necessary to classify as hearsay much evidence which is constantly admitted by the courts as non-hearsay. 12 Not only extra-judicial assertions offered for the truth of the matter stated in them, 13 but also all other non-assertive conduct offered as circumstantial evidence of the state of mind of its author, to prove that state of mind, or by a longer inference to prove the event or condition which caused it, would be hearsay. 14 The past recollection of a witness recorded in a memorandum or in the mind of another person falls also within the definition, because it is an assertion offered for the truth of the matter stated and one as to which its author cannot be cross-examined, as he has no present recollection of the facts asserted. 15

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12 Though this definition classifies as hearsay much more evidence than is usually considered as such by the courts and textwriters, Professor Morgan does not favor the restriction of the admissibility of hearsay. While his classification of hearsay is more inclusive, he would enlarge the exception as to declarations against interest and would admit as declarations of present state of mind all the non-assertive conduct which is offered to prove circumstantially the state of mind of its author. That which is offered to prove the event or condition which caused that state of mind would be admitted as a declaration of present state of mind, if the event or condition is one experienced by the declarant himself. Morgan, loc. cit. supra note 4.
13 The American Law Institute has adopted Mr. Wigmore's definition of hearsay which includes only assertive conduct offered as tending to prove the truth of the matter stated. However, the A.L.I. classifies as hearsay all statements not made at the trial at which they are offered or in a deposition or other record taken for use at that trial. This includes admissions and testimony at a former trial which Mr. Wigmore classifies as non-hearsay. Model Code of Evidence, op. cit. supra note 1, Rule 501; 5 Wigmore, op. cit. supra note 3, §§1362, 1364, 1370; 4 ibid. §1048.
14 When non-assertive conduct is offered as circumstantial evidence of the state of mind of its author, in all cases there is the risk that the conduct was intended to operate as an assertion and so there is the danger of lack of veracity. In some cases there are also risks of error in perception and memory. See Morgan, loc. cit. supra note 4.
B. The Rule of Exclusion of Hearsay

Such a comprehensive definition of hearsay has the merits of recognizing hearsay dangers of much evidence that is being constantly admitted by the courts as non-hearsay and of thus enabling the trier to evaluate more intelligently that class of evidence. But the problem still remains as to how much of that evidence classified as hearsay will be excluded. According to the present law, hearsay must be excluded unless it falls within one of the recognized exceptions to the rule of exclusion. As Professor Morgan says of his own definition: "Any rule excluding hearsay so defined would have many more exceptions than applications." 16 I submit that this is no reason for the abandonment of that most logical theory; rather it points to what should be the correct rule: That hearsay should be admitted except when its dangers, with reference to cross-examination, out-weigh its probative value and render it incapable of being fairly evaluated by the trier. Courts have been constantly increasing the number of the exceptions to the rule of exclusion and the modern tendency is to enlarge those exceptions, eliminating the many irrational restrictions imposed by tradition upon admissibility. All these facts are proof that ultimately admissibility should be the rule and exclusion the exception. 17

But we must not expect that centuries of judicial experience will be easily given up and it will be a very long time before the law comes to be shaped in those terms. Meanwhile, we shall have to deal with the rule of exclusion and its exceptions. To ignore the hearsay dangers of evidence for the purpose of avoiding the increase in number of the exceptions will leave the theory of hearsay with too much of its irrationality. If a logical theory is to be worked out on

16 Morgan, loc. cit. supra note 5; Model Code of Evidence, op. cit. supra note 1, at 38. Professor Morgan goes on saying: "By the exclusion of all such evidence rational investigation would be impossible. Indeed most of the courts confine hearsay to conduct which amounts to an assertion, evidence of which is offered to prove the truth of the matter asserted; and even so, much hearsay is admitted." The fact that such definition is going to have more exceptions than applications is no argument for its rejection. If cross-examination is used as the basis of the hearsay theory, the logical definition of hearsay is that which includes all evidence having the dangers against which cross-examination is directed. That such a definition results in more exceptions than applications of the rule of exclusion shows that the correct rule should be one of admission.

17 "The courts by multiplying exceptions reveal their conviction that relevant hearsay evidence normally has real probative value and is capable of valuation by a jury as well as by other triers of fact. This is further demonstrated by the majority view that inadmissible hearsay received without objection may be sufficient to sustain a verdict." Model Code of Evidence, op. cit. supra note 1, at 223, 224.
the basis of a rule of exclusion, and if cross-examination is to be the central point of that theory, it is worthwhile to have a great number of exceptions and to enlarge the scope of admissibility under them. Although less symmetrical, that scheme has another advantage—it will be evidence that the present rule of exclusion should be substituted for a rule of admissibility of hearsay.\footnote{18}

C. The Rule of Exclusion in Puerto Rico

The rule of exclusion of hearsay obtains in Puerto Rico\footnote{19} as in the other jurisdictions of the United States. Its adoption by the Supreme Court of Puerto Rico is important as showing the conflict between the civil and common law techniques. That tribunal has tried to fix the basis of the rule on Section 19 of the Law of Evidence\footnote{20} which provides:

"A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible."\footnote{21}

\footnote{18}Although the American Law Institute classifies as hearsay only assertive conduct which is offered as evidence of the truth of the matter asserted, it adopts so many exceptions and enlarges their scope so much, that the rule of exclusion has almost more exceptions than applications. See Model Code of Evidence, \textit{op. cit. supra} note 1, Rules 503-530.

\footnote{19}The cases applying this rule are too numerous for a complete citation. The following are some examples of the exclusion of hearsay as not falling within any of the well recognized exceptions: People v. Ruiz (1904) 7 P.R.R. 129; People v. Santos (1905) 8 P.R.R. 348; People v. Salinas (1905) 9 P.R.R. 334; People v. Reyes (1906) 10 P.R.R. 240; People v. Roman (1906) 10 P.R.R. 532; People v. Rivera (1907) 12 P.R.R. 386; People v. Rojas (1910) 16 P.R.R. 238; People v. Fajardo (1912) 18 P.R.R. 452; Camacho v. Balasquide (1913) 19 P.R.R. 564; Succession of Perez v. Marquez (1913) 19 P.R.R. 692; Latorre v. Torres (1917) 24 P.R.R. 800; People v. Ramirez de Arellano (1917) 25 P.R.R. 243; Rios \textit{et al} v. Amoros \textit{et al} (1919) 27 P.R.R. 735; People v. Rosario (1929) 39 P.R.R. 75; People v. Rodriguez (1930) 41 P.R.R. 391; De la Rosa v. Quevedo (1934) 47 P.R.R. 165; People v. Aviles (1936) 50 P.R.R. 505; Galanes v. Galanes (1939) 54 D.P.R. 885; People v. Marchand Paz (1938) 53 P.R.R. 640.

\footnote{20}Code of Civil Procedure (1933) \textsection{381}. Although the Law of Evidence was passed to "regulate the introduction of evidence in civil proceedings" (Laws of 1905, p. 70, March 9), it has been held applicable to criminal cases as well. People v. Rivera, \textit{supra} note 19; People v. Fernandez (1908) 14 P.R.R. 611.

\footnote{21}In Webb v. Porto Rico Am. Tob. Co. the inadmissibility of hearsay was based directly on this section. \textit{Supra} note 2. In People v. Ramirez de Arellano the exclusion of hearsay was based on section 11, par. 4, of the Code of Criminal Procedure (1935) which gives the accused the rights to confront and cross-examine witnesses. The reference to section 19 of the Law of Evidence is only a dictum. \textit{Supra} note 19, at 255.
It is clear that this provision merely requires the testimonial qualification of personal knowledge and that only by a great strain of its last clause can the section serve as the authority for the exclusion of hearsay. An erroneous notion that lack of personal knowledge is the reason for excluding hearsay has been a contributing factor but the principal reason for the use of Section 19 in this sense has been the effort of the supreme court to find, in accordance with the Roman law technique, some statutory support for the hearsay rule.

Also Section 11, paragraph 4, of the Code of Criminal Procedure, which gives to the accused the right of confrontation, has been interpreted as including the right of cross-examination and as requiring the exclusion of hearsay. However, that section operates only in criminal cases and, then, only in favor of the accused; it is too narrow for a general hearsay rule.

There can be no question that the adoption of the common law rule of hearsay was a necessary and wise step after the introduction into the Puerto Rican law of the Anglo-American principles of litigation. The incorporation of the jury trial, of the adversary theory and of the principles of evidence embodied in the Code of Civil Procedure of California affords sufficient reason for the adoption of the common law rules in the field of evidence. The only sin is that instead of frankly adopting the hearsay rule from the common law.
In the application of the rule of exclusion and its exceptions, the Puerto Rican decisions have included in the definition of hearsay only extra-judicial assertions offered as tending to prove the truth of the matter asserted. Non-assertive conduct is admitted as having no hearsay character when it is offered as the basis of an inference to the state of mind of its author, or even when it is offered for a double inference from it to the state of mind and from the state of mind to the event or condition which caused it. As has been suggested before, in that use of non-assertive conduct there is always the danger of lack of veracity. Before admitting it the court has to determine whether it was intended to operate as an assertion or not and for the jury the danger always remains that it was so intended. Furthermore, in some cases dangers of errors in perception may also be present, as when the event or condition that is being proved has not been part of the behavior of the same person whose conduct is offered as evidence of that event or condition. And memory will also be involved if some time has passed between the event or con-

27 People v. Ramirez de Arellano is a striking example of this attitude. The court said: "For a number of centuries certain kinds of evidence, secondary or otherwise incompetent, like hearsay, have been kept from English and American juries by the Laws of Evidence. The Law of Evidence has been deliberately introduced into Porto Rico, and the courts are bound thereby." Supra note 19, at 256. But instead of following those principles which have been built by a judicial tradition "of centuries" in a field in which it is proper to use them, the court proceeded to fix the hearsay rule on section 19 of the Law of Evidence (C.C.P. §381) and section 11, par. 4, of the Code of Criminal Procedure (1935).

28 People v. Santos; People v. Salinas; People v. Reyes; People v. Rivera; People v. Rojas; Webb v. Porto Rico Am. Tob. Co.; Camacho v. Belasquide; Succession of Perez v. Marquez; Latorre v. Torres; People v. Ramirez de Arellano; People v. Rosario; People v. Rodriguez; De la Rosa v. Quevado; People v. Aviles; People v. Marchand Paz, all supra note 19; People v. Fernandez, supra note 20; Melendez v. Registrar (1911) 17 P.R.R. 575; Hermida v. Gestera (1915) 23 P.R.R. 92; Gonzales v. Roig et al (1922) 31 P.R.R. 32; People v. Roque (1938) 53 P.R.R. 875; Galanes v. Galanes (1939) 54 D.P.R. 885; Colon v. Shell Co. (P.R.) Ltd. (1939) 55 D.P.R. 592.

29 In Bravo et al v. Bravo et al, the defendant, for the purpose of proving that his management as a guardian had been good, was allowed to testify that he had received no complaints from his tenants. Mr. Justice Wolf, speaking for the court, said that "the absence of complaint by the tenants is a fact by itself and not merely hearsay evidence." (1919) 27 P.R.R. 410, 416. The absence of complaint tended to prove the tenants' state of mind (their belief that the management was good) and by another inference from that state of mind, that the management was actually good. Thus, there were hearsay dangers as to veracity and perception. More than a danger of misperception, there was a question of opinion involved in the appreciation by the tenants of the quality of the management.
dition and the conduct offered as evidence of it. All this conduct is included in what I consider to be the correct definition of hearsay.

Past recollection of witnesses recorded in memoranda has been admitted by the Puerto Rican courts under the fiction that the memory of the witness is always revived and even in the clearest cases of absence of any present recollection, the supreme court has failed to recognize the hearsay character of this kind of evidence.

Verbal conduct offered for purposes other than to prove the truth of the matter asserted has been correctly kept out of the realm of hearsay. Extra-judicial declarations offered to prove the fact that they were uttered, because that is an issue in the case, have been considered as non-hearsay. Thus, extra-judicial declarations have been admitted to prove the terms of a contract. The same attitude has been followed when the extra-judicial declarations have been offered as circumstantial evidence of some other fact in issue, such as the state of mind of the person to whom they were communicated.

Although no express definition is found in the decisions dealing with hearsay, it can be seen that the term has been applied only to assertions which are offered for the truth of the matter asserted. This is substantially Dean Wigmore's theory and the one followed by the majority of the courts. Also in accord with Mr. Wigmore, admissions and confessions have been put together with depositions as non-hearsay. As to prior reported testimony, which that author

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30 Morgan, loc. cit. supra note 4.
31 See supra p. 35.
34 A letter introducing a certain person as an agent was admitted to prove that the receiver had dealt with that person believing him to be the agent of the writer. Nones v. Heirs of Serralles, supra note 33. Threats were held admissible to prove that the threatened victim had not immediately complained of the rape because of her fear to do so on account of the threats. After her state of mind was thus proved, the complaints made at a later time were held admissible as part of the "res gestae." People v. Blanco (1929) 40 P.R.R. 122. Evidence of the threats made by the victim to the defendant is admissible on the issue of self-defense. People v. Morales (1933) 45 P.R.R. 185; People v. Barrios (1916) 23 P.R.R. 772; People v. Sutton (1911) 17 P.R.R. 327. See also People v. Carreras (1943) 62 D.P.R. 156.
35 Hearsay rule is "that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court..." 5 Wigmore, op. cit. supra note 3, §1364.
36 4 ibid. §1048. See infra p. 44.
also leaves out of the realm of hearsay, the court has not passed upon its hearsay character.38

We have observed that the Supreme Court of Puerto Rico, following the traditional principles of the common law, has failed to recognize the hearsay dangers of much evidence. It may seem that it has been liberal in admitting hearsay but, when we study the exceptions to the rule of exclusion, we shall see how very far that is from being true. The fact is that admissibility is greatly restricted and ignoring the hearsay character of that evidence has only served to make the law more irrational.

II
THE EXCEPTIONS TO THE RULE OF EXCLUSION

A. General Considerations

It is in the exceptions to the rule of exclusion that the incoherence of the hearsay theory can be most clearly appreciated.39 The subject is incapable of being explained in terms of general principles and many of its aspects openly defy the approach of reason. Dean Wigmore finds a common ground for the exceptions in the principles of "necessity" and "circumstantial probability of trustworthiness," but he admits that they are only imperfectly carried out and that in some instances they are practically lacking. However, he concludes that they play a fundamental part and that it is impossible without them to understand the exceptions.

"In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness."

It is true that these principles help to understand some aspects of the exceptions, but "what does not present itself as an application of them" is so much, that we feel justified in saying that "whatever of reason underlies the exceptions" is very well disguised by the

37 ibid. §1370.
38 See infra p. 64.
39 For a very acute criticism of the lack of reason in the exceptions, see Morgan, The Rule of Reason in Hearsay (1932) 6 Conn. B. J. 207.
40 §§ Wigmore, op. cit. supra note 3, §§1420, 1421, 1422. As Wigmore classifies admissions and prior reported testimony as non-hearsay, these are not within the exceptions which he explains on the basis of the two principles mentioned.
41 Ibid. §1423.
results of "mere precedent, or tradition, or arbitrariness." As Professor Morgan says, commenting on Dean Wigmore's theory:

"It, therefore, seems not only futile but positively harmful to make a classification of utterances which appears to give to the decisions an element of coherent reasonableness which they lack."42

And, urging us to classify as exceptions all utterances not subject to cross-examination at the trial at which they are offered, he adds:

"This will require an exposition of the reasons upon which each exception stands; it will stimulate comparison of one with the other; it will expose the rulings for what they are, a hodgepodge of inconsistencies due to the application of conflicting theories and historical accidents."43

Not much effort is needed to show the inconsistencies in the exceptions. Admissions and prior reported testimony can be explained in terms of the adversary theory of litigation while in most of the other exceptions the adversary is disregarded and no adequate substitute for cross-examination can be found.44 Only the danger of lack of veracity is compensated by a "circumstantial probability of trustworthiness," which in most cases reduces itself to a mere probability that an ordinary man would have been inclined to say the truth and in some cases is nothing more than the absence of a motive to lie.45 As to the perception, memory and narration of the hearsay declarant, there is no substitute for cross-examination. The principle of necessity, Mr. Wigmore himself admits, "is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated."46 To all these inconsistencies, we still have to add the many irrational details which the courts have developed as rigid

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43 Ibid.
44 See Model Code of Evidence, op. cit. supra note 1, at 222.
46 See Wigmore, op. cit. supra note 3, §1421. "A careful examination of the 18 or 19 classes of utterances, each of which is now recognized by some respectable authority, will reveal that in many of them the necessity resolves itself into mere convenience and the substitute for cross-examination is imperceptible. The fact is that no one theory will harmonize the decisions." Model Code of Evidence, op. cit. supra note 1, at 222. See also Morgan, Some Suggestions for Defining and Classifying Hearsay, op. cit. supra note 10, at 269.
requisites for the admission of hearsay under the exceptions.

As Mr. Morgan suggests, cross-examination is the best device for bringing order into this mass of confusion. Each class of hearsay should be considered with reference to cross-examination in order to determine the balance between its untested dangers and its probative value and to enable the trier to evaluate it fairly.

As long as hearsay is governed by a rule of exclusion, its intelligent evaluation in comparison with evidence tested by cross-examination will result in the expansion of admissibility under the exceptions. New exceptions should be recognized in every case in which there is a class of hearsay having enough reliability as compared with the already admissible hearsay. And the traditional exceptions should be freed of their many technical restrictions. That is, in fact, the modern tendency.

In studying the Puerto Rican law I shall attempt to reveal its irrationalities and to show how admissibility is greatly restricted by them.

B. Admissions

The previous declarations of a party which are inconsistent with his position at the trial are admissible in Puerto Rico as not being affected by the hearsay rule. The classification of non-hearsay was applied in the earlier cases to that special class of admissions which is known as confessions, but later it was extended to admissions in

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47 Morgan, ibid. at 273.
48 The Supreme Court of the United States has left the way clear for the expansion of the admissibility of hearsay. In sustaining the admissibility of dying declarations as not violating the constitutional right of the accused to confront the witnesses against him, the court said: "But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." Although it was added that "we are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted," it seems justified to conclude that "considerations of public policy and the necessities of the case" will keep the court from interfering with the development of the law in this field. Mattox v. U.S. (1895) 156 U.S. 237, 243. In Aguilar v. People (1936) 49 P.R.R. 652, the Supreme Court of Puerto Rico followed the Mattox case.
49 Model Code of Evidence, op. cit. supra note 1, at 223 and Rules 501-529; Morgan, Hearsay and Preserved Memory, op. cit. supra note 10, at 714.
50 Section 35 of the Law of Evidence (§397, C.C.P. 1933) authorizes the reception of evidence of "the act, declaration, or admission of a party as evidence against such party."
51 People v. Rivera (1904) 7 P.R.R. 325, 336; People v. Rivera (1905) 9 P.R.R. 454, 462; People v. Eligier (1905) 9 P.R.R. 357, 358; People v. Dones (1905) 9 P.R.R. 423, 427; People v. Almestico (1912) 18 P.R.R. 314, 323; People v. Liceaga (1931) 42
Greenleaf always considered admissions as "a substitute for the ordinary and legal proof"; "in virtue of the direct consent and waiver of the party." Dean Wigmore once sustained the theory that admissions were received only for the purpose of impeaching the party, performing the same function as prior inconsistent statements with reference to the witness and, so, lacking in positive value. Professor Morgan, after showing that courts do not receive admissions as conclusive substitutes for proof, or as merely impeaching evidence, but as positive proof of the truth of the matter asserted, and after showing that admissions do not fall within the exception of declarations against interest, considers it inevitable to conclude that admissions are received as an exception to the hearsay rule and not on any theory that they are not hearsay.

But that conclusion is not inevitable at all from the facts considered; there is the alternative now supported by Dean Wigmore that, though admissions are received for the truth of the matter asserted, they fall out of the hearsay rule "because the very basis of the rule is lacking, viz. the need and the prudence of affording an opportunity of cross-examination." Both distinguished writers agree in that the reason for receiving admissions is the impossibility for the adversary to object that he had no opportunity to cross-examine himself, and, in fact, courts seem to have been governed by this adversary notion in dealing with the whole field of admissions.

P.R.R. 925. Other cases approving the same doctrine as to the admissibility of confessions but not expressly saying that they are non-hearsay: People v. Kent (1906) 10 P.R.R. 325; People v. Hernandez et al (1908) 14 P.R.R. 217; People v. Morales (1908) 14 P.R.R. 227; People v. Asencio (1910) 16 P.R.R. 337; People v. Flores (1911) 17 P.R.R. 166; People v. Lassalle (1912) 18 P.R.R. 410.

People v. Ruiz (1922) 31 P.R.R. 297, 298; People v. Orsini (1929) 40 P.R.R. 227.

1 G=NEA.xP, Evidence (1st ed. 1842) §169, Repeated in the other 14 editions. It is not clear what Professor Greenleaf meant and we have followed Professor Morgan's interpretation. Morgan, Admissions as an Exception to the Hearsay Rule (1921) 30 Yale L. J. 355, 356.

1 Greenleaf, Evidence (1st ed. 1899) §169; 2 Wigmore, Evidence (1st ed. 1904) §1048.

5 Morgan, supra note 53, at 360. Professor Straborn, writing in 1937 tried to show that Professor Morgan had abandoned his classification of admissions as an exception to the hearsay rule. Straborn, A Reconsideration of the Hearsay Rule and Admissions (1937) 85 U. of Pa. L. Rev. 564, 574. But that is denied with new arguments in Morgan, op. cit. supra note 10, at 267.

2 Wigmore, Evidence (2d ed. 1923) §1048; 4 ibid. (3d ed. 1940).

Ibid.; Morgan, op. cit. supra note 53, at 361.
If only the adversary is considered, the most logical conclusion is that admissions are not hearsay. However, if the irrationalities which the adversary notion has brought into the field of admissions are not to be perpetuated, it is necessary that this subject be considered also from the position of the trier of fact. Since admissions are assertions, offered to prove the truth of the matter asserted, which have not been tested by cross-examination, they certainly have the same dangers for the trier of fact as other hearsay utterances. The recognition of this reality may be of great help to detect the many absurdities of present decisions, especially with respect to implied, adoptive and vicarious admissions. It may also be of great help to put that law in more reasonable terms in the future.

The Puerto Rican courts receive admissions as positive evidence of the truth of the matter asserted. They are distinguished from judicial admissions as not being conclusive waivers or substitutes for proof and from prior inconsistent statements, which have only impeaching value. But the erroneous notion that they are not hear-

58 Professor Morgan rejected with weak arguments the other non-hearsay theory suggested by Dean Wigmore—that admissions are circumstantial evidence. Morgan, op. cit. supra note 53, at 356-57. That theory was later ardently supported by Professor Strahorn. See Strahorn, op. cit. supra note 55, at 564. I submit that Professor Strahorn’s mistake was to limit himself to find a rationale of the present law, trying to build a comprehensive theory which would explain all kinds of admissions—implied, vicarious and express. Of course, the only rationale which can be derived from the present law is one based on the adversary theory. Therefore, he considered that all kinds of admissions should be treated as relevant conduct. It is our opinion that a theory resulting from an effort to find a rationale in the present law, and ignoring the point of view of the trier of fact, serves only to perpetuate the irrationalities caused by the adversary notions.

Professor Morgan brought stronger arguments against the classification of admissions as circumstantial evidence in his later article. Morgan, Some Suggestions for Defining and Classifying Hearsay, op. cit. supra note 10, at 267.

59 Professor Morgan recognizes these facts in his later article. Morgan, ibid. See also Model Code of Evidence, op. cit. supra note 1, Rules 505, 508.

60 We see no reason why the rules as to testimonial qualifications are not applied to personal admissions; or why the declarations of persons united to the party by a relationship shall be admitted when they have no intrinsic superiority over other hearsay; or why the declarations of other persons in front of the party can be admitted when there is not the remotest indication that the party adopts them or believes them to be true. All these and many others are curious results of the adversary theory exclusiveness in the field of admissions. See infra pp. 46-49.


say has persisted and the adversary theory, ruling supreme, has produced curious results. However, it must be acknowledged that the supreme court has followed only the most orthodox absurdities of the common law. But, fear to take a step ahead of those traditional principles and lack of opportunity, rather than wisdom, have prevented the adoption of other aberrations.

There are certain classes of admissions which are governed by special rules and so deserve special attention. It is in vicarious, implied, and adoptive admissions that the curious results of the adversary theory can be observed better, and, for the sake of organization, we shall take them before confessions, which do not present much difficulty.

1. Vicarious Admissions

The declarations of other persons are admitted against a party when he is related to the declarant according to the principles of vicarious responsibility of the substantive law. The introduction of these principles into the Law of Evidence, to determine the admissibility of hearsay, has worked wonders everywhere. It is clear that, to admit certain hearsay declarations in preference to others, the test cannot be whether there is a substantive relationship between one of the parties and the declarant. That is nothing but a manifestation of the adversary theory, and a perverted one, for the adversary has reason to object because he has not had an opportunity to cross-examine. If the declarations of other persons are to be received against a party, it should be because their hearsay dangers are not so great as to warrant exclusion.

In Puerto Rico, the extra-judicial declarations of an agent or servant, made within the scope of his employment, are admissible against his principal or master. There is a likelihood that the

63 Supra p. 43 and cases cited in notes 51 and 52.
64 Section 1185 of the Civil Code of Puerto Rico (1930) requires that a "civil confession," judicial or extra-judicial, must relate to the personal acts of the confessor. Professor Benjamin Ortiz discusses the conflict between this provision and those of the Law of Evidence in his Digest, 9 U. or P. R. L. Rev. 111, 140. Section 384, C.C.P. (§22, Law of Evidence) provides that "the rights of a party cannot be prejudiced by the declaration, act, or omission of, or a proceeding against, another, except by virtue of a particular relation between them." The Supreme Court of Puerto Rico has had no difficulty in admitting vicarious admissions in spite of the section of the Civil Code.
65 See Morgan, The Rationale of Vicarious Admissions (1929) 42 Harv. L. Rev. 461.
declarant is telling the truth when he speaks about the things which he is authorized and under the obligation to do, and that likelihood is greater than when he is later called to testify against his employer. Although these reasons do not appear in the decisions, the result is a happy one.

The declarations of a co-conspirator are received against the defendant and the only requisite is that they be made during the life of the conspiracy, that is, before the execution of its object. It is not necessary that the declarations be in furtherance of the conspiracy; declarations concerning the conspiracy have been admitted. Again, the law is in reasonable terms, since these declarations are likely to be true and are made by the declarant with the consciousness that they are against his penal interest. That this desirable result cannot be attributed to the wisdom of the supreme court, but rather to its acceptance of the traditional analogy from the substantive law relationship, is clear from the fact that confessions of a third person, which are strongly against his penal interest, have not been received under the exception of declarations against interest.

The declarations of a predecessor in interest are admissible against his successor provided that they were made while in possession of the title. The admitted declarations have been against the interest of the declarant, but there is no reason to believe that this

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67 See Model Code of Evidence, op. cit. supra note 1, Rule 508(a).
68 People v. Diaz, supra note 2; People v. Mercado (1918) 26 P.R.R. 107; People v. Lopez (1931) 42 P.R.R. 487; People v. Escobar (1939) 55 D.P.R. 505. In People v. Colon (1937) 52 P.R.R. 399, declarations of a co-conspirator made after the execution of the object of the conspiracy were held inadmissible. Of course, there is the requisite of producing extrinsic evidence of the conspiracy; but whether that evidence must be produced before or after the declarations is discretionary with the court. People v. Beltran (1912) 18 P.R.R. 908.
69 See cases in note 68, supra.
70 Model Code of Evidence, op. cit. supra note 1, Rule 508(b).
71 People v. Marchand Paz, supra note 19.
72 Falero v. Falero (1909) 15 P.R.R. 111; Marrero v. Skerret el al (1911) 17 P.R.R. 540. In the following cases the declarations were admissible as falling within the exception of declarations against interest and the court seems to have been governed by that but reference is also made to their character as admissions of a predecessor: Rios et al v. Amoros et al, supra note 19; Aponte et al v. Garzot et al (1920) 28 P.R.R. 586; Santiago et al v. Santiago et al (1920) 28 P.R.R. 903. There is no indication in the cases as to whether—as in other jurisdictions—the declarations must concern the quantity or quality of the declarant's interest, or his power to convey.
will be insisted upon. That should be a condition for admissibility. As the American Law Institute says:

"There is no reason why a hearsay declaration of an available witness, which is self-serving or which has no indicium of veracity should be received against a party merely because he happens to be in the relation of joint obligor, or joint owner, or predecessor in interest with the declarant. The application of these common law rules has resulted in absurd distinctions, particularly in bankruptcy actions and actions for wrongful death and on policies of insurance."

It is fortunate that in Puerto Rico the declarations of joint obligors and joint owners have not been admitted. However, there are examples of the absurd distinctions of the common law rules. It has been recently held that the declarations of a deceased are not admissible against his heirs in hearings before the Industrial Commission when they claim compensation for his death. The reason given is that they are not vicarious admissions because the right for compensation is not derived or inherited from the deceased but has been granted directly by the law. Thus, the admissibility of hearsay is made to depend upon whether or not the party is related to the declarant by the principles of succession.

2. Implied Admissions

The extra-judicial non-assertive conduct of a party from which an inference can be drawn to his consciousness of guilt falls within the definition of hearsay which we have adopted. It is properly admitted by the courts as an implied admission; there is enough value in this kind of evidence and we have already seen that its

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73 MODEL CODE OF EVIDENCE, op. cit. supra note 1, Rule 508(b). Examples of the "absurd distinctions" are: In proceedings against trustees courts admit the schedules made by the bankrupt while his estate was in him. So, the schedules of a voluntary bankrupt, since they are sworn to before the petition is filed, are admissible, while those of an involuntary bankrupt are not. MORGAN AND MAGUIRE, op. cit. supra note 7, at 738. The declarations of the deceased assured, if he had reserved the right to change the beneficiary, are admissible against the latter but, if no reservation was made, they are inadmissible. It is said that in the first case there is privity between the assured and his beneficiary while in the second case the right was invested directly in the beneficiary when the policy was made. Ibid. at 740. See also Morgan, op. cit. supra note 65, at 477.

74 Montaner v. Comision Industrial (1939) 54 D.P.R. 781; Tomas v. Comision Industrial (1942) 59 D.P.R. 860. See infra p. 56.

75 In People v. Delerme (1937) 51 P.R.R. 503, it was held that if the inferior court was completely convinced that evidence of an alibi was invented, it could have considered that as an "implied admission" of guilt. There is no hearsay problem involved in that situation but rather other problems out of the scope of the present work.

76 Supra p. 35.
dangers are very scarce.\textsuperscript{77} In Puerto Rico the trip of the defendant to another town immediately after the crime was held admissible, but it is not clear whether the court considered it as an implied admission or as circumstantial, non-hearsay evidence.\textsuperscript{78} The conversations and negotiations for the purpose of avoiding a suit or of compromising a pending one have been refused admissibility on considerations of policy and because they do not constitute implied admissions.\textsuperscript{79}

3. Adoptive Admissions

There are two classes of adoptive admissions which should be distinguished. When the party by words or other conduct has manifested his adoption of the declarations made by another person, it is as if the declarations had been originally made by him. In the other class the party has not manifested his approval, but his conduct has been such as to warrant an inference of his consciousness of the truth of the declarations made by the other person. In that case, his conduct does not afford a basis for an inference of adoption; it may be silence or a suspicious denial; the important thing is that it shows his belief in the truth of the declarations.\textsuperscript{80}

No such distinctions can be seen in the Puerto Rican cases. Under the authority of a statute which renders admissible evidence of the "act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto,"\textsuperscript{81} all kinds of declarations made in the presence of a party have been admitted against him, without any finding that his conduct was such that a reasonable person could find his intention to adopt or his consciousness of the truth of the declarations.\textsuperscript{82}

\textsuperscript{77} Supra p. 39.

\textsuperscript{78} People v. Alsina (1915) 22 P.R.R. 426.

\textsuperscript{79} Colome v. Guanica Centrale (1910) 16 P.R.R. 442; Perez v. Guanica Centrale (1911) 17 P.R.R. 927; Diaz v. Arroyo (1936) 50 P.R.R. 306; Pueblo v. Central Cambalache (1941) 59 D.P.R. 60. In the case of Guzman v. Ortiz (1929) 39 P.R.R. 170, it was decided that when a party after a collision tells the other party to have his car repaired and to send him the bill, there is an implied admission of responsibility. This attitude has been greatly modified if not overruled, by the subsequent decisions cited at the beginning of this note.

\textsuperscript{80} MODEL CODE OF EVIDENCE, \textit{op. cit. supra} note 1, Rule 507(b).

\textsuperscript{81} C.C.P. (1933) §397, par. 3 (§35, par. 3, Law of Evidence).

\textsuperscript{82} As some years had passed without the party to whom the accounts were rendered having made any objection, it was held that his silence was a tacit approval of the accounts. Torres v. Lathrop, Luce & Co. \textit{et al} (1910) 16 P.R.R. 172. Highly incriminating statements made in the presence of the accused without being denied by him were admissible against him. People v. Gelpi (1941) 59 D.P.R. 556. Incriminating statements...
4. Authorized Admissions

No pronouncement has been found as to the declarations of a person who has been authorized by a party to make statements for him. The fact that the declarations of an agent or servant within the scope of his employment are admissible against his principal, and the liberality shown with respect to adoptive admissions, afford enough reason to believe that the court will admit authorized admissions without imposing too many restrictions on them. It is very probable that only a general authority to make statements as to the subject matter of the declaration will be required.\(^3\)

5. Confessions

As we have seen before, confessions are admitted in Puerto Rico under the theory that they are not hearsay.\(^4\) Thus, the practice of the common law of receiving confessions has been followed without any effort to find a statutory basis for their admissibility.\(^5\) And the orthodox common law requirements have been adopted; the confession must have been voluntarily made, without being coerced by threats, or improper influences, or promises.\(^6\) In the absence of as to which the defendant's reaction was to smile were held admissible. People v. Már-rero (1931) 41 P.R.R. 938. In these cases the party's conduct was enough to warrant an inference of his adoption or of his consciousness of the truth of the declarations. But no such reason is present in the following cases: In People v. Millan (1926) 35 P.R.R. 817, the defendant smiled at statements which did not refer to him but were made in plural; much hearsay went in. In Morales v. Ceide (1937) 51 P.R.R. 25, there was no consideration of the party's conduct. In all these cases the only question is whether the declarations were made in presence of the party; no attention is paid to the question whether his conduct was enough to justify a finding of approval or of belief in the truth of the declarations. In People v. Turull (1919) 27 P.R.R. 571, and in People v. Maldonado (1930) 41 P.R.R. 28, statements made out of the presence of the accused were considered not enough to justify a conviction.

\(^3\) The Model Code of Evidence, op. cit. supra note 1, Rule 507 rejects the requirements imposed by some courts that the declarant should have specific authority as to the particular statements made by him and provides that a general authority to make statements concerning the subject matter of the declaration is enough.

\(^4\) Supra p. 43.

\(^5\) In People v. Rivera, supra note 51, at 336, decided before the adoption of the Law of Evidence, Justice MacLeary, ignoring their Roman law background, criticized the Puerto Rican lawyers because they tried to find everything in the Codes. He admitted confessions in the light of the common law and said it was not necessary to find any authority in the statute.

\(^6\) People v. Rivera (1904); People v. Eligier; People v. Dones; People v. Rivera (1905); People v. Kent; People v. Hernandez; People v. Morales; People v. Atenco; People v. Flores; People v. Almestico; People v. Lasalle; People v. Liceaga, cases cited in note 51, supra; People v. Lebron (1943) 61 D.P.R. 657. People v. Almestico held that in the absence of objection a confession is presumed voluntary, unless the contrary appears from the testimony of the witness.
statute, it is not necessary that the accused was previously warned of his legal rights and of the fact that the confession might be used against him.\textsuperscript{87}

The sufficiency of confessions to support a conviction has been affected by Section 206 of the Penal Code which provides that in cases of murder or manslaughter the death of the victim has to be established by direct proof and independent from the fact of the killing by the defendant.\textsuperscript{88} Also, their reception has been conditioned by a none too clear notion that evidence of the "corpus delicti" must first be produced.\textsuperscript{89} It is very difficult to ascertain what the "corpus delicti" means to the supreme court, or how much evidence of it will be required, or even if it is going to be required at all.\textsuperscript{90}

Neither is it clear what the concept "confession" embraces for the application of all these rules. While in some occasions it has been extraordinarily inclusive,\textsuperscript{91} it does not follow that it will have the same breadth for the purpose of imposing all those qualifications. For that purpose the tendency has been to make it include only those declarations in which all the essential elements of the crime are admitted.\textsuperscript{92}

\textsuperscript{87} People v. Mendez (1939) 54 D.P.R. 195, overruling People v. Martinez (1909) 15 P.R.R. 725. See also People v. Lebron, supra note 86.

\textsuperscript{88} People v. Rosado (1911) 17 P.R.R. 417.

\textsuperscript{89} People v. Almodovar (1934) 46 P.R.R. 96.

\textsuperscript{90} In People v. Matos (1918) 26 P.R.R. 520, it was held that proof of the "corpus delicti" is proof of the fact of the death, of the cause producing it and of the fact that the accused was the one who committed the crime. But in People v. Lamboy (1928) 38 P.R.R. 207, the requisite was not applied to attempts of crime and in People v. Rodriguez (1918) 28 P.R.R. 464 and People v. Mendez (1939) 54 D.P.R. 195, the voluntary confession of the accused was considered enough evidence to justify a conviction.

\textsuperscript{91} In People v. Matos (1918) 26 P.R.R. 328, it was held that "They caught us" was considered a confession in People v. Rosario (1939) 55 D.P.R. 233. In People v. Flores, supra note 51, a public officer testified that in the day following the arrest he took the defendant to another town and on the way they conversed of "how sad it was to commit a crime of that sort." The declaration of the accused during that conversation that "it would have been better to have stabbed him to death than to have killed him with poison" was considered admissible as implying an admission of his guilt.

\textsuperscript{92} In People v. Sanchez (1939) 55 D.P.R. 351, 370, we find the following dictum: "A confession in criminal law is an admission or declaration by a person accused of crime that he is guilty of that crime. An admission is distinguished from a confession in that 'admission' in criminal law refers to questions of fact not involving criminal intention while a confession is an acknowledgment of guilt." In People v. Dones (1940) 56 D.P.R. 211, the court distinguished a confession from an admission for the purpose of requiring proof of its voluntary character but no clear definition of it is given. With some effort it is possible to deduce that a confession is considered to be an admission of all the essential elements of the crime and not of only one of them. For a criticism of this position see Model Code of Evidence, op. cit. supra note 1, Rule 505.
C. Dying Declarations

There is no statutory provision in the Puerto Rican law authorizing the admissibility of dying declarations and this exception to the hearsay rule has been adopted by judicial action from the common law. In the case of Aguilar v. People an objection was made to the practice of admitting dying declarations on the grounds that there is no express provision in the Codes authorizing it and that the common law of England is not in force in Puerto Rico. Thus, the question was squarely raised whether in the absence of statutory authority the Supreme Court of Puerto Rico can adopt the principles of the common law. Although there was no necessity of ruling as to the applicability of the common law in the other departments of the law of Puerto Rico, the supreme court considered that the question, limited to the field of evidence, was sufficiently embarrassing and erroneously avoided the issue. Chief Justice del Toro said:

"The fact that our laws contain no specific authorization as do those enacted in California—from which state our laws on the matter are said to have been adopted—concerning the admissibility of such declarations, is not conclusive. It is sufficient that they provide, as do subdivisions 1 and 13, of section 35 of the Law of Evidence that evidence of the . . . precise fact in dispute . . . (and of) any other facts from which the facts in issue are presumed or are logically inferable . . . it is sufficient, because from time immemorial, within the system established in Puerto Rico as a whole by the adoption of the new Penal Code and the new Code of Criminal Procedure as well as by the new Law of Evidence, it has repeatedly been held that dying declarations are admissible in cases of murder or manslaughter as direct evidence of the death and the way in which it was caused, that is, of the real fact involved. This practice has been followed for over 30 years with the approval of this court and with the knowledge of the Insular Legislature."
If the sections mentioned above afford any support to the reception of dying declarations, then they can be invoked for the admissibility of everything relevant to the issues of a case, in spite of all the exclusionary rules of the law of evidence. Since the principles of evidence were adopted from the common law, it is proper and necessary for the Supreme Court of Puerto Rico to draw from that source in order to develop the provisions of the Law of Evidence. And that is what the supreme court has been doing in fact. But, instead of a frank approval of that practice, we find in its words an absurd effort to find authority in the statute and only a timid suggestion of the "new system." The main argument for admitting dying declarations was that they had been admitted before and, again, "with the knowledge of the legislature." The case is typical of the uncertain attitude of the court when dealing with the important problem of harmonizing the Roman law and common law tendencies. Without any doubt, that is a very difficult task, but in situations like the one we are now considering there is absolutely no excuse for avoiding the problem, and in that way, failing in the responsibility of improving the law.

In the light of that discouraging attitude we can hardly expect anything other than the well established absurd conditions imposed by the common law on the admissibility of dying declarations. As in the overwhelming majority of jurisdictions, they are received only in cases of homicide in which the death of the declarant is the subject of the charge, and they must be concerned with the facts immediately related to the declarant’s death.98

Due to an early identification of dying declarations with "res gestae,"99 which was one of the many rationalizations used to justify the departure from the statute, a notion lingered for some time that the victim ought to have made the statements soon after the event which caused his death. This further requirement of contemporaneity was happily rejected in a subsequent decision in which dying declarations were distinguished from the "res gestae" exception.100

We need not explain the lack of reason in the traditional limita-

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97 In 5 WIgmore, op. cit. supra note 3, §§1432-1436 there is a very strong criticism of the present limitations of the common law on dying declarations. Mr. Wigmore classifies these as "pedantic refinements," "shackles of irrational tradition" and illustrates with cases the "irrational and pitiful absurdity of this feat of legal cerebration."


99 People v. Berrios, supra note 94.

100 People v. Pietrantoni (1942) 60 D.P.R. 13.
tions on the admissibility of dying declarations.\textsuperscript{101} It is truly mar-
velous how the courts have so stubbornly refused to recognize that the con-
sciousness of impending death\textsuperscript{102} gives these hearsay utter-
ances enough value to be admitted in all kinds of cases and without any qualification as to their subject matter other than the personal knowledge of the declarant.

As late as 1941 the Supreme Court of Puerto Rico manifested its intention to limit the use of dying declarations to homicide cases.\textsuperscript{103} An extension of their admissibility to cases of abortion or sexual crimes resulting in death is rendered very improbable by that decision. Perhaps an exception to the homicide case preference will be made with prosecutions under Section 328 of the Penal Code.\textsuperscript{104}

The supreme court has held that the crime punished by that section has exactly the same elements of involuntary manslaughter.\textsuperscript{105}

It is significant to compare this resistance of courts to the de-
mands of reason with those recent statutes under which the declara-
tions of deceased persons in general are admissible.\textsuperscript{106}

D. Declarations Against Interest

Section 35, subdivision 4 of the Law of Evidence of Puerto Rico,\textsuperscript{107} authorizes the reception of evidence of

\begin{quote}
... the act or declaration of a deceased person done or made against
his interest in respect to his property.
\end{quote}

and Section 93, paragraph 1,\textsuperscript{108} provides that:

\begin{flushright}
\textsuperscript{101} \textit{S WUWORE, op. cit. supra} note 3, §§1432-1436.
\textsuperscript{102} As to this requisite in Puerto Rico, see the following cases: People v. Díaz (1926) 35 P.R.R. 533; People v. Mejías (1934) 47 P.R.R. 266; People v. Quiros (1935) 48 P.R.R. 939.
\textsuperscript{103} People v. Girona, \textit{supra} note 98.
\textsuperscript{104} Ed. 1937. That section punishes any person having charge of a railroad car, locomotive, automobile, train or steamboat or charged with the duty of directing their movements, who through gross negligence or carelessness allows the same to collide with any object whereby the death of a human being is produced.
\textsuperscript{105} People v. Lebron (1916) 23 P.R.R. 611.
\textsuperscript{106} "A declaration of a deceased person shall not be inadmissible in evidence as hearsay or as a private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant. Massachusetts General Laws (1932) c. 233, §65 (as amended in 1941). See also the English Act of 1938 (St. 1938, c. 28, Evidence). The \textit{Moore Code of Evidence, op. cit. supra} note 1, Rule 503 provides: "Evidence of a hearsay declaration is admissible if the judge finds that the declarant a) is unavailable as a witness, or b) is present and subject to cross-examination."
\textsuperscript{107} C.C.P. (1933) §397 par. 4.
\textsuperscript{108} \textit{Ibid.} §455 par. 1.
\end{flushright}
"The entries and other writings of a decedent, made at or near the time of the transaction, when he was in a position to know the facts stated therein, may be read as prima facie evidence of such facts . . . when the entry was made against the interest of the person making it."  

The strictness of these provisions has prevented the supreme court from making the law more reasonable. Though it is clear that at least any kind of unavailability should be sufficient, it is hard to expect such an interpretation of a statute which carries the "principle of necessity" to its extreme by requiring the death of the declarant. The correction of the defect is beyond the power of the courts and must be requested from the legislature. Since declarations of a person against his interest are likely to be as trustworthy and accurate as the testimony of that person in court, the new legislation should do away completely with the requirement of unavailability.

The condition that the declarations must have been against the "pecuniary or proprietary" interest of the declarant has been strictly applied as in most American jurisdictions. The text of Section 35 and the general rule of the common law have proved too much of a barrier against reason. Although very little effort is necessary to understand that declarations against penal interest are even more reliable than those against pecuniary interest, the Supreme Court of Puerto Rico has manifested its unswerving determination to exclude them.

A mistaken confusion of the principles of "admissions" with those of "declarations against interest" has served to narrow even more the admissibility of hearsay under the latter exception. In *Montaner v. Industrial Commission* the declarations of a deceased against

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100 The requirement that the entries must have been made at or near the time of the transaction is due to the fact that subdivisions 2 and 3 of this section deal with entries in the regular course of business or duty. In the light of section 35, subdivision 4, quoted supra p. 54, this extraneous requisite can be dispensed with, in relation to declarations against interest. It has never been enforced by the Supreme Court.

110 5 Wigmore, op. cit. supra note 3, §1456.

111 Model Code of Evidence, op. cit. supra note 1, Rule 509.

112 Ibid. §1476.

113 Ibid. §1477; Model Code of Evidence, op. cit. supra note 1, Rule 509; Mr. Justice Holmes, dissenting in *Donnelly v. U.S.* (1913) 228 U.S. 243.

114 People v. Marchand Paz, supra note 19, following *Donnelly v. U.S.*, supra note 113, and the rule of most jurisdictions, held that the confession of a third person was inadmissible.

115 (1939) 54 D.P.R. 781.
his pecuniary interest were held inadmissible in a proceeding before the Industrial Commission, because they had been offered against a person not inheriting from the declarant the right to compensation for his death. In applying the irrational rules of vicarious admissions to exclude a declaration clearly falling within the present exception, the supreme court tacitly approved the ruling of the Commission, which was stated in Justice Travieso's erroneous opinion in the following terms:

"The Commission held that the declaration . . . was neither admissible under Section 93, par. 1 of the Law of Evidence, as a declaration made by the deceased against his interest, because it has not been offered against the interests of the declarant but against the interest of a third person, his daughter, 'whose right to compensation originates, not because she is the heiress of the declarant, but because she is among the group of persons whom the Workmen's Accident Compensation Act protects as being his dependents.'"118

As the death of the declarant is a requisite in Puerto Rico for the admissibility of declarations against interest, according to the curious words quoted above, those declarations can never be used except against the successors of the declarant. We must hope that this was a momentary aberration of the supreme court, motivated by its conviction that the substantive aspect of the case had been justly decided by the Commission; probably, such an evident mistake will not persist in future decisions. Declarations against interest should be and have always been admitted, even under the most rigid rules, against persons not related to the declarant by the bonds of privity.

A notion which has prevailed in Puerto Rico, that there is a rule excluding "self-serving declarations" as such,117 is an illustration of the fact that the principles as to declarations against interest have served more for the exclusion of evidence than for its reception. The supreme court has criticized the

"... general tendency on the part of the bar to regard the words 'self-serving declaration' either as a phrase to conjure with, or else as the stereotyped expression of some settled principle of the law of evidence too elementary to demand serious discussion."118

118 Ibid. at 783.
118 Nones v. Heirs of Serralles, supra note 33, at 687.
It has repeatedly held that there is no rule especially excluding self-serving declarations, and that the question with reference to them is always whether or not they come within any one of the exceptions to the hearsay rule. These correct pronouncements should be enough to end the practice of excluding self-serving declarations as such, without any investigation as to whether they fall within another exception to the hearsay rule.

E. "Res Gestae"

The irrationality and confusion of the law as to hearsay reaches its climax in Puerto Rico, as everywhere, with the so-called "res gestae" exception to the rule of exclusion. The magical phrase has been used for all kinds of purposes. It has served to disguise the creation of new exceptions to the hearsay rule; examples are the early cases justifying the reception of dying declarations with it. Also past recollection recorded has been admitted under the protective effect of "res gestae", when the fiction of "refreshing the present memory" of the witness was too hard to invoke. When the court has been aware of the absurdity of some limitation upon another of the exceptions and it has lacked the courage or the wisdom to eliminate that absurdity, "res gestae" has been used to admit the evidence


120 Prof. Thayer commenting on the use of the "res gestae" phrase by lawyers and judges said: "They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one; some things belonged there, others might, for purposes of present convenience, he put there." Thayer, Bedingfield's Case (1881) 15 Am. L. Rev. 1, 10. "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as 'res gestae.'" Morgan, A Suggested Classification of Utterances Admissible as Res Gestae (1922) 31 Yale L. J. 229. And in Morgan and Maguire, op. cit. supra note 7, at 945, the following footnote appears: "According to the rough teaching notes of E. R. Thayer, J. B. Thayer's memorandum books, under date of October 1, 1895, contain this: 'Williston reports the following: "Linscott was trying a case before Holmes, J., and trying to get in some hearsay evidence. 'No,' said the judge, 'the hearsay rule has been a good deal nibbled around the edges, but nobody has taken quite such a bite out of it as that! And I think I won't set the example.' 'Not as a part of the res gestae?' said Linscott. Holmes, J. 'The man that uses that phrase shows that he has lost temporarily all power of analyzing ideas! For my part I prefer to give articulate reasons for my decisions!' "

121 People v. Barrios, supra note 34. People v. Pietrantoni, supra note 100, rejected the earlier notion.

122 People v. Perez (1929) 39 P.R.R. 776, 784.
rendered inadmissible by the unreasonable requisite. Finally, in a case where the supreme court is convinced that the result of the case in the trial court was substantively just, "res gestae" may be employed to justify the reception of clearly inadmissible evidence.

Of the many hearsay declarations which have been favored by the flexibility of the "res gestae" phrase, there are two classes which deserve admissibility under a separate exception to the hearsay rule. If the declaration was contemporaneous to the event or condition which the declarant was perceiving or if it was made immediately thereafter, there is enough probability of veracity and accuracy to warrant its reception. Again, when the declarant was under the stress of a nervous excitement caused by his perception of the event or condition to which his statement referred, the spontaneity of the declaration is enough guaranty.

These two principles—contemporaneity and spontaneity—have not been worked out wisely in the Puerto Rican decisions. In the majority of cases all attention is directed to determine whether the declarations have been contemporaneous, and spontaneity plays a secondary role of justifying the admissibility of declarations made a long time after the events. That is, the main requisite is contemporaneity and it is satisfied if spontaneity is present. The two principles are not applied separately, as they should be, and in some cases the result has been to admit evidence without either of the two guaranties, or to exclude spontaneous evidence which lacks

123 In People v. Girona, supra note 98, a dying declaration was admitted as part of the "res gestae" to obviate the limitation of the use of dying declarations to homicide cases only. The absurd distinctions of vicarious admissions are also obviated by the use of "res gestae" in Tomas v. Comision Industrial (1942) 59 D.P.R. 860, and in Ruiz v. Comision Industrial (1942) 60 D.P.R. 228.

124 People v. Flores, supra note 51; People v. Girona, supra note 98.

125 Morgan, op. cit. supra note 120.

126 Ibid. at 238; Model Code of Evidence, op. cit. supra note 1, Rule 512(b).

127 The value of contemporaneous declarations, urged by Prof. Thayer, and that of "spontaneous exclamations" put forth by Dean Wigmore are both recognized in §512 of the Model Code of Evidence, op. cit. supra note 1. See Ibid. at 263.

128 People v. Rosado, supra note 2; People v. Rivas (1910) 16 P.R.R. 581; People v. Flores, supra note 51; Rosado v. Ponce Railway & Light Co. (1912) 18 P.R.R. 593; People v. Anglada (1914) 20 P.R.R. 11; Torres v. Dominguez, supra note 66; People v. Ramos (1927) 36 P.R.R. 739; People v. Martinez (1927) 36 P.R.R. 792; People v. Benitez (1927) 36 P.R.R. 815; People v. Perez (1929) 39 P.R.R. 776; People v. Quiros, supra note 102; People v. Portalatin (1938) 53 P.R.R. 604; Montaner v. Comision Industrial (1939) 54 D.P.R. 781.

129 People v. Rivas; People v. Benitez, both supra note 128; People v. Flores, supra note 51; People v. Gelpi, supra note 82.
contemporaneousness.\textsuperscript{120}

Dean Wigmore's influence has resulted in the sound practice, seen in later cases, of not following a strict rule as to the time which may be allowed between the event and the declaration, and of giving a very broad discretion to the trial court in deciding the question according to the particular circumstances of each case.\textsuperscript{121} However, in the application of this wise doctrine there must be some guide to prevent disorder, and that guide should be the principle of spontaneity. The court should recognize that if a declaration is not contemporaneous, then the only question should be whether it is spontaneous. The failure to recognize the latter as the controlling factor in those cases and the insistence on regarding the problem always with reference to contemporaneity, has resulted not only in different decisions according to different circumstances but also in a great deal of uncertainty.\textsuperscript{122}

The reception in evidence of complaints of rape deserves special attention. The orthodox theory that those declarations are inadmissible for hearsay purposes and that they serve only to corroborate the testimony of the victim in court,\textsuperscript{123} has manifested itself frequently,\textsuperscript{124} but in many other cases the complaints have been admitted as positive evidence of the truth of the matter asserted.\textsuperscript{125}

\textsuperscript{120} People v. Rosado, supra note 2; Torres v. Dominguez, supra note 66; People v. Martinez, supra note 128.

\textsuperscript{121} People v. Anglada, supra note 128; People v. Calventy (1925) 34 P.R.R. 375; People v. Ramirez (1927) 37 P.R.R. 84; People v. Arenas (1929) 39 P.R.R. 14; People v. Vazquez (1925) 40 P.R.R. 245; People v. Alvarez (1934) 47 P.R.R. 152.

\textsuperscript{122} In the most intelligent decisions the problem is viewed from the point of view of spontaneity. See People v. Arenas, supra note 131; People v. Alvarez, ibid. On the other hand, in the majority of cases great discretion is given to the trial judge to decide according to the particular circumstances of the case and the supreme court makes no investigation as to whether the declarations were sufficiently spontaneous to be received. People v. Calventy, supra note 131; People v. Parquez (1925) 34 P.R.R. 538; People v. Cortes (1925) 34 P.R.R. 785; People v. Benitez, supra note 128; People v. Ramirez, supra note 131; People v. Blanco, supra note 34; People v. Vazquez, supra note 131; People v. Ramirez (1931) 41 P.R.R. 742; People v. Nieves (1935) 48 P.R.R. 149.

\textsuperscript{123} "In the United States, the general consensus of decision has accepted the original and orthodox result, and does not receive the complaints as testimony under a hearsay exception; although practically the effect of this exclusion has been undermined in some instances by a liberal employment of the complaint-details as corroborative of the woman's testimony." 6 Wigmore, op. cit. supra note 3, §1761.

\textsuperscript{124} People v. Rosado, supra note 2; People v. Ruiz (1912) 18 P.R.R. 587; People v. Parquez, People v. Nieves, both supra note 132.

\textsuperscript{125} People v. Anglada, supra note 128; People v. Cortes (1925) 34 P.R.R. 785; People v. Ramirez, People v. Arenas, both supra note 131; People v. Blanco, supra
Though it is not clear how this inconsistency will finally resolve itself, it is probable, and desirable, that those complaints which are spontaneous will be admitted under the present exception to the hearsay rule.\textsuperscript{186}

The Supreme Court of Puerto Rico has developed the doctrine that the declarations made by the victim in the earliest opportunity for talking about the crime are admissible in evidence.\textsuperscript{187} If this means that the declarations made in the first opportunity have been sufficiently spontaneous to warrant the approval of their reception by the trial judge, there is no danger in it. But the “earliest opportunity” doctrine has been applied without any search for spontaneity.\textsuperscript{188} In that sense it may very well serve to receive much hearsay having no guaranty at all and to make new contributions of uncertainty to the already intricate state of the law.\textsuperscript{139}

\textbf{F. Other Exceptions}

What we have already discussed about those exceptions more frequently used in Puerto Rico is enough to observe in the law of that jurisdiction the presence, in all its force, of the characteristic irrationality of the common law on hearsay and to appreciate the special complications caused by the fusion of the two great modern systems of law. But in order to ascertain the extent to which admissibility is restricted by the hearsay rule, we need a more complete

\begin{footnotesize}
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  \item note 34; People v. Vazquez, \textit{supra} note 131; People v. Ramirez, \textit{supra} note 132; People v. Alvarez, \textit{supra} note 131.
  \item \textsuperscript{186} 6 \textit{Wigmore, op. cit. supra} note 3, §1761.
  \item \textsuperscript{187} The doctrine of the “earliest opportunity” has not been limited to complaints of rape. People v. Cortes, \textit{supra} note 132 (rape); People v. Benitez, \textit{supra} note 128 (aggravated assault and battery); People v. Arenas, \textit{supra} note 131 (rape); People v. Blanco, \textit{supra} note 34 (rape); People v. Ramirez, \textit{supra} note 132 (burglary); People v. Alvarez, \textit{supra} note 131 (incest); People v. Nieves, \textit{supra} note 134 (rape).
  \item \textsuperscript{188} \textsuperscript{139} See cases in note 137, \textit{supra}.
  
  \item \textsuperscript{139} Prof. Benjamin Ortiz complains of the lack of a uniform and fixed rule as to the contemporaneity of the declarations. He protests that the substitution of the doctrine of the “earliest opportunity to speak” for that of contemporaneity destroys the basis of “res gestae”; that is, it permits declarations which probably are not spontaneous. I submit that Prof. Ortiz discusses the subject from the point of view of contemporaneity alone. His criticism is mainly directed to the fact that no definite amount of time has been fixed as the limit. There is nothing wrong in the absence of a uniform rule as to that and it is wise to decide each case according to its particular circumstances. The uniformity which that writer does not find must be sought not with reference to time but to spontaneity. If the latter is chosen as the guide, there need not be any question of contemporaneity. See Ortiz, \textit{Digito de la Ley de Evidencia} (1940) 9 \textit{U. of Puerto Rico L. Rev.} 111, 126.
\end{itemize}
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picture—one that will also include all the other exceptions as to which some reference is found in the Puerto Rican law. I shall limit myself to outlining their most important features with reference to that problem, as the scarcity of legal material prevents any extensive discussion on them.

1. Entries in the Course of Business or Duty

According to Section 93 of the Law of Evidence,¹⁴⁰

"The entries and other writings of a decedent, made at or near the time of the transaction, when he was in a position to know the facts stated therein, may be read as prima facie evidence of such facts in the following cases:

1. . . . . . . . .
2. When it was made in a professional capacity, and in the ordinary course of professional conduct.
3. When it was made in the performance of a duty specially enjoined by law, contract or employment."

The requirements of the death of the entrant, of his personal knowledge of the facts stated and of the contemporaneousness of the entry with the transaction, have been rendered obsolete by modern business practices¹⁴¹ and the Supreme Court of Puerto Rico, conscious of that reality, has completely disregarded the letter of the statute. In Puerto Rico Fertilizer Co. v. Perez and Brother¹⁴² the trial court had admitted a page from a loose leaf ledger, identified by the president of the corporation as the original entry made in the course of business. The witness did not have any personal knowledge of the transaction and testified that the bookkeeper who had made the original entry was no longer employed by the corporation. Justice Hutchison conceded

"that this was not a very satisfactory showing as to the unavailability of the bookkeeper and the better practice would have been to exclude. . . ."¹⁴³

but following Wigmore he held that "the court had some discretion in the matter"¹⁴⁴ and affirmed its ruling.

In general, entries in the course of business or duty have been liberally received either under the present exception or under the

¹⁴⁰ Supra note 20, §455.
¹⁴² (1926) 35 P.R.R. 43.
¹⁴³ Ibid. at 45.
¹⁴⁴ Ibid.
fiction that they refresh the memory of the witness who made them.\textsuperscript{145} The latter requires the presence of the entrant in court and that the entries were made with personal knowledge of, and contemporaneously with, the transaction. To eliminate all those unnecessary conditions, the statute dealing with the present exception should be reenacted following the proposal of the Commonwealth Fund Committee.\textsuperscript{146}

2. Declarations and Reputation as to Pedigree

Section 35, subdivisions 4 and 11, of the Law of Evidence\textsuperscript{147} authorizes the reception of

\textquote{the act or declaration, verbal or written, of a person deceased or out of the jurisdiction of the court, in respect to the pedigree, birth, parentage, age, marriage, death, or relationship, of any person related by blood or marriage to such person . . . and memoranda or entries in the family books or charts, engravings on rings, family portraits and the like, as evidence of the pedigree, birth, parentage, age, marriage, death, or relationship, of any member of such family.}''

These provisions embody the common law exception as to declarations and reputation concerning family history. Unavailability is required and the declarant must have been a relative of the person whom his declaration concerns, servants and other intimates being excluded. I have been able to find only one decision of the supreme court on this exception and it fails to throw any light on its rules.\textsuperscript{148}

\begin{footnotes}

\textsuperscript{146} "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." \textit{Morgan and Others, op. cit. supra} note 141, at 63. This proposal has been followed by the most recent legislation on the subject. \textit{Model Code of Evidence, op. cit. supra} note 1, Rule 514.

\textsuperscript{147} \textit{Supra} note 20, §397, par. 4, 11.

\textsuperscript{148} Cartagena v. Rodriguez (1941) 58 D.P.R. There is also a dictum in \textit{Ex Parte Otero et al} (1919) 27 P.R.R. 315, 319, which merely mentions the present exception.
\end{footnotes}
Thus, all problems must remain unanswered and the statute must be taken on its face as the law of Puerto Rico on this subject.

3. Official Records and Certificates

Section 71 of the Law of Evidence provides that:

"Entries in public or other official books or records, made in the performance of his duty by a public officer of Puerto Rico, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein."

The exception covers not only records made by public officials but also those made by private persons if required by law, the former being limited to those made by public officials of Puerto Rico. As in the other jurisdictions, unavailability is not a requisite.

Under this exception have been admitted certificates of baptism and marriage, issued by priests before the adoption in Puerto Rico of the Civil Register in 1885, as evidence of all the facts recited in them. In Cerecedo v. Medina a negative certificate issued by a public officer was declared inadmissible to prove the non-appearance of the fact in the record, it being necessary to produce that negative evidence by testimony under oath of a search made and its results. Therefore, it appears that, when produced in that way, evidence of the non-appearance in the records of some matter is admissible to prove its non-existence.

4. Church Records and Certificates

The records kept and the certificates issued by the priests after the adoption of the Civil Register do not have any official character and, unless they fall within one of the other recognized exceptions, they are inadmissible for the truth of their statements, as no separate exception to the hearsay rule in favor of them has ever been recognized in Puerto Rico.

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149 C.C.P. (1933) §433; Conde v. Falu (1921) 30 P.R.R. 45; People v. Toro (1924) 32 P.R.R. 737.
151 (1919) 27 P.R.R. 750.
152 As to the propriety of admitting a certificate of the officer in custody of the records to prove the non-appearance of the entry, see Model Code of Evidence, op. cit. supra note 1, Rule 517, par. 2.
153 Ex Parte Carreras et al (1904) 7 P.R.R. 151; Montalvo v. Montalvo (1917) 25 P.R.R. 800.
5. Prior Testimony

Section 35, paragraph 6, of the Law of Evidence\textsuperscript{154} declares to be admissible,

"the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter."\textsuperscript{17}

The statute imposes the traditional conditions of unavailability, identity of parties and identity of issues. The tendency of other jurisdictions to enlarge the scope of this exception by receiving the testimony if the issues are substantially the same and if the party against whom it is offered was a party at the former trial,\textsuperscript{155} cannot be seen in Puerto Rico where there are very few supreme court decisions on the subject.\textsuperscript{156} The infrequent use of the exception is natural in view of the narrowness of the statute; the cases where prior testimony is relevant and the conditions of unavailability, identity of parties and identity of issues are all present have been practically impossible to find in Puerto Rico.\textsuperscript{157} It is convenient to compare the Puerto Rican exception with the proposal of the American Law Institute\textsuperscript{158} to admit prior testimony for any purpose for which it was admissible in the former action unless the declarant is available and the judge in his discretion rejects the evidence.\textsuperscript{159}

6. Declarations of Present State of Mind

In Davila v. Sucesion Gonzalez\textsuperscript{100} the Supreme Court of Puerto Rico, following the Hillmon case,\textsuperscript{161} adopted the exception to the hearsay rule under which are receivable the declarations of a person

\textsuperscript{154} Supra note 20, §397.
\textsuperscript{155} Model Code of Evidence, op. cit. supra note 1, Rule 511.
\textsuperscript{157} In the three cases cited supra note 156, the testimony was inadmissible because some requisite was lacking. Therefore, there is no decision in which it was held admissible.
\textsuperscript{158} Model Code of Evidence, op. cit. supra note 1, Rule 511.
\textsuperscript{159} "If the witness who gave the former testimony or deposition is present and subject to cross-examination, evidence of the hearsay declaration will be admissible under Rule 503(b); if he is unavailable, it will be admissible under 503(a). Only where he is available and not present for cross-examination will resort to the present Rule be necessary, and in that event the judge may reject the evidence if he believes the witness should be produced." Ibid.
\textsuperscript{160} (1942) 60 D.P.R. 430.
as to his presently existing mental condition. Mr. Justice Snyder stated the opinion of the court as follows:

“Sometimes an act is capable of more than one interpretation and the intention of the party doing the act becomes essential. In that case a contemporaneous declaration, written or oral, of the intention of the actor is admissible... The fact that the declaration was made before the act does not affect the application of the rule. In fact, most contemporaneous declarations are made immediately before or after, instead of during the act.”

Contemporaneousness was required but the concept was strained to cover declarations which had been made some time before the execution of the ambiguous act. Thus, the court was not aware that contemporaneousness is not essential under the present exception since the intention of the declarant at the time of the declaration can be the basis of an inference to his intention at a later or previous time, without any increase in the hearsay dangers of the declaration.

Before that decision, uncommunicated threats had been erroneously rejected on the issue of who was the aggressor. If the unnecessary requisite of contemporaneousness is not insisted upon, in the light of the Davila case, the threats should be admitted as declarations of a present state of mind which may be circumstantial evidence of a later state of mind and of the aggression in accordance therewith.

7. Learned Treatises

Section 83 of the Law of Evidence provides that:

“Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety or interest.”

In its only decision bearing upon this exception, the supreme court affirmed a ruling of the trial court allowing an expert to base his opinion upon a scientific book and in a dictum referred to the probative value of scientific works as discussed by Wigmore.

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162 supra note 160, at 435, 436.
163 See Morgan, op. cit. supra note 120, at 233-236 and Model Code of Evidence, op. cit. supra note 1, Rule 513. In People v. Ortiz (1943) 62 D.P.R. 258, the declarations made by the accused several weeks before the crime, to the effect that he was willing to kill the victim, were held admissible on the issues of motive and malice aforethought.
164 People v. Morales, supra note 34.
166 Ibid. at 614.
167 3 Wigmore, Evidence (2d ed. 1923) 640.
8. Commercial and Professional Lists, Registers, etc.

In the above mentioned dictum reference is also made to the discussion by the same author of the admissibility of commercial lists, professional lists, registers and reports. This intimation renders probable the adoption of the new exception in the first opportunity presenting itself to the supreme court in the future but, until then, commercial lists and the like are inadmissible hearsay in Puerto Rico.

9. Reputation

Under section 35, paragraphs 9 and 11, evidence is admissible of the common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old . . . (and of) monuments and inscriptions in public places, as evidence of common reputation.”

Thus, the reputation as to facts more than 30 years old is admissible on any event of general interest and is not limited to boundaries or customs affecting land. The vehicle of the reputation may be a monument or an inscription.

Present reputation is admissible in Puerto Rico as evidence of the character of a party, a witness, or a third person.

10. Ancient Documents

Section 102, subdivision 33, establishes a presumption of genuineness in favor of documents more than 30 years old when they have been acted upon as genuine by interested persons and their custody is satisfactorily explained. But there is nothing in the statute author-
izing their admissibility as evidence of the truth of what is stated in them. In *Ex Parte Otero et al*, after giving other reasons for the admissibility of a certificate of baptism, the supreme court suggested in a dictum:

“... for what the analogy is worth, that recitals in ancient deeds are admissible to prove heirship when corroborated by possession thereunder, or other circumstances.”176

That is a very weak support but in a previous case a recital in an ancient deed had been received to prove the truth of the facts stated in it.178 These early rulings will make it more easy in the future for the supreme court to clear the present uncertainty by recognizing in unmistakable terms the exception to the hearsay rule which covers ancient documents.

11. *Prior Judgments*

The exception recognized in some jurisdictions as to the admissibility of certain kinds of judgments for the truth of the facts determined by them has been rejected in Puerto Rico. In *Mansanares v. P. R. Racing Corporation*177 the judgment of another civil suit between independent parties had been admitted by stipulation in the trial court. The supreme court said:

“We are agreed that if in the present case the defendant had offered the record in the Garcia case as evidence, the plaintiff could have successfully opposed the admission of any and all parts thereof. ... The opinion and judgment of the court, and the answer of the defendant admitting the essential averments of the complaint, are each one of them hearsay evidence....”178

This dictum is all that I have found in relation to the admissibility of prior judgments under an exception to the rule of exclusion of hearsay.

12. *Prior Consistent or Inconsistent Statements of a Witness*

Following the rule of the overwhelming majority of jurisdictions, the Supreme Court of Puerto Rico has consistently condemned the use of prior inconsistent statements for the truth of the matter as-

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176 (1919) 27 P.R.R. 315, 319.
176 Nuñez v. Heirs of Rivera (1913) 19 P.R.R. 701.
177 (1933) 45 P.R.R. 124.
178 Ibid. at 129.
179 There is very little hope that the proposal of the American Law Institute—to admit hearsay if the declarant is present and subject to cross-examination—will be adopted by judicial action. That theory was expressly rejected in People v. Colon. 181

13. Past Recollection Recorded

As we have suggested before, the past recollection of a witness is considered as non-hearsay in Puerto Rico and so, it is admissible, not under any exception to the hearsay rule but under section 154 of the Law of Evidence which provides that

"A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adversary party, who may, if he choose, cross-examine the witness upon it, and may read it to the court or jury. So, also a witness may testify from such a writing, though he retains no recollection of the particular facts, but such evidence must be received with caution."

In accordance with this provision a record of past recollection is not received as a substitute for the memory of the witness but, instead, the witness is allowed to read from the memorandum. Past recollection recorded is admitted under the absurd fiction that the present memory of the witness is in all cases revived. Justice Tray-
ieso, in *Sotomayor v. Smallwood*,\(^\text{186}\) gave an example of that astonishing theory:

"The generally accepted rule is that memoranda of certain facts, made by a witness, may be used by him to refresh his recollection, even in a case where the witness has no present recollection of the facts, if he recollects that when the memorandum was made he knew it to be true and hence can swear that it was correctly made."\(^\text{187}\)

The result of this rather curious judicial invention is that past recollection recorded is admitted and relied upon by the trier without any recognition of its hearsay dangers, although the adversary has had no opportunity to cross-examine the witness in relation to it as the latter has no present recollection. The record of the past recollection of a witness, which he identified as accurately representing his knowledge of the facts at a time when he clearly remembered them, is sufficiently reliable to be admitted as an exception to the hearsay rule and should be treated as such.\(^\text{188}\)

III

THE INARTICULATE PREMISE

Before judging the Puerto Rican law as to hearsay, we must pay attention to the presence in the decisions of an inarticulate premise—as to how the case should be decided in its substantive aspect—which affects the solution of the problems of evidence. It is impossible to ascertain the part played by this element in the formation of the law which we have studied because its operation is imperceptible. However, in a few instances its influence can be guessed\(^\text{189}\) and in others the premise becomes articulate and is expressed in the opinions. This proves that in many other occasions it may have been an invisible but determining factor. Therefore, I shall give an example of its expression.

The case of *People v. Girona*\(^\text{190}\) is a striking illustration of what

\(^{186}\) (1937) 51 P.R.R. 194.


\(^{188}\) See Morgan, *op. cit. supra* note 10, at 714; *Model Code of Evidence, op. cit. supra* note 1, Rule 504.

\(^{189}\) See *supra* pp. 48 and 55 discussing the cases of Montaner v. Comision Industrial (1939) 54 D.P.R. 781 and Tomas v. Comision Industrial (1942) 59 D.P.R. 860. The insistence of the supreme court in excluding the declarations of the deceased worker against his interest, in proceedings for compensation instituted by his dependents, has been probably influenced by the "inarticulate premise."

\(^{190}\) (1941) 59 D.P.R. 296.
in “softening” the rules of evidence it went beyond what is “legally the rules of evidence can do to hinder the discovery of the truth and of how the Supreme Court of Puerto Rico may completely disregard those rules in order to do justice. Girona was charged with a crime of libel consisting in the publication of a book in which he accused Rafael Leonidas Trujillo, at that time President of the Dominican Republic, of having committed innumerable and horrible crimes, such as the torture and assassination of political rivals and the rape of women. The defendant tried to prove that there had been a justifiable motive for the publication and that all the facts narrated in it were true. For that purpose he produced the testimony of distinguished Dominican professionals and public men in exile, who testified as to the atrocities committed by Trujillo. By rigidly applying the rules of evidence, the district court consistently excluded evidence which in every non-judicial human affair would have been considered as extremely valuable.

On appeal, the supreme court commented as follows:

"Considering as a whole the transcription of the evidence, there is a fundamental error, source of all the other individual errors committed by the inferior court. Closing its eyes to reality and ignoring facts of which it could and should have taken judicial notice, the inferior court tried the case as if the facts had occurred in our island and not in a foreign country ruled by laws different to ours and under a system of government different to ours. And limiting itself strictly to the technicalities of the law, the trial court excluded one by one all the testimony. . . ."  

"We are of the opinion that in trials of this nature, the court should give the accused ample and free opportunity to prove his defense, softening as much as is legally possible the rigour of the rules of evidence, with the single purpose of reaching the discovery of the truth."

There is no doubt that “the rigour of the rules of evidence” was the principal cause of the failure of the trial judge to open his eyes to reality. To correct that mistake the supreme court, instead of searching for individual errors in the application of those rules, considered the case as a whole and declared the accused not guilty. Thus,

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191 Penal Code (1937) §§243, 244.  
192 Ibid. §245.  
193 Ibid. §246.  
194 People v. Girona (1941) 59 D.P.R. 296, 314.  
195 Ibid. at 317.
possible”; the rules of evidence were completely disregarded. Nothing could have been wiser considering the present unreasonableness of those rules which, paradoxically, are an impediment to the administration of justice.

That the rules of evidence were in such a conflict with reality, that the supreme court had to ignore them in order to decide the case justly, and that it was willing to do so, are all very significant facts. The conclusions that may be derived from the tangible legal materials that we have studied must be conditioned, in their application to particular cases, by this disposition of the Supreme Court of Puerto Rico to decide what is substantively right in spite of the rules of evidence.

IV

CONCLUSION

The rules of evidence were incorporated into Puerto Rican law from the Anglo-American system and embodied into a statute. In order to fill the gaps of that statute and to develop its provisions, the Supreme Court of Puerto Rico has frequently drawn directly from the common law. Thus, the present law as to hearsay is a mixture of statutory provisions and judicially adopted doctrines, all of which have a common law origin.

The common law on hearsay has been described as “a conglomerate of inconsistencies.... Refinements and qualifications within the exceptions only add to its irrationality.” In drawing from this source, the supreme court, limited by its civil tradition, has been hesitant to go far from the statute and instead of recognizing the general applicability of the common law, has followed a disguised, step by step, process of incorporation. Much traditional absurdity has been received by that method, as the best established rules have been preferred to the wiser recent tendencies.

The results on the law governing the admissibility of hearsay have been observed throughout our study. The irrationality and confusion present in other jurisdictions are seen increased by the un-

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190 P. R. LAWS 1905, p. 70.
197 See supra pp. 50, 52, 57, 64.
198 See supra p. 31.
199 The best example of this attitude is Aguilar v. People, supra note 93, discussed supra p. 52.
certainty resulting from the fusion of the Anglo-American and Roman laws.

The rule of exclusion of hearsay everywhere restricts greatly the scope of admissibility but in that sense it is especially effective in Puerto Rico, where admissibility under the exceptions has not grown much. Only eight exceptions\(^\text{200}\) are recognized in the statute and the supreme court has been slow in adopting others from the common law.\(^\text{201}\) But the great extent to which admissibility is narrowed is better appreciated in the strict conditions imposed upon the majority of the exceptionally admissible hearsay declarations. The use of dying declarations is limited by the traditional and unreasonable requisites of the common law.\(^\text{202}\) Declarations against interest are received only when the declarant is dead and his statements were against his pecuniary or proprietary interest exclusively. Furthermore, it has been suggested that they are receivable only against his privies.\(^\text{203}\) The statutory provisions as to business entries\(^\text{204}\) are so impossible of application that they are ignored and the scope of the exception as to prior testimony is so narrow that it is practically useless.\(^\text{205}\) The majority of the exceptions are infrequently used.

Examples of the other extreme are found in the erroneous reception of unreliable hearsay under other exceptions, specially those covering admissions\(^\text{206}\) and "res gestae" utterances.\(^\text{207}\) But, in general, the admissibility of hearsay is greatly limited. If the hearsay

\(^{200}\) Admissions, declarations against interest, entries in the course of business or duty, official records, declarations and reputations as to pedigree, prior testimony, learned treatises, and reputation. See supra pp. 43, 54, 61-66, respectively.

\(^{201}\) The exception as to confessions was introduced from the common law before the adoption of the Law of Evidence. See supra p. 50, note 85. Dying declarations were early admitted. See supra p. 52, note 94. Also the "res gestae" exception received early recognition. See supra p. 57 et seq. The exception as to declarations of present state of mind was not sanctioned until very late in Davila v. Sucesion Gonzalez (1942) 60 D.P.R. 430, discussed supra p. 64. The principles governing the admissibility of vicarious admissions have been adopted from the common law also. See supra p. 46 et seq. Also some uncertain support is found for the admissibility of ancient documents. See supra p. 66. But the following exceptions have been denied recognition: church records and certificates, commercial lists and registers, prior judgments, prior statements of a witness and statements of deceased or unavailable declarants in general. See supra pp. 63, 66, 67, 54, respectively.

\(^{202}\) See supra p. 53.

\(^{203}\) See supra p. 55.

\(^{204}\) See supra p. 61.

\(^{205}\) See supra p. 64.

\(^{206}\) See supra p. 43.

\(^{207}\) See supra p. 57.
rule should be one of admission instead of one of exclusion, the Puerto Rican law is very far from that ideal.

The progress of the American jurisdiction in bringing the law of hearsay to conform to reason and in increasing the amount of admissible hearsay has been very slow. In Puerto Rico it has been, and will probably continue to be, even slower on account of the binding force of the statute and the hesitancy of the court in deviating from it.

Since the principles of evidence were originally received from the common law, it is proper to adopt from that source the technique and materials for their application and development. A frank recognition of the applicability of the common law in the field of evidence would give the supreme court greater freedom of action in the improvement of that aspect of the law. But, even in that case, the meager achievements of the common law courts show the futility of having faith in judicial action. In the light of the refusal of the supreme court to assume common law functions, it is more evident that our only hope lies in intelligent legislation.

\[208\] See supra p. 36.